ANNUAL LABOR &EMPLOYMENT

LAW UPDATE

NEW LEGISLATION AND

CASE SUMMARIES

December 13, 2018

BEST BEST & KRIEGER LLP

ATTORNEYS AT LAW

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NEW LEGISLATION

ASSEMBLY BILLS:

ASSEMBLY BILL 1565 - LABOR RELATED LIABILITIES: DIRECT CONTRACTOR

Existing law requires, for all contracts entered into on or after January 1, 2018, a direct contractor making or taking a contract in the state for the erection, construction, alteration, or repair of a building, structure, or other work, to assume, and be liable for, specified debt owed to a wage claimant that is incurred by a subcontractor.

AB 1565 cleans up existing law by repealing provisions stating that obligations and remedies for unpaid wages benefits are in addition to existing obligations and remedies provided by law. For contracts entered into on or after January 1, 2019, a direct contractor or subcontractor is required to include a provision in its contract that lists the specific documents or information that the direct contractor or subcontractor will require a lower tiered subcontractor to produce before the direct contractor or subcontractor is allowed to withhold any disputed payments from the lower tiered subcontractor under these provisions.

Amends Section 218.7 of the Labor Code. Effective September 19, 2018.

ASSEMBLY BILL 1654 – CONSTRUCTION INDUSTRY PAGA PROHIBITION

The Labor Code Private Attorneys General Act of 2004 (PAGA) authorizes employees to bring a civil action to recover specified civil penalties, that would otherwise be assessed and collected by the Labor and Workforce Development Agency. AB 1654 crates an exception to PAGA that prohibits employees in the construction industry from filing PAGA claims if they are subject to a valid collective bargaining agreement in effect any time before January 1, 2025. The collective bargaining agreement must contain certain provisions, including a grievance and binding arbitration procedure to redress violations that authorizes the arbitrator to award otherwise available remedies. AB 1654 would authorize the exception until the collective bargaining agreement expires or until January 1, 2028, whichever is earlier, and would repeal the bill's provisions on January 1, 2028.

Adds and repeals Section 2699.6 of the Labor Code. Effective January 1, 2019.

ASSEMBLY BILL 1888 – PEACE OFFICERS: BASIC TRAINING REQUIREMENTS

Existing law requires peace officers to successfully complete the Peace Officer Standards and Training (POST) course before exercising the powers of a peace officer and requires a person who does not become a peace officer within 3 years of passing the examination, or who has a 3-year or longer break in service, to pass the examination again before exercising the powers of a peace officer. Deputy sheriffs employed by to perform custodial duties are exempt from this training requirement as long as their assignments remain custodial related, but need to take the POST course before being reassigned to positions with responsibility for preventing and detecting crime and the general enforcement of the criminal laws of this state.

Existing law, until January 1, 2019, exempts a deputy sheriff employed to perform custodial duties from having to retake the POST course before being reassigned to positions with responsibility for preventing and detecting crime and the general enforcement of the criminal laws of this state if they are continuously employed by the same department, maintains specified skills, and took the training course within the previous 5 years. AB 1888 repeals the January 1, 2019, cutoff date thereby extending the this exception indefinitely.

Amends and repeals Section 832.3 of the Penal Code. Effective January 1, 2019.

ASSEMBLY BILL 1976 – LACTATION BREAKS

Existing law requires every employer to provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee's infant child and requires an employer to make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area for the employee to express milk in private.

AB 1976 requires an employer to make reasonable efforts to provide an employee with use of a room or other location, other than a bathroom instead of a toilet stall. If the employer can demonstrate to the Department of Industrial Relations that this requirement would impose an undue hardship, the bill would require that employer to make reasonable efforts to provide a room or location for expressing milk that is not a toilet stall.

Amends Section 1031 of the Labor Code. Effective January 1, 2019.

ASSEMBLY BILL 2012 – SCHOOL AND COMMUNITY COLLEGE EMPLOYEES: PARENTAL LEAVE

Existing law authorizes a person employed by a school district in a position requiring certification qualifications (teacher), and a person employed in an academic position by a community college district (professor), to use his or her sick leave for purposes of parental leave for a period of up to 12 workweeks. Existing law has varying payment requirements for teachers and professors who exhaust their sick leave but continue to be absent for parental leave. AB 2012 requires, regardless of the type of differential pay system used by a school district or community college district, that a teachers and professors receive no less than 50% of their regular salary for the remaining portion of the 12-workweek period of parental leave when sick leave has been exhausted.

Amends Sections 44977.5, 45196.1, 87780.1, and 88196.1 of the Education Code. Effective January 1, 2019.

ASSEMBLY BILL 2034 – HUMAN TRAFFICKING TRAINING – PASSENGER EMPLOYEES

AB 2034 requires that, on or before January 1, 2021, specified businesses or other establishments that operate intercity passenger rails, light rails, or bus stations to provide training to new and existing employees who may interact with, or come into contact with, a victim of human trafficking or who are likely to receive a report from another employee about suspected human

trafficking. The training must be on recognizing the signs of human trafficking and how to report those signs to the appropriate law enforcement agency. Because the bill would require local government agencies to perform additional duties, it would impose a state-mandated local program.

Amends Section 52.6 of the Civil Code. Effective January 1, 2019.

ASSEMBLY BILL 2128 – SCHOOL EMPLOYEES: DISMISSAL OR SUSPENSION

Existing law prohibit testimony or evidence relating to matters that occurred more than 4 years before the filing of a notice of intent to suspend or dismiss a school district employee. Existing law also prohibits a decision relating to the dismissal or suspension of an employee to be made based on charges or evidence of any nature relating to matters occurring more than 4 years before the filing of the notice. Existing law exempts from these provisions allegations of a sex offense or an act of child abuse or neglect.

AB 2128 also exempts allegations of behavior or communication of a sexual nature with a pupil for purposes of a disciplinary proceeding based on similar conduct, and allegations of offenses involving lewd and lascivious acts and certain types of contact or communication with minors, for purposes of any disciplinary proceeding.

Amends Section 44944 of the Education Code. Effective January 1, 2019.

ASSEMBLY BILL 2234 – SCHOOL DISTRICT EMPLOYEES: DISMISSAL OR SUSPENSION ADMINISTRATIVE PROCEEDINGS

AB 2234 enacts a comprehensive set of requirements for the presentation of testimony by minor witnesses at certain dismissal or suspension administrative proceedings relating to certificated employees and in hearings relating to classified employees conducted by school district governing boards in school districts that have not adopted a merit system or by personnel commissions in school districts that have adopted a merit system. This bill also sets requirements to keep pupil contact information confidential in response to court orders or lawfully issued subpoenas.

Amends Sections 45113, 45312, and 49077 of, and adds Article 3.3 (commencing with Section 44990) to Chapter 4 of Part 25 of Division 3 of Title 2 of, the Education Code. Effective January 1, 2019.

ASSEMBLY BILL 2282 – SALARY HISTORY

Existing law prohibits an employer from relying on the salary history information of an applicant for employment as a factor in determining whether to offer an applicant employment or what salary to offer an applicant. Existing law requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant applying for employment. AB 2282 defines “pay scale” as a salary or hourly wage range, “reasonable request” as a request made after an applicant has completed an interview, and “applicant” as someone who is not currently employed with that employer. AB 2282 specifies that an employer is not prohibited from asking about an applicant for employment’s salary expectation for the position being applied for.

AB 2282 also authorizes an employer to make a compensation decision based on an employee's current salary as long as any wage differential resulting from that compensation decision is justified by one or more specified factors, including a seniority system or a merit system.

Amends Sections 432.3 and 1197.5 of the Labor Code. Effective January 1, 2019.

ASSEMBLY BILL 2291 – SCHOOL STAFF TRAINING: BULLYING

AB 2291 requires local educational agencies to adopt, on or before December 31, 2019, procedures for preventing acts of bullying, including cyberbullying.

Existing law requires the State Department of Education to develop an online training module to assist all school staff, school administrators, parents, pupils, and community members in increasing their knowledge of the dynamics of bullying and cyberbullying. AB 2291 required the department to post on its Internet Web site the online training module developed by the department and an annually updated list of other available online training modules relating to bullying or bullying prevention. The online training module must be made available to certificated school-site employees and all other school-site employees who have regular interaction with pupils annually.

Amends Section 32283.5 of, and adds Section 234.4 to, the Education Code. Effective January 1, 2019.

ASSEMBLY BILL 2327 – PEACE OFFICERS: MISCONDUCT

Existing law requires every department or agency that employs peace officers to establish a procedure to investigate complaints by members of the public. Existing law requires complaints and any reports or findings related to the complaints to be retained for at least 5 years and allows all complaints retained to be maintained in the peace officer's general personnel file or in a separate file designated by the department or agency.

AB 2327 requires that a record of any investigations of misconduct involving a peace officer be made and retained in his or her general personnel file or separate file designated by the department or agency. A peace officer seeking employment with a department or agency would be required to give written permission for the hiring department or agency to view his or her general personnel file or separate file.

Adds Section 832.12 to the Penal Code. Effective January 1, 2019.

ASSEMBLY BILL 2334 – HEALTH/SAFETY & WORKERS' COMPENSATION

With regard to workers' compensation, AB 2334 permits the Office of Self-Insurance Plans of the Department of Industrial Relations to use individually identifiable information as necessary to carry out its duties and authorizes the Director of Industrial Relations to publish information regarding the costs of administration, workers' compensation benefit expenditures, and solvency and performance of public self-insured employers' workers' compensation programs.

With regard to workplace health/safety, AB 2334 extends employers' liability for workplace injury reporting violation penalties from six months to five years by providing that an "occurrence" continues until it is corrected, the division discovers the violation, or the duty to comply with the requirement that was violated no longer exists. Existing law prohibits the Division of Occupational Safety and Health from issuing a citation more than 6 months after the occurrence of the violation. This change in the code's definition of an "occurrence" as it relates to citations for recordkeeping purposes means citations may be issued for the entire five-year mandatory record retention period until they are corrected or discovered by the Division, or until any recordkeeping duty is eliminated.

AB 2334 also requires the Cal/OSHA to create an advisory panel to consider how California employers could still be required to continue electronic submission if the United States Department of Labor's Occupational Safety and Health Administration's Improve Tracking of Workplace Injuries and Illnesses rule reduces requirements for electronic submission of workplace injury and illness data.

Amends Sections 138.7, 3702.2, and 6317of, and adds Sections 6410.1 and 6410.2 to, the Labor Code. Effective January 1, 2019.

ASSEMBLY BILL 2338 – SEXUAL HARASSMENT EDUCATIONAL MATERIALS – TALENT AGENCIES

Existing law requires talent agencies to be licensed by the Labor Commissioner and to comply with specified employment laws applicable to talent agencies. AB 2338 requires talent agencies to provide their adult artists with educational materials on sexual harassment prevention, retaliation and reporting resources, as well as on nutrition and eating disorders. All materials must be provided within 90 days in language the artist understands. Talent agencies will be required to confirm to the Labor Commissioner, as part of their license renewal process, that they are providing the relevant educational materials.

Existing law also regulates the employment of minors in the entertainment industry and requires the written consent of the Labor Commissioner for a minor to take part in certain types of employment. AB 2338 requires that an age-eligible minor and the minor's parent or legal guardian receive and complete training in sexual harassment prevention, retaliation, and reporting resources before a permit to employ a minor in the entertainment industry is issued. AB 2338 further requires a talent agency to request and retain a copy of the minor's entertainment work permit prior to representing or sending a minor artist on an audition, meeting, or interview for engagement of the minor's services.

AB 2338 makes it a violation of existing laws for a talent agency to fail to comply with the bill's education and permit retention requirements and would authorize the commissioner to assess civil penalties of $100 for each violation, as prescribed.

Adds Article 4 (commencing with Section 1700.50) to Chapter 4 of Part 6 of Division 2 of the Labor Code. Effective January 1, 2019.

ASSEMBLY BILL 2358 – APPRENTICESHIPS: DISCRIMINATION PROHIBITION

AB 2358 expressly prohibits discrimination in any building and construction trades apprenticeship program on the basis of certain enumerated categories, including, race, sex, religious creed, or national origin, with regard to acceptance into, or participation in, the program. The bill requires an apprenticeship program to designate one or more individuals to oversee the commitment to equal opportunity in the program and to maintain records regarding compliance with certain requirement. The bill requires the apprenticeship program to develop and implement procedures to ensure that its apprentices are not harassed or discriminated against. The bill also requires each apprenticeship program to include a specified equal opportunity pledge in its apprenticeship standards and other publications. Existing registered building and construction trades apprenticeship programs must comply within 180 days of the effective date of this act. New building and construction trades apprenticeship programs registering with the Division of Apprenticeship Standards after the effective date of this act must comply upon registration or within 180 days after the effective date of this section, whichever is later.

Adds Section 3073.9 to the Labor Code. Effective January 1, 2019.

ASSEMBLY BILL 2504 – PEACE OFFICER TRAINING: SEXUAL ORIENTATION AND GENDER IDENTITY

AB 2504 requires the Commission on Peace Officer Standards and Training to develop and implement a course of training regarding sexual orientation and gender identity minority groups in this state. The course will be required to be incorporated into the course or courses of basic training for law enforcement officers and dispatchers and would require the course or courses to include specified topics, including the terminology used to identify and describe sexual orientation and gender identity and how to create an inclusive workplace within law enforcement for sexual orientation and gender identity minorities. The bill would authorize law enforcement officers, administrators, executives, and dispatchers to participate in supplementary training that includes the topics, as specified, in that course of training.

Adds Section 13519.41 to the Penal Code. Effective January 1, 2019.

ASSEMBLY BILL 2587 – DISABILITY COMPENSATION: PAID FAMILY LEAVE

Existing law establishes, within the state disability insurance program, a family temporary disability insurance program, also known as the paid family leave program, for the provision of wage replacement benefits to workers who take time off work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement.

Existing law, before January 1, 2018, deemed an individual to be eligible for family temporary disability benefits if, among other things, the individual was unable to perform his or her regular or customary work for a 7-day waiting period during each disability benefit period, and prohibited payments for benefits during this waiting period. Existing law, on and after January 1, 2018, removes the 7-day waiting period for these benefits.

Existing law authorizes an employer to require an employee to take up to 2 weeks of earned but unused vacation before, and as a condition of, the employee's initial receipt of these benefits during any 12-month period in which the employee is eligible for these benefits. Existing law specifies that if an employer so requires an employee to take vacation leave, that portion of the vacation leave that does not exceed one week is to be applied to the waiting period.

AB 2587 deletes that application of vacation leave to the waiting period, consistent with the removal of the 7-day waiting period for these benefits on and after January 1, 2018.

Amends Section 3303.1 of the Unemployment Insurance Code. Effective January 1, 2019.

ASSEMBLY BILL 2605 – REST BREAK EXCEPTION FOR SAFETY SENSITIVE POSITIONS AT PETROLEUM FACILITIES

Existing law prohibits an employer from requiring an employee to work during a mandated meal or rest or recovery period. Existing law requires an employer who fails to provide an employee a mandated meal or rest or recovery period to pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period was not provided. Existing law provides certain exemptions from these requirements.

AB 2605 exempts specified employees who hold a safety-sensitive position at a petroleum facility from the rest and recovery period requirements until January 1, 2021. For any rest or recovery period during which the employee was interrupted or forced to miss, the employer would be required to pay to the employee one additional hour of compensation at the employee's regular rate of pay.

Adds and repeals Section 226.75 of the Labor Code. Effective September 20, 2018.

ASSEMBLY BILL 2610 – MEAL PERIOD EXCEPTION

Existing law generally prohibits an employer from requiring an employee to work more than 5 hours per day without providing a meal period of not less than 30 minutes. Existing law excepts employees in specified occupations that meet certain conditions from this prohibition and authorizes the Industrial Welfare Commission to adopt a working condition order permitting a meal period to commence after 6 hours of work if the order is consistent with the health and welfare of affected employees.

AB 2610 authorizes a commercial driver employed by a motor carrier transporting nutrients and byproducts from a licensed commercial feed manufacturer to a customer located in a remote rural location to commence a meal period after 6 hours of work, if the regular rate of pay of the driver is no less than one and one-half times the state minimum wage and the driver receives overtime compensation in accordance with specific provisions of existing law.

Amends Section 512 of the Labor Code. Effective January 1, 2019.

ASSEMBLY BILL 2770 – SEXUAL HARASSMENT REPORTING

AB 2770 designates certain communications concerning sexual harassment as privileged communications, thereby eliminating potential liability for damage to the alleged harasser's reputation (e.g. libel and slander). The now privileged communications include complaints of sexual harassment made by an employee, without malice, to an employer based on credible evidence, and communications between the employer and interested persons (e.g. witnesses) regarding a complaint of sexual harassment. AB 2770 also authorizes an employer to answer, without malice, whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment.

Amends Section 47 of the Civil Code. Effective January 1, 2019.

ASSEMBLY BILL 2992 – PEACE OFFICER TRAINING: COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN

AB 2992 requires the Commission on Peace Officer Standards and Training to develop a course on commercial sexual exploitation of children (CSEC) and victims of human trafficking. The bill would require the course to include specified topics and components including, among others, recognizing indicators of commercial sexual exploitation, appropriate interviewing techniques, local and state resources available to first responders, and issues of stigma. The bill would require the course to be equitable to a course that the commission produces for officers as part of continuing professional training and include facilitated discussions and learning activities, including scenario training exercises. The bill would require the commission to develop the course in consultation with survivors, agencies, and advocates.

Adds Section 13516.5 to the Penal Code. Effective January 1, 2019.

ASSEMBLY BILL 3109 – RIGHT TO TESTIFY

AB 3109 makes a provision in a contract or settlement agreement void and unenforceable if it waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment.

Adds Section 1670.11 to the Civil Code. Effective January 1, 2019.

ASSEMBLY BILL 3231 – PUBLIC WORKS

AB 3231 authorizes a joint labor-management committee to bring an action against an employer who fails to provide payroll records under the same provisions for bringing an action against an employer for failure to pay prevailing wage.

Amends Sections 1771.2 and 3073.5 of the Labor Code. Effective January 1, 2019.

SENATE BILLS:

SENATE BILL 3 (2015-2016 SESSION) – MINIMUM WAGE

On January 1, 2019, California's minimum wage will increase to $11/hour for employers with 25 or fewer employees and to $12/hour for employer with 26 or more employees. This is a scheduled increase that was part of SB 3, which was passed in 2016.

Amended Sections 245.5, 246, and 1182.12 of the Labor Code. Effective January 1, 2019.

