ANNUAL LABOR &

EMPLOYMENT

LAW UPDATE

NEW LEGISLATION AND CASE

SUMMARIES

December 10, 2015

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

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NEW LEGISLATION

ASSEMBLY BILL 10 – MINIMUM WAGE (2013)

Under current law, employers subject to the minimum wage requirement must pay employees at least $9.00 per hour. Exempt employees include outside salespersons, individuals who are the parent, spouse, or child of the employer, and apprentices. There is also an exemption for employees during their first 160 hours of employment working in occupations in which they have no previous similar or related experience. In 2013, the governor approved AB 10, which amends section 1182.12 of the California Labor Code. AB 10 raises the minimum wage in California to $10.00 per hour, effective January 1, 2016.

ASSEMBLY BILL 304 CLARIFIES PAID SICK LEAVE LAW

AB 304, enacted as urgency legislation, went into effect on July 14, 2015, clarifying some of the questions raised by California's new paid sick leave law -- the Healthy Workplaces, Healthy Families Act (AB 1522). In addition to these clarifications, AB 304 provides employers with additional options on the method of accrual of these paid leave benefits.

Accrual Options

The Healthy Workplaces, Healthy Families Act (AB 1522) allowed employers to choose between an accrual or a lump sum method for providing paid sick leave. If the employer used the lump sum method, the full three days or 24 hours was required to be available at the beginning of each year. AB 304 clarifies that leave can be made available at the beginning of each year, calendar year or 12-month period. Employers who choose to provide leave under the lump sum method are not required to meet the accrual or carry-over requirements. Under AB 1522, if the employer elected to utilize an accrual-based method for sick leave, the employer was required provide employees sick leave at a minimum accrual rate of one hour per 30 hours worked. AB 304 provides that employers may use a different method for accrual that is 1) on a regular basis and 2) ensures that employees accrue no less than 24 hours of sick leave or paid time off by the 120th calendar day of employment, or each calendar year, or in each 12-month period. For example, under these revised standards, an employer could have a sick leave policy under which employees accrue one day of sick leave a month or, at a minimum, two hours per month. AB 304 further provides that an employer may provide not less than 24 hours or three days leave that is available for use by completion of the employee's 120th calendar day of employment to satisfy the accrual requirement. Under these alternative accrual methods, employers must still allow accrual of sick leave and carry over to the next year of accrued hours up to 48 hours (or six days).

Major Clarifications

AB 304 provides many clarifications, including, but not limited to, the following:

- Clarifies that to be eligible for paid sick leave, the employee must have worked for the same employer for the 30 days within a year of employment. AB 304 fails to clarify whether the 30 days is calendar or actual days worked, leaving the law ambiguous.

- Excludes retired annuitants of a public entity from the definition of employee under the law, so that no sick leave is required to be provided.

- Establishes that the year for accrual and use can be calculated based on a year of employment, a calendar year, or any other 12-month period.

- Explains that for non-exempt employees, an employer must calculate the value of paid sick leave based on either an employee's regular rate of pay for the week in which the leave is taken, or by dividing the employee's total wages (not including overtime premium pay) by the total hours worked in the full pay periods of the prior 90 days of employment. For exempt employees, the paid sick leave shall be calculated in the same manner as the employer calculates wages for other forms of paid leave.

- Clarifies that if an employer pays out sick leave upon termination, separation, or resignation (which is not required) and then reinstates the employee within one year, the leave that was paid out is not required to be reinstated.

- Clarifies the conditions under which an employer can rely on an existing paid leave or paid time off policy and is not required to provide additional paid leave. These conditions apply if the employer makes available leave that can be used for the same purposes and under the same conditions as provided in the law, and the policy meets one of the following:

  - It satisfies the accrual, carryover, and use requirements (discussed above).

  - It existed prior to January 1, 2015, and provided accrual of leave on a regular basis, so that an employee has no less than one day or eight hours of accrued sick leave or paid time off within three months of employment of each calendar year, or each 12-month period, and the employee was eligible to earn at least three days or 24 hours of time off within nine months of employment.

  - It provides sick leave benefits provided pursuant to the provisions of Sections 19859 to 19868.3, inclusive, of the Government Code, or annual leave benefits provided pursuant to the provisions of Sections 19858.3 to 19858.7, inclusive of the Government Code, or by provisions of a memorandum of understanding reached pursuant to Section 3517.5 that incorporate or supersede provisions of Sections 19859 to 19868.3, inclusive, or Sections 19858.3 to 19858.7, inclusive of the Government Code.

- Provides that employers who provide unlimited sick leave or paid time off can meet their obligations to provide written notice of available leave by stating "unlimited" on the itemized wage statement or other notice.

- States that the employer does not have the obligation to inquire into or record the reasons why an employee used sick leave or paid time off.

ASSEMBLY BILL 622 – UNLAWFUL EMPLOYMENT PRACTICES

The federal E-Verify system enables employers to verify that the employees they hire are authorized to work in the United States. Existing law prohibits the state or a county, city, or special district from requiring an employer to use an electronic employment verification system, including E-Verify, except when required by federal law or as a condition of receiving federal funds. Existing law prohibits an employer from engaging in unfair immigration-related practices against any person for the purpose of retaliating against the person for exercising specified rights. AB 622 adds section 2814 to the Labor Code and expands the definition of an "unlawful employment practice" to prohibit an employer from using the E-Verify system at a time or in a manner not required by a specified federal law or not authorized by a federal agency memorandum of understanding to check the employment authorization status of an existing employee or applicant who has not received an offer of employment. It also requires an employer that uses the E-Verify system to provide to the affected employee any notification issued by the Social Security Administration or the U.S. Department of Homeland Security containing information specific to the employee's E-Verify case or any tentative non-confirmation notice. The bill includes a $10,000 civil penalty for violations. The new legislation becomes effective January 1, 2016.

ASSEMBLY BILL 987 – RETALIATION FOR REQUESTING A DISABILITY OR RELIGIOUS ACCOMMODATION

AB 987 amends the California Fair Employment and Housing Act (FEHA), section 12940 of the Government Code. Current law provides all people the right to seek, obtain, and hold employment without discrimination or harassment because of race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. It also requires an employer to provide reasonable accommodation of a person's disability or religious beliefs and prohibits discrimination. AB 987 reasserts, in light of the decision in *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, that FEHA prohibits an employer from retaliating against a person for requesting accommodation of a disability or religious beliefs, regardless of whether the request was granted. The new legislation becomes effective January 1, 2016.

ASSEMBLY BILL 1509 – RETALIATION AGAINST EMPLOYEE FAMILY MEMBERS

Existing law prohibits an employer from discharging, discriminating, retaliating, or taking any adverse action against any employee or applicant because the employee or applicant engaged in protected conduct. Existing law provides that an employee who made a bona fide complaint, and was consequently discharged or otherwise suffered an adverse action, is entitled to reinstatement and reimbursement for lost wages. AB 1509 amends sections 98.6, 1102.5, 2810.3, and 6310 of the Labor Code and extends the protections of these provisions to an employee who is a family member of a person who engaged in, or was perceived to engage in, the protected conduct or made a complaint protected by these provisions. The new legislation becomes effective January 1, 2016.

ASSEMBLY BILL 1513 – PIECE-RATE COMPENSATION

Existing law prohibits an employer from requiring an employee to work during any meal or rest period and requires rest periods to be counted as hours worked. AB 1513 adds section 226.2 to the Labor Code and requires the itemized statement provided to employees compensated on a piece-rate basis to separately state the total hours of compensable rest periods and other nonproductive time, the rate of compensation, and the gross wages paid for those periods. Employees must be compensated for rest and recovery periods and other nonproductive time at or above the minimum wage, separately from any piece-rate compensation. The bill would define "other nonproductive time" to mean time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis. Until January 1, 2021, an employer has an affirmative defense to any claim for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties based solely on the employer's failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if, by no later than December 15, 2016, the employer complies with specified requirements, subject to specified exceptions. The new legislation becomes effective January 1, 2016.

ASSEMBLY BILL 1897 – JOINT LIABILITY FOR CONTRACTOR AND EMPLOYER (2014)

AB 1897 added section 2810.3 to the Labor Code. It made businesses with 25 or more employees that use more than five temporary workers liable if the temporary agency supplying the labor fails to pay wages and/or obtain workers' compensation coverage. This legislation took effect January 1, 2015.

ASSEMBLY BILL 2617 – CIVIL RIGHTS WAIVERS (2014)

Prior law provided that all persons in California have the right to be free from violence, or threat of violence, because of political affiliation, or on account of position in a labor dispute, or sex, race, color, religion, ancestry, national origin, disability, or medical condition, or because another person perceives them to have one or more of those characteristics. AB 2617 amended section 52.1 of the Civil Code to prohibit a person from requiring a waiver of these protections as a condition of entering into an employment contract, including the right to file a complaint with the Attorney General, public prosecutor, law enforcement agency, the Department of Fair Employment and Housing, or any court or government entity. AB 2617 also requires any waiver to be knowing and voluntary, in writing, and expressly not made as a condition of entering into the contract or providing or receiving goods or services. This legislation took effect January 1, 2015.

SENATE BILL 327 – MEAL PERIODS

Existing law prohibits an employer from requiring an employee to work more than five hours per day without providing a meal period. Existing Wage Orders of the Industrial Welfare provide that employees in the healthcare industry who work shifts in excess of eight total hours in a workday may voluntarily waive their right to one of their two meal periods. An employer may not require an employee to work during a meal or rest or recovery period. SB 327 clarifies that

these Wage Orders remain valid and enforceable. The law took effect on October 5, 2015, as urgency legislation.

SENATE BILL 358 – CALIFORNIA FAIR PAY ACT

Existing law prohibits an employer from conditioning employment on an employee not disclosing the amount of wages, signing a waiver of that right, or discriminating against an employee for making such a disclosure. It also prohibits an employer from paying an employee less than employees of the opposite sex in the same establishment for equal work on jobs that require equal skill, effort, and responsibility and are performed under similar conditions. Existing law establishes exceptions where payment is made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex. SB 358 amends section 1197.5 of the Labor Code to eliminate the requirement that the wage differential be "within the same establishment," and instead prohibits an employer from paying any of its employees at wage rates less than those paid to employees of the opposite sex for "substantially similar work" when viewed as a combination of skill, effort, and responsibility. It also revises the exceptions to require the employer to demonstrate that a wage differential is based on a factor other than sex. The employer must demonstrate that each factor relied upon is applied reasonably, and that the factors relied on account for the entire differential. The bill prohibits an employer from discharging, discriminating, or retaliating against any employee because of any action taken to enforce these provisions. It also authorizes an employee who has been discharged or discriminated or retaliated against to recover reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. The bill prohibits an employer from preventing an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under these provisions. It increases the duration of employer recordkeeping requirements for records of wages and wage rates, job classifications, and other terms and conditions of employment from two years to three years. The new legislation becomes effective January 1, 2016.

SENATE BILL 579 – EMPLOYEE TIME OFF FOR CHILD CARE

Existing law prohibits an employer who has 25 or more employees working at the same location from discharging or discriminating against an employee who is a parent, guardian, or grandparent with custody of a child in a licensed child day care facility, kindergarten, or grades 1 to 12 for taking off up to 40 hours each year to participate in school activities. It requires an employee to provide documentation on request and provides remedies to employees discharged, demoted, or discriminated against because they exercised their right to take time off. SB 579 amends section 230.8 of the Labor Code and revises references to a child daycare facility to instead refer to any childcare provider. The bill defines "parent" as a parent, guardian, stepparent, foster parent, or grandparent of, or a person who stands in loco parentis to, a child and, therefore, extends these protections to an employee who is a stepparent or foster parent or who stands in loco parentis to a child.

Existing law further requires an employer who provides sick leave to permit an employee to use sick leave to attend to the illness of a child, parent, spouse, or domestic partner and prohibits an employer from denying an employee this right or taking discriminatory action against an employee for using, or attempting to exercise, the right to use sick leave. SB 579 amends section 233 of the Labor Code to make it consistent with the Healthy Workplaces, Healthy Families Act of 2014 (the Act). The Act requires an employer, upon the request of an employee, to provide paid sick days for a victim of domestic violence or the care of an existing health condition of, or preventive care for, the employee or the employee's family member, which is defined as including a child, parent, spouse, domestic partner, grandparents, grandchildren, and siblings. SB 579 amends section 233 of the Labor Code to require an employer to permit an employee to use sick leave for the purposes specified in the Act and for those family members covered by the Act. The new legislation becomes effective January 1, 2016.

SENATE BILL 588 – LABOR COMMISSIONER JUDGMENT ENFORCEMENT

SB 588 amends several sections of the Labor Code to allow the Labor Commissioner to enforce judgments against an employer arising from the nonpayment of wages. Existing law authorizes the Labor Commissioner to investigate employee complaints and to provide for a hearing in any action to recover wages, penalties, and other demands for compensation. SB 588 would also authorize the Labor Commissioner to provide for a hearing to recover civil penalties against any employer for a violation of those provisions regulating hours and days of work in any Wage Order of the Industrial Welfare Commission.

Further, parties under current law are authorized to seek review by filing an appeal to the Superior Court. SB 588 would authorize the Labor Commissioner to collect any outstanding amount of the judgment by mailing a notice of levy to anyone who owes any debt to the judgment debtor at the time they receive the notice of levy. If a final judgment against an employer arising from the employer's nonpayment of wages for work performed in this state remains unsatisfied after the time to appeal has expired and no appeal is pending, the bill would prohibit an employer from continuing to conduct business in California, unless the employer has obtained a bond or notarized copy of an accord. The new legislation becomes effective January 1, 2016.

