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LEGAL TRENDS 2021

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Burke, Williams & Sorensen's comprehensive annual publication of labor and employment updates affecting California public employers.

About This Year's Edition of Legal Trends

Burke, Williams & Sorensen, LLP is pleased to present its 14th Edition of Legal Trends. This edition continues the tradition of producing Legal Trends. The purpose of Legal Trends is to inform employers about the key areas of labor and employment law, and to inform employers about new developments in these areas of law. Legal Trends provides a special focus on these topics for public employers.

With over 130 attorneys in ten offices throughout the state, Burke has a remarkable combination of experience in California public labor relations and employment law, involving the representation of numerous cities, special districts, school districts, community college districts, and other public entities. Burke will continue to provide this vital publication to public sector employers in the years to come. This new edition continues to provide the insightful and concise information you have come to rely on from Legal Trends.

The material contained in this publication is informational only, and is not intended to constitute professional legal counsel or a legal opinion. Although we consider this communication to be timely and accurate, there is no substitute for personal counsel with a professional. Provided with specific facts, your attorney can fashion a solution sensitive to your needs.

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The Public Sector Labor Relations Statutes

SUMMARY OF THE LAW

OVERVIEW OF STATUTES AND PERB JURISDICTION

There are numerous California public sector labor relations statutes, each of which covers a different subset of public employees. The statutes include:

- The Educational Employment Relations Act ("EERA"),[1] which covers California's public K-12 schools and community colleges;
- The "Dills Act" or the State Employer-Employee Relations Act ("SEERA"),[2] which covers state government employees;
- The Higher Education Employment Relations Act ("HEERA"),[3] which covers the California State University system, the University of California system, and Hastings College of Law;
- The Meyers-Milias-Brown Act ("MMBA"),[4] which covers most municipal, county, and local special district employers, including some private hospitals,[5] but not all transit districts;[6]
  The Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act ("TEERA"),[7] which covers supervisory employees of that transit agency;
- The Trial Court Employment Protection and Governance Act (the "Trial Court Act");[8]
- The Trial Court Interpreter Employment and Labor Relations Act (the "Court Interpreter Act");[9]
- The Judicial Council Employer-Employee Relations Act ("JCEERA"),[10] which grants certain employees of the California Judicial Council the right to organize and participate in employee organizations for the purpose of representation on all matters of employer-employee relations.[11] The rights, duties, and prohibited conduct in the JCEERA are parallel to those in the Dills Act.
- The Excluded Employees Bill of Rights ("EEBR"), which covers state supervisory, managerial, confidential, and other employees excluded from the Dills Act;[12] and The Public Transportation Labor Disputes Act,[13] which addresses resolution of labor disputes, but does not establish a comprehensive administrative structure governing transit labor relations.[14]

PERB administers and enforces each of these statutes, except the EEBR and the Public Transportation Labor Disputes Act. This has

[1] Gov. Code, §§ 3540 et seq.
[2] Gov. Code, §§ 3512 et seq.
[3] Gov. Code, §§ 3560 et seq.
[4] Gov. Code, §§ 3500 et seq.
[5] *El Camino Hospital Dist.* (2009) PERB Dec. No. 2033, 33 PERC ¶ 93.
[6] Most transit districts are governed by labor relations provisions included in the Public Utilities Code enabling statutes, and therefore are not covered by the MMBA or subject to PERB jurisdiction. (See *Rae v. Bay Area Rapid Transit Supervisory Etc. Assn.* (1980) 114 Cal.App.3d 147, 161, 170 Cal.Rptr. 448.) A few transit districts are covered by the MMBA, including the Sonoma-Marin Area Rail Transit Dist. (Gov. Code, § 105140), and the San Francisco Municipal Railway, which is operated by the City and County of San Francisco. Finally, Public Utilities Code § 99560 et seq., gives PERB jurisdiction over supervisory employees of the Los Angeles County Metropolitan Transportation Authority.
[7] Pub. Util. Code, §§ 99560 et seq.
[8] Gov. Code, §§ 71600 et seq.
[9] Gov. Code, §§ 71800 et seq.
[10] Gov. Code, §§ 3524 et seq.
[11] Excepted from JCEERA's coverage are managerial, confidential, and supervisory employees; judicial officers; and employees of the Supreme Court, the courts of appeal, or the Habeas Corpus Resource Center.
[12] Gov. Code, §§ 3525-3539.5.
[13] Lab. Code, §§ 1137-1137.6.
[14] Transit districts are governed by laws in the Public Utilities Code, joint powers agreements and bylaws or, in a few cases, the MMBA.

long been the case for the EERA, SEERA, and HEERA. Until 2001, only the state courts enforced and interpreted the MMBA. In 2001, PERB was granted exclusive authority to resolve unfair labor practice charges and unit determination and representation disputes in local agencies subject to the MMBA, except those involving management employees[15] and peace officers.[16] Disputes involving those employees remain subject to state court jurisdiction.[17]

MMBA section 3511 excludes "persons who are peace officers as defined in section 830.1 of the Penal Code" from PERB's jurisdiction. PERB, however, will assert jurisdiction over a charge brought by an employee organization representing a "mixed" bargaining unit of peace officers and non-peace officers. "Although MMBA section 3511 excludes PERB from hearing charges filed by 'persons' who are peace officers, it does not prohibit the agency from hearing charges brought by employee organizations. The fact that an employee organization represents or seeks to represent *some* peace officers does not alter the analysis or result." PERB reasoned, "If the Legislature had intended to prohibit PERB from investigating and remedying an unfair practice charge brought by an employee organization, it would have stated that PERB has no authority over 'persons who are peace officers' *nor over entities* who represent or seek to represent peace officers."[18]

The California Supreme Court has concluded that PERB has initial exclusive jurisdiction under the MMBA over strikes and threats of strikes affecting public health and safety.[19] PERB's jurisdiction expanded further in 2004 to include employees covered by the Trial Court Act,[20] the Court Interpreter Act,[21] and the TEERA.[22] Since PERB's inception, the question of joint powers agency coverage by PERB has varied. PERB recently asserted jurisdiction over the Central Contra Costa Transit Authority, a joint powers authority, when a union president filed an interference claim with PERB. PERB determined that a joint powers agency that did not have its own separate statute for administering labor relations is a "public agency" within the definition of the MMBA. This case may open the door for PERB jurisdiction over similarly-situated transit authorities that do not have a separate employment relations statute.[23]

In the context of a union's request for fact-finding under the MMBA, PERB ruled that the Workforce Investment Board of Solano County, organized under California law as a nonprofit public benefit corporation to implement the publically funded and publically controlled workforce investment program, is a "public agency" under the MMBA and subject to PERB's jurisdiction.[24]

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[15] Gov. Code, § 3509(e) (excluding management employees from PERB's jurisdiction over unfair labor practice charges and local agency rules).

[16] "Peace officers," as defined in Pen. Code, § 830.1, are excluded from S.B. 739's changes to MMBA §§ 3501 (definitions), 3507.1 (unit determinations and elections), 3509 (PERB's jurisdiction, powers, and duties regarding the MMBA). Consequently, two sets of labor relations law will evolve. As a general rule, excluded "peace officers" include sheriffs, under-sheriffs, deputy sheriffs, police chiefs, police officers, police officers of a district authorized by statute to maintain a police department, municipal court marshals or deputy marshals, inspectors or investigators employed by a district attorney, and Department of Justice special agents and Attorney General investigators, as well as assistant and deputy chiefs, chiefs, and deputy and division directors designated as peace officers by the Attorney General. Warning: The definition of "peace officers" excluded by S.B. 739 and A.B. 1852 is narrower than the definition of "peace officers" in the unchanged provisions of § 3508(a) concerning the rights of full-time "peace officers" to participate in employee organizations composed solely of those peace officers. As a result, some local agencies may currently have "S.B. 739-excluded peace officers" in the same bargaining unit as peace officers that are covered by S.B. 739 changes to the MMBA.

[17] Concerned with the increasing burden placed on PERB to administer state labor relations statutes already under its jurisdiction, former Governor Brown vetoed AB 2305, 2866, and 3034. As we reported in last year's *Legal Trends*, these bills would have expanded PERB's jurisdiction. AB 2305 would have amended the MMBA to include peace officers' unions under PERB's jurisdiction. AB 2866 would have transferred jurisdiction over unfair practices for the Orange County Transportation Authority ("OCTA") and the San Joaquin Regional Transit District ("SJRTD") to PERB, and AB 3304 would have required that employer-employee relations for San Francisco Bay Area Rapid Transit District ("BART") supervisory, professional, and technical employees be governed by the MMBA under PERB's jurisdiction.

[18] *County of Santa Clara* (2015) PERB Dec. No. 2431-M, 39 PERC 181 (emphasis in original).

[19] Cal. Code Regs., tit. 8, §§ 32000-91630.

[20] Gov. Code, § 71639.1.

[21] Gov. Code, § 71825.

[22] Pub. Util. Code, §§ 99560 et seq.

[23] *Central Contra Costa Transit Authority* (2012) PERB Dec. No. 2263-M, 36 PERC ¶ 177.

[24] *Workforce Investment Bd. of Solano County* (2014) PERB Order No. Ad-418-M, 39 PERC 65.

On December 27, 2019, the Office of Administrative Law adopted a number of new regulations and amendments to existing regulations[25] intended to assist PERB in resolving disputes over the violation of:

(1) The Public Employee Communication Chapter ("PECC"), which provides unions access rights to employees[26]

and

(2) The Prohibition of Public Employers Deterring and Discouraging Union Membership ("PEDD"), which prohibits employers from deterring or discouraging employees or applicants for public employment from becoming or remaining union members, from authorizing representation by a union, or from authorizing dues or fees deductions by a union.[27]

These new regulations and amendments to existing regulations took effect April 1, 2020 to fill in gaps in the PECC or the PEDD statutes and to extend PERB regulations to the PECC and PEDD.[28]

Additionally, PERB implemented new regulations concerning precedential decisions. All PERB decisions and orders are precedential unless expressly designated otherwise by PERB.[29] PERB Regulation 32320(d)[30] sets forth the seven factors that PERB considers in determining whether a case should be designated precedential or non-precedential; and PERB Regulation 32320(e)[31] permits PERB to wholly or partially reverse its prior designation of a PERB decision as precedential or non-precedential and requires that parties requesting the reversal of such a designation make that request within 20 days following the service of PERB's decision or order. Regulation 32320(g) provides that a request to change the precedential or non-precedential designation of a decision or order does not stay the effectiveness of the decision or order, and PERB Regulation 32320(h) makes clear that the ruling is not subject to reconsideration by PERB.

PERB Has Limited Authority to Interpret Statutes Outside of Its Jurisdiction.

PERB has the authority and the duty to decide in disputed cases whether a particular issue is within or without the scope of representation, and as such, PERB has the authority to interpret provisions of external laws that it does not administer if such interpretation is necessary to decide whether that external law removes an otherwise negotiable matter from the scope of representation or creates a statutory right to bargain not subject to waiver by the employer's unilateral action.[32]

INTERPRETATION OF LABOR RELATIONS STATUTES BY PERB AND STATE COURTS

PERB has developed a large and growing body of reported decisions. Decisions of PERB itself have precedential value in subsequent PERB cases, but the decisions of PERB administrative law judges do not. To the extent that the different labor relations statutes share common language and construction, PERB's interpretation of one statute will apply to the other statutes as well. But where the statutes' language varies from one another, PERB's application to the law will vary, especially in the areas of unit determination and recognition.

The California Supreme Court has ruled that PERB's interpretation of statutes under its jurisdiction is entitled to great deference.[33] The Court explicitly stated:

"PERB is the agency empowered by the Legislature to adjudicate unfair labor

[25] Changes to PERB regulations permit PERB to designate certain decisions as precedential (Cal. Code Regs., tit. 8, §§ 32000, 33013), and PERB has actively utilized its discretion to designate precedential decisions. Consequently, beginning with Legal Trends 2014, discussions of Board decisions in Chapters 1 through 6 are limited to decisions that PERB has designated as "precedential."

[26] Gov. Code, § 3555 et seq.

[27] Gov. Code, § 3550 et seq.

[28] The new regulations also define what constitutes an unfair practice in PERB Regulation 32610 and 32610.5 for PECC and what constitutes an unfair practice under the PEDD in PERB Regulation 32611.

[29] Cal. Code Regs., tit. 8, section 32320, subd. (c).

[30] Cal. Code Regs., tit. 8, section 32320, subd. (d).

[31] Cal. Code Regs., tit. 8, section 32320, subd. (e).

[32] *El Dorado Superior Ct.* 2018) PERB Dec. No. 2589-C (wherein PERB concluded it had authority to interpret the Public Employment Retirement Law to determine whether an issue fell within the scope of representation and was bargainable).

[33] *Boling v. PERB* (2018) 5 Cal.5th 898.

practice claims under the MMBA and six other public employment relations statutes. It is settled that '[c]ourts generally defer to PERB's construction of labor law provisions within its jurisdiction. . . .' We follow PERB's interpretation unless it is clearly erroneous. (citations omitted)."[34]

The Court also reiterated that "findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive."[35]

Consequently, courts err if they apply a de novo standard of review to PERB's interpretation of those statutes under its jurisdictions.

The California Supreme Court also has ruled, at least where PERB has not squarely addressed the issue, that state courts must look to the federal National Labor Relations Act cases when interpreting public sector statutes if the language of the state law is parallel to the federal statute.[36]

Unfair Labor Practice Charges

Most PERB enforcement actions involve unfair labor practice charges. An unfair labor practice charge is a complaint alleging any violation of the appropriate labor relations statute, and in the case of the MMBA, any violation of local agency rules and regulations adopted pursuant to section 3507, as well as allegations that local rules are unreasonable, i.e., contrary to the purposes of the MMBA.[37] The vast majority of unfair labor practice charges allege either:

- Discrimination/retaliation/interference against employees or unions for exercising their rights to form, join, or participate in unions for the purpose of representation on all matters of employer-employee relations;[38] or
- A violation of the duty to bargain in good faith.

Under a series of California Supreme Court decisions, PERB has initial, exclusive jurisdiction to determine whether an unfair labor practice charge is justified and, if so, the appropriate remedy necessary to accomplish the labor relations statute's purposes. With few exceptions, this means that any claim which arguably is an unfair labor practice must first be processed by PERB before there is any access to local courts or state courts of appeal.[39] Courts have continued to expand PERB's initial exclusive jurisdiction, including for disputes over refusal to bargain a Firefighters Procedural Bill of Rights,[40] and employees' claim that a union failed to secure overtime pay.[41]

Following a 2007 Court of Appeal decision concluding that PERB had initial exclusive jurisdiction over a dispute between a city and a union under the city charter's binding interest arbitration procedures, the California Professional Firefighters successfully sponsored legislation to exclude firefighters' interest arbitration disputes from PERB. Government Code section 3509 of the MMBA now provides that superior courts have exclusive jurisdiction over actions involving interest arbitration when the action involves an employee organization that represents firefighters.