SENATE BILL 224 – SEXUAL HARASSMENT – PROFESSIONAL RELATIONSHIP

Existing law establishes liability for sexual harassment when the plaintiff proves specified elements, including, among other things, that there is a business, service, or professional relationship between the plaintiff and defendant and there is an inability by the plaintiff to easily terminate the relationship. SB 224 eliminates the element that the plaintiff prove there is an inability by the plaintiff to easily terminate the relationship and includes, as an element for sexual harassment, that the defendant hold himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a 3rd party.

Existing law states that a relationship may exist between a plaintiff and certain persons, including an attorney, holder of a master's degree in social work, real estate agent, and real estate appraiser. SB 224 includes an investor, elected official, lobbyist, director, and producer among those listed persons who may be liable to a plaintiff for sexual harassment.

The California Fair Employment and Housing Act (FEHA) makes it an unlawful practice for a person to deny or to aid, incite, or conspire in the denial of certain civil rights. AB 224 amends FEHA to make it an unlawful practice to deny or aid, incite, or conspire in the denial of rights of persons related to sexual harassment actions. SB 224 will make the Department of Fair Employment and Housing responsible for receiving, investigating, conciliating, mediating, and prosecuting complaints alleging sexual harassment claims.

Amends Section 51.9 of the Civil Code, and amends Sections 12930 and 12948 of the Government Code. Effective January 1, 2019.

SENATE BILL 820 – CONFIDENTIALITY CLAUSES IN SETTLEMENT AGREEMENTS

SB 820 prohibits settlement agreements that prevent the disclosure of factual information relating to civil or administrative claims of sexual assault, sexual harassment, workplace harassment or discrimination based on sex, failure to prevent workplace harassment or discrimination based on sex, or retaliation against a person for reporting harassment or discrimination based on sex. Settlement agreements entered into on or after January 1, 2019, that include confidentiality provisions regarding these types of claims are void as a matter of law and against public policy.

SB 820 includes an exception, not applicable if a party is a government agency or public official, for a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, if the provision is included within the settlement agreement at the request of the claimant.

Adds Section 1001 to the Code of Civil Procedure. Effective January 1, 2019.

SENATE BILL 826 – GENDER REPRESENTATION ON BOARDS OF DIRECTORS

SB 826 requires domestic general corporations or foreign corporations that are publicly held, whose principal executive offices are located in California, to have a minimum of one female on its board of directors by the close of the 2019 calendar year. No later than the close of the 2021 calendar year, the bill would increase that required minimum number to 2 female directors if the corporation has 5 directors or to 3 female directors if the corporation has 6 or more directors.

SB 826 requires the Secretary of State to publish various reports on its Internet Web site documenting, among other things, the number of corporations in compliance with these provisions. The bill would also authorize the Secretary of State to impose fines for violations of the bill and would provide that moneys from these fines are to be available to offset the cost of administering the bill.

Adds Sections 301.3 and 2115.5 to the Corporations Code. Effective January 1, 2019.

SENATE BILL 846 – PUBLIC EMPLOYMENT: LIABILITY FOR FAIR SHARE FEES

Among other things, SB 846 prohibits public employers from being liable for any claims or actions under California law for requiring, deducting, receiving, or retaining agency or fair share fees from public employees, and would deny standing to current or former public employees to pursue these claims or actions, if the fees were permitted at the time and paid prior to June 27, 2018.

Amends Sections 1159, 19230, 19232, 19236, 19237, and 31552.5 of the Government Code, amends Section 101853.1 of the Health and Safety Code, and adds Section 10298.1 to the Public Contract Code. Effective September 14, 2018.

SENATE BILL 970 – HUMAN TRAFFICKING TRAINING – HOTEL/MOTEL EMPLOYEES

This bill would amend the California Fair Employment and Housing Act (FEHA) to require hotel and motel employers to provide at least 20 minutes of prescribed training and education regarding human trafficking awareness to employees who are likely to interact or come into contact with victims of human trafficking. The bill would establish a schedule for compliance commencing January 1, 2020. The bill would authorize the Department of Fair Employment and Housing, in the case of an employer violation of the bill's requirements, to seek an order requiring compliance.

Adds Section 12950.3 to the Government Code. Effective January 1, 2019.

SENATE BILL 1085 – PUBLIC EMPLOYEES: LEAVES OF ABSENCE

Existing law regulates the labor relations of the state, the courts, specified local public agencies, and their employees. Relevant laws include the Meyers-Milias-Brown Act, the Ralph C. Dills Act, the Trial Court Employment Protection and Governance Act, the Trial Court Interpreter Employment and Labor Relations Act, the Judicial Council Employer-Employee Relations Act and the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act, as well as provisions commonly referred to as the Educational Employment Relations Act and the Higher Education Employer-Employee Relations Act. These acts grant specified public employees the right to form, join, and participate in the activities of employee organizations of their choosing and require public agency employers, among other things, to meet and confer with representatives of recognized employee organizations and exclusive representatives on terms and conditions of employment.

SB 1085 requires public employers, subject to the acts described above, upon request of the exclusive representative of an employee, to grant reasonable leaves of absence without loss of compensation or other benefits for the purpose of enabling employees to serve as stewards or officers of the exclusive representative, or of any statewide or national employee organization with which the exclusive representative is affiliated. Leave may be granted on a full-time, part-time, periodic, or intermittent basis. The steward or representative has the right to be reinstated to the same position and work location held before the leave, or, if not feasible, a substantially similar position without loss of seniority, rank, or classification. The leave provided shall be in addition to any leave to which public employees may be entitled by other laws or by a memorandum of understanding or collective bargaining agreement. The exclusive representative or employee organization shall reimburse the public employer for all compensation paid to the employee on leave unless otherwise provided by a collective bargaining agreement or memorandum of understanding.

Adds Section 3558.8 to the Government Code. Effective January 1, 2019.

SENATE BILL 1123 – PAID FAMILY LEAVE

Existing law establishes, within the state disability insurance program, a family temporary disability insurance program, also known as the paid family leave program, for the provision of wage replacement benefits to workers who take time off work to care for a seriously ill family member or to bond with a minor child within one year of birth or placement. An individual who is entitled to leave under FMLA and CFRA is required to take Family Temporary Disability Insurance leave concurrent with leave taken under FMLA and CFRA.

SB 1123 expands paid family leave, beginning on January 1, 2021, by allowing employees to collect paid family leave benefits if they take time off for activities related to the covered active duty status of their spouse, registered domestic partner, child or parent who is a member of the US Armed Forces. These activities are called “qualifying exigencies” and include official military ceremonies, briefing, changes to child care/financial/legal arrangements as a result of military service, counseling, and spending time with the covered military member during rest and recuperation leave. Although paid family leave does not provide a leave, the FMLA provides up to 12 weeks of protected leave for qualifying exigencies.

Amends, repeals, and adds Sections 3301, 3302.1, 3303, and 3303.1 of, and to add Sections 3302.2 and 3307 to, the Unemployment Insurance Code, and making an appropriation therefor, relating to paid family leave. Effective January 1, 2021.

SENATE BILL 1252 – PAYROLL RECORDS

Existing law requires an employer, semimonthly or at the time of payment of wages, to furnish an employee, an accurate, itemized, written statement containing specified information regarding the amounts earned, hours worked, and the employee's identity, among other things, subject to certain variations. Existing law grants current and former employees of employers who are required to keep this information the right to inspect or copy records pertaining to their employment, upon reasonable request. SB 1252 does not change existing law, it only clarifies that employees have the right to receive these records rather than being forced to make copies themselves.

Amends Section 226 of the Labor Code. Effective January 1, 2019.

SENATE BILL 1300 – SEXUAL HARASSMENT

SB 1300 makes numerous changes to the Fair Employment and Housing Act (FEHA) relating to workplace harassment claims and declares a Legislative intent that harassment claims under FEHA can be supported by a limited number of allegedly harassing incident and should not be resolved on summary judgment.

FEHA already makes it an unlawful employment practice for an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to engage in harassment of an employee or other specified person. FEHA also makes harassment of those persons by an employee, other than an agent or supervisor, unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. Currently, an employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees and other specified persons, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. SB 1300 expands employer liability for the acts of nonemployees from sexual harassment to all harassment activity.

SB 1300 prohibits an employer from requiring an employee, in exchange for a raise or bonus, or as a condition of employment or continued employment to agree not to sue or bring a claim against the employer under FEHA or sign a non-disparagement agreement preventing the employee from disclosing information about unlawful acts in the workplace, including but not limited to sexual harassment. Any such agreement or document in violation of either of those prohibitions is contrary to public policy and unenforceable. These prohibitions will not apply to negotiated settlement agreements or severance agreements. "Negotiated" means that the agreement is voluntary, deliberate, and informed, provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney.

FEHA requires employers with 50 or more employees to provide at least 2 hours of prescribed training and education regarding sexual harassment to all supervisory employees within 6 months of their assumption of a supervisory position and once every 2 years, as specified.

SB 1300 authorizes an employer to provide bystander intervention training to their employees. Bystander training is meant to provide guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors.

FEHA authorizes the court in certain circumstances and in its discretion to award the prevailing party in a civil action reasonable attorney's fees and costs, including expert witness fees.

SB 1300 prohibits a prevailing defendant from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.

Amends Sections 12940 and 12965 of, and to add Sections 12923, 12950.2, and 12964.5 to, the Government Code. Effective January 1, 2019.

SENATE BILL 1312 – STATE PUBLIC EMPLOYEES: SICK LEAVE FOR VETERANS WITH SERVICE-RELATED DISABILITIES

Existing law grants a state officer or employee who is a veteran *hired* on or after January 1, 2016, with a service-connected disability rated at 30% or more, an additional credit for sick leave with pay of up to 96 hours for the purpose of undergoing medical treatment for his or her military service-related disability. Existing law requires that the sick leave be credited to a qualifying officer or employee on the first day of employment and remain available for use for the following 12 months of employment.

SB 1312 extends that benefit to a state officer or employee *employed* on or after January 1, 2016, who is a veteran with a service-connected disability rated at 30% or more. Credit for leave of absence is required to be credited to a state officer or employee on the effective date of the officer's or employee's disability rating decision from the United States Department of Veterans Affairs, or on the first day the officer or employee begins, or returns to, employment after active duty, whichever is later. Sick leave credited under these provisions is ineligible for conversion to service credit.

Amends Section 19859 of the Government Code. Effective January 1, 2019.

SENATE BILL 1331 – PEACE OFFICERS: DOMESTIC VIOLENCE TRAINING

Existing law requires the Commission on Peace Officer Standards and Training to implement a training course for law enforcement officers in the handling of domestic violence complaints and to develop guidelines for officer response to domestic violence. Existing law requires the course to include instruction on specified procedures and techniques for responding to domestic violence, including, among others, the signs of domestic violence, and techniques for handling incidents of domestic violence that minimize the likelihood of injury to the officer and that promote the safety of the victim.

AB 1331 requires the course to include procedures and techniques for assessing lethality or signs of lethal violence in domestic violence situations.

Amends Section 13519 of the Penal Code. Effective January 1, 2019.

SENATE BILL 1343 – SEXUAL HARASSMENT TRAINING

The California Fair Employment and Housing Act (FEHA) currently requires employers with 50 or more employees to provide at least 2 hours of prescribed training and education regarding sexual harassment, abusive conduct, and harassment based upon gender, as specified, to all supervisory employees within 6 months of their assumption of a supervisory position and once every 2 years.

SB 1343 requires employers who employs 5 or more employees, including temporary or seasonal employees, to provide at least 2 hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020, and once every 2 years thereafter. Beginning January 1, 2020, temporary and seasonal employees will be required to be trained within 30 days of hire or 100 hours worked, whichever is earlier. Beginning January 1, 2020, sexual harassment prevention training for migrant and seasonal agricultural workers must be consistent with training for nonsupervisory employees.

SB 1343 also requires the Department of Fair Employment and Housing to develop or obtain 1-hour and 2-hour online training courses on the prevention of sexual harassment in the workplace and post the courses on the department's web site and to make existing informational posters and fact sheets, as well as the online training courses regarding sexual harassment prevention, available to employers and to members of the public in specified alternate languages on the department's web site. Employers are permitted to develop their own training module or direct employees to view the online training course provided by the Department.

Amends Section 12950 and 12950.1 of the Government Code. Effective January 1, 2019.

SENATE BILL 1402 – JOINT LIABILITY – PORT TRUCKING COMPANIES

SB 1402 will impose joint liability of client employers who hire port drayage motor carriers (trucking companies) with certain unpaid employment-related judgments. Port trucking companies will be placed on a DLSE website if they have an unsatisfied final judgment for taxes, various wage and hour violations, unreimbursed expenses, failure to provide workers' compensation coverage, or independent contractor misclassification. A customer that uses a port trucking company listed on the DLSE website will share all civil legal responsibility and civil liability for services obtained after the date the trucking company appeared on the list.

Adds Section 2810.4 to the Labor Code. Effective January 1, 2019.

SENATE BILL 1412 – CRIMINAL BACKGROUND

Existing law prohibits an employer from seeking information from an applicant concerning participating in a pretrial or post-trial diversion program or concerning a conviction that has been judicially dismissed or ordered sealed. Existing law specifies that these provisions do not

prohibit an employer from seeking this information if, pursuant to state or federal law, (1) the employer is required to obtain information regarding a conviction of an applicant, (2) the applicant would be required to possess or use a firearm in the course of his or her employment, (3) an individual who has been convicted of a crime is prohibited by law from holding the position sought, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation, or (4) the employer is prohibited by law from hiring an applicant who has been convicted of a crime.

SB 1412 narrows an employer's ability to consider sealed or expunged convictions to only those circumstances where a particular conviction would legally prohibit someone from holding that job.

Amends Section 432.7 of the Labor Code. Effective January 1, 2019.

SENATE BILL 1421 – PEACE OFFICERS: RELEASE OF RECORDS

The California Public Records Act requires a state or local agency to make public records available for inspection, subject to certain exceptions. Existing law makes Peace officer or custodial officer personnel records confidential and prohibits the disclosure of those records in any criminal or civil proceeding, except by discovery.

SB 1421 requires certain peace officer or custodial officer personnel records and records relating to specified incidents, complaints, and investigations involving peace officers and custodial officers to be made available for public inspection pursuant to the California Public Records Act. These include records relating to:

- An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
- An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.
- An incident in which a sustained finding was made that a peace officer or custodial officer engaged in sexual assault involving a member of the public.
- An incident in which a sustained finding was made of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

Amends Sections 832.7 and 832.8 of the Penal Code. Effective January 1, 2019.

SENATE BILL 1500 – DISCRIMINATION PROHIBITED AGAINST MILITARY RESERVISTS

Existing law prohibits various types of discrimination against a member of the military or naval forces of the state or of the United States because of his or her membership or service, including, among others, discrimination with respect to his or her employment. Existing law prohibits an

employer or officer or agent of a corporation, company, or firm, or other person from, among other things, discharging a person from employment because of the performance of any ordered military duty or training or by reason of being a member of the military or naval forces of the state. SB 1500 extends these protections to members of the federal reserve components of the Armed Forces of the United States and members of the State Military Reserve.

Amends Section 394 of the Military and Veterans Code. Effective January 1, 2019.

WAGE & HOUR

WAGE & HOUR - 2019

SENATE BILL 3: 2019-2023 CALIFORNIA MINIMUM WAGE PHASE-IN

Date	Employers with 25 Employees or Less	Employers with 26 Employees or More
January 1, 2019	$11.00/hour	$12.00/hour
January 1, 2020	$12.00/hour	$13.00/hour
January 1, 2021	$13.00/hour	$14.00/hour
January 1, 2022	$14.00/hour	$15.00/hour
January 1, 2023	$15.00/hour	$15.00/hour
January 1, 2024	Indexed	Indexed

California exempt salary threshold for overtime pay will rise in tandem with state minimum wage:

Date	Employers with 25 Employees or Less	
January 1, 2019	$3,813.33/mo	$45,760/yr
January 1, 2020	$4,160/mo	$49,920/yr
January 1, 2021	$4,506.67/mo	$54,080/yr
January 1, 2022	$4,853.33/mo	$58,240/yr
January 1, 2023	$5,200/mo	$62,400/yr

Date	Employers with 26 Employees or More	
January 1, 2019	$4,160/mo	$49,920/yr
January 1, 2020	$4,506.67/mo	$54,080/yr
January 1, 2021	$4,853.33/mo	$58,240/yr
January 1, 2022	$5,200/mo	$62,400/yr
January 1, 2023	$5,200/mo	$62,400/yr

ABC TEST APPLIES TO ESTABLISH WORKERS AS INDEPENDENT CONTRACTORS UNDER STATE IWC ORDERS

Plaintiff delivery drivers brought a class action against defendant Dynamex claiming the company had misclassified the drivers as independent contractors in derogation of the state IWC order governing the transportation industry. IWC orders are quasi-legislative regulations that have the force of law. They impose obligations relating to minimum wages, maximum hours and basic working conditions (e.g., required meal and rest breaks) of California employees.

Dynamex is a nationwide same-day courier and delivery service. Drivers are required to provide their own vehicles and pay for all of their own transportation expenses, including fuel, maintenance and liability insurance. Dynamex obtains its own customers and sets the delivery fees. Drivers are paid a flat fee or a percentage of the delivery fee. Drivers are free to set their own schedules, with no guarantee of the number or type of deliveries Dynamex will offer. Drivers are expected to wear Dynamex shirts and badges when making deliveries for Dynamex. Drivers are free to make deliveries for other companies when not making pickups or deliveries for Dynamex. Dynamex retains the authority to terminate its agreement with any driver without cause on three days' notice.

Before 2004, Dynamex had classified its California drivers as employees and compensated them in conformity with the IWC order and other state wage and hour laws. Dynamex thereafter converted all of its drivers to independent contractors.

Dynamex appealed from the trial court's order certifying a class action embodying a limited group of drivers. Dynamex argued that, under the multifactor *Borello* standard, the court should have denied class certification because individual issues unique to each driver's situation predominated over common issues.

The California Supreme Court affirmed the lower court's certification of the class based on the three alternative definitions for "employ" contained in the IWC order – particularly the "suffer or permit to work" definition. The Court ruled that, in determining whether a worker is one whom the hiring company "suffers or permits to work" (and thus an "employee" protected under IWC orders), the "ABC test" should be applied to distinguish employees from independent contractors. Under that test, a worker is properly considered an independent contractor to whom an IWC order does not apply **only** if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; **and** (B) that the worker performs work that is outside the usual course of the hiring entity's business; **and** (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

The Court held that, with respect to the plaintiffs' misclassification claim, there was a sufficient commonality of interest under parts B and C of the ABC test to allow their claim to be resolved on a class basis. The Court also signaled that the ABC test is to be applied retroactively. *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal. 5th 903

EMPLOYER'S POLICY OF ROUNDING EMPLOYEE HOURS COMPORTS WITH STATE LAW

State law requires employers to pay each employee for all time the employee is at work and subject to the employer's control. AHMC operates medical facilities in San Gabriel and Anaheim. AHMC uses an automatic time-clock payroll system at both locations that rounds employee time, up or down, to the nearest quarter hour. Plaintiffs, former hourly AHMC employees, filed a class action alleging that AHMC's calculation of compensable hours violated the Labor Code because its rounding method did not use the employees' exact check-in and check-out times. Under AHMC's system, for example, an employee clocking in between 6:53 and 7:07 was paid as if he/she had clocked in at 7:00; an employee clocking in between 7:23 and 7:37 was paid as if he/she had clocked in at 7:30.