ASSEMBLY BILL 305 – WORKER'S COMPENSATION PERMANENT DISABILITY - VETOED

Existing workers' compensation law requires employers to secure payment for injuries incurred by their employees in the course of employment. An employer is liable only for the percentage of the permanent disability directly caused by the injury occurring in the course of employment. AB 305 would have prohibited apportionment of permanent disability from being based on pregnancy or menopause. AB 305 also would have prohibited apportionment of permanent disability from being based on psychiatric disability caused by sexual harassment, pregnancy, or menopause. The bill also would have provided that the impairment ratings for breast cancer may not be less than comparable ratings for prostate cancer.

Governor Brown vetoed this bill on October 6, 2015. He stated that the workers' compensation system must be free of gender-bias, but this bill replaces the American Medical Association's evidence-based standard with an "ill-defined and unscientific" standard.

ASSEMBLY BILL 465 – CONTRACTS AGAINST PUBLIC POLICY – VETOED

Under existing law, negotiation of labor terms and conditions must result from a voluntary agreement between an employer and an employee. Any person who coerces or compels any other person to enter into an agreement not to join a labor organization, as a condition of employment, is guilty of a misdemeanor. AB 465 proposed to prohibit any person from requiring another person, as a condition of employment, to agree to the waiver of any legal right, penalty, forum, or procedure for any employment law violations. It also would have prohibited a person from threatening, retaliating against, or discriminating against another person based on refusal to agree to such waiver. The bill would have required that any waiver of a person's employment rights be knowing and voluntary, in writing, and expressly not made as a condition of employment.

The Governor vetoed AB 465 on October 11, 2015. Governor Brown stated that AB 465 would make California the only state to outlaw the use of mandatory arbitration agreements as a condition of employment. He noted that there is significant debate about whether arbitration is less fair to employees than litigation. Some studies show that employees receive more in arbitration while other studies show the opposite. Governor Brown was also concerned that arbitration abuses should be addressed by targeted legislation rather than a blanket prohibition. In addition, such blanket bans have been struck down in other states as violating the Federal Arbitration Act (FAA). The U.S. Supreme Court is also currently considering two cases from California involving preemption of state arbitration policies under the FAA. Before enacting a law, the Governor stated that he would prefer to see the outcome of those cases.

ASSEMBLY BILL 678 – UNEMPLOYMENT STATUS DISCRIMINATION – VETOED

AB 678 would have prohibited an employer from publishing an advertisement or job announcement that states or indicates that an unemployed person is not eligible for the job. It also would have prohibited an employer from asking an applicant to disclose his employment status.

Governor Brown vetoed AB 678 on October 10, 2015. He stated that this bill was similar to a bill he vetoed before and does not provide a proper or effective path to get unemployed people back to work.

ASSEMBLY BILL 883 – PUBLIC EMPLOYEE STATUS DISCRIMINATION – VETOED

Existing law prohibits private employers from requiring an applicant to take a polygraph test as a condition of employment or continued employment. It also generally prohibits employers from requiring an applicant to disclose an arrest or detention that did not result in a conviction. AB 883 would have prohibited a state or local agency from publishing or posting a job advertisement or announcement that states or indicates that an individual's status as a current or former public employee disqualifies an individual from eligibility for employment. It also would have

prohibited a state or local agency from asking an applicant to disclose his status as a current or former public employee until the employer determined that the applicant meets the minimum employment qualifications.

The Governor vetoed this bill on October 10, 2015. He stated that the bill seeks to vest in the Division of Labor Standards Enforcement an entirely new responsibility, and the provisions in this bill could limit legitimate efforts of public jurisdictions to manage their workforce.

NEW LEGISLATION RELATING TO PUBLIC EMPLOYERS

ASSEMBLY BILL 169 – INTERNET PUBLIC RECORDS

AB 169 adds section 6253.10 to the Government Code. AB 169 requires local agencies, except school districts, that maintain an "open data" Internet Resource and post public records, to post the records in a format that allows them to be retrieved, downloaded, indexed, and searched. The new legislation becomes effective January 1, 2016.

ASSEMBLY BILL 215 – MAXIMUM SETTLEMENT FOR SCHOOL SUPERINTENDENT

Existing law requires all employment contracts between an employee and a local agency to include a provision that establishes the amount of a settlement that may be paid if the contract is terminated. Under existing law, the maximum settlement permitted is the employee's monthly salary multiplied by the number of months left on the contract. If the term left on the contract is more than 18 months, the maximum settlement permitted is the employee's monthly salary multiplied by 18. AB 215 amends section 53260 of the Government Code to specify that for a school superintendent, for employment contracts executed on or after January 1, 2016, the maximum settlement is equal to the superintendent's monthly salary multiplied by 12.

Existing law also limits the amount of a settlement that a local agency may pay its superintendent to an amount no greater than the superintendent's monthly salary multiplied by six, if it terminates the superintendent's contract and confirms pursuant to an independent audit that the superintendent engaged in fraud, misappropriation of funds, or other illegal fiscal practices. AB 215 instead provides that for an employment contract executed on or after January 1, 2016, the employer may not provide a cash settlement in any amount if it believes, and subsequently confirms, that the superintendent engaged in illegal fiscal practices. The new legislation becomes effective January 1, 2016.

ASSEMBLY BILL 375 – SCHOOL EMPLOYEE PATERNITY AND MATERNITY SICK LEAVE

Under existing law, when a certificated school employee has used all available sick leave, and continues to be absent from work because of illness, the employee receives the difference between his salary and the amount paid to a substitute employee, or, if no substitute was employed, the amount that would have been paid to a substitute for an additional five school months. AB 375 adds section 44977.5 to the Education Code, which provides that a certificated school employee who has used all sick leave, and continues to be absent from work because of maternity or paternity leave, receives the difference between his salary and the amount paid, or that would be paid, to a substitute teacher for an additional 12 weeks. The new legislation becomes effective January 1, 2016.

ASSEMBLY BILL 1452 – EXPUNGEMENT FROM CERTIFICATED EMPLOYEE PERSONNEL FILES

Existing law prohibits a permanent school employee from being dismissed, except on the basis of certain enumerated reasons, including "egregious misconduct." Existing law also prohibits a

school employer from entering an agreement to expunge from an employee's personnel file credible complaints of, substantiated investigations into, or discipline for, egregious misconduct, unless the allegations have been the subject of a hearing in which the employee prevailed, the allegations were determined to be false, not credible, or unsubstantiated, or a determination was made that discipline was not warranted. AB 1452 amends section 44939.5 of the Education Code and expands these provisions to also prohibit school employers from directly expunging from an employee's personnel file such complaints and investigations unless found to be false or unsubstantiated at a hearing, as described above. The new legislation becomes effective January 1, 2016.

SENATE BILL 272 - PUBLIC RECORDS ACT CATALOGUE

SB 272 adds section 6270.5 to the Government Code. It requires local agencies, such as schools, to create a catalog of enterprise systems (software, applications, or computer systems), to make the catalog publicly available upon request, and to post the catalog on the local agency's website.

SENATE BILL 703 – PUBLIC CONTRACTS GENDER IDENTITY DISCRIMINATION

Existing law prohibits state agencies from entering into contracts for goods or services of $100,000 or more with a contractor that discriminates between spouses and domestic partners or same-sex and different-sex couples. Existing law also provides that a contract entered into in violation of these prohibitions is void and authorizes the state to bring a civil action seeking such a determination. SB 703 adds section 10295.35 to the Public Contract Code, additionally prohibiting a state agency from entering into contracts for goods or services of $100,000 or more with a contractor that discriminates between employees on the basis of gender identity. The new legislation becomes effective January 1, 2016.

SENATE BILL 704 – GOVERNMENT CONFLICTS OF INTEREST

SB 704 amends section 1091 of the Government Code. Relating to prohibited "financial interests" in contracts, the bill adds to the list of "remote interest" exceptions the interest of an owner or partner of a firm serving as an appointed member of an unelected board or commission of the contracting agency if the owner or partner recuses himself or herself from providing any advice to the contracting agency regarding the contract between the firm and the contracting agency, and from all participation in reviewing a project that results from that contract. The new legislation becomes effective January 1, 2016.

SENATE BILL 707 – GUN FREE SCHOOL ZONES

Under current law, the Gun-Free School Zone Act of 1995 prohibits a person from possessing a firearm in a school zone, unless with written permission of school officials. Existing law defines a "school zone" as an area on the grounds of a school providing instruction in kindergarten or grades 1 to 12, or within a distance of 1,000 feet of that school. Existing law also prohibits a person from possessing a firearm upon the grounds of a university or college campus, or buildings used for student housing, teaching, research, or administration, unless with the written permission of university officials. However, certain people are exempt from both the school zone and the university prohibitions, including a person with a valid license to carry a concealed firearm and a retired peace officer authorized to carry a concealed or loaded firearm. SB 707

revises sections 626.9 and 30310 of the Penal Code to allow a person with a license to carry a firearm in an area that is within 1,000 feet of, but not on the grounds of, a public or private school. It also deletes the exemption that allows a person holding a valid license to carry a concealed firearm on the campus of a university or college. SB 707 creates an additional exemption for peace officers who are authorized to carry a firearm, and an exemption for certain retired reserve peace officers who are authorized to carry a concealed or loaded firearm.

Existing law also prohibits carrying ammunition onto school grounds unless with the written permission of the school district superintendent, the superintendent's designee, or equivalent school authority. SB 707 deletes the exemption that allows a person to carry ammunition onto school grounds if the person is licensed to carry a concealed firearm. It also creates an additional exception by authorizing a person to carry ammunition onto school grounds if the ammunition is in a motor vehicle at all times and is in a locked container or in the vehicle's locked trunk. The new legislation becomes effective January 1, 2016.

PROPOSED CHANGES TO THE FAIR LABOR STANDARDS ACT REGULATIONS

Under the Fair Labor Standards Act (FLSA), some employees are exempt from minimum wage and overtime pay requirements. For example, "white collar" exemptions apply to administrative, executive, and professional employees. Under the current law, executive employees who make at least $455 per week, or $23,660 per year, are exempt from both the minimum wage and overtime requirements. In addition, highly compensated employees who make at least $100,000 are exempt. On July 6, 2015, the Department of Labor (DOL) issued proposed new regulations relating to white collar exemptions. The proposed changes to the FLSA are the first major changes since 2004 and more than double the minimum salary required for an employee qualify for the white collar exemptions. The proposed regulations increase the minimum pay required for employees to be exempt to $970 per week, or $50,440 per year. Highly compensated employees must make at least $122,148 per year to qualify for an exemption. The proposed regulations also automatically adjust the minimum salary level for exemptions each year to account for the increase in the cost of living. These proposed regulations will likely take effect in 2016.

2015 CASES - WAGE & HOUR

DRIVING HOME NOT WITHIN THE COURSE AND SCOPE OF EMPLOYMENT

Plaintiff Lobo was the widow of a San Bernardino County sheriff who was killed as the result of negligent operation of a motor vehicle by Luis Del Rosario. Del Rosario was leaving his employer's premises and exiting the driveway and failed to notice three motorcycle deputies approaching with lights and sirens activated. Lobo filed a wrongful death suit alleging that Del Rosario was acting within the course and scope of his employment with defendant Tamco at the time of the accident. The employer filed a motion for summary judgment, contending that as a matter of law, Tamco was not vicariously liable for the officer's death because Del Rosario was not acting within the course and scope of his employment, but was merely leaving work at the end of his workday, intending to go home and driving his personal vehicle. The trial court granted summary judgment. The Court of Appeal reversed holding that there was a triable issue of material fact as to whether Del Rosario was acting in the course and scope of his employment. On remand, a trial was held solely to determine whether Del Rosario was acting in the course and scope of his employment at the time of the accident. The jury returned a special verdict stating that Del Rosario was not acting within the course and scope of his employment at the time of the accident, and Lobo appealed. On appeal the court held that the verdict was supported by substantial evidence. *Lobo v. Tamco*, 230 Cal.App.4th 438 (2014).

CALIFORNIA SUPREME COURT HOLDS SECURITY GUARDS ENTITLED TO COMPENSATION FOR ALL ON-CALL HOURS, INCLUDING SLEEP TIME

Security guards alleged that their employer failed to compensate them for on-call time. The guards worked 16-hour shifts during weekdays, with eight hours on patrol and eight hours "on call." On the weekends, the guards worked 24-hour shifts, with sixteen hours on patrol and eight hours "on call." While "on call," the guards could generally use their time as they saw fit, but they were not allowed to leave the worksite without approval. To obtain approval, the guard had to tell the employer where he or she would be, how long he or she would be off-site, request a relief guard, and wait for the relief guard to arrive. If no relief guard was available, the employee was not allowed to leave the site, even if the reason was a personal emergency. When a relief guard was available, the departing guard had to be accessible by pager or radio and had to stay close enough to the site to return within 30 minutes if called. While on-site, guards were required to respond immediately to any alarm or other circumstance requiring investigation. The guards were paid for all patrol hours but, under a written agreement, "on-call" time was not counted as hours worked unless: (1) an alarm or other circumstance required the guard to investigate; or (2) the guard requested to leave the site and waited for, or was denied, a relief guard. The Supreme Court applied a 7-factor test to determine whether the "on-call" time constituted hours worked. Namely, (1) whether on-site living was required; (2) whether there were excessive geographic restrictions; (3) whether the frequency of calls was excessive; (4) whether the expected response time was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether the use of a pager eased the restrictions; and (7) whether the employee engaged on personal activities during the "on-call" time. Applying these factors, the court determined that the restrictions imposed regarding leaving the site were excessively restrictive and resulted in hours worked. The court held that even though the guards could engage in some personal activities such as sleeping, showering, eating, reading, watching

television, and browsing the internet, the reporting and physical restrictions were sufficient to warrant hours worked. Further, the court found that there was no authority under the appropriate wage order to allow a written agreement to waive compensation during sleep periods. *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal.4th 833 (2105).