PERB will allow employee organizations, local agency employers, and in some limited instances, individual employees to file unfair labor practice charges. Individual employees may have standing to file unfair labor practice charges against both a local agency and an employee organization for alleged

[34] *Id.* at p. 912.
[35] *Ibid.*
[36] *FireFighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608, 116 Cal.Rptr. 507; Cal. Code Regs., tit. 8, §§ 31001-95330.
[37] Gov. Code, § 3509(g); *City & County of San Francisco* (2007) PERB Dec. No. 1890-M, 31 PERC ¶ 72; *FireFighters Union, Local 1186*, *supra.*
[38] Gov. Code, §§ 3502, 3506.
[39] *San Diego Teachers Assn. v. Superior Ct.* (1979) 24 Cal.3d 1, 593 P.2d 838, 154 Cal.Rptr. 893; *El Rancho Unified School Dist. v. National Ed. Assn.* (1983) 33 Cal.3d 946, 192 Cal.Rptr. 123; *City and County of San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 Cal.App.4th 938, 60 Cal.Rptr.3d 516. See, e.g., *University of Cal.* (2012) PERB Dec. No. 2300-H, 37 PERC ¶ 141.
[40] *International Assn. of Fire Fighters Local Union 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 35 PERC ¶ 79.
[41] *Paulsen v. Local No. 856 of Internat. Brotherhood of Teamsters* (2011) 193 Cal.App.4th 823, 123 Cal.Rptr.3d 332.

interference with the employee's rights under the MMBA.[42]

PERB is specifically required to enforce and apply local agency rules that are consistent with the MMBA concerning unit determinations, representation, recognition, and elections.[43]

PERB Has Jurisdiction to Hear Unfair Practice Charges Filed by Unions that Represent Units that Include Sworn Peace Officers.

In *County of Orange*,[44] the County excepted to a proposed decision finding that PERB had jurisdiction over a dispute between the County and the Association of Orange County Deputy Sheriffs ("Union") some of whose members are sworn peace officers pursuant to Penal Code section 830.1.

The County has an ordinance creating an Office of Independent Review ("OIR") to advise the Sheriff-Coroner regarding in-custody incidents involving death or serious injury and complaints against law enforcement personnel. In 2015, the County extended OIR authority to cover the District Attorney's Office without meeting or conferring with the Union over either the decision or the effects of the decision on the unit. The Union filed a charge with PERB alleging that the County violated the MMBA by failing to meet and confer. The County moved to dismiss arguing that PERB lacked jurisdiction over the charge. Specifically, the County argued that MMBA section 3511[45] precluded the Union from filing the charge because the Union represented sworn peace officers. The ALJ disagreed, and the County filed exceptions.

PERB rejected the County's argument that the County had no jurisdiction over claims by a Union because it represents both sworn peace officers. PERB noted that it has jurisdiction over claims brought by unions that represent or seek to represent bargaining units composed partially or entirely of peace officers as defined in Penal Code section 830.1. More specifically, PERB concluded that MMBA section 3511[46] does not preclude unions from filing charges with PERB, but only charges by the peace officers themselves. PERB concluded that section 3511 exempts from its jurisdiction only charges brought by natural persons who are peace officers. Thus, PERB concluded that it has jurisdiction to hear and decide unfair practice charges filed by unions that represent sworn peace officers and non-peace officers.

Nonexclusive Employee Organization Has Standing to Allege Violation of the Rights of Employees It Represents under HEERA.

In *Regents of the University of California*,[47] International Brotherhood of Teamsters, Local 2010 ("Union") appealed the partial dismissal of its unfair practice charge, which accused the Regents of the University of California from interfering with employees' rights to form, join, and participate in the activities of employee organizations of their own choosing in violation of HEERA. The OGC dismissed the allegation on the grounds that the Union lacked standing under HEERA to allege a violation of section 3571, subdivision (a)[48] because that statutory provision protects only employees' rights and not those of employee organizations.

PERB disagreed with OGC's legal analysis and ruled that under HEERA, an employee organization that has not been certified as an exclusive representative has standing to allege violations of the rights of employees it represents. PERB noted that PERB Regulation 32602, subdivision (b) confers standing upon a person or entity to allege a particular unfair practice, depending upon the rights conferred by the statute.[49] PERB acknowledged, though, that unlike other statutes it administers, HEERA does not grant employee organizations an independent right to represent employees in their employment relations with their employer.

[42] See, for example, the ALJ decision in *County of San Joaquin* (2002) PERB Order No. HO-U-803-M, 26 PERC ¶ 33073.
[43] Gov. Code, §§ 3509(b), (c).
[44] (2019) PERB Dec. No. 2657.
[45] Gov. Code, § 3511.
[46] *Ibid.*
[47] (2020) PERB Dec. No. 2696H.
[48] Gov. Code, § 3571, subd. (a).
[49] Cal. Code Regs., tit. 8, §32602, subd. (b) ("... unfair practice charges may be filed by an employee, employee organization, or employer against an employee organization or employer").

In finding that the Union had standing to bring the charge, PERB first noted it has long allowed exclusive representatives to file charges alleging that the employer's conduct interfered with the rights of employees to be represented by their exclusive representatives under HEERA section 3571, subdivision (a).[50] This is so even though subdivision (a) expressly concerns only employees and not their representatives.

Second, PERB concluded that it could find no basis in HEERA to deny non-exclusive representatives standing to allege violations of section 3571, subdivision (a)[51] because it could find no basis to treat exclusive representatives differently from nonexclusive representatives for purposes of conferring standing with respect to this subdivision of HEERA.

Third, PERB found that granting a nonexclusive representative the right to represent employees is necessary to effectuate employees' statutory right to be represented by an employee organization of their choice, particularly in organizing campaigns where employees may be unable or unwilling to file an unfair practice charge or be unaware of their statutory rights. Denying a nonexclusive representative standing to allege a violation of HEERA on employees' behalf under these circumstances would leave HEERA-covered employees more vulnerable than other public employees to coercion by their employer during an organizing campaign unless the nonexclusive bargaining representative ultimately becomes the exclusive representative. Thus, PERB reversed the partial dismissal and remanded the case to the OGC to issue a complaint.

Statute of Limitations and Unfair Labor Practice Charges

Most of the PERB-administered statutes have a six-month time limit within which an unfair labor practice charge must be filed – the statute of limitations. The MMBA has no such specific provision, but has a court-imposed six-month time limit.[52]

The six-month statute of limitations begins running at the point when the charging party knows, or should have known, of the employer conduct underlying the unfair labor practice charge.[53] Specifically, the statute of limitations begins to run when the charging party discovers the conduct, not the date of discovery of the legal significance of that conduct.[54] The party charging that an unfair labor practice has been committed (usually a union) has the burden of proof and must allege facts sufficient to establish that the six-month statute of limitations period has been satisfied.[55] The charging party's duty to establish timeliness is discharged at the point at which the Office of the General Counsel has determined that the charge is not subject to dismissal for lack of timeliness and issues a complaint. After a complaint is issued, the respondent must raise the timeliness defense in its formal answer to the complaint, and at the formal hearing, present evidence and prove by a preponderance of the evidence that the charge is untimely.[56]

In some cases, the union may argue that a "continuing violation" extends the limitations period. PERB has ruled that for the "continuing violation" doctrine to apply to an unfair labor practice charge, an independent unfair labor practice must occur within the

[50] Gov. Code, § 3571, subd. (a).
[51] *Ibid.*

[52] *Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090.
[53] *Orange County Professional Firefighters Assn., IAFF Local 3631* (2008) PERB Dec. No. 1968-M, 32 PERC ¶ 112. See also *Compton Unified School Dist.* (2009) PERB Dec. No. 2015, 33 PERC ¶ 67 (employees should have known the District considered them not bargaining unit members); *SEIU, United Healthcare Workers West* (2009) PERB Dec. No. 2025-M, 33 PERC ¶ 95 (employee should have known that union would not support contesting termination), *County of Riverside* (2010) PERB Dec. No.2132-M, 34 PERC ¶ 139.
[54] *County of San Diego (Health & Human Services)* (2009) PERB Dec. No. 2042-M, 33 PERC ¶ 67.
[55] *Long Beach Community College Dist.* (2009) PERB Dec. No. 2002, 33 PERC ¶ 36. For rules about tolling the statute of limitations, see *State of Cal. (Department of Personnel Admin.)* (2008) PERB Dec. No. 2013-S, 33 PERC ¶ 57; see also *Department of Personnel Admin.* (2009) PERB Dec. No. 2017-S, 33 PERC ¶ 68; *Solano County Fair Assn.* (2009) PERB Dec. No. 2035-M, 33 PERC ¶ 102; *California State U. (San Jose)* (2009) PERB Dec. No. 2032-H, 33 PERC ¶ 94.
[56] *Los Angeles Unified School Dist.* (2014) PERB Dec. No. 2359, 38 PERC ¶ 136.

statute of limitations period without reference to an earlier violation.[57]

The charging party may argue tolling of the statute of limitations based on a prior or concurrent grievance.[58] Government Code section 3541.5(a)(2) (EERA) provides that the six-month statute of limitations is tolled during the time spent exhausting the grievance machinery; this tolling period lasts only as long as the grievance is being actively pursued, and not if the charging party knows that the union is not pursuing the grievance.[59] Under the MMBA, the statute of limitations is tolled during the time that the parties are pursuing a non-binding dispute resolution process if the following elements are satisfied: (1) the procedure is included in a negotiated agreement between the charging party and the employer; (2) the procedure is used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party pursues the procedure reasonably and in good faith; and (4) tolling does not frustrate the purpose of the statute of limitations period by causing surprise or prejudice to the responding party.[60]

PERB's statute of limitations rule for charges that an employee termination or discipline constitutes unlawful retaliation for protected activity recognizes (1) that the exhaustion of any public employee due process procedures often results in a considerable delay between the employer's announcement of an intent to dismiss or discipline and the actual effective date of the final action, and (2) that the statutes administered by PERB protect employees from the *threat* of retaliatory discipline as well as actual retaliatory discipline. Where a charging party timely alleges that an employer's notice of intent to terminate or discipline is unlawful and following the parties' utilization of due process procedures, the employer does in fact either terminate or discipline the employee, an amended charge alleging that the termination or discipline itself either was unlawfully motivated or interfered with the exercise of employee rights, will be deemed to relate back to the timely-filed charge.[61]

Six-Month Statute of Limitations Begins to Run When a Charging Party Has Notice of a Charged Party's Clear Intent to Implement a Unilateral Change If No Subsequent Notice of the Employer Wavering In its Intent.

In *California State University (San Marcos),*[62] the California State University Employees Union ("Union") filed exceptions to the proposed decision of ALJ. The amended complaint alleged that the University violated the HEERA by unilaterally changing the negotiated In-Range Progression ("IRP") salary policy by: (1) violating a contractual requirement to provide a "written reason" for denying an IRP request, and (2) departing from existing practices in the way it reviewed an employee's request. The ALJ dismissed the allegations, finding that the former allegation was untimely and the latter unproven. PERB affirmed the findings of the ALJ.

In finding the first allegation untimely, PERB noted that HEERA section 3563.2, subdivision (a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge."[63] Because the Union filed the charge on January 28, 2016, for the charge to be timely the conduct alleged to constitute the unfair practice must have been committed no earlier than July 28, 2015.

PERB explained that the statute of limitations period begins to run on the date that the charging party has actual or constructive notice of the employer's "clear intent to implement a unilateral change," provided that nothing evinces a subsequent wavering of that intent. PERB also explained that a charging party's belated discovery of the

[57] *County of Riverside* (2011) PERB Dec. No. 2176-M, 35 PERC ¶ 69.
[58] *Nevada Irrigation Dist.* (2009) PERB Dec. No. 2052-M, 33 PERC ¶ 134; *Los Angeles Community College Dist.* (2009) PERB Dec. No. 2059, 33 PERC ¶ 149.
[59] *IFPTE, Local 21 (Hosny)* (2011) PERB Dec. No. 2192-M, 36 PERC ¶ 18; *Orcutt Union Elementary School Dist.* (2019) PERB Dec. No. 2626.
[60] *County of Riverside* (2013) PERB Dec. No. 237-M, 37 PERC ¶ 180; *Orcutt Union Elementary School Dist., supra* (PERB applies this same equitable for tolling doctrine for non-binding dispute resolution under EERA as it does under the MMBA).
[61] *Moberg v. Monterey Peninsula Unified School Dist*. (2014) PERB Dec. No. 2381, 39 PERC 12.
[62] *Trustees of the Cal. State U. (San Marcos)* (2020) PERB Dec. No. 2738-H.
[63] Gov. Code, § 3563.2.

legal significance of the underlying conduct does not excuse an otherwise untimely filing.[64]

Here, PERB concluded that the Union had constructive notice by at least July 6, 2015 when it sent a memo notifying the University that its bases for denying an employee's IRP request did not comply with the parties' MOU. Further, PERB found "there was no basis to equitably toll the statute of limitations period [in the instant case] because the parties expressly exempted the University's IRP decisions from the parties' contractual grievance procedure."[65] Thus, the limitations period had expired before the charge was filed.

The "Continuing Violation Doctrine" Exception to the Six-Month Limitation Period to Bring Unfair Practice Charges Typically Applies in Connection with an Alleged Unlawful Employer Rule or Policy.

In *County of San Diego,*[66] *Service Employees International Union, Local 221* ("Union"), appealed the Office of General Counsel's ("OGC") dismissal of the Union's unfair practice charge as untimely. The Union alleged in the dismissed charge that the County of San Diego violated the MMBA through interference, discrimination, retaliation, and maintenance of an unreasonable local rule. This work rule was a policy which provided: "Members of this Board . . . shall not meet and discuss or have audience with any employee or any employee organization or representative thereof on any matter within the scope of representation or consultation during the period when such matters are, should be, or may be, the subject of consultations, or meeting and conferring between the County negotiator and an employee or an employee organization."[67]

PERB found the underlying unfair practice charge to be timely filed, granted the Union's appeal and remanded the matter to the OGC to issue a complaint. PERB noted that it generally may not issue a complaint based upon an alleged unfair practice that occurred more than six months before the charge was filed, and that the limitations period begins to run when the charging party knows, or should have known, of the conduct underlying the charge. PERB then noted that there are three distinct exceptions to the six-month statute of limitations: (1) if the alleged violation is a continuing one, (2) if the alleged violation has been revived by subsequent unlawful conduct within the six-month limitations period (a new wrongful act), and (3) if the statute of limitation period is tolled.

First, PERB explained that the continuing violation doctrine applies if a charging party alleges that a respondent's rule or policy on its face interferes with protected rights or discriminates against protected activity, and the policy was in effect during the six months prior to the filing of the charge. PERB noted that it is the policy's existence continuing to the time of hearing that constitutes the unlawful conduct and not the act of adopting, revising, or applying the policy. Thus, for a charge to be timely under the continuing violation doctrine, the employer need not have adopted or applied the rule or policy to the charging party during the limitations period.[68] PERB concluded that the unfair practice charge was timely filed under its continuing violation doctrine, noting that the challenged policy remained in effect when the Union filed its charge.

Second, PERB explained that the new wrongful act doctrine involves a charged party engaging in a new unlawful or wrongful action within the six month limitations period, unlike the continuing violation doctrine which does not require a new unlawful action inside the limitations period but may rely on an allegedly unlawful policy established outside the limitations period remaining in effect through the limitations period. Thus, in unilateral change cases, the new wrongful act doctrine can apply if there are sufficient facts within the limitations period to support the exception.[69] PERB concluded that the County's re-approval of its expiring and alleged unlawful "meet and discuss" policy by the Board of Supervisors

[64] *Trustees of the Cal. State U. (San Marcos), supra*, at p. 12.
[65] *Id.* at p. 12, fn.9.
[66] (2020) PERB Dec. No. 2721M.
[67] *Id.* at p. 4.
[68] *Id.* at p. 13.
[69] *Id.* at p. 14.

within six months of the statute of limitations period constituted a new wrongful act within the statute of limitations period. Thus, the Union's charge with regard to the new wrongful act was timely filed.

Third, PERB noted that a charging party "[n]ormally need not rely on the new wrongful act exception when it challenges a rule or policy based on an interference or discrimination theory, as the continuing violation doctrine usually applies in such cases. However, for claims based upon a unilateral change theory, in contrast, the new wrongful act doctrine likely has more salience.[70] Nonetheless, PERB concluded that the allegations were timely under the new wrongful acts doctrine as well, noting that the County reapproved the expiring policy and that this constitutes reimplementation to the same degree as if the Board of Supervisors had first allowed the policy to expire before reapproving it. Consequently, PERB found that the Board of Supervisors' re-approval had sufficient independent significance to constitute a new wrongful act and therefore the charge was timely.