Both sides moved for summary judgment. In support of its motion, AHMC submitted an uncontested four-year analysis of time records for the San Gabriel and Anaheim facilities. On a day-by-day basis, a majority of employee shifts at each location had time added or unaffected by the rounding procedure. The two named plaintiffs, however, lost time: one lost 3.7 hours at San Gabriel during the four-year study period; the other lost 1.6 hours in the nine months she worked at Anaheim. The trial court denied both summary judgment motions, and AHMC appealed.

The appellate court observed that federal wage regulations and court decisions have long permitted the use of rounding systems if they "average out sufficiently" such that employees are not systematically undercompensated for all time actually worked. Relying on federal precedent, the court determined that a rounding system passes muster under California law if the system is "fair and neutral" both facially and as applied such that it does not undercompensate employees over time.

The undisputed evidence here established that the rounding system was neutral on its face and that the employees as a whole were significantly *overcompensated*. The law does not require that every employee gain or break even over any particular pay period or set of pay periods: "fluctuations from pay period to pay period are to be expected under a neutral system." That some employees, including the named plaintiffs, lost a minimal amount of time was insufficient to create a triable issue of fact. The appellate court thus reversed the lower court and ordered summary judgment be entered in favor of AHMC. *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal. App. 5th 1014

EMPLOYER NEED NOT PROVIDE ITEMIZED WAGE STATEMENT CONCURRENTLY WITH CASH PAYMENT OF EMPLOYEE'S FINAL WAGES ON DISCHARGE

Plaintiffs, non-exempt former employees of defendant Wells Fargo (Bank), brought a class action against the Bank regarding its practice of furnishing itemized wage statements to discharged employees. Labor Code sections 201(a) and 208 require that, when an employer discharges an employee, the wages earned and unpaid at the time of discharge be paid "immediately" and at the place of discharge. Labor Code section 226(a) also mandates that an employer furnish an accurate, itemized written wage statement to each employee "semimonthly or at the time of each payment of wages, either as a detachable part of the check, draft or voucher

paying the employee's wages, *or separately when wages are paid by personal check or cash…."* (emphasis added).

In certain situations, the Bank issued final wages to employees at the time of their discharge through "in-store" payments made by cashier's check. The Bank's payroll department would then create a wage statement either the same day or the next day and mail it to the discharged employee. Plaintiffs challenged this practice, claiming it violated Section 226(a) because the discharged employees were not furnished with the required itemized statements at the time and place of their discharge. The trial court granted summary judgment for the Bank, and the plaintiffs appealed.

The appellate court affirmed summary judgment for the Bank. The court determined that Section 226(a) allowed the Bank to furnish a separate (detached) wage statement because paying a discharged employee by cashier's check was the equivalent of paying the employee in cash. Given the plain meaning of Section 226(a), the court found that the Bank had the option to furnish a separate wage statement "immediately" upon payment of the final wages or else "semimonthly". The Bank's practice of mailing the statement the day of or following its final "in-store" payment of wages in cash, the court ruled, met the optional semimonthly deadline under Section 226(a). In so ruling, the court rejected the DLSE Manual's admonition that an itemized wage statement "must accompany" a "cash payment" of wages. The court deemed the DLSE's interpretation of Section 226(a) to be a "void underground regulation" as it had not been adopted in accordance with the Administrative Procedure Act. *Canales v. Wells Fargo Bank* (2018) 23 Cal. App. 5th 1262

TEMPORARY STAFFING AGENCY NOT LIABLE FOR MEAL PERIOD VIOLATIONS BY CLIENT EMPLOYER

Plaintiff Serrano, a nonexempt temporary employee, sued defendant Aerotek (a staffing agency employer) and defendant Bay Bread (Aerotek's client) for failing to provide meal periods in accordance with California law. Labor Code section 226.7 and IWC Wage Order No. 7-2001 require California employers to furnish employees with a meal period of not less than 30 minutes within five hours of starting work; the meal period may be waived by mutual agreement of the employer and employee where the employee's workday shift can be completed in six hours or less.

Aerotek is a staffing agency that places temporary employees with its clients. Bay Bread was one such client, operating a large food production facility. Some 200 Aerotek temporary employees and 100 Bay Bread employees worked at the facility. Aerotek maintained an employee handbook for its employees. The handbook articulated a meal period which tracked the above-mentioned Labor Code and wage order provisions. The handbook stated that employees should be relieved of all duties during their 30-minute meal breaks and advised employees to report any incidents of interference with their authorized meal periods to Aerotek management. Serrano received a copy of the handbook; and also signed forms waiving a meal period on any day she worked no more than six hours.

Aerotek's service contract with Bay Bread stipulated that Bay Bread would control, manage and supervise the work of the assigned Aerotek employees in compliance with applicable federal,

state and local laws. Aerotek representatives conducted training for the temporary employees, including Serrano, on Aerotek's employment policies; the training covered the meal period policy in the handbook. Aerotek stationed an on-site manager, Scott, at the production facility, and he conducted twice-daily "walk-throughs".

Bay Bread's production supervisors were unfamiliar with Aerotek's meal period policy. On several days when she worked more than six hours, Serrano took her meal breaks more than five hours after beginning work or not at all. She did so in an effort to conform her break schedule to that of her Bay Bread co-workers. Aerotek took no affirmative steps to prevent Serrano from taking timely meal periods, and she never shared any concerns with Scott about the meal periods. The trial court granted Aerotek's motion for summary judgment, and Serrano appealed.

The appellate court affirmed summary judgment for Aerotek, finding that Aerotek had sufficiently met its obligation to provide meal periods and was not liable for Bay Bread's meal period violations. The court deemed it significant that Aerotek's service contract required Bay Bread to comply with applicable state wage and hour laws; Aerotek had adopted its own lawful meal period policy in the handbook which Serrano received; Aerotek gave orientation to Serrano and her co-workers on the meal period policy; the handbook advised employees to notify Aerotek management of interference with the meal period policy; and, Aerotek took no action to prevent Serrano from taking meal breaks.

The appellate court noted that, under *Brinker*, an employer is not required to "police" the taking of meal breaks, and mere knowledge they are not being taken does not establish liability. The steps implemented by Aerotek in this instance fulfilled its own legal duty to provide meal periods. The court also rejected Serrano's argument that Aerotek was liable for Bay Bread's actions because the companies were "joint employers". The court reasoned that, given the particular scope of meal period obligations imposed under *Brinker*, the Labor Code, and the pertinent wage order, an employer who satisfies its own duty to furnish meal periods cannot be liable for meal period violations committed by a co-employer. *Serrano v. Aerotek, Inc.* (2018) 21 Cal. App. 5th 773.

PROPER METHOD FOR CALCULATING OVERTIME ON FLAT SUM BONUSES REQUIRES DIVIDING BONUS AMOUNT BY TOTAL NON-OVERTIME HOURS ACTUALLY WORKED

This case involves a dispute over the method that California employers must use when calculating overtime on flat sum bonuses. Here, plaintiff Alvarado sued his employer Dart Container Corp. (Dart) alleging Dart had improperly calculated his overtime on flat $15 bonuses that he earned by completing full shifts on weekend days. Dart calculated Alvarado's overtime in accordance with the prescribed federal formula as no California regulatory formula currently exists. Alvarado claimed that Dart's use of the federal formula was unlawful, asserting that it does not align with California's overarching wage and hour policy of discouraging overtime. He further argued that the federal formula should not be applied because it is not as employee-friendly as the formula set forth in the Division of Labor Standards Enforcement (DLSE) Manual. Dart moved for summary judgment on the grounds that the DLSE Manual has no precedential value or legal effect, and, therefore, Dart was following the only formula grounded in valid law. The trial court agreed with Dart and granted its motion for summary judgment.

The court of appeal followed suit by affirming the trial court's finding that summary judgment was appropriate.

The California Supreme Court reversed. The Court framed the issue as what *divisor* should be used to calculate the per-hour value of a flat sum bonus to be included in an employee's regular rate for overtime purposes. The "federal formula" divisor urged by Dart was (A) the number of hours the employee actually worked during the pay period, *including overtime hours*. The "DLSE Manual" formula urged by Alvarado was (B) the number of non-overtime hours the employee actually worked during the pay period. The Court concluded that the appropriate divisor was (B).

The Court found that alternative (B) more aptly furthers that state's policies of discouraging employers from imposing overtime work and interpreting labor laws in favor of protecting employees' interests. The Court declared that state law controls to the extent it is more protective of workers than federal law. Of particular significance to the Court was the fact that the weekend attendance bonus is payable even if the employee works no overtime at all during the relevant pay period. It then follows, the Court reasoned, that the bonus is properly treated as if it were fully earned by only the *non-overtime* hours in the pay period; therefore, only *non-overtime* hours should be considered when calculating the bonus's per-hour value. The Court also noted that, even though the DLSE Manual was invalid as an "underground regulation," its interpretation of the underlying statutes and wage orders was entitled to consideration in view of the DLSE's expertise and special competence. *Alvarado v. Dart Container Corporation of California* (2018) 4 Cal. 5th 542

RELEVANT UNIT FOR DETERMINING FLSA MINIMUM WAGE COMPLIANCE IS THE WORKWEEK AS A WHOLE

In this case, the Ninth Circuit considered the relevant unit for determining compliance with FLSA minimum wage requirements. Plaintiff nonexempt employees worked as customer service representatives at call centers run by Xerox in Washington state. For certain defined activities, plaintiffs received a flat rate of $9.04 per hour. For other activities, plaintiffs were paid on a variable per minute basis. On some workdays, plaintiffs' earned variable rates were insufficient to cover the FLSA hourly minimum of $7.50.

At the end of each workweek, Xerox totals the amounts earned for flat rate and variable rate activities and divides that sum by the total number of hours the employee worked that week. If the resulting hourly wage equals or exceeds the FLSA minimum, Xerox does not pay the employee anything more. If the result falls below the $7.50 hourly minimum, Xerox gives the employee subsidy pay to bump the employee's average hourly wage up to minimum wage.

Plaintiffs brought a class action against Xerox for violating the FLSA. Plaintiffs claimed their earnings should be scrutinized on an hour-by-hour basis and not averaged over an entire workweek. Under the former approach, plaintiffs maintained they were entitled to recoup any per-hour shortfalls between the variable rate pay they earned and the FLSA hourly minimum.

The trial court ruled that Xerox's workweek averaging method complied with the FLSA, and plaintiffs appealed. The reviewing Court declared the issue to be one of first impression in the

Ninth Circuit: when gauging compliance with the FLSA's minimum wage requirement, is it permissible to use the workweek as the unit of measure? The Court answered that question in the affirmative and upheld the trial court's decision. The Court looked to longstanding Department of Labor interpretations of the FLSA which "established the workweek as the measuring rod for compliance at a very early date," as well as precedent from other circuits. The Court concluded that the FLSA's purpose is accomplished as long as the total *weekly* wage paid by an employer meets the minimum *weekly* requirements of the statute. *Douglas v. Xerox Business Services, LLC*, 875 F. 3d 884 (9th Cir. 2017)

WAGE DIFFERENTIAL UNDER EQUAL PAY ACT CANNOT BE BASED ON EMPLOYEE'S PRIOR SALARY

Plaintiff was hired as a math consultant by defendant Fresno County Office of Education. She previously had been employed in Arizona as a middle and high school math teacher at an annual salary of $50,630. Defendant's salary guideline consisted of 10 stepped salary levels, with a new hire's salary determined by taking the hiree's prior salary, adding 5%, and placing the new employee on the corresponding step of the salary schedule. The guideline dictated that plaintiff be placed on step 1 of level 1 of the salary schedule. Plaintiff later learned that defendant had subsequently hired male colleagues as math consultants at higher salary steps.

Plaintiff sued, claiming a violation of the federal Equal Pay Act (Act). The Act mandates equal pay for substantially equal work regardless of sex. Under the Act, a plaintiff must show that her employer has paid male and female employees different wages for comparable work. But not all differentials in pay for equal work violate the Act. The Act prescribes four exceptions which operate as affirmative defenses for the employer: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or, (4) *a differential based on any factor other than sex.*

Defendant moved for summary judgment, claiming plaintiff's pay differential was based on her prior salary, and her prior salary constituted a "factor other than sex" within the meaning of the catchall exception (4). Defendant contended that plaintiff's prior salary was a permissible affirmative defense under exception (4) to her admittedly lower salary than her male counterparts. The trial court denied summary judgment, and defendant appealed.

The Ninth Circuit Court of Appeal affirmed the trial court's ruling. The Court held that prior salary alone or in combination with other factors cannot justify a wage differential under the Act. To hold otherwise, the Court said, would "allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum" – thus undercutting the very purpose of the Act. The Court determined that the factors referenced in exception (4) were limited to legitimate, job-related factors such as employment experience, educational background, ability, or prior job performance. The Court concluded that prior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception that would permit employers to pay disparate wages. *Rizo v. Yovino*, 887 F. 3d 453 (9th Cir. 2018)

NONEXEMPT EMPLOYEE ENTITLED TO COMPENSATION UNDER CALIFORNIA LAW FOR OFF-THE-CLOCK DUTIES PERFORMED AS A REGULAR PART OF THE JOB

Federal regulations implementing the FLSA apply the "de minimis" rule to claims for unpaid wages under federal law. The rule allows employers to disregard insubstantial and insignificant amounts of time beyond the scheduled work hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes. In this case, the California Supreme Court addressed the question of whether the de minimis rule applies to unpaid wage claims brought under California law.

Plaintiff was a nonexempt shift supervisor employed by Starbucks. Starbucks' computer software required plaintiff to clock out on every closing shift before initiating the software's "close store procedure" on a separate computer terminal in the back office. The procedure transmitted daily sales, profit and loss, and store inventory data to Starbucks' corporate headquarters. After completing that task, plaintiff activated the store alarm, exited the store, and locked the front door. He also walked co-workers to their cars in accordance with Starbucks' policy; and he occasionally re-opened the store to allow employees to retrieve items they left behind, waited with employees for their rides to arrive, or brought in store patio furniture mistakenly left outdoors. Those closing tasks required plaintiff to work an additional 4 to 10 minutes each work day. Over 17 months of work, plaintiff's unpaid wages added up to $102.67.

Plaintiff filed a class action on behalf of himself and all non-managerial California employees of Starbucks. Plaintiff alleged that the employees were entitled to compensation for off-the-clock tasks under state IWC wage order No. 5-2001. The wage order requires that a nonexempt California employee be paid "for all hours worked" – i.e., "all the time the employee is suffered or permitted to work." Starbucks based its defense on the de minimis rule, arguing that the rule applied since it had been adopted in the DLSE Manual.

The Supreme Court noted that the DLSE Manual was not binding on California Courts, as the Manual's interpretive rules had not been adopted in accordance with the Administrative Procedure Act. The Court held that, under California's employee-protective scheme of wage and hour laws, an employer requiring its employees to work minutes off-the-clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate employees for that time by invoking the de minimis rule. To many ordinary people who work for hourly wages, the Court observed, $102.67 was not "de minimis" at all. The Court left open the prospect that, unlike the "regular" off-the-clock tasks at issue here, there may be employee activities which are so irregular or brief in duration that employers may not be reasonably required to compensate employees for the time spent on them. *Troester v. Starbucks Corporation* (2018) 5 Cal. 5th 829.

CLASS ACTION WAIVER IN TRUCK DRIVER'S ARBITRATION AGREEMENT WITH STAFFING AGENCY UNENFORCEABLE

Defendant Cornerstone is an employee staffing firm assisting employers throughout California and other states. Cornerstone specializes in transportation staffing, among other things. Cornerstone hired plaintiff Muro to drive trucks for its client, Team Campbell. Muro drove Team Campbell delivery routes within California and across state lines. Muro signed an

employment contract with Cornerstone. The contract contained an arbitration policy requiring binding arbitration of nearly all disputes and stating that the policy is "governed solely by the Federal Arbitration Act (FAA)." The employment contract stipulated that the parties waived a jury trial, as well as "the right to initiate or proceed on a class action basis." The FAA deems such contractual waivers enforceable.

Muro filed a class action against Cornerstone and Team Campbell. His complaint included claims for failure to pay all compensation for time worked, failure to provide meal periods, and failure to authorize and permit rest breaks. Cornerstone petitioned the trial court to compel Muro to arbitrate his claims on an individual basis. Cornerstone maintained that the FAA required the court to enforce the jury trial and class action waivers and dismiss all of Muro's purported class claims. The trial court denied Cornerstone's petition, ruling that Muro's claims were exempt from FAA coverage and eligible for arbitration as class claims under California law. Cornerstone appealed.

The appellate court affirmed the trial court's determination. The court concurred that the Cornerstone contract's arbitration policy was not subject to the FAA because the statute expressly exempted contracts of employment of transportation workers engaged in interstate commerce – whether or not Cornerstone was considered an employer "within the transportation industry." Muro's contract was therefore exempt from the FAA. Having concluded the FAA was inapplicable, the court applied the four-part *Gentry* test to decide whether the class waiver provision was enforceable under California law. The court ruled that Muro had submitted sufficient evidence to invalidate the waiver under the *Gentry* standard because: (1) his potential individual recovery ($26,000) was of modest size; (2) there was a risk of retaliation by the employer against Muro and other similarly situated drivers; and, (3) absent members of the class likely would be ill-informed of their rights (Cornerstone had not challenged the lower court's finding that Muro's evidence satisfied the fourth *Gentry* prong, i.e., that other real world obstacles existed to the vindication of the employees' rights through individual arbitration.) Thus, the appellate court held that the class waiver was an unlawful exculpatory clause under California law and that Cornerstone's petition to compel an individual arbitration of Muro's claims was properly denied. *Muro v. Cornerstone Staffing Solutions, Inc.* (2018) 20 Cal. App. 5th 784.