EMPLOYERS MUST PROVIDE A SECOND MEAL PERIOD FOR SHIFTS OVER 12 HOURS, AND NO WAIVERS ARE PERMITTED EVEN FOR HEALTH CARE WORKERS – EXCEPT NOW AFTER SB 237 WAS ENACTED

There was a significant amount of excitement on or about February 10, 2015, when the Court of Appeal invalidated a 22-year-old healthcare industry meal period waiver practice. Employers operating in California must provide any employee working more than ten hours in a day with two meal breaks. While the second meal break can be waived if the shift lasts twelve hours or less, the rules generally prohibit waivers of the second meal break if the shift is more than twelve hours long. Since 1993, however, the relevant wage order (IWC Wage Order No. 5) provided the healthcare industry a right to waive the second meal break, even where the shifts are in excess of twelve hours.

Plaintiffs in this case filed a putative class action asserting meal break violations and claiming, in part, that the hospital improperly had healthcare workers waive their second meal break when shifts were longer than twelve hours. The hospital moved for, and was granted, summary judgment on the basis of the healthcare exception stated in the relevant wage order. On appeal, the Court of Appeal held that the wage order was contradicted by Labor Code section 512, which requires two meal periods for work periods of more than ten hours but allows employees to waive their second meal period only if the total hours are less than twelve. The court held that the wage order exceeded its authority by creating an exception to section 512's meal period requirements. Finally, the court allowed the plaintiffs to seek Labor Code section 226.7 premiums for failure to provide the second meal period for the full three year statute of limitations, despite the hospital's good faith in following the prescribed wage order. *Gerard v. Orange Coast Mem'l Med. Ctr.*, 234 Cal.App.4th 285 (2015) (time for granting or denying review extended by *Gerard v. Orange Coast Mem'l Med. Ctr.*, 2015 Cal. LEXIS 6662). Note: Effective October 5, 2015, the California Legislature remedied Labor Code section 512 to allow waiver of the second meal period in the healthcare industry. (See SB 327 (2015).)

MORTGAGE LOAN OFFICERS DO NOT QUALIFY FOR FLSA ADMINISTRATIVE EXEMPTION

The Fair Labor Standards Act (FLSA) establishes the federal minimum wage and obligation to pay overtime compensation for each hour worked in excess of 40 in the workweek. Certain classes of employees are exempt from those overtime requirements, primarily those employed in a bona fide executive, administrative, or professional capacity. In 1999 and 2001, the Department of Labor's Wage and Hour Division issued opinion letters stating that mortgage loan officers were not administratively exempt and, therefore, had to be paid minimum wage and overtime. In 2004, the Secretary of Labor first promulgated its current regulations regarding the FLSA administrative exemption. That same year, the Mortgage Bankers Association requested an opinion letter to interpret the new regulations. In 2006, the Department of Labor (DOL) responded with a letter that opined that mortgage loan officers were, in fact, subject to the

administrative exemption. However, in 2010, the Wage and Hour Division reviewed the provisions of the 2004 regulations and judicial decisions that addressed the exemption and determined that because mortgage loan officers "have a primary duty of making sales for their employers," they did not qualify for the exemption. Accordingly, the DOL withdrew its 2006 opinion letter. The Mortgage Bankers Association brought suit against the DOL seeking declaratory and injunctive relief on the ground that the Deputy Administrator had violated the Administrative Procedure Act (APA) by issuing an Administrator's interpretation without following the notice-and-comment requirement for rule making. The Supreme Court disagreed. The Court stated that the notice-and-comment procedures (as set out in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997)) is contrary to the clear text of the APA. The Supreme Court concluded that the text of the APA "clearly" stated that only if notice-and-comment procedures were required by statute did an agency have to abide by the procedures. In other words, unless a statute required it, the agency could issue "unilateral" interpretations. *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015).

LOADING OF TURN OUT GEAR NOT COMPENSABLE AND SICK LEAVE BUY BACK NOT PART OF REGULAR BASE PAY

This case arose when firefighters and emergency medical personnel sued the Menlo Park Fire Protection District (District). The firefighters and emergency medical personnel claimed that the District's policies violated the Fair Labor Standard Act (FLSA) because: (1) they were entitled to overtime for taking their gear to temporary duty stations, and (2) they claimed that the District's system of paying them cash, in lieu of unused sick-leave time, violated the FLSA because that time was not being considered in calculating their base rate for the purposes of overtime pay. Summary judgment in favor of the District, was affirmed by the U.S. Court of Appeals for the Ninth Circuit, stating that the loading up of "turnout gear" to report to a shift at a visiting station does not qualify as "integral and indispensable" to their firefighting activity. Furthermore, the Court affirmed the dismissal of the challenge to the annual sick leave buyback because it did not qualify as an attendance bonus, should not be considered an attendance bonus, and should not be considered in determining the regular base pay. *Balistrieri v. Menlo Park Fire Prot. Dist. (9th Cir. 2015) 800 F.3d 1094.*

SECURITY CHECKS NOT COMPENSABLE WORK UNDER FLSA

Integrity Staffing Solutions provides warehouse staffing to Amazon. The employees retrieve products from the warehouse and package them for delivery. In order to avoid theft of any items, the employees are required to undergo security screening before leaving the warehouse each day. The employees claimed that this process takes about 25 minutes per day. The U.S. Supreme Court held that an employee's time spent waiting to undergo and undergoing security screening before leaving the workplace does not qualify as an integral and indispensable part of the employee's principal activities and, therefore, is not compensable under the Fair Labor Standard Act (FLSA) and the Portal-to-Portal Act. Specifically, the Portal-to-Portal Act exempted employers from liability under FLSA for activities that are preliminary or postliminary to the principal activity or activities that the employee is employed to perform. The Court found the security check was not compensable because they could have been eliminated altogether and would not have impaired the employees' ability to do their work. *Integrity Staffing Solutions, Inc. v. Jesse Busk (2014)135 S.Ct. 513 (2014)*

ADMINISTRATOR'S INTERPRETATION RE: INDEPENDENT CONTRACTORS

The U.S. Department of Labor's Wage and Hour Division issued an Administrator's Interpretation (AI) regarding the misclassification of employees as independent contractors under the Fair Labor Standards Act (FLSA). The AI sets forth that the Wage and Hour Division sees most workers as employees, considering the FLSA's broad definitions. In order to determine whether an individual is an employee or an independent contractor, the "economic realities" need to be examined, specifically it must be determined "whether an individual is economically dependent on the [putative] employer (and thus an employee) or is really in business for him or herself (and thus is an independent contractor)." The AI further set forth the six-factor test to be used when determining status: (1) whether the work performed is integral to the employer's business; (2) whether the worker has an opportunity for profit and loss based on his/her skills; (3) the relative investments of the employer and the worker; (4) whether the work requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. No one factor is determinative. AI states that no weight will be given to the parties' understanding or agreement regarding the relationship.

2015 CASES - ARBITRATION

NLRB CONTINUES TO HOLD THAT CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS ARE UNLAWFUL

The National Labor Relations Board (Board) once again found that a provision of an arbitration agreement waiving employees' rights to bring a class action lawsuit violated the National Labor Relations Act (Act). This decision was issued despite the fact that the Fifth Circuit had previously overturned two prior Board decisions that came to the same conclusion. In particular, the Board found that the inclusion of class action waivers in arbitration agreements infringes upon an employee's protected right under the Act to engage in concerted activity.

In this decision, the Board went further than it had in its prior "class action waiver" rulings, finding unlawful even a voluntary waiver, where each employee could affirmatively opt out of the class action waiver portion of what was otherwise a mandatory arbitration agreement. The Board also found that the employer committed an additional violation when it moved to compel arbitration of wage and hour claims and ordered the employer to cease enforcement of the waiver and reimburse the employees' attorney's fees and costs, with interest.

It appears that the Board's strategy in continuing to rule that class action waivers are unlawful may be an attempt to obtain a contrary ruling on the issue in a different, and perhaps more favorable, federal appeals court, with a split among circuit courts increasing the likelihood that the matter will be eventually heard and decided by the Supreme Court. *Amex Card Service Co*., NLRB Case No. 28-CA-123865 (Nov. 10, 2015).

EMPLOYER WAIVED ITS RIGHT TO ARBITRATION BY PARTICIPATING IN DISCOVERY PROCESS

Brian Bower was employed by Inter-Con as an armed security officer from 2007 until he was terminated in 2011. At the start of his employment, he signed an arbitration agreement in which he agreed to submit all disputes with Inter-Con to arbitration, including claims for compensation and wages. In 2008, Bower signed a second arbitration agreement with Inter-Con that superseded the first. The second arbitration agreement was similar to the first agreement, but it also contained a clause where Bower agreed not to assert claims against Inter-Con on behalf of a class or in a representative capacity and specified that the parties agreed to arbitrate claims for breaks and rest periods. After his termination, Bower filed a putative class action against Inter-Con regarding meals, rest periods, and wages. Inter-Con filed an answer, but asserted that the claims were subject to arbitration. After propounding and responding to discovery, Inter-Con filed a motion to compel discovery, but the lower court denied the motion, finding that Inter-Con waived its right to arbitration by participating in the discovery process.

The appellate court affirmed the lower court's decision, holding that Inter-Con had waived its right to arbitration. The court explained that in order to prove a waiver of the right to arbitrate, Bower was required to demonstrate that Inter-Con was aware of its right to compel arbitration, acted inconsistently with that right, and prejudiced Bower as a result. The court found substantial evidence to support each of these elements. Inter-Con was clearly aware of its right to compel arbitration, as it asserted the right in its answer to Bower's complaint. In addition, Inter-Con

acted inconsistently with that right by propounding class-wide discovery and making an effort to settle class-wide claims. Doing so was inconsistent with Inter-Con's assertion that Bower was limited to pursuing individual claims. Finally, Inter-Con's actions prejudiced Bower because he was unable to obtain the cost-saving benefits of arbitration, as extensive class-wide discovery had already occurred. *Bower v. Inter-Con Security Systems,* 232 Cal.App.4th 1035 (2014).

CLASS ACTION WAIVER DOES NOT MAKE AN ARBITRATION AGREEMENT UNCONSCIONABLE ON ITS FACE

Plaintiff Sanchez filed a putative class action against defendant car dealer on a variety of claims, including a California Consumer Remedies Act claim based on purported false commercial representations related to his purchase of a used Mercedes Benz. Notably, this is not an employment case. The sales agreement signed by Sanchez had a class action waiver and an arbitration clause, and the defendant moved to compel arbitration. The court denied the motion to compel arbitration, holding the class waiver was unenforceable on the ground that the Consumer Remedies Act expressly provides for class action litigation and forbids class action waivers. After the trial court's ruling, the U.S. Supreme Court ruled on *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011) that the Federal Arbitration Act preempts state laws that prohibit class action waivers in consumer arbitration agreements. On appeal, the Court of Appeal upheld the trial court's denial of the motion to compel but focused only on the procedural and substantive unconscionability issues, rather than the *Concepcion* holding. The California Supreme Court reversed the Court of Appeal and acknowledged that "*Concepcion* requires enforcement of the class waiver, but does not limit the unconscionability rules applicable to other provisions of the arbitration agreement." The California Supreme Court held that the Court of Appeal erred in finding the agreement unconscionable since the agreement was not unreasonably one-sided. *Sanchez v. Valencia Holding Co., LLC,* 61 Cal.4th 899 (2015).

CLASS ACTION WAIVER IN ARBITRATION AGREEMENT MAY INVALIDATE AN ARBITRATION AGREEMENT IF PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE

Plaintiff Carlson sued her former employer for wrongful termination, harassment, breach of employment agreement, and other claims. Defendant employer moved to compel arbitration based on an arbitration policy and agreement Carlson signed during her employment. On her first day of employment, her employer provided her access to its "onboarding system," which contained the company policies, including provisions about arbitration. A dispute resolution policy was incorporated by reference into the agreement, but Carlson did not receive a copy of the policy. Carlson objected to signing the agreement in an email to the HR manager, because it did not contain the essential terms and because she felt it was too broad. The HR manager responded that she would provide a telephone number, and Carlson could call "in a couple weeks" to see if someone could give her a copy of the policy, but that Carlson must sign the agreement that day or her offer of employment would be withdrawn. Carlson signed the agreement. In addition, the agreement itself had a number of procedural hoops that stood as a barrier to dispute resolution. Namely, Carlson was required to: (1) request dispute resolution in writing and, within 90 days of her request, file a "demand for arbitration"; (2) meet with the company, without representation, in an attempt to resolve her disputes prior to arbitration; (3) split costs, fees, and expenses with the exception of civil rights claims; and (4) allow the

company to proceed with court action against Carlson for unfair or unlawful competition and misappropriation of trade secrets. Furthermore, the company was not required to follow pre-arbitration procedures. The court agreed with Carlson that the agreement was both procedurally and substantively unconscionable and, therefore, invalid and unenforceable. The court opined that the agreement lacked basic fairness and mutuality. While Carlson was required to arbitrate all of her employment claims (except claims filed with federal and state agencies), waive class action, and demand dispute resolution, the company was given access to the courts for its claims and not required to jump through procedural hurdles to do so. *Carlson v. Home Team Pest Defense*, 239 Cal.App.4th 619 (2015).