Fourth, PERB noted that its equitable tolling doctrine was not applicable in this case because the parties had no grievance procedure under their MOU available to resolve the dispute as required by the doctrine. In fact, the parties' MOU expressly exempted the employer's decisions regarding the issue in dispute from the parties' MOU's grievance provisions.

Finally, PERB ordered the OGC to issue a complaint rather than remand the case to the OGC to decide if the Union's factual allegations would support a *prima facie* case for an unfair practice and justify issuance of a complaint. PERB concluded that the County's meet and confer policy is reasonably susceptible to the Union's reading of the County's policy as violating the MMBA.

Parties May Amend Their Complaint By Close of Case-In-Chief If It Does Not Unduly Prejudice Responding Party; But a Party Cannot Amend a Complaint Prior to Hearing Where It Fails to Amend Its Charge.

In *County of Tulare*,[71] the SEIU ("Union") alleged that the County violated the MMBA by maintaining an unreasonable rule restricting protected activities in County buildings, by alleging and prosecuting a bad faith bargaining charge against the Union, and that pursuing this charge had a tendency to dominate Union and/or interfere with protected union and employee rights. Complaints issued, but the ALJ found no merit to the allegations in either the Union's or the County's complaint and proposed dismissing both. The County filed exceptions and Union filed cross-exceptions. PERB partially affirmed and partially reversed the proposed ALJ's decision.

In making its decision, PERB addressed the parties' efforts to amend their complaints. PERB noted that the County sought to amend its complaint to allege that the Union engaged in regressive bargaining by attempting to bargain for a new unit that the parties had previously agreed to exclude from successor negotiations. PERB noted that the County alleged that it was simply seeking to conform the complaint to the proof.

PERB found that the ALJ erroneously denied the County's motion to orally amend its complaint prior to resting its case-in-chief. More specifically, PERB concluded that the County's motion to amend its complaint should have been granted under PERB's liberal amendment rules. PERB noted that the ALJ could have granted the Union an appropriate continuance if necessary to avoid undue prejudice.

PERB then noted that the County had no need to amend its complaint if it sought only to add a violation of ground rules as an additional indicator of bad faith (because the complaint need not list all such indicia of bad faith). However, even if the County sought to allege violation of the ground rules as an independent violation, the County

[70] *Id.* at p. 14.

[71] (2019) PERB Dec. 2697-M.

should have been permitted to amend its complaint to add an independent violation or possibly satisfy the unalleged violation doctrine if it satisfied the doctrine's requirements.[72]

PERB affirmed the ALJ's refusal to grant the Union's motion to amend its complaint before hearing. Contrary to the ALJ, PERB concluded that the motion to amend was timely and not prejudicial, particularly given the option of providing a continuance to mitigate any undue prejudice. Still, PERB concluded that the ALJ correctly denied the Union's motion to amend its complaint. First, the Union did not file an amended charge with its pre-hearing motion to amend its complaint as required by PERB Regulation 32647.[73] Thus, the pre-hearing motion did not amend the complaint. Second, the Union made no effort orally during the hearing to renew its motion to amend its complaint which would have obviated the Union's need to have file an amended charge pre-hearing pursuant PERB Regulation 32648.[74] Thus, PERB concluded that the ALJ's rejection of the Union's motion to amend its complaint was proper.[75]

PERB Concluded that an Administrative Hearing Should Be Held on Union's Allegation of Retaliation if There Are One or More Contested Outcome-Determinative Facts in the Complaint.

In *City and County of San Francisco*,[76] Service Employees International Union, Local 1021 ("Union") appealed the Office of the General Counsel's ("OGC") dismissal of its unfair practice charge against the City and County of San Francisco ("City") for failing to state a prima facie case. The Union alleged that the City violated the MMBA by retaliating against a Union chapter president for protected activities.

The Union appealed the dismissal of the complaint. PERB granted the Union's appeal and directed the OGC to issue a complaint on the Union's retaliation allegations concluding the Union alleged sufficient factual allegations to warrant a complaint.

First, PERB noted that it has relatively few pleading requirements, citing PERB Regulation 32615, subdivision (a)(5) which requires a charging party to provide a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice," and PERB Regulation section 32620, subdivision (b)(1)[77] which requires OGC to assist the charging party in stating the information that Regulation 32615[78] requires. PERB noted that it prefers "to hear cases on their merits, notwithstanding technical non-compliance with matters of form."[79]

Second, PERB noted that a charging party's burden at this point in the litigation is not to produce evidence, but merely to allege facts that, if proven true at a subsequent hearing, would state a *prima facie* violation, and that PERB will assume that the charging party's factual allegations are true. Thus, the charging party bears a relatively low burden to allege facts tending to show the requisite state of mind. Nonetheless, PERB will dismiss a charge without issuing a complaint if the parties' filings disclose undisputed facts sufficient to defeat the claim.

Third, if there are one or more contested, outcome-determinative facts or contested, colorable legal theories, the OGC should issue a complaint and a formal hearing is needed.

Finally, PERB concluded that the retaliation allegations raised material conflicting facts justifying a hearing. PERB noted that one of the Union's allegations in this case was that in a reclassification, the City will grant all remaining employees who occupied positions in the same classification and department the right to positions in a new classification as vacancies occur, according to seniority, and that the City deviated from

[72] The unalleged violation doctrine provides PERB a means to find an unfair practice based on allegations not plead in the complaint. The unalleged violation doctrine applies when, if proven, factual allegations presented at hearing but not included in the complaint would constitute a separate unfair practice in addition to the theories of liability set forth in the complaint. *See City of Roseville* (2016) PERB Dec. 2505-M, p. 18.
[73] Cal. Code Regs., tit. 8, § 32647.
[74] Cal. Code Regs., tit. 8, § 32648.
[75] *County of Tulare, supra.,* at p.10 fn.8.
[76] PERB. Dec. No. 2712-M.
[77] Cal. Code Regs., tit. 8, § 32620, subd. (b)(1).
[78] Cal. Code Regs., tit. 8, § 32615.
[79] *City and County of San Francisco, supra,* p. 22, fn. 7, citing *County of Santa Clara, supra*, p.7, citing *United Farm Workers of America v. Agricultural Labor Relations Board* (1985) 37 Cal.3d 912, 916.

its "normal" process. In contrast, the City alleged that it acted in a typical and lawful manner when it ultimately chose to promote four employees with less seniority as superior candidates. PERB concluded that under its regulations, where there are conflicting factual material statements, a formal hearing is necessary to resolve the conflicting material factual statements.

PERB Reversed ALJ Decision Denying Motion to Amend Answer Noting that Its Liberal Amendment of Pleading Standards Applies Equally to Amendment of Answers.

In *Eastern Municipal Water District*,[80] Eastern Municipal Water District filed exceptions to an ALJ's proposed decision granting an employee's partial summary judgment on the employee's claim that the District violated the MMBA by terminating the charging party Corliss in retaliation for charging party's protected activities and interfering with employee rights. In a pre-hearing memorandum, the ALJ found that the District admitted most material facts and had not properly pled affirmative defenses. The ALJ then denied the District's motion during the hearing to amend its answer as untimely and that it would be prejudicial to charging party if the District raised new affirmative defenses while the summary judgment motion was pending. The ALJ then granted the charging party's partial motion for summary judgment. The District filed exceptions contending the ALJ erred in denying the District's motion to continue the hearing to give it time to amend its answer to cure perceived pleading defects would prejudice the charging party.

PERB reversed the ALJ grant of partial summary judgment, reinstated the complaint, and remanded the case for evidentiary hearing.

First, PERB noted that it prefers to hear cases on their merits, notwithstanding technical non-compliance with matters of form.[81]

Second, PERB noted that it "favors liberal amendment of pleadings, so that parties are not deprived of the opportunity to have their issues heard on the merits due to legal technicalities."[82] PERB pointed to PERB Regulation 32648[83] which explicitly permits a party to amend a complaint during a hearing unless it would result in undue prejudice to other party. PERB then noted that it is appropriate to grant an amendment to a pleading even if the amendment would prejudice the other party if the ALJ can order accommodations such as a continuance to allow the other party additional time to prepare their case.

Third, PERB noted that there is no absolute bar to a party (either a union/employee or employer) curing or otherwise amending their pleading while a dispositive motion is pending. If the other party is prejudiced by the other party moving to amend their pleading, an ALJ could grant a continuance to allow the other party the opportunity to amend their dispositive motion.

Fourth, PERB concluded that a PERB agent's broad powers under PERB Regulation 32170[84] warrant treating motions to amend an answer on the same basis as motions to amend a complaint. PERB noted that pursuant to PERB Regulation 32170[85] an ALJ's primary responsibility is to obtain a complete record upon which the decision can be rendered. Thus, an ALJ is to decide the merits of a case on a dispositive motion only if the facts are truly undisputed and the parties have had full opportunity to assert any claims or defenses that do not prejudice the other party.

Finally, PERB concluded that the ALJ erred in denying the District's amendment of its answer during the hearing because the ALJ could have remedied any prejudice by granting a continuance to allow the charging party employee to amend its summary judgment motion or prepare for the hearing.

Admission in a Pleading Constitutes a Judicial Admission Removing the Issue from Dispute.

An employer's unequivocal admission of material allegations in its Answer constitutes a judicial admission that *forbids* PERB's consideration of contrary evidence, including

[80] (2020) PERB Dec. No. 2715-M.
[81] *Id.* at p.7.
[82] *Id.* at pp. 7-8.
[83] Cal. Code Regs., tit. 8, § 32648.
[84] Cal. Code Regs., tit. 8, § 32170.
[85] *Id.*

evidence offered to rebut the judicial admission, thus removing the issue from dispute.[86]

PERB Will Not Assert Jurisdiction Over a Private Entity by Finding a Private Entity Is a "Single Employer" with an Entity Subject to PERB.

PERB only has the jurisdiction and powers conferred onto it by statute. It cannot "obtain jurisdiction over a private entity that does not fall within the definition of 'employer' under the applicable statute by finding that entity to be part of a 'single employer' relationship with an entity over which the Board does have jurisdiction."[87]

PERB Usually Grants Parties' Request to Withdraw Charges when Parties Settle Disputes During the PERB Process.

The parties to unfair practice charges often settle their underlying disputes after an ALJ's proposed decision is issued or after one or both of the parties has filed exceptions to the ALJ's proposed decision, and one party or both parties jointly request withdrawal of the charge and dismissal of the complaint. PERB has a long-standing policy of favoring voluntary settlements.[88] Relying on PERB Regulation 32320(a)(2), "The Board itself may: ... take such other action as it considers proper," PERB generally finds that withdrawal of the unfair practice charge and dismissal of the complaint to be in the parties' best interests and consistent with the relevant labor relations statute's purpose to promote harmonious labor relations. And, PERB generally grants with prejudice the request to withdraw the charge and dismiss the complaint, and PERB vacates the proposed decision. PERB continued this practice in recent cases.[89]

Similarly, PERB allowed a party to withdraw its exceptions to an ALJ's proposed decision, in which case the proposed decision becomes final and binding as to the parties, but not precedential.[90] In another case, based on PERB's review of the parties' settlement, PERB deemed exceptions to the proposed decision withdrawn, dismissed the charge with prejudice, and vacated the proposed decision.[91]

Note, however, that PERB also has the discretion to deny requests to withdraw and dismiss cases that are pending before it. "When an appeal or exceptions pending before the Board involves "a matter of continuing public interest and a precedential ruling on the matter will be instructive to all parties similarly situated, the Board has exercised its discretion by denying a request for withdrawal, in the interest of justice."[92]

PERB Has Discretion to Grant Requests to Withdraw Unfair Practice Charges and Exceptions to ALJ's Decision.

In *County of Contra Costa*,[93] the County and the Physicians and Dentists Organization of Contra Costa ("Union") excepted and cross-excepted to an ALJ decision awarding 36 minutes of compensatory time off for affected physicians as a remedy for failing to engage in effects bargaining with the Union over the County's decision to increase the ambulatory care patient rosters from 10 to 11 patients per physician. While the case was pending before PERB, the parties settled the dispute. As part of the settlement, the parties submitted a joint request to PERB asking to withdraw the unfair practice charge and the parties' exceptions and cross-exceptions to the proposed decision.

PERB approved the joint request to withdraw the unfair practice charge and the exceptions

[86] In *Turlock Unified School Dist.* (2017) PERB Dec. No. 2543, 42 PERC ¶ 61, the District's Answer unequivocally admitted to the scope of its professional growth policy for teachers. Consequently, the ALJ could not find that the parties' collective bargaining agreement established a different policy. Thus, the District's unilateral change in policy constituted an unfair labor practice. *City of Calexico* (2017) PERB Dec. No. 2541-M, 42 PERC 53 (City precluded from arguing that the Wednesday through Tuesday pay period schedule was not the City's past practice because the City's admitted this was the past practice in its Answer).

[87] *Alliance College-Ready Public Schools* (2017) PERB Dec. No. 2545, 42 PERC ¶ 76.

[88] *Dry Creek Elementary School Dist.* (1980) PERB Order No. Ad-81, 4 PERC § 11036.

[89] *Bellflower Unified School Dist.* (2014) PERB Dec. No. 2403, 39 PERC 81; *Turlock Irrigation Dist.* (2015) PERB Dec. No. 2413-M, 39 PERC 105; *County of Fresno* (2015) PERB Dec. No. 2436-M, 40 PERC 12.

[90] *San Mateo County Community College Dist.* (2014) PERB Dec. No. 2395, 39 PERC 58.

[91] *City of Milpitas* (2015) PERB Dec. No. 2412-M, 39 PERC 99.

[92] *County of Kern* (2015) PERB Dec. No. 2430-M, 39 PERC 180.

[93] (2019) PERB Dec. 2681.

and cross-exceptions to the ALJ's decision finding that doing so effectuates the purpose of the MMBA and promotes harmonious labor relations. PERB noted that it has the discretion to grant or deny requests to withdraw or dismiss exceptions, appeals, and cases pending before it, and to vacate or otherwise withdraw administrative determinations and other decisions or orders issued at any level of PERB.

Both the Charging Party Requesting a Withdrawal of a Charge, and an ALJ in Its Notice Approving Withdrawal Must State in Writing if the Charge is Being Withdrawn With or Without Prejudice.

In *Solano County Community College District*,[94] the District appealed an ALJ's notice of withdrawal of a charge and dismissal of complaint. The charging party filed a request to withdraw its charge without indicating whether it intended the withdrawal to be with or without prejudice shortly before hearing, which the ALJ granted. The District asked the ALJ to clarify if the withdrawal was with or without prejudice. The ALJ refused to clarify its withdrawal notice even though the charging party later stated that they intended the withdrawal to be without prejudice. The District then appealed the ALJ's withdrawal of the charge and dismissal of the complaint, and PERB granted the appeal and concluded that the dismissal was without prejudice.

PERB noted that pursuant to its regulations, a PERB agent must include in its written notice of withdrawal whether it is dismissing a charge with or without prejudice.[95] A PERB agent can not omit this determination. Thus, the ALJ's notice of withdrawal did not comply with the express requirements of PERB's regulation, and accordingly, PERB granted the appeal.

However, PERB approved the withdrawal of the charge without prejudice noting that the charging party received no consideration from the District in exchange for the withdrawal. However, PERB noted that granting the withdrawal without prejudice was meaningless in this case (as is true for most cases not alleging a continuing violation) because the underlying claims were already more than six months old at the time of the withdrawal and therefore were time-barred. Finally, PERB noted that even if the charge was timely filed, the OGC could decline to issue a complaint pursuant to PERB Regulation 32625[96] if the charging party filed a new charge alleging substantially identical conduct.

PERB Posting Requirements Include Electronic Posting.