HARASSMENT, RETALIATION AND DISCRIMINATION

ADMINISTRATIVE PROCEEDINGS OF THE REQUISITE JUDICIAL CHARACTER CAN RESULT IN AN ADMINISTRATIVE DECISION THAT IS BINDING IN A LATER CIVIL ACTION BROUGHT IN SUPERIOR COURT

Carol E. Wassmann was terminated for cause from her employment as a tenured librarian with the South Orange County Community College District ("District") in April 2011. A five-day administrative hearing was conducted in accordance with Education Code section 87660 et seq., which governs "the evaluation of, the dismissal of, and the imposition of penalties on, community college faculty." After hearing testimony, receiving documentary evidence, and reviewing written arguments, the administrative law judge issued a 20-page decision in August 2012, upholding the District's decision and determining there was cause for dismissing Wassmann. In October 2012, Wassmann filed a petition for writ of mandate, alleging that the ALJ's findings were not supported by the weight of evidence. (Notably, she did not raise any issues regarding race discrimination, age discrimination or harassment.) The trial court denied the petition in August 2013, finding the record to be "replete with instances of repeated violations of rules, multiple conflicts with supervisors and numerous failures to perform assignments."

In December 2013, Wassmann filed a charge of race and age discrimination, as well as harassment, with the California Department of Fair Employment and Housing (DFEH). The charge named several of her former supervisors as respondents, and while it did not name the District, she later amended the charge to add two coworkers in her employee association who had represented her in her performance management and disciplinary proceedings. She requested a right-to-sue letter, and subsequently sued the District and the individuals named in the charge, alleging, among other things, claims for racial discrimination, age discrimination, and harassment in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), and for intentional infliction of emotional distress. The trial court granted motions for summary judgment on the ground the FEHA claims were barred by res judicata, collateral estoppel, or failure to exhaust administrative remedies, and the intentional infliction of emotional distress cause of action was barred by res judicata, collateral estoppel, or the statute of limitations. Wassmann appealed.

The court of appeal affirmed. The process required under the Education Code affords an employee a robust platform of due process from which to challenge adverse employment actions, concluding with an evidentiary hearing before an administrative law judge. The ALJ's determination is then subject to judicial review via petition for writ of mandate, where the trial court exercises independent judgment on the evidence. Where these sorts of administrative proceedings possess the requisite judicial character, the resulting administrative decision is binding in a later civil action brought in superior court. See, e.g., Runyon v. Board of Trustees, 48 Cal.4th 760 (2010); Johnson v. City of Loma Linda, 24 Cal.4th 61 (76). The appellate court here determined that Wassermann's unsuccessful challenge to the ALJ's decision had preclusive effect under principles of res judicata and collateral estoppel. Wassmann could have challenged the District's action "on any ground" (both from the outset and in her writ petition), but failed to raise concerns about discrimination or harassment, and thus she failed to exhaust her administrative remedy. The appellate court also found her claims time-barred, given that the

latest date of any potential discriminatory or harassing conduct would have been her termination date in April 2011. Neither her one-year DFEH deadline, nor the two-year statute of limitations on her IIED claim, were tolled during her pursuit of administrative remedies with the District. Thus her subsequent DFEH charge and lawsuit in December 2013 were untimely. *Wassman v. South Orange County Comm. College Dist.* (2018) 24 Cal.App.5th 825.

THE 90-DAY PERIOD FOR FILING A CIVIL ACTION BEGINS WHEN A CLAIMANT IS GIVEN NOTICE OF THE RIGHT TO SUE BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Scott began working for Gino Morena Enterprises ("GME") in April 2011 at a barbershop located on the United States Marine Corps Base Camp Pendleton. There she was responsible for providing customers with haircuts and selling hair products. She alleged that two female GME managers sexually harassed and retaliated against her by treating her poorly for declining their advances. On November 13, 2013, while still employed by GME, Scott filed a charge with the California Department of Fair Employment and Housing ("DFEH"). Six days later, the DFEH transferred the duty to investigate Scott's charge to the EEOC (pursuant to a work sharing agreement between the DFEH and the EEOC) and issued her a right-to-sue letter on November 25, 2013. The DFEH letter explained that: (1) a civil action under California's Fair Employment and Housing Act (the "FEHA") "must be filed within one year from the date of this letter"; (2) Scott's DFEH charge "is dual filed with the [EEOC]" and Scott "ha[s] a right to request EEOC to perform a substantial weight review of [DFEH's] findings . . . within fifteen (15) days of . . . receipt of this notice"; (3) "[a]lthough DFEH has concluded that the evidence and information did not support a finding that a violation occurred, the allegations and conduct at issue may be in violation of other laws"; and (4) Scott "should consult an attorney as soon as possible regarding any other options and/or recourse [she] may have regarding the underlying acts or conduct."

Scott alleged that on December 22, 2013, after being issued a warning letter by one of the managers, she decided to quit. On October 15, 2014, Scott spoke with someone at the EEOC, who confirmed that Scott's complaint was being processed and gave her a claim number. She filed a second charge with the DFEH on November 17, 2014. The second charge recounted the allegations leading to her first DFEH charge, and then additionally stated that she had been constructively discharged due to the intolerable harassment by her managers. Scott received a second DFEH right-to-sue letter on the same date she filed the second charge. The letter stated that Scott's case was being closed because an immediate right-to-sue notice was requested and that the DFEH would take no further action on the charge. The letter also stated: "To obtain a federal Right to Sue notice, you must visit the U.S. Equal Employment Opportunity Commission (EEOC) to file a complaint within 30 days of receipt of this DFEH Notice of Case Closure or within 300 days of the alleged discriminatory act, whichever is earlier."

On November 20, 2014, Scott filed a complaint in the Orange County Superior Court asserting FEHA claims, and GME moved the case to federal court. In mid-2015, Scott requested, and obtained, a right-to-sue notice from the EEOC (associated with her first administrative charge). That notice, which was issued on June 3, 2015, stated that "[m]ore than 180 days have passed since the filing of this charge" and "[t]he EEOC is terminating its processing of this charge." Id. The notice also stated that Scott's "lawsuit under Title VII. . . must be filed in a federal or state court WITHIN 90 DAYS of ... receipt of this notice; or [the] right to sue based on this charge

will be lost." Scott then amended her complaint to assert only federal Title VII-based discrimination and harassment claims. After the parties subsequently engaged in discovery on the issue of equitable tolling, GME filed a motion for summary judgment. The district court granted the motion, ruling that all of Scott's claims were time-barred and equitable tolling did not apply. Scott timely appealed.

The Ninth Circuit Court affirmed in part and reversed in part. Claims based on Scott's second charge were deemed untimely, as she had not obtained a federal right-to-sue letter by the earlier of 30 days of the DFEH's closure letter or 300 days of the alleged discriminatory act. As to claims based on her first charge, the dispute turned on whether the 90-day period to file a civil action begins when the plaintiff receives a right-to-sue notice from the EEOC or 180 days after the charge is filed with the EEOC, regardless of when the EEOC issues a right-to-sue notice. The panel held that, under 42 U.S.C. § 2000e-5(f)(1), the 90-day period for filing a civil action, following exhaustion of administrative remedies, begins when the aggrieved person is given notice of the right to sue by the Equal Employment Opportunity Commission, rather than when the person becomes eligible to receive a right-to-sue notice from the EEOC. Accordingly, Scott's claims based on her first administrative charge were timely. The panel further held that she could base her Title VII claims on the defendant's alleged acts occurring after she filed her first administrative charge to the extent she could show such acts were part of a single hostile work environment claim (i.e. a continuing violation). *Scott v. Gino Morena Enters.* (9th Cir. 2018) 888 F3d 1101.

VIABLE RETALIATION CLAIM UNDER FEHA REQUIRES DEMONSTRATION OF EMPLOYMENT ACTION REASONABLY LIKELY TO ADVERSELY AND MATERIALLY AFFECT AN EMPLOYEE'S JOB PERFORMANCE OR OPPORTUNITY FOR CAREER ADVANCEMENT

Meeks was hired at AutoZone as a customer sales representative in March 2006, and she later received a number of promotions, eventually becoming a store manager. From early in her employment, she had regular encounters with a co-worker (Fajardo) who had similarly worked his way up from service representative to store manager. Meeks claimed Fajardo regularly subjected her to sexual harassment in various forms, both while she was a customer sales representative and after she was promoted into management. Meeks alleged that: he would comment on her body and clothes; he would ask her to go out with him, or more directly suggest that they have sex; he would send her text messages with sexual content, including images and video, and he forcibly attempted to kiss her three times, succeeding once in pressing his lips to hers. She claimed he also suggested that he could facilitate her advancement and promotion within AutoZone, through his position as one of the "favorites" of the district manager (and their supervisor in common), Ledesma. He also told Meeks that he would get her fired if she reported his conduct.

Meeks first reported Fajardo's conduct to AutoZone in October 2009. According to Meeks, Ledesma told her that when she talked to Fajardo about it, he had "just kind of laughed it off and said, 'Oh, it was all a misunderstanding. It's a joke. It's no big deal.'" Meeks testified that Ledesma told her that she (Meeks) should "just squash it," because Ledesma did not want to "lose three managers" (referring to Meeks, Meeks' husband, who was also an AutoZone employee, and Fajardo). She instructed Meeks to tell the investigator from the human resources department that "everything had been taken care of." Meeks further testified that Ledesma

threatened to fire Meeks and her husband if Meeks took her complaints higher. Meeks sued AutoZone and Fajardo, alleging sexual harassment, failure to prevent sexual harassment, and retaliation. The trial court granted summary adjudication in favor of AutoZone on the retaliation claim. The jury returned defense verdicts on the remaining claims, and Meeks appealed, arguing (a) that certain evidentiary rulings at trial constitute prejudicial error, requiring reversal, and (b) that the summary adjudication on her retaliation claim was erroneous.

The appellate court reversed on the evidentiary claims (exclusion of various types of evidence deemed prejudicial) and remanded for a new trial. However, the court upheld summary adjudication of the retaliation claim because there was no evidence of adverse action following her complaint. The term "adverse employment acts" encompasses not only 'ultimate' employment actions, such as hiring, firing, demotion or failure to promote," but also "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for career advancement." (*Jones v. Department of Corrections & Rehabilitation* 152 Cal. App. 4th 1367, 1380-1381 (2007). On the other hand, minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee and cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable. Meeks continued to be employed at AutoZone, experienced no loss or reduction in her classification, position, salary, benefits and work hours; and her employment was not terminated. She did not contend she suffered working conditions so intolerable or aggravated as to constitute constructive discharge, that her performance evaluations suffered, or that she was ever denied any promotion or assignment that might have led to promotion. Meeks testified that Ledesma threatened her with an adverse employment action – to fire her and her husband, if she did not "squash" her complaint about Fajardo – but there is no evidence that the threat was carried out. *Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855.

MISLEADING AN APPLICANT TO BELIEVE THAT NO EMPLOYMENT OPENING EXISTS CAN BE SUFFICIENT EVIDENCE OF INTENTIONAL PREGNANCY DISCRIMINATION TO DEFEAT SUMMARY JUDGMENT ON A FEHA CLAIM

Western Dental operates dental offices and clinics throughout California, including one in Napa. The company accepts student externs from schools that have dental assistant programs. Western Dental had a practice of posting job openings for a dental assistant on its website, both to solicit applications for current openings and to create a pool of candidates for positions to be filled in the future. In March 2015, an open requisition for a dental assistant in the Napa office was approved, and a solicitation for applications was publicly posted. Abed obtained an externship in Western Dental's office in Napa, the city where she wanted to live, and she began on May 18, 2015. At the time, she was pregnant, which she did not disclose to anyone at Western Dental. The managing dentist, Dr. Andrew Rivamonte, told her to treat the externship as "a four-to six-week working interview" and try to learn as much as possible because historically such externs were ultimately hired on full-time.

At some point during her externship, Abed hung her purse in the employee break room. The purse was partially open and it contained a bottle of prenatal vitamins. Abed's supervisor, Strickling, saw them and asked whose they were, and another coworker indicated the purse was Abed's. Strickling later told another dental assistant (DeHaro) she thought Abed may be

pregnant, and DeHaro said something to the effect that "if [Abed] were pregnant, it would not be convenient for the office." Abed later testified that she overheard a conversation about her pregnancy between Strickling and DeHaro. According to Abed, Strickling said, "[W]ell, if she's pregnant, I don't want to hire her." Strickling testified that approximately two weeks after the discovery of Abed's pregnancy, her supervisor asked Strickling to tell Abed there were no open positions for a dental assistant in Napa, but that there was one in Vacaville. Abed did not apply for a position in the Napa office because Strickling had told her there were no openings there. But before her externship was over, Abed learned that an opening in the Napa office was posted on Western Dental's website.

Abed completed her externship June 20, 2015. Less than a week later, a recruiter emailed Western a form for an extern candidate who could start July 6, and in late July, Western Dental extend her an offer to become a dental assistant in the Napa office. Shortly afterward, that candidate was hired for the position created by the open requisition approved the previous March. Abed filed an action in September 2015, bringing claims for pregnancy discrimination under the FEHA and invasion of privacy. Western Dental successfully moved for summary judgment, arguing that Abed's failure to apply for a position was dispositive.

On appeal, the court reversed. In most cases alleging a failure to hire for discriminatory reasons, the prima facie case includes a showing that the plaintiff applied for the job. However, Abed was not required to show that she submitted an application because Western Dental falsely telling her no position was available (and thereby causing her not to apply for one) was sufficient evidence of intentional pregnancy discrimination. *Abed v. Western Dental Servs., Inc.* (2018) 23 Cal. App. 5th 726.

COURT AFFIRMS THAT PREVAILING DEFENDANTS IN FEHA AND WAGE CASES MUST ESTABLISH THAT UNDERLYING CLAIMS WERE FRIVOLOUS OR IN BAD FAITH BEFORE RECOVERY OF ATTORNEYS' FEES AND COSTS IS PERMISSIBLE, AND THAT FEHA FEE-SHIFTING RULE TRUMPS CODE OF CIVIL PROCEDURE SECTION 998

Plaintiff Brent Arave brought several claims under the California Fair Employment and Housing Act (FEHA) against his former employers, Merrill Lynch, Pierce, Fenner & Smith, Inc., Bank of America, his supervisor and a human resources supervisor to recover damages caused by purported discrimination, harassment, and retaliation based on his membership in the Church of Jesus Christ of Latter-day Saints. He also sought damages for a wage claim - nonpayment of vacation pay he alleges he was owed - and for whistleblower retaliation. A jury returned a verdict in favor of defendants on all counts that had survived summary judgment and dismissal. After judgment was entered in defendants' favor, defendants filed motions, as the prevailing party, for costs, expert witness fees, and attorneys' fees. The trial court denied the request for attorneys' fees on the FEHA claims, but granted the motion for attorneys' fees on the wage claim and for recovery of expert witness fees.

Arave appealed, arguing that numerous evidentiary errors, counsel and court misconduct, and issues with the jury instructions necessitated reversal of the judgment, and that defendants were not entitled to recover attorneys' fees, costs or expert witness fees. Defendants cross-appealed,

arguing that the trial court abused its discretion by determining that Arave's FEHA claims were not frivolous and by denying defendants' motion to recover attorneys' fees on the FEHA claims.

The Court of Appeal denied Arave's appeal on the merits of the trial, holding that there was no error which necessitated reversal of the judgment. The Court affirmed the trial court's order denying defendants' motion for attorneys' fees for defense of the FEHA claims based on Government Code section 12865(b) and controlling Supreme Court precedent which require a finding that the underlying FEHA claims were frivolous, unreasonable, without foundation or brought in bad faith before a prevailing defendant in a FEHA case is entitled to recover attorneys' fees. For the same reason, the Court reversed the trial court's award of costs and expert witness fees, holding that a prevailing defendant in a FEHA case is not entitled to recover ordinary costs unless there is finding that the claims were frivolous. The Court of Appeal rejected defendants' argument that they were entitled to recover expert witness fees under Code of Civil Procedure section 998 (which provides that expert costs incurred after an offer of compromise is rejected are recoverable if the plaintiff does not recover an amount greater than that which was offered in compromise), holding that section 998 does not override the requirement that costs can only be recovered if the underlying FEHA claims are found to be frivolous. Finally, the Court of Appeal remanded the questions of whether the defendants were entitled to recover attorneys' fees and costs for prevailing on the wage claim to the trial court, noting that Labor Code section 218.5 requires a finding that the employee brought the action in bad faith before a prevailing defendant on a wage claim is entitled to recover fees and costs, and that the lower court had failed to make such determination. *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 18 Cal.App.5th 1098.

PUBLIC SCHOOL TEACHER DENIED RECOVERY FOR ALLEGED HARASSING COMMENTS FROM STUDENTS AND OUT-OF CONTEXT ISOLATED COMMENT FROM VICE PRINCIPAL

Patricia Campbell was employed by the Hawaii Department of Education from 2000 until she resigned in July 2009. From 2004 through 2007, Campbell taught music and band at King Kekaulike High School in Maui. Campbell alleged that throughout her time at the high school she was harassed and degraded by students on the basis of her race (white) and her sex (female). She alleges that she was called offensive names and was physically threatened by a student who claimed to have a gun. She routinely reported the student's alleged misconduct to the high school's administration during the 2006-2007 school year, in response to which various disciplinary measures were imposed against the students who were found to have misbehaved. At the same time, Campbell herself with the subject of numerous complaints. The high school investigated and determined that Campbell had intimidated and discriminated against students, physically grabbed and verbally abused students, failed to adequately supervise students at school-sanctioned activities and harassed a colleague. Despite such findings, the school took no action against Campbell and she was allowed to keep her position.

On May 7, 2007, Campbell reportedly stormed into the office of a vice principal who was meeting with a student. Campbell started yelling at the vice principal and others in the office and refused to leave. Two days later, the vice principal held a counseling meeting with Campbell to discuss the incident and later gave her a memorandum documenting the meeting. Among other things, the memorandum stated that Campbell had "verbally ragged at" a security officer and it

directed Campbell not to "address adults or students on campus in a yelling or ragging manner." Campbell took offense to the memorandum and in particular to the use of the words "ragged" and "ragging," alleging that they were a reference to her menstrual cycle. She immediately complained to the superintendent's office about the incident and claimed that the vice principal had stalked and sexually harassed her. Her allegations were investigated and it was ultimately found that there was not enough evidence to sustain her complaint. In particular, the investigator found that the vice principal's use of the words "ragged" and "ragging" were not derogatory, but rather were used to mean that Campbell "railed at" or "scolded" others.