9TH CIRCUIT CONFIRMS THAT WAIVER OF PAGA CLAIMS IN ARBITRATION AGREEMENT IS NOT ENFORCEABLE

Plaintiff Sakkab was a former employee of Lenscrafters and filed a putative class action complaint against his employer for unlawful business practices, failure to pay overtime, failure to provide accurate wage statements, and failure to pay wages when due. Sakkab added a non-class, representative claim for civil penalties under the Private Attorney General Act (PAGA) with a first amended complaint. The employer filed a motion to compel arbitration, relying on a dispute resolution agreement contained in its "Retail Associate Guide," which provided: "You and the Company each agree that, no matter in what capacity, neither you nor the Company will (1) file (or join, participate or intervene in) against the other party any lawsuit or court case that relates in any way to your employment with the Company or (2) file (or join, participate or intervene in) a class-based lawsuit, court case or arbitration (including any collective or representative arbitration claim)." Sakkab signed an acknowledgment indicating he understood and agreed to the terms during his employment. In response to his employer's motion to compel arbitration, Sakkab argued that, although *Concepcion v. AT&T Corp.*, 131 S.Ct. 1740 (2011) provides that the class action waivers are enforceable pursuant to the preemption of state law by the Federal Arbitration Act, the PAGA claim could not be waived pursuant to the rule announced in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 349 (2014). The Court agreed. *Sakkab v. Luxottica Retail No. America, Inc.*, 803 F.3d 425 (9th Cir. 2015).

2015 CASES – HARASSMENT, RETALIATION AND DISCRIMINATION

FAILURE TO PREVENT HARASSMENT CLAIM FAILED WHERE THE JURY FOUND THERE WAS NO ILLEGAL HARASSMENT

The plaintiff was a massage therapist who sued her corporate spa employer alleging she had been subjected to harassing and discriminatory conduct by two customers. At trial, she presented to the jury claims arising out of the Fair Employment and Housing Act (FEHA) for sexual harassment, sex discrimination, racial harassment, retaliation, and failure to prevent harassment and discrimination based on both race and sex. The trial court refused the defendant's jury instruction, stating that the jury should only reach the "failure to prevent" claim if it first determined there was liability for harassment or discrimination in the first place. The jury found the plaintiff had been subjected to harassing conduct based on her sex, but that it was not "severe or pervasive" conduct, and thus there was no liability for harassment. However, based on such conduct, the jury found the defendant employer had failed to take reasonable steps necessary to prevent harassment or sex discrimination. The defendant appealed.

The court of appeals reversed, holding that it would be an anomaly to provide a remedy for failure to prevent acts that were not otherwise "unlawful" under FEHA. *Dickson v. Burke Williams, Inc.*, 234 Cal. App. 4th 1307 (2015)

EMPLOYEE'S RETALIATION CLAIM NOT SUBJECT TO EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIREMENT

Plaintiff Satyadi was hired as clinical laboratory director at the District's Doctor's Medical Center (DMC) in late 2010. She alleged in her "whistleblower" lawsuit (Lab. Code 1102.5) that, despite having initially received praise for her performance and evaluations stating she met standards, she was later fired in 2012 in retaliation for informing DMC's executive staff about lab operational practices she felt violated state and federal law. DMC held an administrative hearing regarding her proposed termination, which was upheld, and she was told there was no further appeals process. DMC demurred to the complaint, arguing that her claims were defective because she had never exhausted her administrative remedies by making a complaint with the Labor Commissioner (*See* Lab. Code 98.7(a)). The trial court sustained the demurrer without leave to amend.

On appeal, the court reversed, holding that amendments to the Labor Code while the appeal was pending did apply to her suit. These amendments, codified in Labor Code section 244(a) and 98.7(g), expressly eliminate a requirement that an individual exhaust administrative remedies with the Commissioner prior to bringing a civil suit. The court held these amendments were declaratory of existing law and thus did apply to the plaintiff's claims. *Satyadi v. West Contra Costa Healthcare Dist.*, 232 Cal. App. 4th 1022 (2014).

WHISTLEBLOWERS SUING UNDER LABOR CODE SECTION 6310 ARE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES

Touchstone Television Productions (Touchstone) hired actress Nicollette Sheridan to appear in the television series *Desperate Housewives,* a show created by Marc Cherry. Sheridan sued Touchstone under Labor Code section 6310, alleging that Touchstone fired her in retaliation for

complaining that Cherry battered her. Sheridan alleged that in a 2008 rehearsal, she attempted to question Cherry about a script and he struck her in response. She complained to Touchstone, and Touchstone did not renew Sheridan's contract for season six. The trial court sustained Touchstone's demurrer to the complaint without leave to amend on the basis that Sheridan failed to exhaust her administrative remedies under Labor Code section 989.7 pursuant to the then-recently decided case *MacDonald v. State of California* (2013) 161 Cal.Rptr.3d 520.

Shortly thereafter, the California Supreme Court ordered the *MacDonald* opinion depublished and, effective January 1, 2014, the legislature amended the Labor Code to specifically state that an individual is not required to exhaust administrative remedies unless the section under which the individual sues expressly requires exhaustion of administrative remedies. (See Labor Code § 244(a).) The legislature also amended Labor Code section 98.7 to state that there is no requirement that an individual exhaust administrative remedies prior to filing a claim for violation of Labor Code section 6310, even though Labor Code section 6312 permits employees to file complaints with the Labor Commissioner. (See Labor Code, § 98.7(g).)

Based on these new laws and the depublication of the *MacDonald* opinion, Sheridan filed a motion for new trial and a motion for reconsideration. The court denied the motion for new trial, but granted the motion for reconsideration and overruled Touchstone's demurrer. Touchstone filed a writ petition to the Court of Appeal, which resulted in the trial court vacating the order granting Sheridan's motion for reconsideration. Sheridan then appealed.

The Court of Appeal held that Sheridan was permitted, but not required, to exhaust her administrative remedies pursuant to the plain language of Labor Code sections 6312 and 98.7 that existed, even prior to the legislature's amendments. The amendments merely clarified what the statute already stated. *Sheridan v. Touchstone Television Productions, LLC* (2015) B254489.

TRIAL COURTS HAVE DISCRETION IN AWARDING ATTORNEYS' FEES AND COSTS TO PREVAILING FEHA PARTIES

Plaintiff Williams was a firefighter who sued the District for disability discrimination in violation of FEHA. The District successfully moved for summary judgment, then filed a memorandum of costs seeking cost recovery, and the plaintiff moved to tax such costs. The trial court granted the plaintiff's motion, in part, by reducing the cost amount sought, but refused to apply the standard from *Christianburg Garment Corp v. EEOC* (434 U.S. 412 (1978)), according to which a prevailing defendant may only receive its attorneys' fees if the plaintiff's action is objectively groundless. The plaintiff appealed, arguing that the operative statute is Government Code 12965(b), which makes the award of such costs discretionary, should be applied in conjunction with the *Christianburg* standard. The court of appeal affirmed, however, holding that the governing statute was Code of Civil Procedure section 1032(b), which allows a prevailing party its court costs as a matter of right.

The California Supreme Court reversed, holding that Government Code section 12965 governs cost awards in FEHA actions, allowing trial courts discretion in awards of both attorneys' fees and costs to prevailing FEHA parties. Further, the California high court held that the *Christianburg* rule constrains such discretion to preclude ordering a FEHA plaintiff to pay defendant's fees or costs absent a finding that the plaintiff filed or pursued the action without an

objective basis for believing it had merit. *Williams v. Chino Valley Indep. Fire Dist*., 61 Cal. 4th 97 (2015).

EMPLOYER LIABLE FOR FEHA CLAIMS MADE BY CONTRACTING PARTY'S EMPLOYEE

Kimberli Hirst was an employee of American Forensic Nurses, Inc. (AFN). AFN provides phlebotomy services for law enforcement agencies in need of blood samples drawn from suspects, such as for intoxication testing. Under a contract with San Diego County, AFN (and specifically Ms. Hirst) provided such services on an "on call" basis to various agencies in the county, including the Oceanside Police Department (OPD). OPD Officer Garcia subjected Hirst to a series of sexually harassing comments and behaviors, and, following her disclosure of his misconduct, to a further campaign of intimidating and harassing behavior. Garcia was fired by the City for his conduct, and Hirst later sued the City on a sexual harassment theory, alleging that the City was liable either (a) because Garcia was a supervisor, or (b) because the City knew or should have known about the harassment but failed to take immediate corrective action. The City argued it was not liable under the Fair Employment and Housing Act (FEHA) because (1) Hirst was not a City employee nor a "person providing services under a contract," (2) that Garcia's conduct was not severe or pervasive, (3) that Garcia was not Hirst's supervisor, and (4) that the City responded timely and appropriately upon learning of Garcia's actions. The jury found the City liable and awarded over $1 million in damages for past and future losses. Specifically, the jury answered "yes" to the special verdict question asking whether Hirst was "an employee of the City of Oceanside, a special employee of the City of Oceanside, or a person providing services under a contract." The jury also found that Garcia had been Hirst's supervisor. The City later appealed, arguing that Hirst had no standing to recover against the City under FEHA.

The appellate court affirmed, finding that Hirst was a "person providing services pursuant to a contract" as described in Government Code section 12940(j)(1). In a lengthy analysis of the legislative history, the court rejected the City's argument that AFN, rather than Hirst, was the party under contract, finding that the statute does not require the protected person to be the contracting party: "Hirst was a skilled worker whose work was in the nature of an independent contractor … and the City was concerned primarily with the results of the work. In performing the phlebotomist services, Hirst was required to work in the presence of City employees, and was frequently required to be in a locked booking room with a City police officer …." In other words, the contract worker category of FEHA plaintiff applies only to claims by a worker performing work *pursuant to a contract* with the harasser's employer, *and* requires the plaintiff prove the perpetrator was a supervisor *or* that the perpetrator's employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action. *Hirst v. City of Oceanside*, 236 Cal. App. 4th 774 (2015).

ACTUAL KNOWLEDGE OF RELIGION/NEED FOR ACCOMMODATION NOT REQUIRED TO FIND LIABILITY UNDER TITLE VII; IMPROPER MOTIVE IS SUFFICIENT

Samantha Elauf applied for a position with Abercrombie & Fitch and wore a headscarf to her interview. The interviewer (Heather Cooke) had seen Elauf wearing headscarves before and assumed (correctly) that Elauf was a practicing Muslim. Elauf made no mention of her religion,

nor requested any particular accommodation for it. Cooke, however, was concerned that Elauf's headscarf might violate Abercrombie's "Look Policy" governing employee dress. (Specifically, the Look Policy prohibits "caps" (an undefined term) as too informal for Abercrombie's desired image.) Cooke sought guidance from the store manager, but received no response. She then checked with the district manager, informing him that she believed Elauf wore the headscarf because of her faith. The manager told her the headscarf would violate the Look Policy, as would all headware − religious or otherwise -- and directed Cooke not to hire Elauf. The Equal Employment Opportunity Commission (EEOC) sued on Elauf's behalf, claiming Abercrombie's refusal to hire Elauf violated Title VII. The district court granted summary judgment for the EEOC, but the Tenth Circuit Court of Appeal reversed and awarded summary judgment for Abercrombie. It concluded that, ordinarily, an employer cannot be liable under Title VII for failing to accommodate a religious practice unless the applicant or employee provides actual knowledge of the need for accommodation.

The U.S. Supreme Court reversed, holding that "motive" and "knowledge" are distinct concepts, and only improper "motive" is needed to support a violation of Title VII: "[A] claim based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." A request for accommodation of a religious practice, or an employer's certainty that the religious practice exists, makes it easier to infer motive, but it is not a necessary condition of liability. Finally, the Look Policy's facial neutrality − precluding all headware − did not exempt Abercrombie from liability. Title VII gives favored treatment to religious practices, rather than demanding that religious practices be treated no worse than other practices. *EEOC v. Abercrombie & Fitch Stores, Inc.*, __ U.S. __, 135 S.Ct. 2028 (2015).

BONA FIDE OCCUPATIONAL QUALIFICATION JUSTIFIES FEMALE-ONLY CORRECTIONAL OFFICERS

In an effort to counter problems common to women's prisons, such as sexual abuse and misconduct by prison guards, breaches of inmate privacy, and security gaps, and after a comprehensive study, the Washington Department of Corrections designated a limited number of female-only correctional positions – specifically, 110 positions – to patrol housing units, prison grounds, and work sites in women's prisons. The prison guards' union, Teamsters Local No. 117, challenged the decision as to all but 50 of the female-only designations, claiming that the Department of Corrections' staffing policy discriminated against male correctional officers on the basis of sex in violation of Title VII of the Civil Rights Act of 1964. The district court granted summary judgment in favor of the Department of Corrections, finding that the staffing policy was justified as a bona fide occupational qualification to protect the privacy of inmates. The Teamsters appealed, and the Ninth Circuit Court of Appeals affirmed judgment in favor of the Department of Corrections.

The Court of Appeals explained that Title VII prohibits employment practices that discriminate on the basis of race, color, religion, sex, or national origin. However, a facially discriminatory employment practice, such as the sex-based hiring at issue, will not be illegal if it is based on a bona fide occupational qualification reasonably necessary to the normal operation of a business. This exception is applied narrowly to special situations where employment discrimination is based on "objective, verifiable requirements" that "concern job-related skills and aptitudes." The

bona fide occupational qualification exception applies only when an employer can show, by a preponderance of the evidence, that (1) the job qualification justifying the discrimination is reasonably necessary to the essence of the business, and (2) that sex is a legitimate proxy for determining where the employee has the necessary job qualifications. The Court noted that the unique context of prison employment is one area where sex-based classifications have been found to be justified.

Applying those standards, the Court of Appeals concluded that the Department of Corrections' individualized, well-researched decision to designate discrete sex-based correctional officer categories was justified because sex was a bona fide occupational qualification reasonably necessary to the normal operation of the women's prisons. The Court stated that the Department was well-justified in concluding that rampant abuse should not be an accepted part of prison life and taking steps to protect the welfare of female inmates under its care. *Teamsters Local Union No. 117 v. Wash. Dep't of Corr.* (9th Cir. 2015) 789 F.3d 979.