PERB's standard remedy for an unfair labor practice includes physically posting in the workplace PERB's cease-and-desist order to the guilty party. PERB has updated the traditional posting requirements to include electronic posting. When the offending party in unfair practice proceedings, whether it be an employer or employee organization, regularly communicates with employees by email, intranet, websites, or other electronic means, PERB will require the employer or the union to use those same media to post notice of PERB's decision and remedial order, in addition to PERB's traditional physical posting requirement.[97]

An Employer's Obligation to Provide Information Pursuant to a PERB Order Is Fixed as of the Date of the Order.

PERB concluded that an employer's duty to provide information pursuant to a PERB order is fixed as of the date of the order, irrespective of whether intervening events create new potential defenses to providing the requested information.[98]

The PERB Office of General Counsel's Post-Decision Actions Cannot Be Raised as a Defense to an Enforcement Action.

The PERB Office of General Counsel's post-decision actions cannot be raised as a defense to an enforcement action in court.[99] Government Code "section 3542(d) specifically permits a trial court to consider only two factors in deciding whether to issue a writ of mandate: whether the underlying

[94] (2020) PERB Dec. No. 2708.
[95] Cal. Code Regs., tit. 8, § 32625.
[96] *Ibid.*
[97] *City of Sacramento* (2013) PERB Dec. No. 2351-M, 38 PERC ¶ 104.
[98] *Children of Promise Preparatory Academy* (2019) PERB Order No. Ad-473.
[99] *PERB v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927.

order was issued pursuant to procedures established by PERB and whether the respondent refused to comply with the order."[100] And Government Code section 3542(d) requires that PERB do just two things to establish entitlement to a writ of mandate:

1. provide the court with a record of the underlying proceedings showing the procedural regularity of the order, and
2. present evidence demonstrating that the party subject to the order refused to comply.

Although the PERB General Counsel has discretion in determining whether a respondent has complied with a PERB order,[101] the General Counsel had no authority to modify a PERB order, including notices. The court concluded the Bellflower Unified School District should have raised with the PERB Board its desire to modify the order and notice prior to the issuance of the decision and not have waited to the compliance proceeding.

PERB REGULATIONS

PERB has established substantial regulations to implement the provisions of the EERA, SEERA, HEERA, MMBA, TEERA, Trial Court Act, and Court Interpreter Act.[102] A number of PERB cases address compliance with PERB regulations, including, for example, dismissing untimely filed unfair practice charges and refusing to toll the statute of limitations,[103] dismissing untimely filed responses and appeals,[104] dismissing appeals and requests for reconsideration for failing to meet PERB standards,[105] and dismissing unfair practice charges for failing to state a *prima facie* case.[106]

Reconsideration Requests

For example, a party may file only one request for reconsideration of a PERB decision, except in the rare situation where an earlier grant of reconsideration results in PERB vacating its prior decision and issuing a completely new and different decision. PERB has noted that this rule both protects parties' right to obtain reconsideration of a decision and avoids unnecessary waste of PERB's and the parties' resources.[107] In an appeal from PERB agent's dismissal of an unfair labor practice charge, PERB will not consider a party's position statement that

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[100] *Id.* at 943.

[101] *PERB v. Bellflower Unified School Dist.*, *supra,* at 942-943; PERB Regulation 32980 grants the PERB General Counsel the authority to conduct an inquiry, informal conference, investigation, or hearing as appropriate.

[102] Cal. Code Regs., tit. 8, §§ 32000-91630.

[103] See, e.g., *Santa Monica Community College Dist.* (2012) PERB Dec. No. 2243, 36 PERC ¶ 132 (dismissal of an unfair practice charge as untimely because the alleged unlawful action did not meet the legal standards of a continuing violation); *California Media Workers Guild/CWA/Local 39521 (Zhang)* PERB Dec. No. 2245-I, 36 PERC ¶ 148 (PERB adopts PERB agent's dismissal of an unfair labor practice charge as untimely because the employee did not timely file a charge from the point she knew or should have known that the union would not represent her on an employment matter); *City of Berkeley (Larsen Orta)* (2012) PERB Dec. No. 2281-M, 37 PERC ¶ 56 (PERB refuses to toll the six-month limit of limitations because of pending EEOC litigation and because the charging party clearly failed to file the charge from the date of her employment dismissal); *County of Santa Barbara (Quinn)* (2012) PERB Dec. No. 2279-M, 37 PERC ¶ 49 (PERB finds that the individual employee's charge was untimely and the six-month timeline was not tolled by unspecified grievance filings, although the charging party stated sufficient facts to constitute a *prima facie* case of retaliation.).

[104] See, e.g., *Stanislaus Consolidated Fire Protection Dist.* (2012) PERB Dec. No. Ad-392-M, 36 PERC ¶ 108 (PERB does not find good cause to excuse a late-filed response to an appeal of a dismissal of an unfair practice charge); *County of Riverside* (2012) PERB Dec. No. 2228-M, 36 PERC ¶ 97 (dismissal as untimely an appeal of a board agent's partial dismissal of an unfair practice charge); *Stanislaus Consolidated Fire Protection Dist.* (2012) PERB Order No. Ad-394-M, 36 PERC ¶ 186 (PERB affirms denial of request for extension of time to file a request for reconsideration as untimely); *Federation of United School Employees, Local 1212 (Corrigan)* (2012) PERB Dec. No. Ad-395, 37 PERC ¶ 29 (untimely appeal dismissed because the excuse that the PERB notice was delayed in the mail by five days within California was not acceptable).

[105] See, e.g., *City of Palmdale and Teamsters Local 911* (2011) PERB Dec. No. 2203a-M, 36 PERC ¶ 98 (denial of a reconsideration request in a unit determination matter); *Office & Professional Employees Internat. Union, Local 29 (Fowles)* (2012) PERB Dec. No. 2236-M, 36 PERC ¶ 120 (denial of a union's request to reconsider a PERB decision because the union merely restated the legal arguments previously considered and rejected by PERB, and did not establish the prejudicial error of fact required for reconsideration); *City of Santa Monica* (2011) PERB Dec. No. 2211a-M, 36 PERC ¶ 100 (PERB's refusal to reconsider the dismissal of claim of retaliation for union activity).

[106] See, e.g., *City of Santa Monica* (2012) PERB Dec. No. 2246-M, 36 PERC ¶ 149 (PERB adopts board agent's dismissal of an unfair practice charge for being untimely and for failing to state a *prima facie* case because an individual cannot process a claim for failure to provide information under the MMBA; *American Federation of State, County, and Municipal Employees, Local 2620 (McGuire)* (2012) PERB Dec. No. 2286-S, 37 PERC ¶ 75; PERB dismisses an individual's claim against a union because on appeal the employee failed to state a *prima facie* case and failed to meet the PERB's standard for consideration of new evidence).

[107] *County of Santa Clara* (2013) PERB Dec. No. Ad-398-M, 37 PERC ¶ 186.

does not conform with the PERB regulation requiring any response to an unfair labor practice charge be signed under penalty of perjury by the party or its agent with the declaration that the response is true and complete to the best of respondent's knowledge and belief.[108]

As a Litigation Sanction, PERB May Advise a Charged Party it Must Refrain from Submitting a Position Statement Until After the Office of General Counsel Concludes that the Charging Party has Alleged Facts in its Charge Sufficient to Plead a Prima Face Case of an Unfair Practice.

In *Los Rios Community College District*, PERB denied the Charging Party employee's request for reconsideration of PERB's decision to affirm an OGC decision to dismiss two unfair practice charges against the Los Rios Community College District and the Los Rios College Federation of Teachers, Local 2779 ("Union"). In so finding, PERB concluded that the request for reconsideration was frivolous but declined to award requested monetary sanctions by the District.[109] that the employee lacked standing to appeal PERB's dismissal of the employee's charges (the charges were originally filed in 1986) because the alleged underlying unlawful conduct was untimely as the statute of limitations on the charges had long since passed on these allegations. The employee nevertheless sought reconsideration of PERB's decision. PERB also found that the employee did not establish any prejudicial errors of fact in the underlying decision or point to any newly discovered evidence that would alter PERB's decision. Therefore, PERB denied the employee's request for reconsideration.

PERB noted that the employee had a lengthy history of filing repetitive and frivolous claims and sought to re-litigate issues that have already been resolved. But PERB denied the District's renewed request for monetary sanctions without prejudice because it had previously deferred any decision regarding monetary sanctions until additional charges filed with PERB and pending with OGC have been resolved. PERB then made clear that the employee could be subject to monetary sanctions should they continue to abuse PERB processes. In any event, PERB noted that it has already awarded litigation sanctions to the District. Specifically, with respect to any unfair practice charge that the employee has on file, or files in the future, the respondent need not file a response unless and until OGC notifies the respondent that the charge raises colorable new allegations of violations, and that a response is required.

PERB Will Not Entertain Requests for Reconsideration of an Administrative Decision, But Only Decisions Following a Hearing with a Developed Factual Record or a Stipulated Record of Fact.

In *Bellflower Unified School District*,[110] the District requested reconsideration of its earlier decision in the case citing prejudicial error of facts.[111], PERB denied the motion for reconsideration.

PERB concluded that "even the most cursory review of its precedent would have revealed that PERB regulations do not permit reconsideration of decisions resolving administrative appeals."[112] In reaching this conclusion, PERB noted that there are only two grounds for reconsideration under PERB Regulations: "(1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party [requesting reconsideration] has newly discovered [factual] evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence."[113]

Thus, a request for reconsideration must involve asserted errors or omissions of fact. Purported errors of law, including the PERB's alleged improper application of its own regulations, or a reversal of PERB precedent, are not grounds for reconsideration.[114] Thus, a party may not use the reconsideration process to challenge PERB's legal analysis or

[108] *National Education Assn.-Jurupa (J. Norman)* (2014) PERB Dec. No. 2371, 38 PERC ¶ 156.
[109] *Los Rios Community College Dist.* (2019) PERB Dec. No. 2614a.
[110] (2019) PERB Order No. Ad-475a.
[111] *Bellflower Unified School Dist.* (2019) PERB Order No. Ad-475.
[112] *Bellflower Unified School Dist.,* (2019) PERB Order No. Ad-475a, at pp. 2-3; PERB Regulation 32410 (Cal. Code Regs., tit. 8, §32410).
[113] *Bellflower Unified School Dist.* (2019), *supra,* at p. 2.
[114] *Id.*, at pp. 2-4.

to re-litigate issues that have already been decided.

PERB noted that it will reconsider only those decisions that are made based on a developed factual record following a formal hearing or stipulated record of facts, such as an ALJ's proposed unfair practice decision. Consequently, reconsideration is not available for a decision arising from an administrative determination where there is no factual record for example, PERB's denial of an appeal of an Office of General Counsel's dismissal of a charge. PERB concluded that the District filed its reconsideration request to delay compliance and evade its obligations under the EERA.

PERB Has Discretion to Grant Requests to Withdraw Unfair Practice Charges and Exceptions to ALJ's Decision.

In *County of Contra Costa*,[115] the County of Contra Costa and the Physicians and Dentists Organization of Contra Costa ("Union") excepted and cross-excepted to an ALJ decision awarding 36 minutes of compensatory time off for affected physicians as a remedy for failing to engage in effects bargaining with the Union over the County's decision to increase the ambulatory care patient rosters from 10 to 11 patients per physician. While the case was pending before PERB, the parties settled the dispute. As part of the settlement, the parties submitted a joint request to PERB asking to withdraw the unfair practice charge and the parties' exceptions and cross-exceptions to the proposed decision.

PERB approved the joint request to withdraw the unfair practice charge and the exceptions and cross-exceptions to the ALJ's decision finding that doing so effectuates the purpose of the MMBA and promotes harmonious labor relations. PERB noted that it has the discretion to grant or deny requests to withdraw or dismiss exceptions, appeals, and cases pending before the Board, and to vacate or otherwise withdraw administrative determinations and other decisions or orders issued at any level of PERB.

[115] (2019) PERB Dec. 2681.

Late Filings and Extension of Time

PERB only occasionally excuses late filings.[116] PERB regulations provide that PERB may excuse a party's late filing for good cause.[117] PERB has found good cause when the explanation was "reasonable and credible" and the delay did not prejudice any party. PERB has usually excused mailing or clerical errors as "honest mistakes."[118] An attorney's misreading of PERB regulations is not good cause to excuse a late filing.[119] When a party alleges that a late filing is caused by an illness, PERB requires that the party demonstrate *how* the illness prevented him from making a conscientious effort to timely file, including, if needed, a timely request for an extension of time.[120] PERB will affirm a board agent's dismissal of an unfair practice charge for failing to include a valid proof of service, as required by PERB regulations.[121]

PERB considered a charging party's appeal from a PERB agent's denial of the individual's seventh request for an extension of time based on various medical conditions. PERB assumed for purposes of the appeal that the charging party was a qualified individual with a disability and that PERB, as a state agency, is subject to California and federal anti-discrimination statutes. PERB noted that reasonable accommodations could include changes to PERB's calendaring or scheduling practices or procedures to provide additional time to ensure disabled persons enjoy full and equal access to PERB's services. A public

[116] See, e.g., *Santa Monica Community College Dist.* (2012) PERB Dec. No. Ad-393, 36 PERC ¶ 134 (PERB finds good cause for accepting an untimely filing because the District filed the response in a timely fashion with the wrong PERB office); *Fallbrook Public Utility Dist.* (2012) PERB Dec. No. 2229-M, 36 PERC ¶ 103 (PERB vacates a board agent's dismissal of an amended unfair practice charge as untimely and finds good cause to excuse the charging party's untimely amended unfair practice charge); *City of Carlsbad* (2012) PERB Dec. No. 2276-M, 37 PERC ¶ 24 (PERB remands charge for further investigation by PERB agents because the charge had been prematurely dismissed); *Educators of San Francisco (Lagos)* (2012) PERB Dec. No. 2232, 36 PERC ¶ 112 (PERB agent dismissal for untimely filing amended charges is reversed).

[117] Cal. Code Regs., tit. 8, § 32136.

[118] *University of Cal. (Estes)* (2012) PERB Dec. No. Ad-396-H, 37 PERC ¶ 118.

[119] *Bellflower Unified School Dist.* (2017) PERB Dec. No. Ad-447, PERC 15.

[120] *County of Santa Clara (H. Guerrero)* (2014) PERB Order No. Ad-412-M, 38 PERC ¶ 159.

[121] *Los Angeles Superior Court* (2012) PERB Dec. No. 2301-C, 37 PERC ¶ 149.

agency, however, is not required to provide accommodations that would fundamentally alter the nature of the service or program offered by the agency.

PERB concluded that it could not assess the reasonableness of the last extension request because the medical documentation provided did not explain how granting an additional extension of time would enable the individual to complete the appeals process when all of the previous extensions which PERB granted had been insufficient. PERB also denied the charging party's appeal because the "indefinite and continuing nature of [her] requests for extensions of time would fundamentally alter the nature of PERB's unfair practice proceedings." PERB noted that "[t]he expectation is that unfair practice charges are handled as expeditiously as possible at both the case processing and administrative appellate stage" and that "[d]elays in this process leave parties in an ambiguous situation as to their rights and responsibilities, which is counter-productive to the maintenance of harmonious labor relations that is a fundamental mission of PERB."[122]

Appeal From a PERB Agent's Dismissal of a Charge

PERB decisional law generally limits the scope of a reconsideration request to identify prejudicial factual errors or newly discovered, previously unavailable evidence, and precludes using the reconsideration process to re-argue previously decided issues or disagree with PERB's legal analysis.