At some point before the 2007-2008 school year, Campbell requested transfer to teach elsewhere on Maui. Her requests were all denied on the grounds that the positions she requested were not open during the transfer period and that she failed to request the transfers in a timely manner. When she was not able to transfer, in August 2007 Campbell requested and was granted a 12-month leave of absence without pay due to work related stress. She was subsequently granted a second year of unpaid leave. In July 2009, as her second year of leave was coming to an end, she learned that because there were not enough students to support a full schedule of music classes, she has been assigned to teach three remedial math classes and only one or two music classes for the upcoming year. Campbell told the administration that she would not teach remedial math, in response to which she was told that she would be fired if she did not do so. Campbell therefor resigned and filed suit against the Hawaii Department of Education and various administrators alleging that she been subjected to several acts of discriminatory treatment and a hostile work environment because of her race and sex in violation of Title VII, and that she had been retaliated against for complaining of harassment at the school in violation of Title VII. All of her claims were eventually dismissed on defendants' motions for partial judgment on the pleadings and summary judgment. Campbell subsequently appealed the district court's summary judgment ruling against her on her claims for disparate treatment, hostile work environment, retaliation and sex discrimination.

The Ninth Circuit Court of Appeal affirmed the district court's grant of summary judgment in its entirety. As to Campbell's claims of disparate treatment based on sex and race and retaliation and intentional sex discrimination, the Court held that Campbell failed to establish a prima facie case because she did not show that she was subject to an adverse employment action or that similarly situated individuals outside her protected class were treated more favorably, or as to the retaliation claim, that the high school's decision to investigate her alleged misconduct and direction to teach remedial math were not neutral decisions and instead were pretextual. The Court also affirmed the district court's grant of summary judgment on Campbell's hostile work environment claim. As to the comments from the students, the Court determined that even if they were sufficient to create a hostile work environment, the defendant school system could be held liable for students' harassing conduct only to the extent that it failed reasonably to respond to the conduct or ratified or acquiesced in the conduct, neither of which was the case. As to the vice principal's use of the words "ragged" and "ragging," the Court found that Campbell was ignoring the difference between the well-known phrase "rag" or "rag on" and the potentially offensive phrase "on the rag." Regardless, the one-time, isolated comments, which were immediately investigated after Campbell complained, would not alone support a claim for a hostile work environment. *Campbell v. State of Hawaii Department of Education, et al* (9th Cir. 2018) 892 F.3d 1005.

EMPLOYEE OF PUBLIC AGENCY REQUIRED TO EXHAUST INTERNAL ADMINISTRATIVE REMEDIES BEFORE ALLEGING A CAUSE OF ACTION FOR WHISTLEBLOWER RETALIATION

Shawn Terris was laid off from her employment with the County of Santa Barbara. She filed a complaint with the County's Civil Service Commission alleging her termination procedure violated her seniority rights. She filed suit, alleging, among other things, that the County terminated her in retaliation for her workplace complaints in violation of Labor Code section 1102.5 The trial court found that Terris failed to exhaust her administrative remedies and granted summary judgment in favor of the County. Terris appealed.

In the court of appeal, Terris argued that she was not required to exhaust administrative remedies before bringing a Section 1102.5 cause of action. She claimed that because Labor Code section 244 stated that claimants aren't required to exhaust administrative remedies unless the code section expressly requires it, and because Section 1102.5 does not expressly require exhaustion, she was under no obligation to file an internal complaint before filing suit under Section 1102.5.

The Court of appeal, upholding the ruling of the trial court, disagreed. The Court found that Section 244 was enacted to protect the right to sue without first having to exhaust administrative proceedings before the Labor Commissioner, not an employer's internal administrative remedies. In doing so, the Court disapproved a federal trial court's ruling to the contrary upon which Terris relied and resolved conflicting interpretations of the controlling Campbell v. Regents of the University of California case. Pursuant to Campbell, employees are required to exhaust their employer's internal administrative remedies before filing suit. Because she failed to do so, her retaliation claims were barred. *Terris v. County of Santa Barbara* (2018) 20 Cal.App.5th 551.

GENERAL RELEASE LANGUAGE IN A WORKERS' COMPENSATION "COMPROMISE AND RELEASE" WAS INSUFFICIENT TO CONSTITUTE A GENERAL WAIVER OF HARASSMENT OR DISCRIMINATION CLAIMS

Adrian Camacho filed a workers' compensation claim against his employer, Target Corporation. In signing the "Compromise and Release" pre-printed form settling his worker's compensation claim, Camacho also signed a release contained in an addendum that Target argued released all civil claims.

Thereafter, Camacho sued Target in the trial court, alleging claims for harassment, discrimination, and retaliation, among other things. The trial court dismissed Camacho's claims on summary judgment, finding that the addendum Camacho signed constituted a broad release of any and all potential claims that Camacho may have had against Target, including the claims at issue in the suit.

Camacho appealed and the court of appeal reversed the trial court's decision. The Court found that Camacho did not release non-workers' compensation claims in his workers' compensation settlement. The pre-printed Compromise and Release stated that the release did not apply to claims that were not within the scope of the workers' compensation law, "unless otherwise expressly noted," and the parties indicated on the form and attached addendum that the Compromise and Release applied only to workers' compensation matters. There was no

reference to claims outside the workers' compensation system and the language did not show an intention to generally release all claims. Accordingly, Camacho was allowed to proceed with his claims. *Camacho v. Target Corporation* (2018) 24 Cal.App.5th 291.

DISABILITY/FAMILY MEDICAL LEAVE

IN ORDER TO PREVAIL ON A CLAIM FOR FAILURE TO ACCOMMODATE UNDER THE AMERICANS WITH DISABILITIES ACT, EMPLOYEE MUST PROVE THAT A REASONABLE ACCOMMODATION WAS AVAILABLE

Danny Snapp worked for Burlington Northern Santa Fe Railway Company ("BNSF") as a trainmaster. After being diagnosed with sleep apnea, Snapp underwent two failed surgeries. When Snapp's doctor thereafter reported to BNSF that Snapp could not work in a safe manner, BNSF required him to undergo a fitness for duty exam. That exam concluded that Snapp was totally disabled and could not return to work. Snapp then commenced a long-term disability leave, during which he received disability benefits from BNSF's LTD insurance carrier (CIGNA). Snapp's leave of absence continued for five years, at which point CIGNA discontinued Snapp's benefits based on the absence of evidence of a continuing disability (due to Snapp's refusal to participate in a sleep study). In response, Snapp demanded that BNSF reinstate his disability payments. BNSF directed Snapp to CIGNA and advised him that his eligibility for benefits was an issue between him and the carrier. BNSF also advised Snapp that, pursuant to BNSF's extended leave policy, he had 60 days to secure an alternate position within the company or be terminated. BNSF directed Snapp to a website with a listing of current open positions and also identified a human resources representative in Snapp's geographic region. Snapp never applied for any open positions or requested any type of accommodation, though he did ask to displace a senior yardmaster. Since Snapp lacked the requisite seniority, that request was denied. After the expiration of the 60-day period, BNSF terminated Snapp's employment.

Snapp filed a lawsuit against BNSF, alleging failure to provide reasonable accommodation under the federal Americans with Disabilities Act. At trial, the jury decided in favor of BNSF, finding that no failure to accommodate had occurred. On appeal, the Ninth Circuit affirmed the jury's determination and rejected Snapp's claim that BNSF was required to prove that no reasonable accommodation was available. The Ninth Circuit confirmed that to prevail at trial, an employee alleging disability discrimination due to the employer's alleged failure to accommodate must prove: (1) that the employee is a qualified individual; (2) the employer received notice of the employee's disability; and (3) a reasonable accommodation was available that would not create an undue hardship for the employer. The Ninth Circuit affirmed the jury's decision in favor of BNSF.

Note that Snapp was an Oregon citizen and filed suit in federal court in Oregon based on the federal ADA. A different result may have been obtained under California law. FEHA provides employees and applicants with greater rights than the ADA. For example, the FEHA, unlike the ADA, makes it unlawful for an employer to fail to engage in the interactive process. By contrast, the ADA has no standalone cause of action for failure to interact. There is only liability if a reasonable accommodation was possible, and the employer did not provide it. *Snapp v. United Transportation Union* (9th Cir. 2018) 889 F.3d 1088.

EXTENDING PROBATION OF AN EMPLOYEE ON LEAVE QUALIFIES AS A REASONABLE ACCOMMODATION UNDER FEHA

Marisa Hernandez worked for Rancho Santiago Community College District ("the District") on and off in different positions for a number of years. During each period of employment, she did not receive any complaints about her work performance. In 2013, the District hired Hernandez as an administrative assistant. In that capacity, she was required to complete a one-year probationary period, during which District policy contemplated performance reviews at specified intervals (three months, seven months, and eleven months). Pursuant to the District's personnel rules, Hernandez would be considered a permanent employee after completing 12 months of probation. Eight months into her probationary period and with the District's approval, Hernandez commenced a temporary disability leave to undergo knuckle replacement surgery (which arose out of a work-related injury from her last position with the District). She requested three to four months of leave, which meant that she was scheduled to return on, or shortly after, the anniversary of her hiring date. The District, however, terminated her while she was on leave.

Hernandez sued the District under FEHA, alleging it failed to provide reasonable accommodation for her medical condition and also failed to engage in an interactive process. At the conclusion of a bench trial, the trial court found in Hernandez' favor and awarded her $723,746 in damages. The District appealed, contending that it was compelled to terminate Hernandez' employment because she otherwise would have automatically become a permanent employee without obtaining the requisite performance evaluations. The Court of Appeal disagreed, finding that the District could have (1) extended her probationary period by the length of her leave and (2) conducted the evaluations upon her return to work after she completed a full 12-months of employment (prior to the commencement of her leave, Hernandez had not received any of the periodic evaluations). The Court of Appeal also concluded that the District failed to engage in the interactive process because there was no exchange of information before the District reached its decision to terminate her employment. *Hernandez v. Rancho Santiago Community College* (2018) 22 Cal.App.5th 1187.

AN EMPLOYEE NEED NOT ESTABLISH A "SUBSTANTIAL" LIMITATION OF A MAJOR LIFE ACTIVITY IN ORDER TO PREVAIL ON A "REGARDED AS" DISABILITY DISCRIMINATION CLAIM UNDER THE ADA

Herman Nunies worked as a delivery driver for HIE Holdings, Inc. ("HIE"), which is in the business of purchasing, selling, and distributing food products. As a delivery driver, Nunies was responsible for operating a company vehicle and loading, unloading, and delivering five-gallon water bottles. Sometime in mid-June 2013, Nunies requested to transfer from his full-time delivery driver position to a part-time warehouse position. The parties disputed the underlying motivations for the transfer. Nunies attributed his desire for a transfer to pain he had developed in his left shoulder, while HIE contended that Nunies wanted more time to focus on his independent landscaping side-business. Regardless, HIE approved the transfer. A few days later, Nunies informed his manager that he was having shoulder pain. Two days after that, HIE rescinded the transfer and forced Nunies to resign on the basis that the driver position had been eliminated due to budget cuts.

Nunies filed a lawsuit in federal court against HIE, alleging disability discrimination under the ADA and Hawaii state law. He alleged both "regarded as" and "actual" disability theories. The trial court granted summary judgment to HIE on both the actual and regarded as theories, concluding that Nunies failed to provide any evidence that his employer subjectively believed he was *substantially* limited in a major life activity. The Ninth Circuit reversed, finding that the trial court applied outdated law. Under current ADA law, an individual need not establish that the employer believed the individual was substantially limited – being limited in a major life activity is sufficient. While the ADA does not apply to "transitory and minor" impairments," the Ninth Circuit found that was an affirmative defense, and HIE offered no evidence to show that Nunies' physical limitations were so limited. The Ninth Circuit also reversed on the disability discrimination claim, finding that Nunies offered sufficient evidence of a substantial limitation since he experienced stabbing pain whenever he raised his arm above chest height.

Notably, this case was based on the ADA. The same result would have likely been reached under FEHA, which does not require a "substantial" limitation – for both actual and "regarded as" claims, any limitation of a major life activity will suffice. *Nunies v. HIE Holdings, Inc.*, ___ F.3d ___, 2018 WL 5660628 (Nov. 1, 2018).

EMPLOYER CANNOT REQUIRE EMPLOYEE TO SHOULDER THE COST OF PRE-EMPLOYMENT MEDICAL TESTING

Russell Holt received a conditional job offer from BNSF Railway Company ("BNSF") for the position of Senior Patrol Officer. This offer was contingent on Holt's satisfactory completion of a post-offer medical review. During that medical review, Holt disclosed that he had injured his back four years earlier. Holt's primary care doctor, his chiropractor, and the doctor BNSF hired to examine Holt all concluded that Holt had no current limitations and found no need for follow-up testing. Holt himself confirmed he had no current symptoms. Despite that, BNSF demanded that Holt submit to an MRI of his back – at his own cost – as a condition of accepting employment. Holt pursued the MRI and discovered that, without a doctor referral, he would have had to pay $2,500 out of pocket. He was in bankruptcy at that time and, after being told again by BNSF that he would have to shoulder the cost, did not obtain an MRI. As a result, BNSF revoked his offer of employment.

Holt filed a charge with the Equal Employment Opportunity Commission ("EEOC"). The EEOC then sued BNSF in federal district court for alleged violations of the ADA. The district court granted summary judgment in favor of the EEOC on a disability discrimination theory and also awarded nationwide injunctive relief, requiring BNSF to bear the cost of procuring any additional information deemed necessary to complete a medical qualification evaluation for any prospective employee. On appeal, the Ninth Circuit agreed with the district court and held that BNSF could not require Holt to pay for the cost of an MRI. While the Ninth Circuit found that BNSF could require Holt to undergo an MRI in order to obtain the requisite medical clearance, BNSF had to shoulder the financial burden of doing so. As for injunctive relief, the Ninth Circuit found that the EEOC had satisfied the standard of obtaining an injunction requiring BNSF to stop its unlawful hiring practices. The Ninth Circuit remanded the case to the district court, however, to make factual findings in order to establish the proper scope of the injunction. BNSF operates in dozens of states, the plaintiff lived in Arkansas, applied for a position in Washington, and was rejected at the direction of employees in BNSF's Texas office. In lieu of

issuing a broad nationwide directive, the district court was directed to evaluate and determine how broad and in what geographic region the injunction should apply. *EEOC v. BNSF Railway Co*. (9th Cir. 2018) 902 F.3d 916.

EMPLOYERS ARE OBLIGATED TO ENGAGE IN THE INTERACTIVE PROCESS BASED ON KNOWLEDGE OF A LIMITATION AND RESTRICTIONS

Tracy Dunlap worked as a shipping clerk at Liberty Natural Products, Inc. ("Liberty"), which is in the business of importing and distributing wholesale botanical products. During her employment, Dunlap began experiencing pain in her elbow, as a result of which she filed a workers' compensation claim. She was diagnosed with problems in both elbows and received modified duty for two years. Her workers' compensation claim was eventually accepted and then closed. One month later, Liberty terminated Dunlap's employment. She requested reinstatement to her former or another suitable position, but that was denied.

Dunlap sued Liberty for disability discrimination and related theories under the ADA and Oregon state law. The trial court granted summary adjudication to Liberty as to four claims (three workers' compensation-related and one whistleblowing). The case went to a jury trial on the remaining three claims for disability discrimination, "regarded as" discrimination, and failure to reinstate. The jury returned a verdict for Dunlap on the disability discrimination claim and in Liberty's favor on the other two. The trial court reduced Liberty attorneys' fees to account for her limited success on the merits. Both parties appealed.

Liberty argued that the trial court improperly conflated the elements of a disability discrimination claim and a failure to accommodate claim. Liberty argued that the jury should have been separately instructed as to the different elements of each claim. The Ninth Circuit noted that while it would have been ideal to provide separate jury instructions, it was harmless error because Liberty was on notice of Dunlap's physical limitations and accompanying restrictions. This triggered Liberty's duty to engage in the interactive process. For that reason, the absence of a separate instruction at trial was not prejudicial to Liberty because the jury would have reached the same verdict had they received the appropriate instruction. On appeal, Liberty also argued that Dunlap failed to meet her burden to show that a reasonable accommodation existed that would have enabled her to perform the essential functions of her job. The Ninth Circuit disagreed. Once an employer is aware of the need for accommodations, the employer has a duty to engage in the interactive process to identify reasonable accommodations. Dunlap did produce evidence that onsite carts and other affordable assistive devices existed that would have allowed her to perform her duties, and Liberty failed to discuss or otherwise pursue any of these options before terminating Dunlap's employment. As for Liberty's attorneys' fees, the Ninth Circuit held that it was appropriate to reduce her fees by 50% to account for her limited success on the merits. She ultimately prevailed on only one of her five claims. *Dunlap v. Liberty Natural Products, Inc*. (9th Cir. 2017) 878 F.3d 794.

VERBAL MOCKING CONSTITUTES SEVERE AND PERVASIVE HARASSMENT ON THE BASIS OF DISABILITY

Augustine Caldera worked for the California Department of Corrections and Rehabilitation ("CDCR") as a correctional officer in a state prison. Caldera has a speech impediment and

stutters when he speaks. Over a period of about two years, a supervisor at the prison, Sergeant Grove, mocked Caldera's stutter about a dozen times. On one occasion, after Caldera made an announcement over the loudspeaker, Grove repeated Caldera's announcement and mimicked the stutter. On several other occasions, Grove would repeat the words that Caldera stuttered in front of other employees. According to another supervisor in the same unit, there was a "culture of joking" about Caldera's stutter. Caldera filed a formal complaint about Grove's actions with CDCR. Two days later, Caldera learned that Grove was to be reassigned to the same hall where Caldera was assigned. Despite asking for Grove to be assigned elsewhere, the prison declined. Grove continued to mock Caldera's stutter.

Caldera (who remained employed at the prison) filed a lawsuit against CDCR, alleging claims for disability harassment, failure to prevent harassment, and retaliation. The jury found in Caldera's favor on all three claims and awarded him $500,000 in emotional distress damages. CDCR appealed, arguing that the evidence did not rise to the level of severe or pervasive harassment. The Court of Appeal disagreed, concluding that Caldera was publicly and repeatedly mocked in front of other employees. The jury verdict was upheld because Caldera was subjected to unwanted harassing conduct based on his disability; the harassment was severe and pervasive; a reasonable person in Caldera's position would have considered the work environment to be hostile or abusive; a supervisor participated in the harassing conduct; and CDCR failed to take reasonable steps to prevent the harassment. *Caldera v. Dept. of Corrections and Rehabilitation* (2018) 25 Cal.App.5th 31.