TERMINATED PUBLIC EMPLOYEE'S INTERNAL GRIEVANCE NOT PROTECTED SPEECH UNDER FIRST AMENDMENT

Peter Turner applied for a permanent position with the San Francisco Department of Public Works and was eventually hired. On the day that he started work, however, Turner was informed that he had been hired as a "temporary exempt employee" rather than as a permanent civil service employee, despite the fact that he had interviewed and been tested for a permanent position. Turner made statements to his supervisors and to Human Resources, alleging that the hiring practice was part of a scheme by the City and the manager of the Department of Public Works to subvert the City's charter, which authorized the hiring of temporary employees only for special projects or professional services with limited funding. Turner claimed that he was subsequently assigned tasks for the purpose of punishing him, that his attempts at promotion were blocked, and that he was eventually terminated. Turner filed a lawsuit alleging, among other claims, that he was subjected to retaliation in violation of the First Amendment for engaging in protected speech. The district court granted the City's motion to dismiss Turner's complaint, and Turner appealed.

The Court of Appeals for the Ninth Circuit affirmed the dismissal. The Court held that Turner's complaints, while potentially significant in their implication, arose primarily out of concerns for his own professional advancement and his dissatisfaction with his status as a temporary employee. The Court noted that Turner voiced his grievances internally, at union meetings, to his supervisor, and to Human Resources, and they were specifically related to the conditions of his employment, rather than to a matter of public concern. Accordingly, the Court concluded that Turner did not engage in protected speech under the First Amendment when he complained to his supervisors about the City's hiring and use of temporary exempt employees. *Turner v. City and County of San Francisco* (9th Cir. 2015) 788 F.3d 1206.

COURT CLARIFIES ANTI-RETALIATION RULE UNDER LABOR CODE SECTION 1102.5(B)

Rosa Lee Cardenas worked as a dental hygienist in the dental office of M. Fanaian, D.D.S., Inc. Cardenas always wore an expensive ring that had been given to her by her husband as an

anniversary gift. At the beginning of each workday, she had a practice of placing the ring in the blouse pocket of her scrubs. When the ring was not in her scrubs at the end of one work day and could not be found anywhere in the office, Cardenas reported to the Reedley Police Department that a coworker may have stolen her ring. The police went to Dr. Fanaian's office on two occasions to question office personnel. After the second occasion, Dr. Fanaian told Cardenas that the situation was causing great tension and discomfort among the staff, and that he was going to have to let her go. Cardenas sued Dr. Fanaian, seeking to recover compensatory damages based on two distinct causes of action: (1) retaliation in violation of Labor Code section 1102.5 (forbidding employers from retaliating against employees who report violations of law to a law enforcement agency); and (2) wrongful termination in violation of public policy under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167. The jury found in favor of Cardenas on both causes of action and awarded her $117,768 in damages. Dr. Fanaian appealed.

Dr. Fanaian argued that filing a police report accusing a coworker of theft of personal property is not protected activity under Labor Code section 1102.5 because the reported activity did not concern any alleged wrongdoing by the employer, and because the real reason Cardenas filed a police report was to serve her private interest, not a public purpose.

The Court of Appeal agreed with Cardenas and affirmed judgment in her favor. The Court explained that the plain and unambiguous language of section 1102.5(b) creates a cause of action for damages against an employer who retaliates against an employee for reporting to law enforcement a theft of her property at the workplace. Nothing in the statute requires a finding that the reported alleged illegal activity concerned a matter of public interest, as opposed to the personal interest of the employee, or that the reported activity must relate to employment practices or business operations. Thus, Cardenas was only required to establish that she reported the alleged theft to a governmental agency, and that her employment was terminated as a result thereof. *Cardenas v. M. Fanaian, D.D.S., Inc.* (2015) 240 Cal. App. 4th 1167.

NINTH CIRCUIT REVERSES SUMMARY JUDGMENT IN AGE DISCRIMINATION LAWSUIT BECAUSE THERE WAS AN ISSUE OF MATERIAL FACT AS TO WHETHER THE EMPLOYER'S LEGITIMATE BUSINESS REASONS FOR NOT PROMOTING THE 54-YEAR OLD PLAINTIFF WERE PRETEXTUAL

The Tucson Sector of Border Patrol created four new positions, and 24 eligible candidates applied. At age 54, Plaintiff John France, a border patrol agent assigned to the Tucson Sector of Border Patrol, was the oldest applicant for the promotion. France was not selected for the promotion and sued his employer, the United States Department of Homeland Security ("the Department"), for violation of the Age Discrimination in Employment Act ("ADEA") in federal court. The Department filed a motion for summary judgment, which the district court granted.

France appealed to the Ninth Circuit, which reversed the district court's grant of summary judgment. The Ninth Circuit held that France established a prima facie case of age discrimination. The Ninth Circuit adopted the Seventh circuit's approach, which held that an age difference of less than ten years between the plaintiff and the replacements creates a rebuttable presumption that the age difference was insubstantial. Nonetheless, the Ninth Circuit concluded that even though France was less than ten years older than his replacements, he established a prima facie case of age discrimination by showing that the Department considered age in general

to be significant in making its promotion decisions, and that the chief patrol agent considered France's age specifically to be pertinent in considering France's promotion.

The Ninth Circuit agreed with the district court's conclusion that the Department proffered legitimate, non-discriminatory business reasons for not selecting France for the promotion, namely that he was not qualified for the position. However, the Ninth Circuit held that there was a genuine dispute of material fact as to whether the Department's nondiscriminatory reasons were pretextual. Despite the fact that the chief patrol agent was not the final decisionmaker, there was a genuine issue of fact as to whether he influenced, or was involved in, the hiring decisions. Furthermore, the Ninth Circuit held that the district court erred in finding that the chief patrol agent had a limited role in the decision-making process. Finally, the Ninth Circuit held that the district court erred in not considering the chief patrol agent's retirement discussions with France in assessing whether the articulated nondiscriminatory reasons were pretextual. Accordingly, the Ninth Circuit reversed and remanded to the district court. *France v. Jeh Johnson* (9th Cir. 2015) 2015 U.S. App. LEXIS 17915.

THE CONTINUING VIOLATION DOCTRINE DID NOT APPLY, REMOVING EVENTS PRIOR TO THE STATUTE OF LIMITATIONS FROM CONSIDERATION, AND RESULTED IN REVERSAL

Plaintiff Jabari Jumaane worked for Defendant City of Los Angeles Fire Department. He sued in 2003, alleging racial discrimination, racial harassment, and retaliation. At trial, the jury found for Jumaane on the causes of action for disparate impact race discrimination, race harassment, retaliation for complaining about discrimination and harassment, and failure to prevent discrimination, harassment, or retaliation. The jury found for the City on the disparate treatment of race discrimination. The City moved for a judgment, notwithstanding the verdict, based on the City's statute of limitations defense, arguing that the evidence of events within the statute of limitations was not part of a continuing violation of the Fair Employment and Housing Act (FEHA). The trial court denied the motion, and the City ultimately appealed.

The Court of Appeal found that Jumaane filed his Department of Fair Employment and Housing (DFEH) complaint on April 16, 2002, alleging that suspensions in June 1999 and April 2001 were discriminatory, retaliatory, and harassing based on race. Jumaane argued that although the June 1999 suspension fell outside the one-year statute of limitations, it constituted a "continuing violation" of his rights and should be considered. The Court of Appeal held that the continuing violation doctrine did not apply because Jumaane failed to establish that the conduct of which he complained had not yet become permanent. Rather, the reasonable inference was that by his 1999 suspension, the conduct was permanent, and that further efforts to end the harassment and retaliation would be in vein. Therefore, he was required to file a DFEH claim within one year of that time. All the conduct that occurred prior to June 1999 was barred by the statute of limitations.

With that conduct beyond the scope of consideration, the Court of Appeal found that there was no substantial evidence to support a claim of disparate impact race discrimination, race harassment, or retaliation, and Jumaane's claims for failure to prevent also failed. The Court of Appeal reversed the judgment and remanded for entry of judgment in favor of the City. *Jumaane v. City of Los Angeles* (2015) 2015 Cal. App. LEXIS 1000.

EEOC PARTLY SUCCESSFUL IN SUBPOENA ENFORCEMENT ACTION AGAINST EMPLOYER FOR NOT PRODUCING RECORDS RELEVANT TO DISCRIMINATION INVESTIGATION

The United States Equal Employment Opportunity Commission ("EEOC") filed a subpoena enforcement action against McLane Company ("McLane") related to an investigation of a charge of sex discrimination filed by a former employee of McLane. The former employee was terminated when she failed to pass a strength test after returning from maternity leave. The subpoena sought information regarding McLane's use of the strength test and the individuals who had been required to take it. The district court held that some of the information sought by the subpoena was not relevant to the EEOC's investigation and, therefore, refused to enforce that portion of the subpoena. The EEOC appealed to the Ninth Circuit.

The Ninth Circuit reversed in part and vacated in part the district court's order. The Ninth Circuit held that the district court erred in refusing to compel production of pedigree information (name, social security number, last known address, and telephone number) of other applicants and employees who took a qualifying test because such information was relevant to the EEOC's investigation. The Ninth Circuit also vacated the district court's order denying enforcement of the subpoena's request for the reasons for termination for those employees who were terminated after taking the test, and remanded so that the district court could rule on whether requiring the employer to produce that information would in fact be unduly burdensome. *U.S. Equal Employment Opportunity Commission v. McLane Company, Inc.* (9th Cir. 2015) 804 F.3d 1051.

2015 CASES – DISABILITY/FAMILY MEDICAL LEAVE

EMPLOYEE'S INABILITY TO WORK FOR A PARTICULAR SUPERVISOR DOES NOT CONSTITUTE A DISABILITY

Michaelin Higgins-Williams was employed as a clinical assistant with Sutter Health Medical Foundation. In July 2010, Higgins-Williams reported to her treating physician that she was stressed because of interactions she had at work with Human Resources and her manager. Higgins-Williams' physician diagnosed her with "adjustment disorder with anxiety," and Sutter granted her stress-related CFRA and FMLA leave for just over 30 days. When Higgins-Williams returned from leave, she received a negative performance evaluation from her supervisor. She also had additional conflicts with her manager, including an incident during which Higgins-Williams allegedly suffered a panic attack after her manager grabbed her arm and yelled at her. Thereafter, Higgins-Williams requested a disability accommodation in the form of a transfer to a different department and additional leaves of absence. Higgins-Williams was absent for over a year, and Sutter informed Higgins-Williams that she would be terminated, unless she provided information as to when she would be able to return to her clinical assistant position. Higgins-Williams did not provide the requested information, and Sutter terminated her employment.

Higgins-Williams sued, claiming that Sutter wrongfully terminated her and discriminated against her on the basis of her disability: adjustment disorder with anxiety. The trial court granted Sutter's motion for summary judgment, finding that Higgins-Williams could not show that she suffered from an FEHA-recognized disability, and, therefore, Sutter did not discriminate against her. The appellate court affirmed the trial court's decision, explaining that "an employee's inability to work under a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of the employee's job performance does not constitute a disability." Although an inability to perform a particular type of job may constitute a disability, the ability to work for a particular person does not. In addition, because Higgins-Williams failed to inform Sutter when she could return to work, if at all, her wrongful termination claim also failed. *Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78.

AN INDIVIDUAL WHO THREATENS VIOLENCE AGAINST COWORKERS IS NOT A QUALIFIED INDIVIDUAL UNDER THE ADA

Timothy Mayo welded aircraft parts for PCC Structurals. Although he had been diagnosed with major depressive disorder, a combination of medication and treatment allowed him to work without incident for many years, until he began having issues with a supervisor. After complaining to a company hotline and attending a meeting about the supervisor's behavior, Mayo made threatening comments to his coworkers, stating that he felt like coming to work with a gun and "blowing off" the heads of the supervisor and other managers, and that he was going to "take out" the management. Mayo's coworkers reported these threats to the management, who then suspended Mayo and notified the police. When the police contacted Mayo about the threats, Mayo admitted to making them and stated that he owned several guns. Mayo voluntarily committed himself to the hospital, then took a two-month leave under the FMLA and Oregon's equivalent law. Once Mayo was cleared to return to work, PCC Structurals terminated him. Mayo sued, claiming that PCC Structurals wrongfully terminated him on the basis of his disability under the ADA and Oregon state law.

In order to establish a discrimination claim, a plaintiff must show that: (1) he is disabled; (2) he is otherwise qualified to do the job with or without a reasonable accommodation; and (3) he suffered an adverse employment action because of his disability. The district court concluded that Mayo was not an "otherwise qualified individual," so he could not establish a discrimination claim. The Ninth Circuit affirmed. It held that, assuming Mayo is disabled, he could not show that he was qualified for his position at the time of his discharge. The court explained, "An essential function of almost every job is the ability to appropriately handle stress and interact with others. And while an employee can be qualified despite adverse reactions stress, he is not qualified when that stress leads him to threaten to kill his coworkers in chilling details on multiple occasions." Neither the ADA nor Oregon state law requires an employer to retain a potentially violent employee. As such, PCC Structurals' decision to terminate Mayo was lawful. *Mayo v. PCC Structurals* (9th Cir. 2015) 795 F.3d 941.

EMPLOYER NEED NOT ACCOMMODATE AN EMPLOYEE BY REMOVING AN ESSENTIAL JOB FUNCTION NOR ASSIGNING THE EMPLOYEE TO A POSITION FOR WHICH HE IS UNQUALIFIED

Tony Nealy worked for the City of Santa Monica as a solid waste equipment operator. In 2003, Nealy injured his right knee when his foot slipped as he was moving a large bin full of food waste. Nealy's treating physician declared him temporarily totally disabled. However, after two surgeries, Nealy's physician released him to light duty work with lifting restrictions. After an accommodations meeting, the City transferred Nealy to a new position as a groundskeeper, but Nealy had trouble performing some of his duties and injured his lower back while operating a tractor. After another disability leave, Nealy and the City met again, but the City determined that it was unable to provide Nealy with a reasonable accommodation into an alternative position, because he was not qualified for any vacant positions. Nealy sued, claiming that the City failed to provide a reasonable accommodation, failed to engage in the interactive process, and discriminated and retaliated against him. The trial court granted the City's motion for summary judgment.