PERB has also made clear that the appropriate procedure for claiming error in the dismissal of an unfair practice charge is to appeal the dismissal directly to the PERB Board under PERB Regulation 32635,[123] and not to file a new charge.[124]

PERB Regulation 32635(a) provides that an appeal from a PERB agent's dismissal of an unfair practice charge must:

1. state the specific issues of procedure, fact, law, or rationale to which the appeal is taken;
2. identify the page or part of the decision to which each appeal is taken; and
3. state the grounds for each issue stated.[125]

PERB has consistently ruled that compliance with Regulation 32635(a) must sufficiently place PERB and the other party on notice of the issues raised on appeal, and that merely reiterating the facts alleged in the unfair practice charge does not comply with the Regulation. Indeed, PERB will dismiss appeals that merely restate facts alleged in the original charge and fail to identify specific issues of procedure, fact, law, or rationale in the PERB agent's dismissal of the unfair practice charge which are being challenged.[126] Reconsideration is available only of a decision based on an evidentiary hearing or stipulated factual record.[127]

PERB maintains a clear rule that only a party has standing to appeal a proposed decision. For example, PERB affirmed the denial of an appeal of a proposed decision by an individual employee when the employee's union, who initiated the retaliation charge on behalf of two employees, declined to appeal the administrative law judge decision. PERB noted that allowing the employee to appeal the proposed decision would undermine the union's right to control the administrative litigation of its own case brought to "vindicate" a collective interest as it determined.[128]

PERB has similarly refused to permit an employee to join a case after its dismissal where the charging party elects not to appeal the decision and where the employee on whose behalf the charge was filed fails to timely join the case after being notified the charging party was withdrawing from the case and after PERB had provided the

[122] *Regents of the U. of Cal. (Polk)* (2016) PERB Order No. Ad-437-H, 40 PERC 177.
[123] Cal. Code Regs., tit. 8, § 32365(a).
[124] *Los Rios Community College Dist.* (2018) PERB Dec. No. 2614-E.
[125] Cal. Code Regs., tit. 8, § 32635(a).
[126] *California School Employees Assn. (Naing)* (2013) PERB Dec. No. 2319, 38 PERC ¶ 24; *SEIU, Local 1021 (Kaboo)* (2013) PERB Dec. No. 2322, 38 PERC ¶ 35; *Palo Verdes Faculty Assn.* (2012) PERB Dec. No. 2289, 37 PERC ¶ 91.
[127] *Berkeley Federation of Teachers, Local 1078 (Crowell)* (2015) PERB Dec. No. 2405a.
[128] *University of Cal. (Lawrence Berkeley Nat. Laboratory)* (2013) PERB Dec. No. Ad-397-H, 37 PERC ¶ 178.

employee multiple chances to join prior to the case's dismissal.[129]

An unfair practice case initiated by a union is presumed to vindicate a collective interest, and allowing an individual employee to appeal an ALJ's decision would undermine the union's right to control the litigation of its case as charging party and to determine how best to represent the bargaining unit's collective interest. In addition, allowing a non-party to appeal violates PERB regulations as well as the actual parties' expectations of finality.[130] Under PERB regulations, in order to protect an employee's individual interests in a case, an individual employee has the right to file an unfair practice charge in his or her own right, or to file an application for joinder as a party to a case between the employee and the union.[131]

A request for reconsideration of a PERB decision is not the appropriate procedural vehicle for seeking a PERB member's recusal. Litigants before PERB should initially consider whether to file a motion for a member's recusal before they file exceptions to an ALJ proposed decision. After the exceptions are filed, a party may file a motion for recusal only if it discovers a member's disqualifying interest and the facts were not available when the exceptions were filed.[132]

Finally, PERB Regulation 32635(a) permits only the charging party to file an appeal of a dismissal of the unfair practice charge within 20 days of the date of service of the dismissal."[133]

Failure to Prosecute

Since the 1989 repeal of former PERB Regulation 32652, there has not been a fixed timeline for bringing an unfair practice complaint to hearing. However, PERB decisions have "held that after a complaint has issued and settlement efforts have failed, the charging party must prosecute the case in a timely manner."[134] On a motion by the respondent or on the Board's own noticed motion, a Board agent may dismiss an unfair practice charge and complaint for failure to prosecute if no good cause is shown by the complainant. "PERB's good cause analysis weighs the charging party's asserted reasons for the delays in the case against the length of the delays and the potential for prejudice to the respondent."[135]

PERB precedent makes clear that granting a pre-hearing motion to dismiss is appropriate only when the material facts are not disputed.[136] In dismissing an unfair practice case, a Board agent cannot resolve factual disputes or make credibility determinations without a hearing. Due process requires a hearing when material facts underlying a motion to dismiss are in dispute, however, the hearing officer may limit the hearing to the material factual disputes underlying the motion.[137]

Failure to Follow PERB Regulations May Result in Dismissal of Complaint.

PERB regulations require a party filing exceptions to a proposed decision (1) to include a statement of the specific issues of procedure, fact, law, or rationale to which each exception is taken; (2) to identify the page or part of the decision to which each exception is taken; (3) to designate the portions of the record relied upon; and (4) to state the grounds for each exception. An exception is waived if not specifically raised.[138] PERB has explained that compliance with the regulation is required to assure that the other party and PERB have the opportunity to respond to the issues presented by the appeal, and that failure to comply with the regulation may result in dismissal of the case without reviewing the merits of the appeal.[139]

[129] *New Haven Unified School Dist.* (2018) PERB Order No. Ad-471.
[130] *Jurupa Unified School Dist.* (2014) PERB Order No. Ad-417-E, 39 PERC 47.
[131] *Ibid.*
[132] *County of Tulare* (2016) PERB Dec. No. 2461a-M, 40 PERC 145; Cal. Code Regs., tit. 8, § 32155.
[133] *Los Rios Community College Dist., supra*; Cal. Code Regs., tit. 8, § 32365(a).
[134] *Santa Ana Unified School Dist. (Felicijan)* (2017) PERB Dec. No. 2514, p. 19, 41 PERC 132.
[135] *Id.* at p. 20.
[136] *Felicijan, supra.*
[137] *Ibid.*
[138] Cal. Code Regs., tit. 8, § 32300(a)(1)-(4).
[139] See, e.g., *Los Angeles Unified School Dist.* (2015) PERB Dec. No. 2432, 40 PERC 2.

PERB continues to dismiss cases for lack of jurisdiction.[140] And, unless good cause is shown, a charging party may not present new allegations or new evidence on appeal.[141] PERB cases demonstrate the importance of a thorough understanding of PERB regulations before initiating or initially responding to a PERB charge, and at every subsequent stage of the PERB proceeding.

PERB updates its regulations from time to time to reflect statutory changes and other developments, so practitioners should check these regulations regularly before any interaction with the agency.

Disqualification of PERB and Its Agents

PERB Regulation 32155 provides the standard for disqualification of PERB Board members and agents. PERB Regulation 32155(a)(4) requires disqualification "[w] hen it is made to appear probable that, by reason of prejudice of such Board member or Board agent, a fair and impartial consideration of the case cannot be had before him or her."[142]

More specifically, PERB Regulation 32155(c) permits "any party to request a PERB "Board agent, [including ALJ's,] to disqualify himself or herself that is probable whenever it appears that a fair and impartial hearing or investigation cannot be held by the Board agent in whom the matter is assigned...."[143]

PERB Regulation 32155, subdivision (d) permits a party to request special permission to appeal within ten days of the denial of a motion for disqualification. If probable cause is found, disqualification of the PERB agent is appropriate only on evidence of a "fixed anticipatory pre-judgment against a party by the decision maker.[144]

Similarly, PERB Regulation 32155, subdivision (f) provides that a party may file a request for a PERB member's recusal directly with the PERB member when exceptions are filed to an ALJ's proposed decision or within ten days of discovering the PERB member's disqualifying interest to the extent the facts supporting the disqualification of the PERB member were not known by the party at the time exceptions were filed.[145]

The PERB Board is also is authorized to rule on its own disqualification.[146] PERB Regulations provide that the individual PERB member is to decide whether to recuse themselves.[147]

PERB'S INJUNCTIVE RELIEF POWER

Injunctive relief under collective bargaining statutes, unlike traditional injunctive relief in the civil judicial system, protects the public interest, rather than private rights. PERB's exercise of its injunctive relief power on behalf of employees or unions protects the integrity of the collective bargaining process and the effectiveness of PERB's remedial power while the case is being decided.

PERB uses a two-pronged test to determine whether it will seek injunctive relief: (1) reasonable cause must exist to believe that an unfair practice has been committed, and (2) injunctive relief must be "just and proper."[148] Meeting the first prong of the test is not difficult; the party seeking injunctive relief must demonstrate only that the theory supporting its unfair practice claim is not "insubstantial or frivolous," not that an unfair practice has in fact been committed.[149]

Turning to the second prong of the test, PERB will determine that injunctive relief is "just and proper" if the alleged unfair practice would make any final PERB order so ineffectual that the remedial purpose of the labor relations act would be frustrated.

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[140] See, e.g., *Oxnard Union High School Dist.* (2012) PERB Dec. No. 2265, 37 PERC ¶ 4 (dismissal of an individual teacher's charge because PERB did not have jurisdiction over individual charges of a refusal to bargain and alleged violations of the Education Code); *San Bernardino City School Dist.* (2012) PERB Dec. No 2278-E, 37 PERC ¶ 36 (PERB dismisses a charge for lack of jurisdiction over an individual employee complaint about the inappropriate salary placement based on the Education Code); *Centinela Valley Secondary Teachers Assn.* (2012) PERB Dec. No. 2270, 37 PERC 11 (school district's charge that the teachers' union failed to reimburse the district for union leave in violation of the Education Code dismissed for lack of jurisdiction).

[141] *Id.*

[142] Cal. Code Res., tit. 8 tit. 8 § 32155, subd. (a)(4); *SEIU, Local 721 v. County of Riverside* (2018) PERB Order No. Ad.-469-M.

[143] Cal. Code Regs., tit. 8 § 32155, subd. (c).

[144] Cal. Code Regs., tit. 8, § 32155, subd. (d).

[145] Cal. Code Regs., tit. 8, § 32155, subd. (f).

[146] *SEIU, Local 721 v. County of Riverside, supra.*

[147] Cal. Code Regs., tit. 8, §32647, subd. (g).

[148] *SEIU, Local 721 v. County of Riverside* (2018), PERB Order No. Ad.-469-M.

[149] *PERB v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 896.

When analyzing whether requested injunctive relief is "just and proper," PERB also assesses whether the alleged unfair labor practice will cause irreparable harm to the party seeking the injunction. If a PERB "make whole" order can remedy the wrong, and if PERB finds no other potential harm to the public interest, to collective bargaining rights, or to PERB's ability to order an effective remedy at the end of the administrative process, PERB usually concludes that there is not irreparable harm.

When individual employees or unions file injunctive relief requests, PERB also considers whether alleged retaliation occurred during a union organizing campaign or whether there are allegations or credible evidence that the alleged unfair practice will chill other employees' rights. Absent these circumstances, PERB typically denies an injunctive relief request from an individual employee or a union.[150]

Employer's Defenses Must Be Timely Asserted.

PERB will not entertain defenses that are not timely raised. In a recent case, PERB rejected an employer's defenses to a charge of refusal to produce relevant information on timeliness grounds.

First, PERB rejected the employer's contractual waiver defense and its defense that production of the information would be unduly burdensome, noting that these were affirmative defenses that must be pled and proved by the respondent. Thus, the respondent must raise the defenses either in its Answer or through an Amendment of the answer before or during the hearing. Waiting until the case is on appeal to PERB is too late, and PERB refused to consider the merits of the defenses.

Second, PERB rejected the employer's confidentiality defense. PERB noted that an employer must raise a confidentiality defense promptly after a request for information is made so that the parties can resolve those confidentiality concerns in time for the union to utilize the information for its intended purpose. PERB concluded that the employer failed to do this. The union requested the information to decide whether to file a grievance, but the employer did not raise its confidentiality concerns until after the deadline passed for the union to file the grievance. Thus, the union was not given sufficient notice of the employer's confidentiality concerns to enable it to attempt to resolve those concerns and use the information.[151]

PRACTICE TIPS

Labor relations practitioners litigating cases before PERB should consult recent PERB decisions illustrating the importance of:

- Understanding the difference between a stay of activity, which is directed at a ruling or order by PERB or one of its agents, and a request for injunctive relief associated with an unfair practice charge, which is the remedy for a party seeking to prevent a public agency from acting unlawfully;[152]
- Understanding the requirements for PERB to consider an unalleged violation;[153]
- Asserting all applicable affirmative defenses in the Answer to a Complaint, and amending an Answer to add an affirmative defense as soon as becoming aware of them;
- Remembering that "contractual waiver" is an affirmative defense that must be pled in the Answer; and
- Understanding, before filing a request for reconsideration, the very limited circumstances under which reconsideration of PERB decisions is available.[154]

[150] *California State U. (East Bay) (Liu)* (2013) PERB Order No. IR-56-H, 38 PERC ¶ 7.

[151] *State of Cal. (Dept. of State Hospitals)* (2018) PERB Dec. No. 2568-S 43, PERC ¶ 3.
[152] *County of Solano* (2017) PERB Order No. Ad-455-M, 42 PERC ¶ 55.
[153] *CSU Trustees (San Marcos)* (2018) PERB Dec. No. 2549-H, 42 PERC ¶ 104.
[154] *Lake Elsinore USD* (2019) PERB Dec. No. A446-E, *Alliance Public Schools* (2018) PERB Dec. No. 2545a.

New Developments 2021

PERB CASES

In Hearing Charges for Violation of PEDD, PERB Does Not Resolve Conflicting Factual Allegations; Material Factual Conflicts Must Be Resolved Based Upon the Evidence Presented at Formal Hearing

In *Teamsters Local 2010*, PERB reversed the dismissal of Teamsters' unfair practice charge alleging the Regents of the University of California violated the prohibition on Public Employers Deterring or Discouraging Union Members.[155] PERB remanded the matter to the Office of the General Counsel to issue a complaint. In so finding, PERB maintained that it does not resolve conflicting factual allegations; material factual conflicts must be resolved based upon the evidence presented at a formal hearing.[156] PERB determined that the Teamsters asserted a *prima facie* case that the University posted flyers to influence employee free choice. Although the University asserted that its flyer was a business necessity to respond to inaccurate information in the union's flyer, PERB reasoned that the University circulated the communication during an organization campaign in direct response to the union's flyer, and suggested that the union's wage increases were less substantial than unrepresented clerical employee wage increases—thereby likely influencing employee decisions on union membership.[157] As such, a material factual dispute existed as to whether the University flyer was a business necessity to respond to inaccurate information in the union's flyer.[158] PERB remanded the matter to the Office of General Counsel to issue a complaint.

In Hearing Charges for Violation of PEDD, PERB Will Treat Government Code Section 3550 Even-Handedly as Prohibiting Public Employer Conduct Which Tends to Influence Employee Choices as to Whether or Not to Authorize Representation, Become or Remain a Union Member, or Commence or Continue Paying Dues or Fees.