EMPLOYER'S USE OF DISCIPLINE AND PERFORMANCE TOOLS DID NOT AMOUNT TO CONSTRUCTIVE DISCHARGE

T.J. Simers was a well-known and sometimes controversial sports columnist for the Los Angeles Times ("Times"). He began working for the paper in 2000 and wrote a column which was published three times each week. During the course of his employment, he received consistently favorable performance reviews. Under the Times news ethics guidelines, employees were allowed to perform outside creative work, but had to obtain pre-approval from a supervisor. Over the years, Simers wrote television scripts, had a few television roles, and made a movie appearance, all of which activities were known to the Times. In March 2013, Simers suffered a neurological event with symptoms similar to a "mini-stroke." He recovered quickly and resumed writing his column three times each week. Approximately two months later, the Times reduced Simers' columns to two per week, expressing dissatisfaction with some recent columns and his interviewing style. Shortly thereafter, the Times learned that a Hollywood producer was apparently developing a television show based loosely on Simers' life. The Times viewed this as a possible breach of the ethical guidelines and put Simers' columns "on holiday" for ten days and, shortly thereafter, suspended the column pending an investigation. Following completion of the investigation, the Times provided Simers with a "final written warning," removed him from his column, and assigned him to a senior reporter position (albeit with no reduction in salary). Through his attorney, Simers informed the Times that he could not work in that environment and considered his employment to have been constructively terminated. The Times thereafter offered Simers his columnist position back, but did not respond to Simers' questions about how many columns he would write and whether he had to change his interviewing approach. Simers later accepted alternate employment at another newspaper.

Simers sued the Times for age discrimination, disability discrimination, and constructive termination. The jury found in Simers' favor on all three claims and awarded him $2.1 million in economic damages and $5 million in emotional distress. With regard to constructive discharge, Simers claimed that the following conditions were intolerable: (1) the reduction in his number of weekly columns; (2) the description of him as a "public embarrassment;" (3) criticisms of sloppy writing that was not up to standard; (4) false accusations of unethical conduct; (5) suspension of his columns for almost two months; (6) being told not to say anything about the investigation; (7) damage to his professional reputation by the absence of his column; (8) his demotion to a reporter position; (9) the receipt of a final written warning; and (10) the offer to return him to an undefined columnist position. The trial court granted the Times' motion for a judgment notwithstanding the verdict on the constructive discharge claim. On appeal, the Court of Appeal agreed with the trial court and concluded, as a matter of law, that none of those circumstances – even when taken collectively – were sufficient to establish constructive termination as they did not demonstrate any aggravated conditions or a pattern of mistreatment. These conditions were not intolerable and did not force Simers' resignation. "In short, the evidence showed only [Simers'] personal, subjective reactions to [the Times'] use of standard disciplinary procedures: criticisms, a suspension, an investigation, and demotion with a performance plan."

As for Simers' remaining two claims of age and disability discrimination, the jury's verdict was upheld. The Court granted a new trial on damages, as it was not possible to determine which damages were attributable to discrimination as opposed to constructive termination. *Simers v. Los Angeles Times Communications* (2018) 18 Cal.App.5th 1248.

PUBLIC AGENCY

RETIREMENT/PENSION BENEFITS

ABSENT A "CLEAR SHOWING" AN MOU DOES NOT PROVIDE A VESTED INTEREST IN RETIREE MEDICAL BENEFITS THAT SURVIVE THE TERM OF THE CONTRACT

Prior to 2008, the City of Vallejo, under its labor agreement with the Vallejo Police Officers Association (VPOA), paid the full amount of the premium cost for retirees and employees of any medical plan offered through the California Public Employees' Retirement System (CalPERS). In 2008, the City filed for bankruptcy. Then, in 2009, the City reached an agreement with VPOA to pay the full premium cost for retirees and employees of any medical plan offered through CalPERS or PERS. The City's contributions were capped at the designated Kaiser rate for each available plan level as the City was subject to the Public Employees' Medical and Hospital Care Act, which governs the CalPERS health benefit system.

In the years following, the parties entered successor MOU negotiations. Throughout these negotiations, the parties disagreed about the 2009 MOU provisions governing City medical care premium contributions for then-existing employees and retirees hired on or before February 2009. The City argued that the MOU required the City to contribute the same amount for retirees as for active employees while VPOA claimed that the MOU required the City to pay the full cost of premium coverage up to one hundred percent of the rate of Kaiser coverage for retirees because every union member hired before the effective date of the agreement had a vested right to retiree medical benefits capped at the designated Kaiser rate.

After continuing to negotiate for more than one year, the City declared an impasse and imposed its last, best and final offer which did not include a provision that the City would pay retiree medical premiums at the rates specified by the union. VPOA filed suit alleging that the City violated the MMBA when it engaged in bad faith in rushing to declare an impasse and that the City's implementation of its last, best and final offer impaired its members vested benefits rights to have the City pay retiree medical insurance benefits and premiums.

The Court of Appeal rejected VPOA's argument that the City violated the MMBA and declined to order the City to start new contract negotiations or to reinstate medical benefits at the level demanded by VPOA. The City had not engaged in bad faith during negotiations as it had consistently and repeatedly communicated its desire to reduce its financial liability for benefits coming off of its 2008 bankruptcy. Further, the Court found that the City had not rushed to impasse as the evidence showed that the City participated in a prolonged period of negotiations for over one year and only declared impasse after the parties were deadlocked on a primary issue of contention, the medical benefit premium payment. Finally, VPOA failed to make by a clear showing that its members had a vested right to a full medical premium payment by the City by a "clear showing" that the City intended to create a right that would survive the term of the 2009 MOU. *Vallejo Police Officers Ass'n v. City of Vallejo* (2017) 15 Cal.App.5th 601.

POBRA/FBOR/DISCIPLINE

QUALIFIED IMMUNITY IS UNAVAILABLE TO A UNIFORMED OFF-DUTY POLICE OFFICER WORKING AS A PRIVATE SECURITY GUARD BECAUSE SERVICE IS FOR A PRIVATE NON-GOVERNMENTAL ENTITY

Kyo-ya Hotel and Resort hired a Honolulu Police Department Officer, Officer Chung, to serve as a security officer during Kyo-ya's New Year's Eve Party. Despite Officer Chung wearing his Honolulu police uniform during this special duty assignment, he was paid by Kyo-ya directly for his services. While the Honolulu Police Department approved Chung's special duty assignment, according to its website, "HPD officers hired for special duty assignments are off duty."

During this party, Dillon Bracken was allegedly assaulted by Kyo-ya security guards after entering a private party on hotel premises without permission. Officer Chung was present during the altercation, although Bracken did not allege that Officer Chung participated in the assault. Bracken then sued the hotel, the hotel security guards and Officer Chung for unlawful seizure, excessive force, and failure to intercede, among other claims. In response to Bracken's failure to intercede claim, Officer Chung asserted a defense of qualified immunity, claiming he was immune from Bracken's lawsuit because he was acting under the authority of his police officer position.

In determining whether Officer Chung had qualified immunity in this situation, the Ninth Circuit addressed two questions: first, whether qualified immunity was categorically available to the officer, and second, if qualified immunity is available generally, whether the officer is entitled to it in this case. The court found that because Officer Chung was in the service of a private, non-governmental entity at the time of Bracken's injury, qualified immunity was unavailable to him. Qualified immunity is only available to governmental officials when it would preserve their ability to serve the public good or ensure police officers are not deterred from service by threat of lawsuits. *Bracken v. Okura* (9th Cir. 2017) 869 F.3d 771.

REFERENCE TO FIRE CHIEF IN FBOR MEANS LEAD FIRE CHIEF OF THE JURISDICTION

George Corley, a longtime firefighter, accepted a position as Battalion Chief for the San Bernardino County Fire Protection District. Corley received numerous awards and positive performance reviews during his career at the District and was promoted to Division Chief until his termination. Once his employment was terminated, Corley sued the District alleging age discrimination. At the trial court level, the jury returned a verdict in favor of Corley's claims.

On appeal, the District argued that the trial court judge improperly failed to instruct the jury that the Firefighter's Bill of Rights (FBOR) justified Corley's termination. The jury instruction at issue related to the FBOR at Government Code section 3254(c), which provides, "A fire chief shall not be removed by a public agency or appointing authority without providing that person with written notice, for the reason or reasons for removal, and an opportunity for administrative appeal . . . [t]he removal of a fire chief by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, or for . . . incompatibility of management styles or as a result of a change in

administration, shall be sufficient to constitute 'reason or reasons.'" The District argued that the instruction applied to Corley because he had been terminated based on a change in administration and incompatibility in management styles thereby allowing the District to lawfully terminate his employment. Corley argued that the instruction did not apply to him because it only applies to the "lead" fire chief of a fire district, of which Corley was not.

On appeal, the court agreed with Corley's interpretation that the words of section 3254 supported the conclusion that the provision only applies to a lead fire chief position. Also noteworthy was the fact that FBOR was modeled and enacted after the Public Safety Officer's Procedural Bill of Rights. As determined by the court in *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 368, the term "police chief" in POBRA only applies solely to a jurisdiction's Chief of Police. Thus, interpreting section 3254(c) as applying only to the jurisdiction's "fire chief" was the proper result. As such, the court affirmed the trial court's judgment in favor of Corley. *Corley v. San Bernardino Cnty. Fire Protection Dist*. (2018) 21 Cal.App.5th 390.

A SERGEANT'S FACTUAL INQUIRY INTO A COMPLAINT OF OFFICER MISCONDUCT TRIGGERS POBRA'S ONE-YEAR LIMITATIONS PERIOD AS THE SERGEANT HAD THE DISCRETION TO ISSUE DISCIPLINE

Ochoa worked as a Deputy Sheriff in the County of Kern Sheriff's Department. In early 2013, a young woman accused Ochoa of harassing her and reported the harassment to Deputy Chiadez who documented the complaint. Shortly thereafter, Sergeant Bittle inquired further into the young woman's allegations, at which point his investigation revealed that Ochoa had made unwanted sexual advances to the young woman over a period of four years, including when she was a minor.

The Department then began a criminal investigation into Ochoa's conduct for assault and molesting a minor and provided Ochoa with a Notice of Proposed Disciplinary Action – Termination. After conducting a Skelly conference, the Department determined that termination was the appropriate course of action. POBRA requires that an investigation and notice of intended disciplinary action must occur within one year after a person authorized to initiate an investigation discovers the alleged misconduct. Based on this, Ochoa argued that Sergeant Bittle initiated the investigation on March 25, 2013, but the Department provided him with an untimely Notice of Proposed Disciplinary Action more than one year later on August 11, 2014. As such, Ochoa argued that his termination was procedurally invalid and requested that the Department rescind his termination.

In turn, the Department asserted that its policies did not authorize Sergeant Bittle to initiate an internal affairs investigation and that such investigation commenced on May 6, 2013 by another officer who was formally authorized to conduct the investigation. As such, the Department argued that its Notice was timely. However, the court found that Sergeant, Bittle was obligated to inquire into the underlying allegations of the young woman and determine whether such allegations were criminal or civil in nature. Sergeant Bittle also conceded that he "started an investigation" to determine the nature of the complaint and took statements from the young woman regarding Ochoa's harassing conduct.

Ultimately, the court of appeal found that given Sergeant Bittle's authority to inquire into Ochoa's wrongdoing, Bittle's inquiries into the complaint were an investigation and could lead to disciplinary action within the meaning of POBRA. Therefore, Bittle's inquiries into Ochoa's misconduct triggered POBRA's one-year statute of limitations period as Ochoa alleged. *Ochoa v. County of Kern* (2018) 22 Cal.App.5th 235.

INTERNAL REPORTS CONTAINING SUMMARIES OF POLICE OFFICER PERSONNEL MATTERS MAY BE DISCOVERABLE, INCLUDING INFORMATION FROM CITIZEN COMPLAINTS OLDER THAN FIVE YEARS

Robert Riske, a retired Los Angeles police officer, sued the City of Los Angeles alleging that the Los Angeles Police Department had retaliated against him for protected whistleblower activity by failing to assign or promote him to several positions, instead selecting less qualified candidates. Riske filed a Pitchess motion, and was granted, discovery of documents submitted by successful candidates subject to a court protective order. These documents included training and evaluation (TEAMS) reports summarizing candidates' history of discipline, commendations, personnel complaints, performance evaluations and other personnel matters.

In ordering the Department to disclose the TEAMS reports, the trial court relied upon Evidence Code section 1045 which provides that in litigation involving peace officers, the following records be disclosed "records of complaints, or investigations of complaints, . . . concerning an event or transaction in which the peace officer or custodial officer . . . participated, . . . provided that information is relevant to the subject matter involved in the pending litigation." Section 1045(b)(1) prohibits disclosure of information consisting of complaints concerning conduct occurring more than five years before the event that led to litigation. The court also ordered that the Department redact all information from these documents that occurred more than five years before Riske filed his lawsuit

The Court of Appeal held that while section 1045(b)(1) prohibits the disclosure of information consisting of complaints, this has been interpreted by the courts to prohibit only the disclosure of citizen complaints against an officer. Because the TEAMS reports were not citizen complaints, they were not subject to the requirements of section 1045(b)(1) and should not have been redacted. As such, the court found that the trial court erred in ordering the TEAMS reports to be redacted and ordered the City to produce unredacted reports. *Riske v. Superior Court (City of Los Angeles)* (2018) 22 Cal.App.5th 295.

COURT OF APPEAL DETERMINES THAT THE COUNTY VIOLATED AN EMPLOYEE'S POBRA RIGHTS BY FAILING TO PROVIDE ANY REPORTS OR COMPLAINTS MADE BY INVESTIGATORS OR OTHER PERSONS

James Davis, a supervising juvenile correctional officer, was dismissed from his employment based on findings of insubordination, discourteous treatment of a subordinate, wrongfully assuming supervisorial duties over his wife despite admonitions to the contrary, exaggerating the hours he worked on multiple time cards, and other misconduct. While Davis filed an administrative appeal based on his dismissal decision, his appeal was denied by the Civil Service Commission and the County of Fresno. Davis then filed a petition for a writ of administrative

mandamus requesting the superior court to set aside the Commission's decision, however the superior court denied his petition.

On appeal, Davis argued that the County violated his constitutional due process rights by failing to provide him a copy of all materials upon which the disciplinary action was based prior to his Skelly hearing, namely a memorandum prepared regarding an investigation into his misconduct and attachments to this memorandum. Davis also argued that the County failed to produce complete copies of reports and witness interviews conducted during the internal affairs investigation into his alleged misconduct which violated the Public Safety Officers Procedural Bill of Rights Act ("POBRA").

While the Court of Appeal found that the materials delivered prior to Davis's Skelly hearing satisfied the requirements of due process applicable before disciplinary action is imposed, the court also found that the County violated Davis's right under POBRA to receive "any reports or complaints made by investigators or other persons." The court interpreted the term "any reports" to include the incident reports and interview transcripts attached to the September 2012 memorandum in question prepared by a special probation investigator who looked into a retaliation complaint made by another officer against Davis. The court found that this memorandum was pertinent as Davis' alleged discourteous treatment of this officer was one of the grounds for his dismissal.

As to the appropriate remedy for this violation of POBRA, the court held that it is "committed to the broad discretion of the superior court." The court stated that the record did not compel it, as a matter of law, to reinstate Davis with backpay. As such, the court remanded this matter back down to the superior court to determine the appropriate remedy for this POBRA violation. *Davis v. County of Fresno* (2018) 22 Cal.App.5th 1122.

DISCRIMINATION/HARASSMENT/RETALIATION

CITY'S DECISION TO CONSIDER RACE OF SHOOTING VICTIM AND POLITICAL IMPLICATIONS OF PLACING OFFICERS BACK IN THE FIELD DID NOT VIOLATE FEHA

In 2010, Los Angeles Police Officers George Diego and Allan Corrales were involved in an on-duty shooting in which Corrales shot and killed an unarmed, autistic African-American man. Following the shooting, the City followed the standard investigation and disciplinary procedures applicable to officer-involved shootings. A summary of the report of the shooting was presented to the Police Chief within 72 hours of the incident after which point the Police Chief determined whether the officers should return to the field and makes a further recommendation after an investigation. In this instance, and following a full investigation, the Chief considered the political implications of allowing the officers to resume work in the field and agreed with the recommended discipline of the independent Use of Force Review Board and decided to continue to keep the officers out of the field.

The officers sued the City arguing that the Department's decision to keep them out of the field was racially motivated as both officers were Hispanic and that they were retaliated against after they filed suit. While the jury found for the officers at trial, the Court of Appeal reversed on the

basis that the officers' legal theory was flawed and that their evidence at trial was insufficient. In making their case, the officers relied on evidence of their victim's race in order to prove that they were subjected to adverse employment action of being kept out of the field. However, Government Code section 12940 prohibits an employer "because of race . . . of any person, to . . discriminate against the person." As such, FEHA did not allow the officers to claim that they suffered discrimination based on the race of a third party. Further, the officers failed to show that the Department's decision to keep them out of the field was substantially motivated by their Hispanic identity or that the Department's reasons for benching them were pretextual. *Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338.

POLICE DEPARTMENT CAN ONLY TAKE DISCIPLINARY ACTION AGAINST POLICE OFFICERS FOR PERSONAL OFF-DUTY CONDUCT IF IT INTERFERES WITH THEIR JOB PERFORMANCE OR VIOLATES NARROWLY DRAFTED REGULATIONS

Janelle Perez, a former probationary police officer employed by the Roseville Police Department, was discharged by the City after an internal affairs investigation into her romantic relationship with a fellow officer. The investigation revealed that the relationship was conducted off-duty, although some texts and phone calls occurred while on duty. Both officers were married to others but separated from their spouses. The City concluded the conduct of both officers constituted "unsatisfactory work performance" and "conduct unbecoming." The City did not have an anti-fraternizing rule but instead relied on general performance standards. As a result, two supervisors who reviewed the investigation report found officer Perez should be released from the Department. Later comments made by these supervisors indicated that they disapproved of Perez's extramarital conduct.

Following her termination, Perez sued the City arguing that her termination violated her rights to privacy and intimate association because it was impermissibly based on her private off-duty sexual contact. Perez also sued the City for sex discrimination based on both state and federal law. The district court granted the City's motion for summary judgment on grounds of qualified immunity, holding the City could reasonably believe termination was lawful and found that Perez presented insufficient evidence to show that her gender was a motivating factor in the City's decision to terminate her.

On appeal, the Ninth Circuit considered whether the City's decision to terminate her was based on legitimate or pretextual reasons that impermissibly violated her right to privacy. The court found that a police department can only take disciplinary action against an officer for private off-duty sexual involvement with another officer if it impacts job performance or if there is a narrowly tailored regulation in place prohibiting such conduct. Thus, an issue of fact existed as to whether Perez was fired, at least in part, because of her extramarital affair. Further, any reasonable official would have been on notice that the City's termination of Perez was unconstitutional if it were motivated by her private relationship with a fellow officer and thus denied the City qualified immunity on the privacy issue. *Perez v. City of Roseville* (9th Cir. 2018) 882 F.3d 843.