The court of appeal affirmed the trial court's decision in the City's favor. The court first struck down Nealy's reasonable accommodation claim. It explained that FEHA does not require an employer to accommodate an employee by excusing him or her from performing the essential functions of a job. Although job restructuring or alteration of how an essential function is performed, may be reasonable, elimination of an essential job function is not. In this case, restructuring Nealy's job to eliminate heavy lifting and accommodate his disability would have eliminated an essential function of the job. In addition, FEHA does not require an employer to reassign an employee if there is no vacant position for which the employee is qualified. Moreover, the employer need not wait for a vacant position to arise or provide an employee indefinite leave to wait for a possible future vacancy. The court then struck down Nealy's interactive process claim and held that the City did not fail to engage in the interactive process, because Nealy was unable to identify a reasonable accommodation.

Finally, Nealy's discrimination and retaliation claims failed, because he could not show that he was discriminated against nor that he engaged in a protected activity. The court held that Nealy's exercise of his right to request a reasonable accommodation is not an activity protected under FEHA. The court reasoned that in order to qualify as a protected activity, the activity must

demonstrate "some degree of opposition to or protest of unlawful conduct by the employer." Without more, requesting a reasonable accommodation or engaging in the interactive process is not sufficient. *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359.

ASSIGNING A TEACHER TO A DIFFERENT GRADE WITHOUT DISCUSSING OTHER ACCOMMODATIONS IS UNREASONABLE UNDER FEHA

Lauralyn Swanson was employed as a teacher at Morongo Unified School District. In 2007, Swanson was diagnosed with breast cancer and underwent radiation and a mastectomy. After missing much of the school year, her supervisor gave her a positive review, but for the next year offered her only a position teaching kindergarten , which she had not taught in over thirty years. In addition, Swanson was afraid that being around the young children would be harmful to her weakened immune system. After taking a medical leave of absence for pancreatitis, pneumonia, and liver issues she developed shortly after starting her kindergarten teaching assignment, Swanson received a negative evaluation, and the District's Board of Education voted not to renew Swanson's contract for the 2009–2010 school year. Swanson sued, claiming discrimination based on medical condition and physical disability, failure to engage in the interactive process, and denial of reasonable accommodation.

The court of appeal reversed the trial court's decision granting the District's motion for summary judgment. First, the court held that a triable issue of fact existed as to Swanson's discrimination claims. Once Swanson informed the District of her breast cancer and subsequently taking medical leave to receive treatment, the District may have set her up for failure by giving her difficult assignments without the resources required to succeed, so the District could later use Swanson's performance as a pretext for its decision not to renew her contract. The court further held that a triable issue of fact existed as to Swanson's reasonable accommodation claims. The District refused Swanson's request to teach an available second grade class, which would likely have been a reasonable accommodation that would have allowed her to perform her essential job functions, because she recently taught a second grade class in another district and, therefore, was familiar with the curriculum and children of that age, and the District presented no evidence that the position was not available. Finally, the court held that a triable issue existed as to Swanson's interactive process claim. The District offered no evidence to show that it engaged in an ongoing dialogue with Swanson regarding her disability and medical conditions. The District also did not show that it discussed with Swanson the second grade assignment nor provided any explanation why it could not grant her request as a reasonable accommodation. *Swanson v. Morongo Unified School District* (2014) 232 Cal.App.4th 954.

STATUS OF THE "HONEST BELIEF" DEFENSE REMAINS UNSETTLED IN CALIFORNIA EMPLOYMENT LAW

Avery Richey was an at-will employee for Power Toyota Cerritos. When he was hired, Toyota gave Richey an employee manual that included a policy prohibiting employees from engaging in outside employment while on medical leave. Richey also signed an arbitration agreement requiring any employment-related dispute to be settled by binding arbitration. In late 2007, while still working full-time for Toyota, Richey began work on plans to open a seafood restaurant. A few months later, Richey opened the restaurant. Richey's supervisors, concerned that the restaurant was distracting him, met with Richey to discuss performance and attendance issues.

Then, in early 2008, Richey injured his back while moving furniture at his home. Richey requested, and Toyota granted, medical leave under the CFRA and FMLA. Richey continued to operate and work at his restaurant during his medical leave. One of his supervisors sent him a letter reminding him that company policy prohibited employees from pursuing outside employment. Richey ignored the letter, never called anyone at Toyota, and never explained why his restaurant-related activity was consistent with his medical leave. Toyota terminated Richey's employment in May 2008 for violating company policy.

Richey sued Toyota for a variety of employment-related claims, including retaliation for taking approved leave and failure to reinstate following CFRA leave. The trial court granted Toyota's motion to compel arbitration pursuant to the arbitration agreement. After a hearing, the arbitrator rejected each of Richey's claims, finding that Toyota had an "honest belief" that Richey was abusing his medical leave and was not telling the company the truth about his outside employment. The superior court upheld the arbitration award, but the appellate court disagreed. The California Supreme Court reversed the court of appeal's decision and upheld the arbitration award in Toyota's favor. First, the court ruled that even in the absence of an express agreement between parties, courts may review an arbitration award involving an employee's unwaivable statutory right or an employer's written policy forbidding outside employment while on leave.

The court then went on to review the arbitrator's award for prejudicial error. Richey argued that the arbitrator violated his right to reinstatement when the arbitrator adopted Toyota's "honest belief" defense, which provides a defense to an employer who honestly but mistakenly relies on a nondiscriminatory reason for making its challenged employment decision. The supreme court, however, declined to decide whether the "honest belief" defense is viable in California employment law. The court reasoned that, even if the arbitrator did err in adopting the "honest belief" defense, Richey failed to show that the error was prejudicial. The arbitrator's award could be upheld on the basis that Toyota terminated Richey for blatantly ignoring his superior's instructions not to work at his restaurant while on CFRA leave, a clear violation of company policy. Therefore, Richey would have lost his case even if the arbitrator had not applied the "honest belief" defense. As such, whether the "honest belief" defense applies when an employer terminates an employee based on a reasonable belief that the employee is violating company policy while on CFRA or FMLA leave is an unsettled question of law. *Richey v. Auto Nation, Inc*. (2015) 60 Cal.4th 909.

THE *MCDONNELL DOUGLAS* BURDEN-SHIFTING FRAMEWORK APPLIES TO CLAIMS OF PREGNANCY DISCRIMINATION: PREGNANT WORKERS MUST BE TREATED CONSISTENTLY WITH "SIMILARLY SITUATED" WORKERS

Peggy Young was employed as a part-time driver for the United Parcel Service (UPS). In 2006, Young became pregnant, and her doctors restricted her from lifting more than twenty pounds. UPS, however, required all drivers like Young to lift up to 70 pounds. UPS told Young that it could not accommodate her lifting restriction and placed her on a leave of absence. Young remained on unpaid leave for most of her pregnancy, and she eventually lost her employee medical coverage. Young then sued UPS for pregnancy discrimination and failure to accommodate under federal law, including the Pregnancy Discrimination Act. Young contended that UPS had accommodated workers who were injured on the job, had ADA-related disabilities, or had lost Department of Transportation certifications. Some of those individuals had lifting

restrictions, which were accommodated with light duty, whereas she was simply placed on unpaid leave. UPS took the position that those other workers were not "similarly situated" because they were not pregnant. UPS also argued that it had no obligation to offer her an accommodation under the ADA, because her pregnancy did not qualify as a disability. The District Court granted UPS' motion, concluding that Young could not make out a prima facie case of discrimination, because those who were treated more favorably were not similarly situated.

The U.S. Supreme Court reversed and held that Young could make out a prima facie case under the *McDonnell Douglas* framework by showing that she belongs to a protected class, that she sought accommodation, that UPS did not accommodate her, and that UPS did accommodate others "similar in their ability or inability to work." UPS may then seek to justify its refusal to accommodate her by relying on "legitimate, nondiscriminatory" reasons for denying accommodation. To avoid summary judgment, Young must show that the employer's reason is pretextual, which here would be satisfied with evidence that UPS accommodated a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers. In the Supreme Court's view, UPS' three separate accommodation policies for non-pregnant workers (i.e., on-the-job, ADA, and DOT) collectively demonstrate a genuine dispute as to whether UPS provided more favorable treatment to some categories of employees in similar circumstances. The case was remanded to the District Court to determine whether Young could establish pretext. *Young v. UPS* (2015) 135 S.Ct. 1338.

TERMINATION AFTER EMAIL COMPLAINT MAY BE DISABILITY RETALIATION

Carol Furtado was employed as a sales representative for RSC Equipment Rentals. After taking a two-month medical leave for uterine fibroids and anxiety, RSC transferred Furtado to a different branch. Thereafter, Furtado's doctor signed multiple notes extending her medical leave, writing that Furtado had a "continued disability" and was "medically excused" from work. When Furtado gave these notes to RSC's leave administrator, however, the administrator told her that the notes were insufficient to support her request for leave as a reasonable accommodation for her alleged disability and requested additional medical records. Furtado emailed her manager complaining about the demand for additional documentation and then submitted her medical records. The leave administrator granted Furtado's request for leave, but found that the medical records only supported leave through December 2011, not February 2012, as Furtado requested. When Furtado failed to return to work in February, RSC terminated her employment. Furtado sued, alleging, among other causes of action, that RSC retaliated against her for asserting her rights under the state disability law.

RSC's successor in interest, United Rentals, Inc., moved for summary judgment. The District Court for the Northern District of California denied United Rentals' motion, holding that a jury could reasonably find that RSC unlawfully retaliated against Furtado. The court held that Furtado had engaged in protected activity by sending her email, because the email was not a mere request for a reasonable accommodation; it was also a complaint about United Rentals' request for medical documentation and an assertion of her state law rights. United Rentals argued that Furtado's email did not contribute to her termination, because she sent it to her manager, when it was actually the company's leave administrator who determined that she was ineligible for leave. However, the termination was made by Furtado's manager, not the leave administrator. Further,

the court found that United Rentals did not offer a legitimate reason for firing Furtado. The fact that Furtado was fired three months after she sent the complaining email could show a retaliatory motive. *Furtado v. United Rentals, Inc.* (N.D. Cal. 2015) 2015 U.S. Dist. LEXIS 161085.

DEPARTMENT OF LABOR ISSUES RULE REVISING THE REGULATORY DEFINITION OF "SPOUSE"

On February 25, 2015, the federal Department of Labor issued a Final Rule revising the regulatory definition of "spouse" under the federal Family and Medical Leave Act (FMLA). Under the revised definition, the term "spouse" means a husband or wife and "refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the state in which the marriage was entered into," 29 C.F.R. § 825.102. This change provides all legally married employees – including same sex marriages – with consistent FMLA leave rights, regardless of their state of residence. This moves from a "state of residence" rule to a "place of celebration" rule, which allows all legally married couples (whether opposite-sex or same-sex) to have consistent federal family leave rights. The Final Rule took effect on March 27, 2015. This Final Rule is an effort to implement the decision of the U.S. Supreme Court in *United States v. Windsor* (2013) 133 S.Ct. 2675, which held unconstitutional section 3 of the federal Defense of Marriage Act. In California, pursuant to section 297.5 of the California Family Code, leave rights under the California Family Rights Act already extend to same-sex registered domestic partners.

2015 CASES – PUBLIC AGENCY

CALIFORNIA SUPREME COURT TO REVIEW THE STATUS OF PERSONAL EMAILS CONCERNING PUBLIC BUSINESS

The status of personal emails concerning public business is unsettled. In 2014, the court of appeal denied a public records request for emails and text messages public officials sent or received on their personal electronic devices regarding the City of San Jose's downtown redevelopment plans. The court held that the messages did not constitute public records because they were not prepared, owned, used, or retained by the City. Although messages from the personal devices concerned public business, the City had no control over the servers or access to the messages. Review of this case is currently pending in the California Supreme Court. *City of San Jose v. Superior Court* (2014) 225 Cal.App.4th 75, *review granted, depublished by City of San Jose v. Superior Court* (2014) 173 Cal.Rptr.3d 46.

NINTH CIRCUIT HOLDS THAT LOADING AND TRANSFERRING FIRE GEAR IS NOT A COMPENSABLE ACTIVITY UNDER THE FLSA

Firefighters, as part of their uniform, wear heavy protective gear that they may store at the fire station or at their home, although most firefighters prefer to store their gear at the station. The firefighters generally work two consecutive 24-hour shifts, beginning and ending at 8AM, followed by 96 hours off duty. When firefighters volunteer to work an overtime shift in a fire station other than their home station, they are often paid overtime, as they volunteer after they have already performed their home station shift. The firefighter gets paid when he reports at the beginning of the shift at the visiting station with his gear. If he leaves his gear at his home station, the time spent stopping at the station to retrieve his gear is not compensated. The firefighters sued the Menlo Park Fire Protection District, claiming the District's failure to pay overtime for taking gear to temporary duty stations violates the Fair Labor Standards Act (FLSA).

The Ninth Circuit affirmed the trial court's judgment in the District's favor. The court explained that under the FLSA, employees are not required to be compensated for activities that are "preliminary" and "postliminary" to the principal activities the employee is required to perform. The fact that the activity may be beneficial to the employer is insufficient on its own. Here, the court determined that loading up gear is too far removed from the firefighters' principal duty to fight fires and protect the public and is thus not compensable. The court reasoned that driving to the home station first is not "indispensable" to the firefighters' principal activities, because if the firefighter takes his gear home, he can begin his visiting station shift without ever having to stop by the home station. The court explained that "most work requires people to do some things before they start that they would not do otherwise, even though they do not get paid for them." *Balestrieri v. Menlo Park Fire Protection District* (9th Cir. 2015) 800 F.3d 1094.