In *American Federation of State, County Municipal Employees Local 3299*, PERB set out the standards it will use to evaluate alleged violations of PEDD.[159] PERB stated that it is a charging party's *prima facie* burden to show that the challenged conduct or communication is reasonably likely to deter or discourage employee free choice, not that the conduct actually did deter or discourage. When conducting this *prima facie* analysis, PERB ruled that it will treat section 3550 even-handedly, as prohibiting public employer conduct which tends to influence employee choices as to whether or not to authorize representation, become or remain a union member, or commence or continue paying dues or fees.[160]

In so deciding, PERB reasoned that section 3550 does not merely duplicate the existing interference standard; it creates a new and more robust protection that is not subject to the free speech safe harbor of HEERA section 3571.3.[161] PERB stated that although the statute itself is sufficiently clear and unambiguous to sustain this interpretation, section 3550's plain meaning is further supported on balance by additional relevant factors, including the legislative history, the nature of the overall statutory scheme, and consideration of the sorts of problems that the Legislature was attempting to solve when it enacted the statute.[162]

Second, upon finding a prima facie section 3550 violation, PERB ruled that it will analyze an employer's business necessity argument as an affirmative defense that the employer has the burden to plead and prove. PERB explained that it will resolve such an

[155] *Teamsters Local 2010* (2021) PERB Dec. No. 2756-H; see also Gov. Code, § 3550.
[156] *Id.* at p. 6 (citing *Sacramento City Unified School District* (2010) PERB Dec. No. 2129).
[157] *Id.* at p. 8.
[158] *Id.* at p. 9.
[159] *American Federation of State, County Municipal Employees Local 3299* (2021) PERB 2755-H; Gov. Code § 3550.
[160] *Id.* at p. 25.
[161] *Id.* at p. 29.
[162] *Id.* at p. 31.

asserted defense by weighing the tendency to deter or discourage against the employer's asserted business necessity.[163] Where a charging party shows employer conduct tended to influence employee decisions on one of these topics, the burden shifts to the employer. The degree of likely influence dictates the employer's burden. If the likely influence is "inherently destructive" of employee free choice, then the employer must show that the deterring or discouraging conduct was caused by circumstances beyond its control and that no alternative course of action was available. For conduct that is not inherently destructive, the employer may attempt to justify its actions based on operational necessity, and PERB will balance the employer's asserted interests against the likelihood of influencing employee free choice.

Finally, PERB ruled that when a charging party proves that the employer violated Government Code section 3553 by failing to meet and confer in good faith with the charging party before issuing a mass communication concerning public employees' rights to join or support, or to refrain from joining or supporting, an employee organization—a rebuttable presumption arises that the communication also violates section 3550. The employer may rebut the presumption by proving that the communication does not deter or discourage employee decisions protected by section 3550.

PERB Found No Unfair Practice Where the Agency Reasonably Interprets Its Own Rules in a Manner that Effectuates the MMBA's Purposes.

In *Long Beach Supervisors Employees Associatio*n ("LBSEA"), PERB's Office of the General Counsel granted the stay request and issued a complaint.[164] The complaint alleged, first, that the City unlawfully accepted the Petition from International Brotherhood of Electrical Workers, Local 47 ("IBEW"), seeking to decertify and replace LBSEA as the exclusive representative of the Supervisors Unit, pursuant to the City's Employer-Employee Relations Resolution ("EERR").[165]

LBSEA alleged that IBEW deviated from the EERR by: (1) filing the Petition outside the window period specified in EERR; (2) omitting from the Petition IBEW's telephone number; (3) attaching to the Petition an incomplete list of bargaining unit classifications, thereby seeking to modify the established unit; (4) failing to indicate that IBEW would abide by any existing Memorandum of Understanding; and (5) relying on authorization cards that were outdated and/or failed to specify that employees desired to have IBEW represent them in their employment relations with the City and no longer wished to be represented by LBSEA.[166]

The complaint further alleged that: (1) the City engaged in unlawful conduct by posting notice of the Petition before verifying whether it complied with the EERR; (2) denied two employees' requests to revoke their authorization cards; (3) provided IBEW with an unsolicited copy of the two employees' revocation requests; (4) maintained an EERR that failed to specify a procedure for revoking previously-submitted authorization cards; and (5) maintained an EERR that failed to protect the confidentiality of employees seeking to revoke their authorization cards.[167]

PERB explained that when evaluating an MMBA employer's application of its local rules, PERB follows a reasonableness standard.[168] Moreover, PERB finds no unfair practice where the agency reasonably interprets its own rules in a manner that effectuates the MMBA's purposes. The inverse is true if the public agency acted inconsistently with a reasonable interpretation of the rule.[169]

In so ruling, PERB noted that the City reasonably found that the petition adequately described the unit sought to be decertified. The City reasonably construed the local rules to mean that a recognition petition covering unrepresented positions

[163] *Id.* at p. 35-36.
[164] *Long Beach Supervisors Employees Assn*. (2021) PERB 2771-M.
[165] *Id*. at p. 3.
[166] *Ibid*.
[167] *Id.* at p. 10.
[168] *Id*. at p. 10 (citing *City of Madera* (2016) PERB Dec. No. 2506-M, p. 5).
[169] *Id.* at p. 11 (citing (*County of Riverside* (2011) PERB Dec. No. 2163-M, at pp. 8-9).

must specify all classifications at issue, but a petition to decertify and replace an incumbent union need only identify the unit at issue.[170] Moreover, the petitioner exercised due diligence in attempting to determine the classifications in the petitioned-for unit, both by examining the City's website and submitting a California Public Records Act request. Given that an MMBA employer must interpret its local rules in a reasonable manner, local rules should not be interpreted so strictly that they become a minefield freezing the status quo in place until a petitioner runs a gauntlet of unreasonably difficult requirements.[171]

NEW LEGISLATION

On January 14, 2021, the Office of Administrative Law implemented procedures to allow for the electronic filing and service of case-related documents and to allow for the electronic signature of union authorization cards. The regulations became effective on February 15, 2021.[172]

Effective February 15, 2021, all filings must be made via the ePERB portal unless the complaining party is an unrepresented individual. Unrepresented individuals may file through ePERB, U.S. mail, a delivery service (e.g., UPS, FedEx, etc.), or in person at the appropriate PERB regional office. The charge must be filed within six (6) months of the occurrence of the conduct that you contend is an unfair practice.

IMPACT OF NEW DEVELOPMENTS

- PERB opined that through the enactment of Government Code Section 3550, the legislative history indicates the Legislature's desire to afford special protection to employee decisions regarding union selection, membership, and support, in the aftermath of Janus, which eroded the public sector union framework provided by agency fees.

[170] *Id.* at p. 12.
[171] *Ibid.*
[172] Cal. Code Regs., tit. 8, § 32090.

Duty to Bargain

SUMMARY OF THE LAW

The courts have devised tests to interpret these statutes' language when determining whether a particular matter is within the scope of representation. For example, California courts should utilize federal precedent under the NLRA when determining the scope of bargaining under the MMBA.[1] If a matter falls between the required items (wages, hours, or other terms and conditions) and the excluded items (merits and necessity of the organization), then the courts look at whether the topic "primarily relates" to the employee interest or the management's interest.[2]

California's public sector labor relations statutes generally require employers and recognized employee organizations to meet and negotiate in good faith with one another on matters that are within the scope of representation.[3] In addition, each statute has individual and varying provisions regarding the timing of negotiations, the duty to consult, and the precise definition of the scope of representation. A party violates its duty to bargain if the party fails to negotiate in good faith on a topic within the scope of representation.

MANDATORY SUBJECTS OF BARGAINING – THE SCOPE OF REPRESENTATION

Topics within the scope of representation are called "mandatory bargaining" subjects. The MMBA, EERA, SEERA, and HEERA are all similar in that each requires bargaining on "wages, hours, and other terms and conditions of employment,"[4] although, each statute varies from the others with specifically-defined elements.

For example, the EERA enumerates other items that are mandatory subjects of bargaining, items that are required for consultation, and a proviso that all items not enumerated in the statute are reserved to the employer.[5]

Unlike the EERA, the MMBA and the SEERA do not list any specific items in their definitions, but do exclude from the scope of representation the "merits, necessity, or organization of any service or activity provided by law or executive order."[6] But, because the MMBA contains the phrase "including but not limited to" preceding the general words of "wage, hours, and other terms and conditions of employment,"[7] and this phrase does not appear in the NLRA or any of the other statutes, it can be argued that the MMBA provides a broader scope of representation than any of the labor relations statutes, including the NLRA.[8] The SEERA does not have a similarly expansive phrase.

The HEERA identifies a different scope of representation for the University of California, for the California State University,

[1] *FireFighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617, 116 Cal.Rptr. 507.
[2] *Id.* at pp. 620-21.
[3] Gov. Code, §§ 3505 et seq. (MMBA), 3543.3 et seq. (EERA), 3517 et seq. (SEERA), 3570 et seq. (HEERA), 71600 et seq. (TCEPGA), 71800 et seq. (TCIELRA). The California Supreme Court in *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898 noted that courts should grant substantial deference to PERB's expertise in interpreting these public sector labor relations statutes.
[4] See Gov. Code, §§ 3504 (MMBA), 3543.2 (EERA), 3516 (SEERA), 3562(q), 3562(r), 3581.3 (HEERA).
[5] Gov. Code, § 3543.2.
[6] Gov. Code, § 3504.
[7] Gov. Code, § 3505.
[8] See *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 391, 113 Cal.Rptr. 461 (quoting Grodin, Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts, 23 Hastings L.J. 719, 749 (1972)).

and for supervisory employees,[9] and provides for negotiations of faculty promotions, appointments, and tenure only if not determined by the academic senate, or if responsibilities for these issues are removed from the academic senate.[10] Unlike the other statutes, the HEERA also lists items that are specifically excluded.[11]

The Trial Court Employment Protection and Governance Act and the Trial Court Interpreter Employment and Labor Relations Act define the scope of representation to include "all matters relating to employment conditions and employer-employee relations including, but not limited to wages, hours, and other terms and conditions of employment." Like the MMBA, these acts exclude from the scope of bargaining the merits, necessity, or organization of any service or activity provided by law or executive order,[12] and also exclude specified topics from the scope related to the courts' unique responsibilities,[13] while requiring negotiations regarding these matters on wages, hours, and terms and conditions of employment.[14]

Legal Tests for Scope of Bargaining

The courts have devised tests to interpret these statutes' language when determining whether a particular matter is within the scope of representation. For example, California courts should utilize federal precedent under the NLRA when determining the scope of bargaining under the MMBA.[15] If a matter falls between the required items (wages, hours, or other terms and conditions) and the excluded items (merits and necessity of the organization), then the courts look at whether the topic "primarily relates" to the employee interest or the management's interest.[16]

Because the SEERA's scope of representation language is similar to the NLRA, PERB has applied the basic private sector test under the NLRA for the SEERA.[17] No clear test has been established for the HEERA. And the test for negotiability under the EERA and the HEERA is quite complicated if the item in question is not one of the items enumerated in the statute, requiring the application of three factors.[18]

Bargaining Impacts/Effects of Management Decisions

Test for Determining Duty to Bargain Effects

A troublesome problem occurs when an employer institutes a change in a fundamental management prerogative that is outside the scope of bargaining, but at the same time that change has an impact on wages, hours, or terms and conditions of employment.[19] The California Supreme Court has provided a three-part test under the MMBA for determining whether there is a duty to bargain over the effects on wages, hours, and other terms and conditions.[20]

First, determine whether the management action has a significant and adverse effect on bargaining unit employees' wages, hours, or working conditions. If there is no significant adverse impact, there is no duty to negotiate the impact before the implementation. If there is a significant adverse impact, proceed to the next step.

Second, if the significant adverse impact arose from the *implementation of a core or fundamental managerial decision*, then go to the next step to determine whether the impact must be negotiated before

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[9] Compare Gov. Code, § 3562(q) with §§ 3562(r) and 3581.3.
[10] See Gov. Code, §§ 3562(q)(1)(D) and 3562(r)(1)(D).
[11] Gov. Code, §§ 3562(q) and 3562(r).
[12] Gov. Code, § 71634(a) (TCEPGA) and § 71816(a) (TCIELRA).
[13] Gov. Code, § 71634(b) (TCEPGA) and § 71816(b) (TCIELRA).
[14] Gov. Code, §§ 71634(c) and 71816(c).
[15] *FireFighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617, 116 Cal.Rptr. 507.
[16] *Id.* at pp. 620-21.
[17] *California Dept. of Transportation* (1983) PERB Dec. No. 361-S, 7 PERC ¶ 14295, p. 1184 (citing *FireFighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 617, 116 Cal.Rptr. 507; see, e.g., *California Dept. of Personnel Admin.* (1987) PERB Dec. No. 648-S, 12 PERC ¶ 19014, p. 59; *California Dept. of Personnel Admin.* (1986) PERB Dec. No. 574-S, 10 PERC ¶ 17111, pp. 508-509.
[18] *Anaheim Union High School Dist.* (1981) PERB Dec. No. 177, 5 PERC ¶ 12148; *California State U.* (2009) PERB Dec. No. 1876a-H, 33 PERC 73.
[19] *City of Calexico* (2017) PERB Dec. No. 2541-M (City has a duty to bargain the effects of decision to change pay periods as that impacted a mandatory bargaining subject wages and hours).
[20] *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 47 Cal.Rptr.3d 69; see also *City of Alhambra* (2010) PERB No. 2139-M, 34 PERC 160.

implementation. Otherwise, if the significant adverse impact did *not* result from the implementation of a fundamental right, the employer must bargain the implementation.

Third, if the question involves the implementation of a fundamental managerial decision *that also has* a significant adverse effect on working conditions, then a balancing test is applied. That is, "the action is within the scope of representation only if the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to the employer-employee relations of bargaining about the action in question."[21]

Finally, the court added a new element to this balancing test, stating that courts also may consider whether the "transactional cost" of the bargaining process outweighs its value to the parties and to the public.[22]

Impacts/Effects Bargaining Demand

In order to trigger the duty to bargain over the impact of a non-negotiable management decision, a union must demand to bargain the impacts, not the decision itself.[23] In making a demand to bargain impacts, a union need identify only reasonably foreseeable effects on mandatory subjects, not actual impacts. PERB has summarized the law of impact bargaining as follows:[24]

1. The employer has a duty to provide reasonable notice and an opportunity to bargain before it implements a decision within its managerial prerogative that has reasonably foreseeable effects (not only actual impacts) on negotiable terms and conditions of employment. "Reasonable" notice is to be "clear and unequivocal," and must "clearly inform the employee organization of the nature and scope of the proposed change."
2. After receiving the advance notice, the union must demand to bargain the effects, or else it risks waiving its right to do so. The union's effects bargaining demand need not be in any particular form, but must identify the matter(s) within the scope of representation on which it proposes to bargain, and must clearly indicate the desire to bargain over the effects of the decision as opposed to the decision itself.
3. If the union does not demand to bargain the reasonably foreseeable effects after receiving the employer's notice, it waives its right to do so, and this is an affirmative defense that the employer must raise in any unfair practice proceeding. An allegation that the employer failed to provide the required notice states a *prima facie* case of failure to bargain in good faith.
4. If the employer implements the change without giving the union reasonable notice and an opportunity to bargain over foreseeable effects within the scope of bargaining, it does so "at its own peril." Implementing a non-negotiable decision that has foreseeable effects on mandatory subjects of bargaining without providing the union reasonable notice and an opportunity to bargain is *per se* a refusal to bargain and an unfair labor practice.

PERB has explained that "effects bargaining is not a stepchild of decision bargaining"[25] and warned that if the union has made a timely demand to bargain the impact on a mandatory subject:

> "[T]he employer has the following three choices: (1) accede to the demand and address the employee organization's concerns in negotiations; (2) ask the

[21] *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 660, 224 Cal.Rptr. 688; see also *International Assn. of Firefighters, Local 188, AFL-CIO v. Public Employment Relations Bd. (City of Richmond)* (2011) 51 Cal.4th 259; 120 Cal.Rptr.3d 117; *County of Santa Clara* (2019) PERB Dec. No. 2680-M (PERB concluded that the City's justification for its decision to staff the hospital clinic with a deputy sheriff rather than a protective service officer, which constituted a unilateral change in policy, outweighed any benefit to labor relations by requiring the County to bargain over its decision to staff the clinic with deputy sheriffs rather than union represented protective service officers and, consequently, the decision was not a mandatory bargaining subject. Visitor and employee safety outweighed the benefit to labor relations).

[22] *Claremont Police Officers Assn*., *supra*.

[23] *Pasadena Area Community College Dist.* (2011) PERB Dec. No. 2218, 36 PERC 80.