BEING PLACED ON ADMINISTRATIVE LEAVE MAY CONSTITUTE ADVERSE EMPLOYMENT ACTION IN VIOLATION OF LABOR CODE SECTION 1102.5 WHICH PROHIBITS EMPLOYERS FROM RETALIATING AGAINST AN EMPLOYEE WHO DISCLOSES IMPROPER GOVERNMENT ACTIVITY

Mary Ann Whitehall, a social worker for the San Bernardino County Children and Family Services (CFS), was assigned to investigate the living conditions of four children who were placed in protective custody following the suspicious death of their infant sibling. Whitehall collected evidence, including law enforcement data and medical reports and photos, that suggested the other children were being abused and neglected. Once Whitehall showed this data to her supervisor, the Deputy Director of CFS told Whitehall to withhold certain photos and alter others. Whitehall then learned that CFS had not provided a full police report to the court that was handling the children's custody hearing.

Upon learning this information, Whitehall provided the Deputy County Counsel with a copy of all of the photographs she had obtained from the police. In turn, CFS removed Whitehall from the case and instructed her not to discuss the case with anyone, including the new case investigator contrary to normal procedure. Concerned about the potential liability for submitting altered photos to the court, Whitehall filed a motion to inform juvenile court that CFS had perpetrated a fraud on the court. CFS then placed Whitehall on paid leave pending an investigation as to whether she had violated County rules and policies prohibiting disclosure of confidential information when she gave the photos to Deputy County Counsel and submitted her motion with the court.

After being placed on administrative leave for two months, the County decided to fire Whitehall but she resigned in order to avoid termination. Whitehall then sued claiming that the County violated Labor Code section 1102.5, which prohibits employers from retaliating against an employee who discloses improper government activity. On appeal, the court held that placing Whitehall on paid administrative leave constituted an adverse action under the circumstances of the case. Moving forward, when an employee is placed on paid administrative leave, courts will look at the effects of the paid administrative leave to determine whether being away from the workplace is a "substantial adverse change in the terms and conditions" of their employment. If it is, as was the case with Whitehall, then employers run the risk of running afoul of Labor Code section 1102.5. *Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352.

SUPERVISOR MUST PROVE A SUBORDINATE'S ALLEGATIONS WERE "FRIVOLOUS" IN ORDER TO RECOVER DEFENSE COSTS PURSUANT TO FEHA'S FEE-SHIFTING PROVISIONS

Elisa Lopez sued her employer, the City of Beverly Hills, and her supervisor, Gregory Routt, for harassment based on race and national origin. After a jury found in favor of the City and Routt, Routt sought to utilize the California Fair Employment and Housing Act (FEHA) fee-shifting provisions that allow a prevailing party to recover attorneys' fees from their opponent.

Routt argued that an individual defendant should not have to meet the same "frivolous" standard that employers are forced to meet in order to recover attorneys' fees under the FEHA fee-shifting provisions. However, the Court of Appeal confirmed that FEHA requires a defendant to

demonstrate that a harassment lawsuit is "frivolous" and that it has no legal or factual basis, regardless of whether the defendant is an employer or an individual defendant. In making this finding, the Court of Appeal confirmed the trial court's ruling that Routt failed to demonstrate that Lopez's lawsuit was unreasonable or "frivolous." In reaching this ruling, the court also affirmed that FEHA allows a plaintiff to hold individual employees, including co-workers or supervisors, personally liable for harassment regardless of whether the employer knew or should have known of the harassing conduct. *Lopez v. Routt* (2017) 17 Cal.App.5th 1006.

SCOTUS HOLDS THAT STATE AND LOCAL GOVERNMENTS ARE COVERED EMPLOYERS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 REGARDLESS OF THE NUMBER OF EMPLOYEES THEY HAVE

In a majority opinion written by Justice Ginsburg, the Supreme Court ruled unanimously that the federal law prohibiting age discrimination in employment applies to state and local governments, regardless of their size. The case of *Mount Lemmon Fire Dist. v. Guido*, began in 2009, when the Mount Lemmon Fire District laid off Captains John Guido and Dennis Rankin, who happened to be the two oldest firefighters in the department at the time. They filed a claim with the Equal Employment Opportunity Commission, citing the Age Discrimination in Employment Act of 1967 (ADEA).

The fire district, in turn, argued that Guido, 46 at the time of his layoff, and Rankin, 54, were let go because they did not participate in volunteer wildland assignments, not because of their age. The district also argued that the ADEA did not apply to it because it was too small to qualify as an "employer" under the ADEA. At the time of Guido and Rankin's layoffs, the District had thirteen employees, which was well below the twenty worker threshold of private businesses that are exempt from the law.

Under the statute, ADEA defines "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day." It goes on to say that employer "also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." Lower courts disagreed about whether the phrase "also means" meant any government unit was covered by the law, or only those with twenty or more employees.

The Supreme Court held that the phrase "also means" adds a new category of employers under ADEA's purview. The ordinary meaning of the phrase "also means" as applied to State and political subdivisions is additive, as opposed to clarifying. This second sentence that applies to state and political subdivisions does not contain a numerical limit such as that which is applicable to private businesses. As such, the definitional provision of "employer" and the phrase "also means" in the second sentence combined to establish two separate categories of employers covered by the ADEA: those persons engaged in an industry effecting commerce with 20 or more employees, and States of political subdivisions with no numerical requirement. *Mount Lemmon Fire District v. Guido* (2018) 139 S.Ct. 22.

PUBLIC RECORDS ACT

PUBLIC AGENCIES DO NOT HAVE TO CREATE RECORDS IN RESPONSE TO PRA REQUESTS, RATHER THE PRA REQUIRES PUBLIC AGENCIES TO GATHER AND SEGREGATE DISCLOSABLE DATA

Joe Hicks and Richard Sander filed a Public Records Act ("PRA") request with the State Bar of California seeking bar applicant demographic data. Sander is an economist and professor at the University of California at Los Angeles who studies the effects of admissions preferences in higher education. In the original request, the petitioners sought the following bar applicant data: race or ethnicity; law school; transfer status; law school graduation year; undergraduate and law school GPAs; LSAT score and bar exam performance.

A July 2016 trial was held to determine whether the bar applicant data being sought by Hicks and Sander could be released while maintaining the applicants' privacy interests. The trial court heard testimony from several experts, including the petitioners' expert, who argued that the data could be anonymized through a series of data manipulations. The trial court denied the petition and concluded that the State Bar, in essence, would be creating new records if it manipulated applicant data in the way required to maintain privacy.

The Court of Appeal agreed with the trial court's holding, finding that it is a well-established principle that public agencies do not have to create records in response to PRA requests. The court acknowledged that the PRA requires agencies to gather and segregate disclosable electronic data. However, "segregating and extracting data is a far cry from requiring public agencies to undertake the extensive 'manipulation or restructuring of the substantive content of a record' such as Petitioners propose…." The court continued by explaining that, "there is no doubt that a government agency is required to produce non-exempt responsive computer records…,[b]ut it cannot be required to create a new record by changing the substantive content of an existing record or replacing existing data with new data."

For public agencies, this is a reassuring opinion because it draws a more clear distinction between what the PRA requires (data compilation, extraction and programming) and the content restructuring that requesters often seek. *Sander et al v. State Bar of California* (2018) 26 Cal.App.5th 651.

PUBLIC AGENCY SPARED ATTORNEYS' FEES AWARD IN REVERSE PRA ACTION AS THE PRA ALLOWS THE REQUESTER TO RECOVER ATTORNEYS' FEES ONLY WHEN AN AGENCY DENIES THE REQUEST AND THE REQUESTER SUCCESSFULLY SUES THE AGENCY TO TURN OVER THE WITHHELD RECORDS

In 2015, City of Sacramento Mayor Kevin Johnson was also the president of the National Conference of Black Mayors ("NCBM"), an organization that filed for bankruptcy during Johnson's term as president. Chico Community Publishing, which publishes the Sacramento News and Review, sought public records from the City related to the Mayor's use of City resources during NCBM's bankruptcy. The City found emails between Johnson and NCBM's law firm that contained possibly privileged attorney-client communications. The City determined that those emails were public records and alerted Johnson and the law firm that it

would release the records because the City "had no authority to assert attorney-client privilege over the records on behalf of [NCBM's] outside counsel."

NCBM, its law firm, and Johnson filed a petition against the City seeking to prevent release of the records in a "reverse PRA" action. The lawsuit also named the newspaper as a respondent. The City did not oppose the petition, but the newspaper did. The trial court completed a private review of the emails in question and determined that seventy-five of the one hundred and thirteen emails were to be produced to the newspaper — some in their entirety and some with redactions. The newspaper then filed a motion for attorneys' fees against the City under the PRA, which the trial court denied.

The Court of Appeal affirmed the trial court ruling, noting that the PRA allows the requester to recover attorneys' fees only when an agency denies a request and the requester then successfully sues the agency to turn over the withheld records. In this instance, the court found that the City did not deny the request. The City appropriately determined the emails were public records because Johnson sent them as NCBM president, a role he could not have had if he had not been Sacramento's mayor.

Moreover, pursuant to *Marken v. Santa Monica-Malibu Unified School District*, decided in 2012, the City alerted the parties who had a privacy interest in the records that the emails would be disclosed absent a court order ruling otherwise. Once the petitioners sought an injunction to block the release of the records, the City had no other obligations — not even to oppose the petition — because the City "could not assert the privilege that exempted the records from disclosure." It was not the City's privilege to assert. Government Code section 6254 provides that, "the exemptions to the Act do 'not prevent any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.'"

Finally, the court rejected the newspaper's argument that Johnson's role as a petitioner/elected official seeking to prevent disclosure converted the action into a PRA action. Although Johnson could only have been president of NCBM because of his position as mayor, "these inter-related positions…did not transform all of Johnson's actions with regard to [NCBM] into actions of Johnson the public official." Further, the court found that Johnson "did not abandon his right to privacy or his right to assert the attorney-client privilege when he was elected mayor."

While the newspaper urged the court to award attorneys' fees based on the public policy that "the Act should be read broadly in favor of public disclosure," the court rejected the argument because the "goal of achieving access to public records is not adversely affected." The PRA "expressly provides…for a cause of action to compel disclosure, not an action to prohibit disclosure." Thus, a PRA requester is not entitled to attorneys' fees from a public agency when a third party intervenes to stop the agency from producing the records requested. *National Conference of Black Mayors, et al. v. Chico Community Publishing Company* (2018) 25 Cal.App.5th 570.

LITIGATION ISSUES

THE LIMITATIONS PERIOD UNDER THE GOVERNMENT CLAIMS ACT BEGINS WHEN THE CLAIMANT DISCOVERED THE ALLEGED WRONGFUL CONDUCT, EVEN IF THEY DO NOT KNOW WHO THE RESPONSIBLE PARTY WAS

Renee Estill was terminated from her employment with the Shasta County Sheriff's Office. In accordance with the California Government Claims Act, before filing a lawsuit against the County, Estill was required to file a government claim with the County within six months after she knew or should have known about the incidents underlying the claim. Estill filed her government claim on February 23, 2012 and stated that she first became aware of the relevant incidents on September 9, 2011. Estill claimed that on this date, she was informed by someone that the Captain had told other employees about the details of an internal affairs investigation that ultimately led to her termination. The County denied Estill's government claim.

Estill then sued the County for invasion of privacy and harassment, among other claims. During her deposition, the County learned that Estill became aware of the incidents underlying her lawsuit in 2009, not in 2011, as her government claim had indicated. The County then moved to dismiss Estill's lawsuit on the basis that she did not timely present her claims.

While the trial court allowed Estill's claims for invasion of privacy and harassment to proceed, the Court of Appeal dismissed the case agreeing with the County that Estill did not timely file her government claim. Although Estill argued that she could not have presented her claim any sooner because she did not know the identity of the specific individual that shared with her the information about the Captain speaking about her internal affairs investigation, the Court of Appeal rejected this argument and held that ignorance of a defendant's identity is not sufficient to delay accrual of the lawsuit because Estill could have listed this individual as a Doe defendant, conducted discovery to learn the defendant's true identity, and then amended her complaint. Thus, the Court of Appeal dismissed her case. *Estill v. County of Shasta* (2018) 25 Cal.App.5th 702.

EMPLOYERS MAY REASONABLY RELY UPON WORKPLACE INVESTIGATION IN ITS DECISION TO TERMINATE MANAGER WHEN DEFENDING A WRONGFUL TERMINATION CLAIM

Paul Nelson, a PG&E employee responsible for testing the gas transmission of pipes, reported a safety concern to his supervisor, Jameson. Nelson was then re-assigned to a new testing site and complained to PG&E management representatives that his supervisor Jameson had retaliated against him for making a health and safety report. In turn, PG&E hired an outside investigator who interviewed ten people over a two month period, including witnesses Jameson believed would support his position that he removed Nelson from the job site because of Nelson's poor performance. Ultimately, the investigation found that Jameson had retaliated against Nelson in violation of PG&E's code of conduct. After considering the investigation report, PG&E terminated Jameson's employment.

Jameson then filed a claim against PG&E for wrongful termination. PG&E moved for summary judgment based on the fact that it terminated Jameson for good cause when the investigation

revealed that Jameson had retaliated against another employee for making a health and safety complaint. The Court of Appeal noted that on a motion for summary judgment, courts will not reexamine the underlying facts, in this matter, whether Jameson actually retaliated against Nelson.

Rather, a court will only consider whether the standard for investigative fairness is met. The court stated that the "three factual determinations that are relevant to the question of employer liability [are]: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances; and (3) did the employer have reasonable grounds for believing the employee had engaged in misconduct." In reviewing these factors, the Court of Appeal held that PG&E's investigation met this criteria and that its decision to terminate Jameson was made in good faith. As such, it was reasonable for PG&E to have relied upon the investigation when it decided to terminate Jameson's employment. *Jameson v. Pacific Gas and Elec*. (2017) 16 Cal.App.5th 901.

FREE SPEECH

SUPREME COURT HOLDS THAT IMPOSING AGENCY FEES ON PUBLIC EMPLOYEES VIOLATES THEIR RIGHT TO FREE SPEECH BY FORCING THE EMPLOYEES TO ENDORSE IDEAS AND POSITIONS THEY MAY BELIEVE TO BE OBJECTIONABLE

Mark Janus, a public sector employee, challenged an Illinois statute that required employees who choose not to join the union to still pay an "agency fee" that presumably covers the union's cost of representing employees during negotiations and other related matters. The Supreme Court had previously addressed this issue and ruled that a public sector employee who did not join the union could be required to pay the agency fee, but could not be required to pay any additional amount designed to cover the union's political and ideological projects, as requiring an employee to pay for those projects would violate his or her First Amendment rights. Janus claimed that the distinction between an agency fee designed to cover the costs of negotiations and additional amounts designed to cover political and ideological projects was irrelevant because the issues the union advanced in negotiations were also political and ideological.

The Supreme Court agreed with Janus and in a 5-4 decision, the Court found that forcing employees to endorse ideas and positions they believed to be objectionable violated their First Amendment right to free speech. In that regard, positions advanced by a union in negotiations often dealt with import issues of public concern, like the public agency's budget, taxes, the level of services provided and how to prioritize competing issues of public concern. The Court also determined that the union's justifications for agency fees, that they promote labor peace and avoid the "free rider" risk where employees can enjoy the benefits of collective bargaining without having to pay their fair share of the costs, were insufficient to justify the intrusion those fees imposed on the employees' free speech rights.

Accordingly, the Court ruled that public sector employers and their unions could no longer require nonconsenting employees to pay an agency fee. Specifically, the Court held that "neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages,

nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."

In response to this decision, Governor Jerry Brown signed Senate Bill 866 which provides specific provisions on the authorization and revocation of the authorization for dues and fees that must be followed by public employers. Included in the new law are procedures for the authorizations for deductions and revocations, which require submission to the union for administration, and the union then informs the employer. Notwithstanding the new procedures outlined in the bill, the question of whether prior authorization for fair share fees can still be relied upon remains.

Among the other significant provisions of the new law, are the restrictions on "mass communications" to employees. Any "mass communication" sent to employees or applicants concerning their rights to join or support an employee organization, or refrain from joining or supporting an employee organization, require the employer to meet and confer. If the employer and employee organization cannot agree on the communication, the employer must also distribute, at the same time, the employee association's own mass communication. Mass communications include a written document, or a script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees. *Janus v. American Federation of State, County, and Mun. Employees, Council 31* (2018) 138 S.Ct. 2448.

HIGH SCHOOL FOOTBALL COACH DID NOT HAVE A FIRST AMENDMENT RIGHT TO KNEEL IN PRAYER DURING FOOTBALL GAMES WHILE ON DUTY AND IN UNIFORM

Joseph Kennedy, a high school football coach of the Bremerton School District, regularly knelt in prayer on the football field during high school football games in view of his students and the public until the District directed him to refrain publicly praying in this manner. In turn, Kennedy defied the District's directive and continued to pray on the field and sued the District claiming that its restrictions were retaliation for exercising his right to free speech under the First Amendment.

In order to prevail on his retaliation claim, Kennedy was required to prove that during his prayer activities, he "(1) spoke on a matter of public concern, (2) spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action." As such, the key inquiry was whether Kennedy's speech, i.e. his public prayer activities, was done as part of his job responsibilities. If they were, he would not be speaking as a public citizen and his speech would not be protected by the First Amendment.

As a football coach, Kennedy's job responsibilities required him to be a "coach, mentor and role model" for student athletes, adopt "sportsmanlike conduct at all times," and acknowledge that he was "constantly being observed by others." By virtue of his position, Kennedy was also required to obey the school's Rules of Conduct while in the presence of his student athletes and the general public. This policy prohibited staff from both encouraging or discouraging students from engaging in prayer.

For these reasons, the court found that Kennedy's professional duties required him to model good behavior through his own conduct including through his actions on the football field. Further, the court held that because Kennedy's position gave him special access to the football field, while on the field he was fulfilling his professional obligations to the school as its coach and was speaking as a public employee, not a private citizen, when he knelt in prayer. As such, the District was permitted to direct Kennedy not to speak in the manner that he did. *Kennedy v. Bremerton Sch. Dist*. (9th Cir. 2017) 869 F.3d 813.