NINTH CIRCUIT HOLDS THAT PROSECUTOR DID NOT ACT UNDER COLOR OF STATE LAW THROUGH HIS PERSONAL TWEETS AND BLOG POSTS

John Patrick Frey, a Los Angeles County Deputy District Attorney, blogs and tweets online about his conservative politics, liberal media bias, and criminal law, frequently referencing his

position as a D.A. Frey wrote multiple articles online about Nadia Naffe, a political activist, calling her a liar and posting about 200 pages of her deposition transcript from a different lawsuit, which contained personal information, including her address and social security number. Naffe filed seven claims against Frey in federal court, including that he acted under color of state law in his harassment of Naffe. The district court dismissed the case, finding that Frey was not acting under color of state law.

The Ninth Circuit affirmed the trial court's decision. The court explained that a defendant acts under color of state law when he abuses the power given to him by the state, either while he is on duty or while off duty, but exercising his responsibilities pursuant to state law. Frey posted while off duty, and Naffe did not produce any evidence that the County encouraged or authorized Frey's commentary. In fact, Frey's Twitter page and blog both contained disclaimers that all posts were on Frey's personal behalf, not his employer's. The fact that Naffe knew Frey was a prosecutor -- and Frey often posted about being a prosecutor, -- did not make the posts rise to the level of state action. *Naffe v. Frey and County of Los Angeles* (9th Cir. 2015) 789 F.3d 1030.

INDIVIDUAL COMPLAINTS AND GRIEVANCES ARE NOT MATTERS OF PUBLIC CONCERN UNDER THE FIRST AMENDMENT

Peter Turner was employed as a survey assistant for the San Francisco Department of Public Works. Although Turner was interviewed for a permanent position, he was informed on his first day of work that he was actually classified as a temporary exempt employee. Turner felt that he was being treated unfairly as a temporary exempt employee, and he began speaking out against the practice of using temporary exempt employees "in violation of civil service rules" at staff meetings, union meetings, and face-to-face meetings with Department officials. Shortly thereafter, Turner was called to a meeting with Human Resources and subsequently terminated. Turner sued, alleging that the Department retaliated against him for engaging in protected speech. The district court ruled against Turner, finding that he failed to show that his speech was protected.

The Ninth Circuit affirmed the district court's decision. In order to show that speech is protected, a public employee must demonstrate that he or she spoke as a citizen on a matter of public concern. The court reasoned that although Turner's speech could partially relate to the public concern about compliance with the City Charter, his complaints were focused and driven by his personal complaints, including concerns for his own professional advancement and his dissatisfaction with his status as a temporary employee. Moreover, the fact that Turner only voiced his grievances internally and failed to pursue a public forum for his speech weighed against his claim that his speech was on a matter of public concern. As such, Turner could not succeed his retaliation claim, because he had not engaged in a protected activity. *Turner v. City & County of San Francisco* (9th Cir. 2015) 788 F.3d 1206.

SUPERVISOR'S PERSONAL NOTES ABOUT AN EMPLOYEE ARE NOT PART OF THE EMPLOYEE'S PERSONNEL FILE

Captain Culp, firefighter Steve Poole's supervisor, maintained a daily log with his thoughts and observations about employees. Culp maintained a separate file for each firefighter and included personal notes about incidents that occurred during work in his daily logs that would help him in

writing each employee's annual review. After receiving some negative comments at his annual review, Poole's union representative requested a copy of Poole's file. Culp provided the representative with the daily log, which included details about specific incidents where Poole failed to clean the stationhouse and left early from a training to make a phone call. Poole complained to Human Resources that because he did not have an opportunity to review the negative comments, those comments must be removed from his file. HR denied the request, and Pooled sued.

The court of appeal reversed, but the California Supreme Court affirmed the trial court's decision. Under section 3255 of the Firefighters Procedural Bill of Rights Act (FPBRA), a firefighter has the right to review and respond to any negative comment entered into his or her personnel file or any other file used for personnel purposes, by his or her employer. The court noted that FPBRA does not define "used for any personnel purposes" and refused to hold that the phrase was broad enough to cover the supervisor's daily log, because the supervisor did not share the log or make it available to anyone else. The court interpreted section 2335 to describe any record that can be used to make decisions about promotion, discipline, or compensation. The supervisor's log did not fall within that definition because the supervisor used the notes for his own personal memory retention. *Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378.

A SHERIFF'S DEPARTMENT CAN DISCHARGE A DEPUTY SHERIFF FOR MISCONDUCT COMMITTED WHILE ON UNPAID, RELIEVED-OF-DUTY STATUS

Thomas Negron had been employed as a deputy sheriff with the Los Angeles County Sheriff's Department for eight years when he and his wife entered contentious divorce proceedings, causing Negron to experience stress, anxiety attacks, and other physical symptoms that caused him to miss work. Negron took a paid medical leave of absence, until the Sheriff's Department determined that Negron's anxiety problems were not work-related and relieved him of duty in late 2010. After being relieved from duty, Negron was arrested after being pulled over for driving erratically and was uncooperative with the officer's requests. Negron's blood alcohol level was at 0.20, and he pleaded guilty to driving under the influence. Negron was also caught driving with a suspended license. Following these events, the Sheriff's Department terminated Negron's employment. Negron sued, arguing that the Sheriff's Department lacked authority to discipline him for his conduct, because it occurred while Negron was on relieved-of-duty status and not receiving pay.

After an administrative appeal, the trial court ordered the Sheriff's Department to reconsider Negron's discharge. The court of appeal reversed, holding that the Sheriff's Department did have the authority to discharge Negron for the misconduct committed while he was on unpaid, relieved-of-duty status. Until Negron was discharged, he was still an employee of the County, and he presented himself as such while on relieved-of-duty status. Negron's conduct reflected adversely upon and was a discredit to the Sheriff's Department. As such, Negron's dismissal was proper. The California Supreme Court's decision in *Garvin v. Chambers* did not compel a different result, because, in that case, termination was based on insubordination during leave and was improper. However, in this case, Negron could be held accountable for his criminal conduct even when relieved of his duties. *Negron v. Los Angeles County Civil Service Commission* (2015) 240 Cal.App.4th 874.

STATE PERSONNEL BOARD'S DECISION DOES NOT HAVE A PRECLUSIVE EFFECT ON SUBSEQUENT SUITS

David Wabakken was a Lieutenant with the California Department of Corrections and Rehabilitation. During 2010-2011, the Corrections Department sent Wabakken three notices of adverse action with multiple charges of misconduct. The third notice resulted in Wabakken's dismissal. Wabakken appealed the three adverse actions to the California State Personnel Board, which found that dismissal was too harsh a penalty. Wabakken subsequently filed suit in the district court alleging violations of the California Whistleblower Protection Act and intentional infliction of emotional distress. The district court granted the Corrections Department's motion for summary judgment, finding that Wabakken was collaterally estopped from relitigating the whistleblower retaliation issue because it had been decided during the State Personnel Board proceedings.

The appellate court reversed, finding that the State Personnel Board's decision does not have preclusive effect and therefore does not prevent Wabakken from litigating his whistleblower retaliation damages claim in the district court. The court reasoned that an employee may bring an action for damages for whistleblower retaliation in superior court, but only after the employee files a complaint with the State Personnel Board and the board has issued, or failed to issue, findings. Therefore, because this step is required, the Board's decision does not preclude a litigant from raising the same decided issues in the courts. *Wabakken v. California Department of Corrections & Rehabilitation* (9th Cir. 2015) 801 F.3d 1143.

A SCHOOL DISTRICT'S ASHTANGA YOGA PROGRAM DOES NOT ESTABLISH A RELIGION IN VIOLATION OF THE CALIFORNIA CONSTITUTION

Stephen and Jennifer Sedlock and their children sued the Encinitas Union School District, alleging that the District's implementation of an Ashtanga yoga program as a component of its physical education curriculum established a religion in violation of the California Constitution. The program began as a traditional yoga practice, using Sanskrit words, meditating, and teaching the students about yoga culture. However, after some parents complained about the program, the District took away the meditation and cultural aspects and re-named the Sanskrit poses in English, such as "crisscross applesauce" or "brain highway." The trial court concluded that the yoga program did not impermissibly establish a religion.

The court of appeals affirmed the trial court's decision. Assuming that Ashtanga yoga is a religion, the court found that the program did not violate the constitution by applying the three-part *Lemon* establishment test. First, the court held that the program had a secular purpose. The District instituted the yoga program to implement a physical fitness program that promotes physical and mental health. Second, the primary effect of the program was neither to advance nor inhibit religion. The District's yoga classes consisted of instruction in performing yoga poses, breathing, and relaxation, combined with lessons on building positive personal character traits, such as respect and empathy. However, almost all of the religious or spiritual elements of Ashtanga yoga had been removed. The court reasoned that a reasonable observer would not conclude that the program had the primary effect of either advancing or inhibiting religion. Finally, the court found that the yoga program did not foster excessive government entanglement with religion. Although the court was skeptical that the original program would have violated the

constitution in the first place, it noted that the District removed almost all of the Ashtanga elements from the program, the teachers were not employed by a religious organization, and the District's relationship with the Ashtanga Yoga Foundation was limited to assisting the District in ensuring that yoga teachers would be proficient in teaching yoga poses to the students. *Sedlock v. Baird* (2015) 235 Cal.App.4th 874.

EMPLOYER MAY NOT EVALUATE NEW CONDITIONS IN DETERMINING REINSTATEMENT AFTER DISABILITY RETIREMENT

Angelita Resendez was employed by the Department of Justice (DOJ) as a special agent supervisor. In late 2008, Resendez received disability retirement for a spine condition resulting from several on-the-job injuries. Resendez applied to CalPERS for reinstatement, and based on an orthopedic evaluation, CalPERS found her eligible for reinstatement in 2010. The DOJ offered to reinstate Resendez on the conditions that she complete and pass medical and psychological evaluations and a background check. Resendez rejected the offer and sued the DOJ, arguing that she was entitled to unconditional reinstatement.

The court of appeal upheld the trial court's decision in Resendez's favor and found that she was entitled to back pay and benefits. The court first held that under section 21192 of the Public Employees Retirement Law, the CalPERS board was authorized to evaluate whether Resendez was "still incapacitated, physically or mentally, for duty" based on a medical examination. The court reasoned that the term "still incapacitated" limits the scope of the board's evaluation to determining whether the conditions disability retirement was granted for continue to exist. The board does not have authority to identify new physical, mental, or emotional conditions which might adversely affect the exercise of an employee's duties. Newly discovered conditions might not have been sustained on the job or meet the requirements for industrial disability retirement. Thus, the board's inquiry ended when it determined that Resendez was no longer incapacitated as a result of the disability for which she had been retired. Second, the court held that the DOJ had a mandatory duty to reinstate Resendez under section 21193 after the board found she was no longer incapacitated as a result of the disability for which she had been granted retirement. Placing conditions on Resendez prior to reinstatement would be contrary to this mandatory reinstatement provision. Only after the employee has been reinstated may the employer require a fit-for-duty exam and updated background examination. *California Department of Justice v. Board of Administration of CalPERS* (2015) 2015 Cal.App. LEXIS 1011.

CHANGES TO A LAW THAT APPLY ONLY TO PROSPECTIVE EMPLOYEES UNDER A COLLECTIVE BARGAINING AGREEMENT DO NOT VIOLATE THE CONTRACTS CLAUSE

San Diego County and the Deputy Sheriffs' Association of San Diego County were parties to collective bargaining agreements covering two groups of employees -- the deputy sheriff's unit and the safety management unit -- through June 26, 2014. The agreements required the county to provide covered employees hired after a date determined by the Board of Supervisors with defined pension benefits based on a 3 percent at age 55 formula. The California Public Employees' Pension Reform Act of 2013 limits the defined benefit formulas available to new members of the county's retirement plan, in this case to a 2.7 percent at age 57 formula. In addition, for covered employees hired after January 1 and before July 1, 2013, the agreements

required the county to pay 6 percent of the employees' required retirement contribution, which averaged 11.19 percent of pensionable income. For covered employees hired on or after July 1, 2013, the agreements required the county to pay 3 percent of the employees' required retirement contribution during the employees first five years of continuous service and 6 percent thereafter. The Act requires new members to pay at least 50 percent of the defined benefit plan's normal cost, which is 12.58 percent of pensionable income for safety members covered by the 2.7 percent at 57 formula, and employers are not permitted to pay any of this amount. The Sheriffs' Association sued, claiming that the application of the 2 percent at 57 formula to new members who were hired and became covered by the agreements on or after January 1, 2013, but before the agreement's' expiration date of June 26, 2014, violates the state constitution's contract clause. They also claimed that the Act's contribution provision only applied after the agreements expired. The trial court held that the application of the 2 percent at 57 formula is not unconstitutional as applied to new members, and that the conflicting employee contribution provisions were applied before the agreements expired.

The appellate court affirmed in part and reversed in part. It held that application of the 2.7 percent at 57 formula to new safety members covered by the agreements did not violate the state constitution's contracts clause. It found that because the collective bargaining agreement incorporates statutorily available retirement plan options, and the legislature has not restricted itself from later changing the options, subsequent changes applicable only to prospective employees were constitutional. In addition, the court held that application of the employee contribution requirements resulted in an impairment of the county's obligations. Because the employees were required to contribute different amounts under the agreement and the Act, the Act does not apply to new members governed by the agreements until the agreements expired on June 26, 2014. *Deputy Sheriffs Association of San Diego County v. County of San Diego* (2015) 223 Cal.App.4th 573.