[24] *County of Santa Clara* (2013) PERB Dec. No. 2321-M, 38 PERC 30; *Rio Hondo Community College Dist.* (2013) PERB Dec. No. 2313, 37 PERC 197; *California State U.* (2012) PERB Dec. No. 2287-H, 37 PERC 79.

[25] *County of Santa Clara* (2013), *supra*, PERB Dec. No. 2321-M.

> employee organization for its negotiation justification; or (3) refuse the employee organization's demand. In choosing the third option, the employer does so at its peril if its refusal is later determined to be unjustified."[26]

PERB and a California Court of Appeal agree that employers are not required to identify the specific reasonably foreseeable effects when providing notice of non-negotiable decisions that have impacts on mandatory subjects of bargaining. The employer must identify the "nature and scope" of the non-negotiable decision. Once such notice is provided, it is the union's duty to demand to bargain any reasonably foreseeable effects of the decision.[27]

Unless an exception to the general rule applies, effects bargaining must be completed before the managerial decision is implemented. This rule applies to layoff decisions as well as to other managerial decisions.[28] The "*Compton* exception" allows employers to implement a non-negotiable decision before effects bargaining is complete when all of the following conditions are met: (1) the implementation date was based on an immutable externally-established deadline or an important managerial interest such that delay would undermine the employer's managerial rights; (2) the employer gave notice of the decision and implementation date sufficiently in advance of implementation to allow meaningful bargaining before implementation; and (3) the employer bargained before implementation and continues to do so thereafter in a good faith effort to reach agreement.[29]

PERB has noted that in effects bargaining over non-negotiable layoff decisions, unions are free to make proposals and arguments to persuade the employer to forgo the layoff, but if the union focuses exclusively on such argument and fails to engage meaningfully and timely in effects bargaining, the union will be unable to demonstrate that the employer failed to bargain in good faith over any negotiable impacts.[30]

General Definition of Mandatory Subjects

So far, the courts and PERB consider the following items to be mandatory subjects under the general definition of wages, hours, and other employment terms and conditions:

Wages

Wages and other economic benefits,[31] including charter provisions setting wages based on prevailing wage rates,[32] furloughs,[33] overtime pay,[34] extra-duty pay,[35] uniform allowance,[36] use of agency car,[37] mileage,[38] tuition reimbursement,[39] health insurance,[40] tax-deferred annuities and deferred pay,[41] holiday schedules and pay,[42] pay for standby and on-call time,[43] longevity pay,[44] merit

[26] *California State U.* (2012), *supra*, PERB Dec. No. 2287-H, p. 14; *Rio Hondo Community College Dist.*, *supra*, PERB Dec. No. 2313.
[27] *El Dorado County. Deputy Sheriff's Assn. v. County of El Dorado* (2016) 244 Cal.App.4th 950, 198 Cal.Rptr.3d 502.
[28] *Salinas Valley Memorial Healthcare System* (2012) PERB Dec. No. 2298-M, 37 PERC 137.
[29] *Compton Community College Dist.* (1989) PERB Dec. No. 720, 13 PERC ¶ 20057; see also *Salinas Valley Memorial Healthcare System* (2015) PERB Dec. No. 2433-M, 40 PERC 4.
[30] *Salinas Valley Memorial Healthcare System, supra*, PERB Dec. No. 2433-M.
[31] *Jefferson School Dist.* (1980) PERB Dec. No. 133, 4 PERC ¶ 11117.
[32] *County of Santa Clara* (2010) PERB Dec. No. 2114-M, 34 PERC 97.
[33] *City of Long Beach* (2012) PERB Dec. No. 2296-M, 37 PERC 130.
[34] *Compton Unified School Dist*. (1989) PERB Dec. No. 784, 14 PERC ¶ 21029; *State of Cal. (Employment Development Dept.)* (1999) PERB Dec. No. 1318-S, 23 PERC ¶ 30073.
[35] *Inglewood Unified School Dist.* (1990) PERB Dec. No. 792, 14 PERC ¶ 21057.
[36] *San Mateo City School Dist.* (1984) PERB Dec. No. 375, 8 PERC ¶ 15021.
[37] *West Covina Unified School Dist.* (1993) PERB Dec. No. 973, 17 PERC ¶ 24042. See also *Los Angeles Unified School Dist.* (2002) PERB Dec. No. 1501, 27 PERC 4.
[38] *State of Cal. (Dept. of Personnel Admin.)* (1998) PERB Dec. No. 1296-S, 23 PERC ¶ 30009.
[39] *San Mateo City School Dist*. (1984), *supra*, PERB Dec. No. 375.
[40] *Palo Verde Unified School Dist.* (1983) PERB Dec. No. 321, 7 PERC ¶ 14182.
[41] *Oakland Unified School Dist.* (1982) PERB Dec. No. 236, 6 PERC ¶ 13201; *Clovis Unified School Dist.* (2002) PERB Dec. No. 1504, 27 PERC ¶ 15.
[42] *Davis Joint Unified School Dist.* (1984) PERB Dec. No. 474, 9 PERC ¶ 16045.
[43] *San Mateo City School Dist*. (1984), *supra*, PERB Dec. No. 375.
[44] *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1224, 79 Cal.Rptr.2d 634.

pay,[45] wages paid to volunteers,[46] parking fees that significantly affect employees,[47] pay raise retroactivity,[48] nonstatutory or permissive aspects of retirement policies,[49] pension contribution cost-sharing,[50] future retirement benefits,[51] pension reform,[52] and benefits, including insurance benefits.[53]

Hours

Vacations[54] and rest periods,[55] work and shift assignments,[56] work schedules,[57] maximum hours,[58] shift changes,[59] caseloads,[60] overtime assignment procedures,[61] annual leave policies,[62] annual work calendars,[63] and the hours and shifts for vacant positions.[64]

Working Conditions

Transfers,[65] job bidding opportunities and procedures,[66] personnel files,[67] seniority,[68] safety,[69] job training,[70] representation rights[71] including released time,[72] and grievance procedures,[73] discipline and evaluation processes,[74] negotiations processes,[75] ground rules for negotiations,[76] changes in bargaining unit work,[77] agency fee arrangements,[78] reclassification of

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[45] *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 972-973, 129 Cal.Rptr. 68.

[46] *American Federation of State, County, and Municipal Employees v. City and County of Santa Clara* (1984) 160 Cal.App.3d 1006, 1009-1010, 207 Cal.Rptr. 57.

[47] *Los Angeles Police Protective League v. City of Los Angeles* (1985) 166 Cal.App.3d 55, 60, 212 Cal.Rptr. 251, overruled on other grounds, *Laurel Heights Improvement Assn. v. U. of Cal.* (1988) 47 Cal.3d 376, 427, n. 28, 253 Cal.Rptr. 426. But see *Social Services Union, Local 535 v. Board of Supervisors* (1978) 82 Cal.App.3d 498, 506, 147 Cal.Rptr. 126, review den. (1978) (parking fees outside scope of representation because insignificant and working conditions only indirectly affected).

[48] *San Joaquin County Employees' Assn., Inc. v. County of San Joaquin* (1974) 39 Cal.App.3d 83, 87-88, 113 Cal.Rptr. 912.

[49] *Mendocino County Employees' Assn. v. County of Mendocino* (1992) 3 Cal.App.4th 1472, 1478, 1480, 5 Cal.Rptr.2d 353.

[50] *County of San Luis Obispo* (2015) PERB Dec. No. 2427-M, 39 PERC 176.

[51] *Madera Unified School Dist.* (2007) PERB Dec. No. 1907, 31 PERC ¶ 109, citing *Temple City Unified School Dist.* (1989) PERB Dec. No. 782, 14 PERC ¶ 21027, and *Jefferson School Dist.* (1980) PERB Dec. No. 133, 4 PERC ¶ 11117.

[52] *Boling* (2018), *supra*, 5 Cal.5th 898.

[53] *Social Services Union, Local 535 v. Board of Supervisors of Tulare County* (1990) 222 Cal.App.3d 279, 285, 271 Cal.Rptr. 494; *San Joaquin County Employees' Assn., Inc. v. City of Stockton* (1984) 161 Cal.App.3d 813, 818, 207 Cal.Rptr. 876.

[54] *Jamestown Elementary School Dist.* (1990) PERB Dec. No. 795, 14 PERC ¶ 21069.

[55] *San Mateo City School Dist*. (1984), *supra*, PERB Dec. No. 375.

[56] *Los Angeles Community College Dist.* (1982) PERB Dec. No. 252, 6 PERC ¶ 13241.

[57] *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 502-503, 129 Cal.Rptr. 893; *Placentia Fire Fighters*, Local 2147 v. City of Placentia (1976) 57 Cal.App.3d 9, 21-22, 129 Cal.Rptr. 126.

[58] *Fire Fighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608, 617-618, 116 Cal.Rptr. 507.

[59] *Salinas Valley Memorial Healthcare System* (2017) PERB Dec. No. 2524-M at p. 21, 41 PERC 154; *Independent Union of Public Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 487, 195 Cal.Rptr. 206.

[60] *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1, 5, 108 Cal.Rptr. 625.

[61] *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 119, 119 Cal.Rptr. 182.

[62] *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1224, 79 Cal.Rptr.2d 634.

[63] *Poway Unified School Dist.* (2001) PERB Dec. No. 1430, 25 PERC ¶ 32060.

[64] *Huntington Beach High School Dist.* (2003) PERB Dec. No. 1525, 27 PERC 76.

[65] *Butte Community College Dist.* (1985) PERB Dec. No. 555, 10 PERC ¶ 17037.

[66] *California Dept. of Transportation* (1983) PERB Dec. No. 361-S, 7 PERC ¶ 14295.

[67] *Jefferson School Dist.* (1980) PERB Dec. No. 133, 4 PERC ¶ 11117.

[68] *San Mateo City School Dist*. (1984) PERB Dec. No. 375, 8 PERC ¶ 15021.

[69] *Jefferson School Dist*. (1980) PERB Dec. No. 133, 4 PERC ¶ 11117; *San Mateo City School Dist*. (1984), *supra*, PERB Dec. No. 375.

[70] *San Mateo City School Dist.* (1984), *supra*, PERB Dec. No. 375.

[71] *Jefferson School Dist.* (1980), *supra*, PERB Dec. No. 133.

[72] *Centinela Valley Union High School Dist.* (2014) PERB Dec. No. 2378, 39 PERC 7; *San Mateo City School Dist*. (1984), *supra*, PERB Dec. No. 375;. AFSCME, Local 2076 v. *County of Orange* (2018) PERB Dec. No. 2611-M.

[73] *Anaheim City School Dist.* (1983) PERB Dec. No. 364, 8 PERC ¶ 15005.

[74] *Cerini v. City of Cloverdale* (1987) 191 Cal.App.3d 1471, 1481, 237 Cal.Rptr. 116.

[75] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 25, 129 Cal.Rptr. 126, review den. (1976) 1976 Cal.LEXIS 382; *Long Beach Police Officer Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1011, 203 Cal.Rptr. 494; *McMillen v. Civil Service Com.* (1992) 6 Cal.App.4th 125, 132, 8 Cal.Rptr.2d 548 (negotiated rules and procedures can differ from agency personnel rules).

[76] *Orange County Employees Association v. County of Orange* (2018) PERB Dec. No. 2594-M (county engaged in bad faith bargaining by implementing an ordinance that included a provision setting forth ground rules for negotiations.)

[77] *Building Material & Construction Teamsters' Union, Local 216 v. Farrell* (1986) 41 Cal.3d 651, 654, 224 Cal.Rptr. 688.

[78] Gov. Code, § 3502.5, as amended by Sen. Bill 739, Stats. 2000, Ch. 901, § 3.

positions,[79] safety rules,[80] layoff procedures and effects,[81] changes to merit system rules affecting promotional opportunities, [82] promotion policies,[83] drug-testing practices,[84] use of agency facilities,[85] employee parking,[86] the right to consult an outside attorney,[87] hiring issues,[88] requiring background checks for continued employment,[89] subcontracting decisions resulting in layoffs,[90] loss of overtime,[91] reduction in size of bargaining unit,[92] fax/phone/email use policies,[93] and name tags.[94]

Bargaining Unit Work – Transfer of Unit Work and Contracting-out

Most agencies will make decisions that alter bargaining unit work, such as: contracting-out work; transferring work to another unit, to non-unit employees, or to volunteers; reclassifying work; reducing work; or discontinuing work altogether. PERB has developed an extensive body of law regarding these issues.

Historically, both PERB and the courts have required employers to negotiate before transferring work between units.[95] Transferring work not only affects the working conditions of unit members, but it also may impact the viability of the employee organizations representing the affected units. The California Court of Appeal found that a City was required to bargain before implementing a police department reorganization plan that eliminated the second tier and mid-level command management. The plan replaced the captain and four lieutenant positions with two non-bargaining unit commanders, and after layoff, would result in the demotion of most of the 14 unit members.[96] The employer is obligated to negotiate the decision to transfer work even if the work is transferred within the bargaining unit,[97] if the positions affected are vacant, or if the work transfer is part of a layoff.[98] Nonetheless, if job duties overlap, a public agency is not required to negotiate a decision to increase or decrease the amount of work contained in the positions with overlapping duties[99] unless the transfer of duties results in the elimination of unit employees.[100] The overlapping-of-duties exception also applies to transfers between *different* employers; for example, the number of police officers hired

[79] *Building Material & Construction Teamsters' Union*, Local 216, *supra*.
[80] *Fire Fighters Union, Local 1186, supra*; *Solano County Employees Assn. v. County of Solano* (1982) 136 Cal.App.3d 256, 261-262, 186 Cal.Rptr. 147.
[81] *Fire Fighters Union, Local 1186, supra*; *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 63-64, 151 Cal.Rptr. 547; *California Dept. of Forestry and Fire Prevention* (1993) PERB Dec. No. 999-S, 17 PERC ¶ 24112.
[82] *County of Orange* (2019) PERB Dec. 2663-M.
[83] *Fire Fighters Union, Local 1186*, *supra*; *San Francisco Fire Fighters, Local 798 v. City and County of San Francisco* (1992) 3 Cal.App.4th 1482, 1491, 5 Cal.Rptr.2d 176, rehg. den. (1992) 1992 Cal.App.LEXIS 440, review den. (1992) 1992 Cal.LEXIS 3153; *International Assn. of Fire Fighters Union, Local 1974 v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 970-971, 129 Cal.Rptr. 68;
[84] *Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528, 540, 280 Cal.Rptr. 206.
[85] *Vernon Fire Fighters, Local 2312 v. City of Vernon* (1980) 107 Cal.App.3d 802, 811, 165 Cal.Rptr. 908; *Fresno Irrigation Dist.* (2003) PERB Dec. No. 1565-M, 28 PERC 30.
[86] *California State U.* (2009) PERB Dec. No. 1876a-H, 33 PERC 73.
[87] *Long Beach Police Officer Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1011, 203 Cal.Rptr. 494.
[88] *Fire Fighters Union, Local 1186, supra*.
[89] *County of Santa Clara* (2013) PERB Dec. No. 2321-M, 38 PERC 30.
[90] *Fire Fighters Union, Local 1186, supra*, at p. 621; *Building Material & Construction Teamsters' Union, Local 216 v. Farrell* (1986) 41 Cal.3d 651, 659, 660, 224 Cal.Rptr. 688; *Bellflower Unified School Dist.* (2017) PERB Dec. No. 2544 (school district had a duty to bargain over its decision to offer parents $25 to take their children to school in lieu of the use of the District bus service as that decision was bargainable and not a non-negotiable management prerogative).
[91] *Dublin Professional Fire Fighters, Local 1885* (1975), *supra*.
[92] *Building Material & Construction Teamsters' Union, Local 216, supra*.
[93] *California State U.* (2003) PERB Dec. No. 1507-H, 27 PERC 26.
[94] *California State U.* (2001) PERB Order No. 1451-H, 25 PERC ¶ 32091.
[95] *Building Material & Construction Teamsters' Union, Local 216*, *supra* at 659 n. 3; *City of Escondido* (2013) PERB Dec. No. 2311-M, 37 PERC 185; *Rialto Unified School Dist.* (1982) PERB Dec. No. 209, 6 PERC ¶ 13113; see also discussions in *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (*City of Richmond*) (2011) 51 Cal.4th 259; 120 Cal.Rptr.3d 117.
[96] *Indio Police Command Unit Assn. v. City of Indio* (2014) 230 Cal.App.4th 521, 178 Cal.Rptr.3d 530.
[97] *Desert Sands Unified School Dist.* (2001) PERB Order No. 1468, 26 PERC ¶ 33013.
[98] *City of Sacramento* (2013) PERB Dec. No. 2351-M, 38 PERC 104; *University of Cal. (Davis)* (2010) PERB Dec. No. 2101-H, 34 PERC 55.
[99] *University of Cal.* (2014) PERB Dec. No. 2398-H, 39 PERC 64, citing *Eureka City School Dist.* (1985) PERB Dec. No. 481, at p. 15, 9 PERC ¶ 16060; *Allan Hancock Joint Community College Dist.* (2005) PERB Dec. No. 1685, 28 PERC 249.
[100] *City of Sacramento*, *supra*, PERB Dec. No. 2351-M; *Desert Sands Unified School Dist.* (2010) PERB Dec. No. 2092, 34 PERC 39.