CITY CANNOT RESTRAIN EMPLOYEES CRITICAL COMMENTS WHEN SPEAKING ON MATTERS OF PUBLIC CONCERN AS A PRIVATE CITIZEN

A community service officer for the City of Springfield's Police Department in Oregon alleged that the City retaliated against her after she responded at a public event to a citizen inquiry about racial profiling by the Department. When asked if she was aware of increasing racial profiling complaints, the employee responded that she "had heard such complaints." After she made the comment, the employee was suspended from work due to her conduct related to two investigations performed earlier that year. Before the employee could return to work, the City required that she sign a "Last Chance Agreement," which prohibited her from making any negative comments about the Department, the City or their employees. She refused to sign the agreement and the City terminated her employment. The employee then sued the City for First Amendment retaliation and imposing unlawful prior restraint.

Case law mandates that in order to prove retaliation, the employee needed to demonstrate that she spoke on a matter of public concern, as a private citizen and that the relevant speech was a substantial or motivating factor in the City's decision to terminate her employment. The court held that, because the employee was speaking at the event as part of her community outreach duties, was paid by the City to attend the event and appeared at the event in uniform, she was clearly speaking as a public employee and not a private citizen. Given that the employee was on-duty at the time she spoke, the court affirmed the lower court's ruling that the employee had failed to prove First Amendment retaliation.

However, the court agreed with the employee that, because the City's proposed agreement restricted the employee's speech as a private citizen on issues of public concern without providing proper justification, it was an unconstitutional prior restraint. In reaching this decision, the court applied the Pickering test, based on a 1968 Supreme Court ruling, that asks whether the restriction affects the employee's speech as a citizen on a matter of public concern and whether the government entity has an adequate justification for treating the employee differently from any other member of the public. An adequate justification may be found when the restriction is narrowly tailored to prevent disruption of government operations. In this case, the court noted that the City's agreement prohibited the employee from speaking negatively about any aspect of the City's services, even those unrelated to her job, and the City failed to justify such a broad prohibition. For those reasons, the court held that the agreement was a prior restraint that violated the First Amendment.

While the court's decision was not surprising in light of prior decisions, the case serves as an important reminder to public employers about employees' rights to speak publicly as private citizens — even when the speech is critical of the employer. Public employers should carefully

consider the First Amendment implications before requiring employees to agree to any restrictions on their speech when acting in their private capacity. *Barone v. City of Springfield* (9th Cir. 2018) 902 F.3d 1091.

NINTH CIRCUIT HOLDS THAT COUNTY CANNOT PROHIBIT AD CONTENT SOLELY BECAUSE IT IS DISPARAGING OR POTENTIALLY DISRUPTIVE

King County provides public transportation in the greater Seattle metropolitan area. The County accepts advertisements for public display on its buses unless the ads contain certain types of prohibited content, including false statements, disparaging material or content that may disrupt the transit system. The American Freedom Defense Initiative ("AFDI") submitted an ad to the County concerning global terrorism which depicted sixteen photos of faces, with the title "Faces of Global Terrorism," and included information about how to report terrorists. The County rejected the ad, concluding that it contained all three types of prohibited content mentioned above. AFDI then corrected certain factual inaccuracies, and re-submitted the ad. The County again rejected the ad, concluding that it contained disparaging material and content that may disrupt the transit system. AFDI sued the County, alleging that the County's rejection of the revised ad violated AFDI's freedom of speech under the First Amendment. The lower court granted summary judgment in favor of the County.

On appeal, the Ninth Circuit determined that the County's bus advertising program was a "nonpublic forum" for First Amendment purposes, meaning the County's ad regulations must be reasonable and viewpoint neutral. The court held that, under this standard, the County could lawfully prohibit ads that contain false statements. However, the court concluded that the County's prohibition on disparaging content unlawfully discriminates on the basis of viewpoint, and that the prohibition of disruptive content, while valid on its face, was unreasonably applied to AFDI's ad.

The County's policy defined disparaging content as that which a reasonable person would believe "contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of any individual, group of individuals or entity." The court, in applying the standard established in the 2017 U.S. Supreme Court case of *Matal v. Tam* (2017) 137 S.Ct. 1744, explained that a government entity cannot prohibit speech simply because it is offensive. To do so is to discriminate on the basis of viewpoint because offensive speech is, itself, a viewpoint.

The County defined content as disruptive to the transit system if a reasonable person would find the material "so objectionable that it is reasonably foreseeable that it will result in harm to, disruption of or interference with the transportation system." The court held that this standard is reasonable and viewpoint neutral, but that the County unreasonably applied the standard to AFDI's ad. The court rejected the County's argument that the ad could perpetuate harmful stereotypes and upset riders, and thereby cause a decrease in ridership, because it only portrayed persons of a certain race as terrorists. The court concluded such harm from AFDI's ad was not reasonably foreseeable because the County experienced no disruption at all during the three weeks in which a similar "Faces of Global Terrorism" ad, submitted by the U.S. State Department, was displayed on County buses.

Thus, the Ninth Circuit reversed the lower court's ruling as to the revised ad, holding that neither of the County's reasons for rejecting the ad withstands First Amendment scrutiny. The court awarded summary judgment to AFDI. The case is an important reminder to public agencies that even within a nonpublic forum, such as advertising space on the agency's property, agencies cannot prohibit speech simply because it is disparaging or offensive. *American Freedom Defense Initiative v. King County* (9th Cir. 2018) 904 F.3d 1126.

PUBLIC ENTITIES CAN LIMIT PUBLIC COMMENT SPEAKING TIME AT MEETINGS TO THREE MINUTES WITHOUT VIOLATING THE FIRST AMENDMENT OR THE BROWN ACT

Joe Ribakoff regularly attended meetings of the Long Beach Transit Company Board of Directors, which is subject to the Brown Act's open meeting requirements. Long Beach's Board policy required each public speaker to fill out a public comment card, which informed the speaker of the three minute limit to address the Board. Ribakoff filled out a card and spoke for three minutes on one agenda item, and then attempted to speak to the Board a second time on the same item, but was not allowed to speak. Ribakoff sued, claiming time and subject matter restrictions and discrimination in violation of the Brown Act and the First Amendment.

The Court of Appeal determined that the three minute time restriction was reasonable and did not violate the Brown Act or the First Amendment. First, the court held that the Brown Act expressly authorizes public entities to put reasonable restrictions on the amount of time a speaker can speak at a meeting and the appellate court concluded that the three minute restriction was reasonable. Additionally, the appellate court held the restriction did not violate the First Amendment because it was a content neutral restriction that simply limited the amount of time for speech and not what was said.

While Ribakoff argued that the restriction violated the law because it was not uniformly applied to all speakers, specifically staff and invited speakers, the court concluded that the Board had a reasonable justification for treating invited speakers differently. Additionally, contrary to Ribakoff's contention, speech at government meetings is not unlimited and public entities can limit speech at meetings based on time and even some types of content — i.e. requiring a speaker to address only the topic or agenda item at issue.

Therefore, the court held that public entities can place reasonable time restrictions on public comment at their meetings as long as the time restrictions do not violate state or federal law. As found in this case, a city transit board's restriction of public comment to three minutes, per person, per agenda item, did not violate the Brown Act "open meeting" law or the First Amendment right to free speech. *Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150.

OTHER PUBLIC AGENCY ISSUES

COURT OF APPEAL INTERPRETS EDUCATION CODE SECTION 45306 REQUIREMENTS SURROUNDING A COMMISSION'S DUTY TO INVESTIGATE

Rodger Hartnett, a former employee of the San Diego County Office of Education whose employment was terminated in 2008, sued the Office and others alleging wrongful termination and other causes of action. Hartnett filed successive writ petitions seeking reinstatement with

back pay pending an administrative review process before the Office's personnel commission. After Hartnett's administrative review proved unsuccessful, he filed a second writ petition challenging the fairness and legality of the commission's findings based upon the grounds that the commission had failed to investigate the matter as required by Education Code section 45306.

Education Code section 45306 covers a commission's obligations following an employee's appeal of a disciplinary action. Specifically, section 45306 states in pertinent part, "The commission shall investigate the matter on appeal and may require further evidence from either party, and may, and upon request of an accused employee shall, order a hearing. The accused employee shall have the right to appear in person or with counsel and to be heard in his own defense." Additionally, "[t]he commission may conduct hearings, subpoena witnesses, require the production of records or information pertinent to investigation, and may administer oaths. It may, at-will, inspect any records of the governing board that may be necessary to satisfy itself that the procedures prescribed by the commission have been complied with. Hearings may be held by the commission on any subject to which its authority may extend as described in this article." This statutory scheme gives the commission power to have a hearing officer or other representative conduct any hearing or investigation, and present findings or recommendations to it.

Here, the Court of Appeal found that the commission fulfilled its statutory duty to investigate the allegations against Hartnett surrounding his termination by conducting a four-day evidentiary hearing at which time Hartnett was either present or chose to be present through his legal counsel and the parties were represented and afforded the opportunity to present oral and documentary evidence relevant to the charges, cross-examine witnesses who were sworn under oath, and argue their positions to the commission. The court held that the commission satisfied its duty to investigate and determine the truth of the allegations against Hartnett, and whether his termination was warranted through the hearing and no separate investigation was required. The court noted that section 45306 does not mandate that an investigation and hearing be independently conducted, or prevent the investigation and hearing from taking place at the same time or being done concurrently. For these reasons, the Court of Appeal held judgment in the Office's favor. *Hartnett v. San Diego County Office of Education* (2017) 18 Cal.App.5th 510.

PERB CASES

PERB CREATES NEW RULE REGARDING EMPLOYEE USE OF EMAIL FOR PROTECTED COMMUNICATIONS DURING NON-WORK TIME

In 2015, Eric Moberg, a part-time adjunct instructor, sent an email responding to an exchange between the faculty association president and a part-time faculty member where an adjunct professor suggested that adjuncts should be paid the same salary as full-time professors. Moberg replied stating, "How about we take some money from the bloated Pentagon that funds death and destruction instead of education and enlightenment." The faculty association president sent an email message disavowing the email exchange and stating that the association's practice was to use District email only for meeting reminders and to conduct any other business using non-District email.

Moberg filed a grievance stating that the faculty association president's directive to refrain from using District email to discuss pay issues violated the collective bargaining agreement between the District and the Association. The District withdrew Moberg's employment offer for the Spring 2016 semester citing that it had discovered that Moberg had misrepresented his employment history and omitted key facts from his employment application.

Moberg then filed an unfair practice charge alleging that the District had violated the EERA by withdrawing his offer of employment for the Spring 2016 semester in retaliation for his prior protected activity. PERB initially dismissed the charge finding that his email exchange and grievance were not protected activity under the EERA. On appeal, PERB re-examined the initial dismissal of Moberg's claim and found that he did engage in protected activity by filing a collective bargaining agreement claim with the District and participating in an email regarding the pay of adjunct professors at the District.

First, PERB found that an employee engages in protected activity by asserting a violation of a labor agreement even if the employee does so outside of the contractual grievance process. As such, Moberg's grievance regarding the directive not to discuss salary on District email was a protected activity. Additionally, PERB held that Moberg's email regarding faculty salary was protected activity even though Moberg's comment about adjusting faculty salaries by decreasing federal government spending was outside of the District's control.

PERB also discussed whether public employees have the right to use their employer's email to disseminate statements that are protected by the EERA. In recognizing that email is a fundamental forum for employee communication in the present day, akin to faculty lunch rooms and employee lounges when the EERA was written, PERB found that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in EERA protected communications on nonworking time. This is significant because in reaching this holding, PERB disapproved of its earlier decision in *Los Angeles County Superior Court* (2008) PERB Dec. No. 1979-C, holding that an employer can restrict employee use of its email system so long as the restrictions do not discriminate against the use of the email for union matters or other protected activity.

Now, PERB held that an employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights. However, PERB stated that it would be a rare case that circumstances would dictate an employer to require a total ban on non-work time email use and that in more typical cases, employers may apply uniform and consistently enforced controls over their email systems that are no more restrictive than needed to protect the agency's interests. *Napa Valley Community College District* (2018) PERB Dec. No. 2563-E.

TEACHER'S STATEMENTS TO OTHER TEACHERS ON DISTRICT EMAIL ALLEGING THAT THE UNION PRESIDENT AND HR DIRECTOR HAD A CONFLICT OF INTEREST WERE PROTECTED UNLESS "MALICIOUSLY UNTRUE"

Manuel Yvellez, a kindergarten teacher, sent a message to other teachers at the Chula Vista Elementary School District ("District") using his District email address criticizing the union

president and HR director as having a conflict of interest. The District Superintendent ordered an investigation on Yvellez's email misuse and for defamation. In turn, Yvellez filed an unfair practice claim alleging interference and discrimination because of protected activities under the EERA.

Upon review, PERB held that Yvellez's statements were protected and that employees have a right to use district emails for employment related matters, citing *Napa Valley Community College District* (2018) PERB Dec. No. 2563-E. PERB found that speech between employees on "matters of legitimate concern to employees as employees" is protected unless the speech is "maliciously untrue." Because Yvellez's statements were not found to have risen to the "maliciously untrue" standard enunciated PERB, his statements were protected. *Chula Vista Elementary School District* (2018) PERB Dec. No. 2586-E.

PERB HELD THAT SCHOOL DISTRICT VIOLATED THE EERA WHEN IT SENT AN EMAIL PROHIBITING STAFF FROM DISTRIBUTING "FLYERS OF A POLITICAL OR UNION NATURE" OR "HANDING OUT PAMPHLETS ON DISTRICT PROPERTY" DURING THE WORK DAY

In 2014, the Petaluma Federation of Teachers, Local 1881 ("Union") and the Petaluma City Elementary School District/Joint Union High School District ("District") were negotiating a successor to the 2012-2015 collective bargaining agreement. On September 2014, the District sent an email memo out to school administrators prohibiting teachers from distributing "flyers of a political nature or union nature" or "handing out pamphlets on district property" during the work day. The Union challenged the blanket prohibition as an interference with the teachers' right to communicate.

PERB held that the EERA makes it an unlawful practice for a public school employer to "interfere with, restrain, or coerce employees" because of their exercise of protected rights, and to "[d]eny to employee organization rights guaranteed to them by [EERA]." A prima facie case of interference, coercion or restraint is established if the employer's conduct would reasonably tend to or does in fact result in hard to protected rights. The inquiry is an objective one which asks whether, under the given circumstances, an employer's conduct has discouraged, or reasonably could discourage, employees from engaging in present or future protected activity.

Applying the above-reference principles, PERB held that regardless of its actual enforcement, an employer's promulgation or maintenance of a rule governing employee conduct may interfere with protected rights if the rule's ambiguity is reasonably susceptible to a broad interpretation that would chill protected activity. Based on these principles, PERB concluded that the District interfered with protected rights when its agents sent an email prohibiting employees from distributing "flyers of a political or union nature" and from "handing out pamphlets" anywhere on the District's premises at any time during the workday, regardless of the employee's non-duty time. *Petaluma City Elementary School District/Joint Union High School District* (2018) PERB Dec. No. 2590-E.

THE CITY OF SAN DIEGO VIOLATED THE MMBA WHEN IT PLACED A CITIZENS INITIATIVE ON THE 2012 BALLOT THAT AFFECTED PUBLIC EMPLOYEE PENSION PLANS WITHOUT FIRST MEETING AND CONFERRING WITH THE UNIONS

In 2010, City of San Diego officials proposed eliminating traditional pension retirement plans in favor of 401k style plans for all newly hired City employees. Instead of proposing the change through a measure proposed by the City, then-Mayor Jerry Sanders helped launch the Citizens Pension Reform Initiative, as he was concerned about compromises that could result from the meet and confer process. In July 2011, the San Diego Municipal Employees Association demanded that the City meet and confer over the initiative under the MMBA. The City refused, alleging that the state election laws required the City place the initiative on the ballet without modification once the procedural requirements for the initiative were met.

In January 2012, several unions filed unfair practice charges with PERB based on the City's refusal to meet and confer regarding the initiative. However, in the interim, the initiative appeared on the June 2012 ballet and was passed by San Diego citizens.

Once reviewed by PERB, it was determined that the City violated the MMBA by failing to meet and confer over the initiative, instead placing it on the ballet, and ordered the City to pay its employees for all lost compensation including the value of lost pension benefits. The City filed a writ with the Court of Appeal challenging PERB's decision and the court held that the City had not been required to meet and confer before placing the initiative on the ballot.

Upon review, the California Supreme Court held that the City was required to meet and confer under the MMBA before it allowed San Diego citizens to vote on the initiative to switch newly hired City employees from the traditional style pension retirement plan to a 401k-style plan. The court held that the interpretation of public employee labor relations statutes fell within PERB's purview and "legislatively designated field of expertise" in dealing with public agency labor relations. For this reason, the court held that the more deferential "substantial evidence" standard applied to PERB's legal determinations. As such, the court held that the Court of Appeal failed to defer to PERB's statutory interpretation and should have followed PERB's interpretation unless "clearly erroneous."

Additionally, and as PERB pointed out in its decision, the court found that the duty to meet and confer attaches to actions taken by agency representatives even without the governing body's participation. Mayor Sanders, as the City's chief executive, was empowered by the City Charter to make policy recommendations regarding City employees and to negotiate with the unions. As such, he was required to meet and confer with the unions before determining policy on matters affecting the terms and conditions of employment. *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898.

POLICE COMMISSION NOT REQUIRED TO MEET AND CONFER UNDER THE MMBA BEFORE ADOPTING A REVISED USE OF FORCE POLICY

In 2015, the San Francisco Police Commission ("Commission") proposed implementing a revised use of force policy for all San Francisco police officers. This revised policy included

provisions prohibiting police use of the carotid restraint, a form of strangulation that compresses one or both carotid arteries and/or the jugular veins without compressing the airway, and strictly prohibiting officers from shooting at moving vehicles. The City and County of San Francisco ("City") agreed to meet with the San Francisco Police Officers' Association ("Association") regarding their concerns over the revised policy, but the two parties were unable to reach an agreement on these issues.

In 2016, the Commission voted to adopt the revised policy and in 2017, the Association filed suit to compel arbitration challenging the City's failure to negotiate in good faith as required by the parties' memorandum of understanding ("MOU"). The trial court denied the Association's petition holding that the issues raised by the Association fell outside of the scope of the parties' MOU.

The Court of Appeal likewise held that the duty to meet and confer did not apply to the Commission's revised use of force policy because the policy fell within the City's exclusive managerial authority and was not subject to arbitration under the MOU with the Association. Where an action is taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer's need for unencumbered decision-making in managing operations is outweighed by the benefits to employer-employee relations of bargaining about the action in question. According to the court, that is not the case with revisions to use of force policies as these policies mainly concern public safety as opposed to wages, hours and working conditions. While it could impinge on conditions of employment, the court found that it could only impinge indirectly and as such, the policy was considered a fundamental managerial decision outside the scope of representation and not subject to arbitration. *San Francisco Police Officers' Ass'n v. San Francisco Police Comm'n* (2018) 27 Cal.App.5th 676.