CALPERS HAS NO DUTY TO PAY DISABILITY RETIREES FOR ADDITIONAL SERVICE CREDITS

Former police officers and firefighters, in order to enhance their service retirement benefits, purchased additional years of service credit offered by CalPERS. Thereafter, each plaintiff was disabled on the job and took industrial disability retirement before reaching retirement age. CalPERS pays each plaintiff a monthly disability retirement allowance of 50 percent of his or her final compensation, but does not pay any additional allowance as a result of the purchase of additional years of service credit. The police officers and firefighters sued, contending that their purchase of additional service credit entitled them to enhanced retirement benefits under the Public Employees' Retirement Law (PERL). The trial court found in CalPERS's favor.

The court of appeal affirmed, holding that neither the PERL nor the plaintiffs' contracts entitled them to additional retirement benefits. The court reasoned that the plaintiffs failed to identify any part of the PERL or of their contracts that requires CalPERS to pay them any benefits above the 50 percent of salary that they are entitled to by reason of having retired prior to age 50 due to on-the-job injury. However, the court held that the trial court should not have dismissed the plaintiffs' claim that CalPERS impermissibly failed to disclose the potential loss of the value of purchased service credit if they suffered a disability. *Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889.

REQUIREMENT THAT RETIREMENT FUND BE FULLY FUNDED TO RECEIVE A SUPPLEMENTAL ALLOWANCE UPHELD FOR PRE-NOVEMBER 1996 RETIREES

As part of their pension benefits, retired employees of the City and County of San Francisco are eligible to receive a supplemental cost-of-living allowance if the retirement fund's earnings from the previous year exceed projected earnings. In 2011, San Francisco voters passed Proposition C, an initiative that amended San Francisco's charter to condition the payment of the allowance on the retirement fund being "fully funded" based on the market value of assets from the previous year. Protect Our Benefits (POB), a political action committee, sought to invalidate the amendment, claiming that it violated the contract clause of the state and federal Constitutions. The trial court denied POB's petition.

The appellate court affirmed in part and reversed in part. First, it held that with respect to current employees who retired after the allowance went into effect in 1996, the full funding requirement is unconstitutional. The contracts clause protects against government interference with vested contractual rights. Post-1996, retirees have a vested right to the allowance. However, for employees who retired before November 6, 1996, the amendment may be constitutionally applied to their pensions because they have no contractual right to the allowance. *Protect Our Benefits v. City & County of San Francisco* (2015) 235 Cal.App.4th 619.

2015 CASES – PUBLIC EMPLOYMENT RELATIONS BOARD

EMPLOYEE HAS A RIGHT TO REPRESENTATION AT AN INVESTIGATORY MEETING IF THE EMPLOYEE REASONABLY BELIEVES IT MAY RESULT IN DISCIPLINE

The California School Employees Association filed an unfair practice charge against the Capistrano Unified School District after the District denied a food service employee a union representative at a meeting to discuss her behavior at work and compliance with District policies. The employee was concerned that the meeting may lead to discipline and stated that she wanted representation if the meeting was going to be disciplinary. The District assured the employee that the meeting was not disciplinary and denied the request.

The Public Employment Relations Board (PERB) clarified and expanded an employee's *Weingarten* rights under the Educational Employment Relations Act (EERA), holding that an employee has a right to union representation when the employee requests representation, the employer requests an investigatory meeting, and the employee reasonably believes the meeting might result in discipline. PERB first concluded that the employee made a sufficient request for a representative because no "magic words" are necessary to invoke the right. A request is sufficient if the employer has "reasonable notice under the circumstances of the employee's desire for representation." PERB then rejected the District's argument that the meeting was not "investigatory," explaining that the purpose of the meeting was to explain proper procedures to the employee, and also to investigate to make sure she was going to comply with those procedures, because she had previously stated that she would not. The fact that discipline may not result from a meeting does not change its investigatory nature. Finally, PERB held that the employee had a reasonable belief that the meeting may result in discipline based on her past heated discussions with her supervisor and defiance of District policies. This decision places the

focus on the employee's state of mind regarding the disciplinary aspect of the meeting, rather than the supervisor's belief that the meeting would result in discipline. Because the District denied the employee's right to representation, subsequent discipline was expunged from her record. *Capistrano Unified School District* (2015) PERB Dec. No. 2440-E.

EMPLOYEE HAS A RIGHT TO REPRESENTATION IN THE INTERACTIVE PROCESS

Cyndi Nguyen was a court employee who, after being diagnosed in 2013 with a physical impairment, met with the court's executive officer as part of the interactive process under the the Americans with Disabilities Act (ADA). Nguyen requested that her union representative be present at the meeting, but the court denied the request, claiming Nguyen was not entitled to a representative because the meeting did not involve discipline, and they were discussing confidential medical information. The meeting resulted in Nguyen being offered a demotion. The union filed an unfair practice charge, claiming that if Nguyen was represented at the meeting, her representative would have been able to highlight her employment history and qualifications to perform at a higher level and propose terms to address any management concerns related to her transition and training.

PERB concluded that an employee has a right to representation in the interactive process if the employee requests a representative. PERB reasoned that meetings held between employers and employees seeking reasonable accommodations are not "investigatory" meetings within the meaning of *Weingarten*, but the right to representation is not limited to misconduct investigation. Because an accommodation meeting is similar to the grievance process, and serves to determine whether an accommodation is needed and what type of accommodation is reasonable, a representative can serve the helpful function of explaining the employer's rights and asserting the employee's rights. Therefore, the court should have allowed Nguyen to have a representative present at the meeting. *Sonoma County Superior Court* (2015) PERB Dec. No. 2490-C.

PARTIES HAVE A RIGHT TO APPOINT THEIR OWN NEGOTIATORS AND NO RIGHT TO DICTATE OPPOSING PARTIES' TEAMS

The American Federation of State, County and Municipal Employees (AFSCME) and the Anaheim Union High School District charged each other with violations of the duty to negotiate in good faith, after the District discharged its vice-president and bargaining team member, Dan Clavel, and Clavel continued to participate in bargaining. After Clavel's dismissal, and after bargaining had begun, the District's Human Resources manager refused to bargain with AFSCME because its team included Clavel.

PERB concluded that the District failed to negotiate in good faith. PERB explained that negotiating parties have the right to appoint their own negotiators, and neither side can dictate who their opposing representatives are. An employer violates the duty to bargain when it demands that a union remove a particular member from its bargaining team in the middle of negotiations, unless it can show a "clear and present danger to the bargaining process." This exception requires "persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible," such as concrete examples of actual disruption to the bargaining process or evidence of an ulterior motive to undermine the bargaining

process. The District did not show a clear and present danger, because there was no evidence that Clavel was disruptive, threatening, intimidating, or unproductive during negotiations, and there was no evidence that any employees that had filed complaints against Clavel would be present or that the HR representative expressed any fear of Clavel. *Anaheim Union School District* (2015) PERB Dec. No. 2434-E.

AN EMPLOYER MAY NOT UNILATERALLY LIMIT OR IMPOSE A WAIVER ON THE STATUTORILY PROTECTED RIGHT TO STRIKE

After the Service Employees International Union United Healthcare Workers West (SEIU) and the Fresno County In-Home Supportive Services Public Authority (Authority) bargained for over a year, the Authority declared an impasse and unilaterally adopted a last, best, and final offer (LBFO). SEIU sued, claiming that the Authority failed and refused to bargain in good faith by making regressive bargaining proposals, unilaterally implementing a LBFO in the absence of a genuine impasse, imposing tentative bargaining proposals that required SEIU and bargaining unit employees to waive statutory rights to bargain over future changes to negotiable subjects and to strike, and impermissibly included a "Separability of Provisions/Savings Clause."

PERB held that even if SEIU and the Authority had reached an impasse, the Authority's unilateral imposition of no strike language violated the duty to bargain. The right to strike is statutorily protected, and a group cannot unilaterally impose a waiver or limit on a statutory right. Because the language would waive the statutory rights to strike and engage in other protected conduct, the no strike clause constituted a per se violation of the Authority's duty to bargain. In addition, the Authority was not privileged to implement the separability clause. Although PERB noted that separability and savings language "generally promotes stability and protects settled expectations in the context of a comprehensive, bi-lateral agreements, when unilaterally imposed as part of an LBFO, such provisions are inconsistent with MMBA section 3505.7's directive that a public agency shall not implement a memorandum of understanding, even after bargaining in good faith to impasse and exhausting all impasse resolution procedures." *Fresno Co. In-Home Support Services Publication Authority* (2015) PERB Dec. No. 2418-M.

ENGAGING IN HARD-BARGAINING BY SEEKING ACROSS THE BOARD CONCESSIONS FROM BARGAINING UNITS DOES NOT CONSTITUTE IMPERMISSIBLE COALITION BARGAINING

The Solano Probation Peace Officers' Association (SPPOA) alleged that Solano County violated the Meyers-Milias-Brown Act (MMBA) and PERB regulations during negotiations for a memorandum of understanding (MOU) when it submitted identical proposals, including the same concessions for all bargaining units in order to address a substantial operating deficit. SPPOA argued that the County's concessions imposed coalition bargaining on the union and deprived its members of the right to be represented by their chosen representative.

PERB held that the County did not engage in coalition bargaining. PERB first distinguished unlawful "coalition bargaining" from lawful "coordinated bargaining." It explained that "in order to prevail on a theory that a party has refused to bargain by insisting on coalition bargaining, the charging party must prove that the other party refused to bargain unless the bargaining units met jointly or that settlement of one contract was conditioned on the settlement of another contract."

Coordinated bargaining, on the other hand, involves communication among different bargaining agents but independent decision making in separate bargaining processes. PERB found that SPPOA did not show that the County ever required that SPPOA bargain with any of the County's other bargaining units, and each contract the County was negotiating was settled independently from the others. Therefore, although the County may have engaged in permissible hard-bargaining tactics, those tactics did not rise to the level of coalition bargaining. *County of Solano* (2015) PERB Dec. No. 2402-M.

EMPLOYER DID NOT ENGAGE IN UNLAWFUL PIECEMEAL BARGAINING WHERE THE UNION FAILED TO PROMPTLY BEGIN BARGAINING ON A TIME-SENSITIVE MATTER

The Salinas Valley Memorial Healthcare System (Hospital) notified the National Union of Healthcare Workers (NUHW) of its need to lay off employees, and the parties held bargaining sessions regarding those layoffs for two months. Then, the union requested to combine layoff negotiations with MOU bargaining, and the hospital refused. NUHW filed an unfair practice charge, alleging that the Hospital refused to negotiate over the timing, number and identity of employees to be laid off, and over the impact and effects of the layoffs on remaining employees. NUHW also alleged that the Hospital's refusal to combine MOU negotiations with the effects bargaining prevented the union from making job-saving concessions.

PERB held that the Hospital did not fail to bargain in good faith over the number, timing, and related effects on employees to be laid off. The Hospital met the *Compton* exception allowing layoff implementation before effects bargaining because the Hospital had a clear and objective layoff deadline, it provided notice to the union two months before scheduled layoffs, and it bargained in good faith before and after the layoffs. PERB further held that the facts did not support NUHW's assertion that the Hospital's refusal to combine successor MOU negotiations with the effects bargaining prevented the Union from making job-saving concessions. The Hospital offered to begin MOU negotiations as early as December, but NUHW ignored this opportunity, at least during the remainder of the month. In addition, negotiations over the effects of layoffs continued after they were implemented. Nothing prevented NUHW from proposing concessions in exchange for saving jobs during any of the parties' negotiating sessions between January and April. Although piecemeal or fragmented bargaining tactics, where one party insists on negotiating certain subjects in isolation from others, or seeks to impose arbitrary limits on the range of possible compromises it will consider, indicate bad faith, the Hospital's failure to combine MOU bargaining with layoff bargaining here was not unlawful piecemeal bargaining. Although the Hospital refused NUHW's request to combine negotiations, indicating it did not believe MOU negotiations could be completed before the date the Hospital selected for the layoffs, the Hospital did not condition successor MOU negotiations on an agreement regarding layoff effects. *Salinas Valley Memorial Healthcare System* (2015) PERB Dec. No. 4233-M.

PARTIES MAY AGREE TO LIMIT AN EMPLOYER'S RIGHT TO IMPOSE TERMS AT AN IMPASSE

The Service Employee International Union, Local S21 (SEIU) filed an unfair practice charge against the County of Tulare, claiming that the County violated its duty to bargain by unilaterally altering provisions contained in the prior MOU of providing promotions and pay increases for

employees. The MOU contained a two-year salary freeze provision, but also stated that after the MOU expiration, the employees would return to the salary schedule placement they would have had if no freeze had occurred. During negotiations on a successor MOU, the County put forth proposals to continue the salary freeze and subsequently unilaterally imposed the continuation of the salary freeze after impasse.

PERB held that, upon reaching a bona fide impasse in negotiations, and in the absence of any applicable impasse resolution procedures, the County was allowed to impose a salary freeze prospectively. However, because the previous MOU contained a provision to restore employees to the preexisting pay and promotion schedule upon the expiration of the MOU, the County was obligated to make a one-time adjustment to employee classifications and step increases. The right to impose terms at impasse is subject to any outstanding contractual obligations the employer may have incurred. The employer may not disregard any outstanding contractual obligations under its previous agreement simply because those obligations do not mature until after the agreement has expired. The MOU here established a contractual right to restoration of employee promotion and pay increases, which survived expiration of the MOU. Therefore, parties may expressly agree to limit an employer's right to impose terms at an impasse, or they may "impliedly achieve the same result by agreeing to terms that do not mature until after the agreement has expired." *County of Tulare* (2015) PERB Dec. No. 2414-M.