part-time from another department can be increased lawfully when the part-time officers' duties overlap with duties of regular officers.[101] Finally, the transfer of new duties not previously performed by any unit generally will not support a charge of an unlawful transfer of bargaining unit work.[102]

Employers are required to meet and confer about proposals to contract out work where the impetus for the decision to contract out the work is economic. Where the employer's motivation is primarily savings from labor costs, both the *decision* and the *effects* of the decision must be negotiated.[103] If the agency's decision is based on organizational concerns, and not labor costs, the proposal is not within the scope of representation,[104] although the agency must still meet and confer over impacts on mandatory subjects that result from the decision.[105] Nevertheless, in one instance, even though an employer contended that its elimination of work was based on organization concerns unrelated to labor costs, PERB determined a $1 million contract with a new service provider trumped the employer's claim of non-labor cost motive.[106] Also, where agency employees lose their jobs because of a decision to contract out work, negotiations are required.[107] PERB also has found "work preservation" proposals that might reduce unit work, such as those related to hiring temporary staff, to be mandatory subjects of bargaining.[108]

Hiring, Retirement, and Promotions

The decision to hire and the qualifications of new employees are generally considered management prerogatives.[109] But proposals that impact mandatory subjects are negotiable. For example, PERB has ruled that proposals to include experience in an agency department as a hiring prerequisite are negotiable.[110] But a proposal to require an employer to prefer unit members when hiring outside the unit is outside the scope of representation.[111]

Promotion policies are treated differently. Under MMBA case law, promotion qualifications, opening recruitment to outside applicants, timing of promotional exams, and hiring schedules affect the working conditions of unit members who may be eligible for promotion within the unit, and have been deemed to be within the scope of representation.[112] Under the SEERA on the other hand, promotion procedures cannot conflict with a state civil service provision, including negotiated seniority provisions that limit selection from within the top three candidates.[113]

Under the HEERA, statutory provisions requiring final arbitration of grievances do not prohibit the California State University from negotiating limits on an arbitrator's authority to overturn decisions on faculty appointment, reappointment, tenure, or promotion.[114]

Retiree benefits for current retirees is outside the scope of representation, but future retiree benefits for current employees

[101] *California State U. (San Marcos)* (2009) PERB Dec. No. 2010-H, 33 PERC 173; *Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295, 66 Cal.Rptr.3d 714, *Los Angeles Unified School Dist.* (2006) PERB Dec. No. 1827, 30 PERC 85.
[102] *State of Cal. (Dept. of Developmental Services*) (2012) PERB Dec. No. 2234- C, 36 PERC 114.
[103] *Lucia Mar Unified School Dist.* (2001) PERB Dec. No. 1440, 25 PERC ¶ 32073, review den. (February 27, 2002) 2002 Cal.LEXIS 1573; *Folsom-Cordova Unified School Dist.* (2004) PERB Dec. No. 1712, 29 PERC 16.
[104] *California Dept. of Personnel Admin.* (1987) PERB Dec. No. 648-S, 12 PERC ¶ 19014.
[105] *Roseville Joint Union High School Dist.* (1986) PERB Dec. No. 580, 10 PERC ¶ 17136.
[106] *Oakland Unified School Dist.* (2005) PERB Dec. No. 1770, 29 PERC 143.
[107] *San Diego Adult Educators, Local 4289 v. PERB* (1990) 223 Cal.App.3d 1124, 1135, 273 Cal.Rptr. 53; *Ventura County Community College Dist.* (2003) PERB Dec. No. 1547, 27 PERC ¶ 133.
[108] *California State U.* (1999) PERB Dec. No. 1333-H, 23 PERC ¶ 30129.
[109] Fire Fighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608, 116 Cal.Rptr. 507.
[110] *California State U.* (1999), *supra*, PERB Dec. No. 1333-H.
[111] *San Mateo City School Dist.* (1984) PERB Dec. No. 375, 8 PERC ¶ 15021.
[112] *Fire Fighters Union, Local 1186*, *supra*; but see *San Francisco Fire Fighters v. City and County of San Francisco, Local 798* (1992) 3 Cal.App.4th 1482, 1494, 5 Cal.Rptr.2d 176, rehg. den. (1992) 1992 Cal.App.LEXIS 440, review den. (1992) 1992 Cal.LEXIS 3153 (implementation of court order affecting promotions not subject to bargaining); *County of Santa Clara, supra,* PERB Dec. No. 2680-M.
[113] *California State Personnel Bd. v. California State Employees Assn., Local 1000, SEIU, AFL-CIO* (2005) 36 Cal.4th 758, 31 Cal.Rptr.3d 201.
[114] *California State U. v. Public Employment Relations Bd.* (2007) 155 Cal.App.4th 866, 66 Cal.Rptr.3d 389.

is negotiable.[115] Pension contribution levels and cost sharing proposals are within the scope of bargaining unless the proposals violate clearly vested rights.[116]

Discipline and Evaluations

MMBA agencies generally have the right to decide what constitutes grounds for discipline, but substantive and procedural rules, once adopted, cannot be changed without first meeting and conferring.[117] PERB's view of the negotiability of disciplinary rules has changed over time as the statutes it administers have changed or been reinterpreted by the courts. In general, PERB favors negotiability of both rules of conduct and disciplinary procedures, but excludes from the scope of representation rules that do not themselves have a significant impact on wages, hours, or employment terms and conditions.[118] PERB has found negotiable proposals to impose a local "statute of limitations" on disciplinary matters,[119] employer strike plans that threaten discipline,[120] and various procedural protections for employees.[121]

Under the EERA, which specifically states that evaluation procedures are "terms and conditions of employment,"[122] PERB has found that a variety of proposals relating to employee evaluations are subject to bargaining.[123] Although the MMBA does not contain a specific provision on evaluation, PERB may apply similar standards under the MMBA's broader definition of the scope of representation. PERB has found employee evaluation provisions to be outside the scope of bargaining when the changes to employee evaluation procedures were made as part of a fundamental managerial policy decision to ensure constitutionally adequate health care for prison inmates.[124]

Workload, Staffing Levels, and Layoffs

Decisions about what work to perform, including how much work to perform, are management decisions. But staffing levels can clearly impact employees' working conditions, including workload and safety. Courts and PERB generally resolve this conflict by requiring agencies to negotiate about the effects of staffing decisions on mandatory subjects.[125] To establish an obligation to bargain effects of a non-negotiable decision, unions must demand to bargain the reasonably foreseeable effects, not the decision.[126] If there is a doubt about the bargaining obligation, the parties have a mutual obligation to meet in an attempt to clarify their differences.[127]

The decision to lay off as a result of a reduction in funds or in work is an example of a staffing decision that management may make without first negotiating the decision.[128] But many aspects of layoff procedures and employee reinstatement rights are negotiable, under both court and PERB decisions.[129] For example, PERB has required

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[115] *County of Sacramento* (2009) PERB Dec. No. 2044-M, 33 PERC 126; *Madera Unified School Dist.* (2007) PERB Dec. No. 1907, 31 PERC 109. *County of Sacramento* (2009) PERB Dec. No. 2043-M, 33 PERC 122; *County of Sacramento* (2009) PERB Dec. No. 2044-M, 33 PERC 126; and *County of Sacramento* (2009) PERB Dec. No. 2045-M, 33 PERC 127.

[116] *County of San Luis Obispo* (2015) PERB Dec. No. 2427-M, 39 PERC 176 ("unless the unions can show a clear legislative intent to create a vested right and thereby remove employee compensation or otherwise negotiable subjects from the scope of bargaining, those matters remain subject to negotiations.").

[117] *Vernon Fire Fighters, Local 2312 v. City of Vernon* (1980) 107 Cal.App.3d 802, 815-817, 165 Cal.Rptr. 908.

[118] *Placer Hills Union School Dist.* (1984) PERB Dec. No. 377, 8 PERC ¶ 15037.

[119] *San Mateo City School Dist.* (1984) PERB Dec. No. 383, 8 PERC ¶ 15081.

[120] *Santee Elementary School Dist.* (2006) PERB Dec. No. 1822, 30 PERC 72.

[121] *San Mateo City School Dist.* (1984) PERB Dec. No. 375, 8 PERC ¶ 15021.

[122] Gov. Code, § 3543.2(a), "Scope of Representation."

[123] *Los Angeles Unified School Dist.* (2017) PERB Dec. No. 2518, 41 PERC 146; *Jefferson School Dist.* (1980) PERB Dec. No. 133, 4 PERC ¶ 11117.

[124] *State of Cal. (Dept. of Corrections)* (2008) PERB Dec. No. 1967-S, 32 PERC 109.

[125] See e.g., *University of Cal.* (2010) PERB Dec. No. 2094-H, 34 PERC 41.

[126] *County of Sacramento* (2013) PERB Dec. No. 2315-M, 37 PERC 206; *California State U. (San Marcos)* (2009) PERB Dec. No. 2010-H, 33 PERC 173.

[127] *Rio Hondo Community College Dist.* (2013) PERB Dec. No. 2313, 37 PERC 197.

[128] *Bellflower Unified School Dist*. (2014) PERB Dec. No. 2385, p. 13, 39, PERC 17, judicial appeal pending; *Salinas Valley Memorial Healthcare System* (2012) PERB Dec. No. 2298-M, 37 PERC 137; *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Board (City of Richmond*) (2011) 51 Cal.4th 259; 120 Cal.Rptr.3d 117; *City of Richmond* (2005) PERB Dec. No. 1720-M, 29 PERC 31.

[129] *Fire Fighters Union, Local 1186, supra*; *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 63-64, 151 Cal.Rptr. 547; *Anaheim Union High School Dist*. (2016) PERB Dec. No. 2504, 41 PERC 146;

employers to bargain over the layoff notice period,[130] bumping rights,[131] severance pay,[132] recall and reemployment rights,[133] retraining,[134] benefits for laid-off employees,[135] and distribution of work among remaining employees.[136] Agencies must complete impact bargaining before implementing layoffs unless any of the narrow exceptions to this rule apply.[137]

PERB considers an agency's decision to reduce hours to be negotiable, even though it relates to service levels, normally a management concern, because the impact on employee wages and hours is direct and substantial.[138]

Union Access, Internal Means of Communications, and Released Time

To the extent that a union's access is not defined by statute,[139] the regulation of access to a public agency's facilities[140] and use of telephones, faxes, computers, and email system is a subject of bargaining.[141]

Although most public sector collective bargaining statutes explicitly require reasonable released time for negotiations, the details of the released time, including the number of employees to be released, the amount of released time, and related details are subject to negotiations. And PERB has concluded that an employer must bargain before changing its practice of providing premium and differential pay during released time. Moreover, because Government Code section 3505.3 requires a public employer to provide released time without loss of compensation or other benefits, the employer must pay employees their full compensation, including any shift differential that the employee otherwise would have been entitled to had they worked their scheduled shift rather than taken the approved released time for collective bargaining.[142]

Grant of Unfettered Discretion on Mandatory Subject

A party may insist to impasse on maintaining or gaining the contractual discretion to act on a mandatory subject of bargaining, such as the reduction in hours. PERB has found that "proposals by which one side would retain discretion over a mandatory subject are also mandatory subjects."[143] PERB explained, "Bargaining over the amount of managerial discretion an employer may retain over a mandatory subject is part of bargaining over the mandatory subject itself."[144]

But, employers may not unilaterally implement proposals that grant management unfettered discretion over a mandatory subject. Relying on the NLRB's *McClatchy* line of cases, PERB found that "although the District was privileged to insist on its proposal through the impasse procedures, it was not privileged to implement the proposal after the completion of impasse procedures,"[145] because allowing such unilateral implementation would be inherently destructive of the principles of collective bargaining. PERB found that because the District's proposal would grant

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Oakland Unified School Dist. (1982) PERB Dec. No. 275, 7 PERC ¶ 14029.

[130] *Oakland Unified School Dist.* (1983) PERB Dec. No. 326, 7 PERC ¶ 14195.

[131] *San Mateo City School Dist.* (1984) PERB Dec. No. 383, 8 PERC ¶ 15081; *San Mateo City School Dist.* (1984) PERB Dec. No. 375, 8 PERC ¶ 15021; see also *Alameda County Management Employees Assn. v. Superior Court* (2011) 195 Cal.App.4th 325, 125 Cal.Rptr.3d 556.

[132] *Mount Diablo Unified School Dist.* (1983) PERB Dec. No. 373, 8 PERC ¶ 15017.

[133] *San Mateo City School Dist.* (1984), *supra*, PERB Dec. No. 383; *San Mateo City School Dist.* (1984), *supra,* PERB Dec. No. 375.

[134] *Kern Community College Dist.* (1983) PERB Dec. No. 337, 7 PERC ¶ 14229.

[135] *Mount Diablo Unified School Dist., supra*, PERB Dec. No. 373.

[136] *Mount Diablo Unified School Dist*., *supra*; *California State U. (San Diego)* (2008) PERB Dec. No. 1955-H, 32 PERC 74; see also *City of Sacramento*, *supra*, PERB Dec. No. 2351-M (distinguishing transfer of work from layoff).

[137] *Salinas Valley Memorial Healthcare System* (2012), *supra*, PERB Dec. No. 2298-M.

[138] *San Ysidro School Dist.* (1997) PERB Dec. No. 1198, 21 PERC ¶ 28095.

[139] *Los Angeles Unified School Dist.* (2018) PERB Dec. No. 2588 (school district is obligated to provide a union access to the district's email system to communicate with district employees represented by the union under Gov. Code § 3543.1).

[140] *University of Cal*. (2004) PERB Dec. No. 1700-H, 28 PERC 270.

[141] *Los Angeles Unified School Dist.* (2018), *supra*, PERB Dec. No. 2588 (duty to bargain in good faith under the EERA also requires a district to bargain over a union's request that the district send the union's email communications to its members on the union's behalf.)

[142] *County of Riverside* (2018) PERB Dec. No. 2573-M.

[143] *Los Angeles Unified School Dist.* (2013) PERB Dec. No. 2326, p. 8, 38 PERC 45, quoting *NLRB v. McClatchy Newspapers, Inc.* (D.C. Cir. 1992) 964 F.2d 1153, 1159.

[144] *Id.*, p. 38.

[145] *Ibid.*

the District unfettered discretion over a key mandatory subject of bargaining – hours – it must apply an exception to the general rule that the employer may unilaterally implement and impose its last, best, and final offer after completing required impasse procedures.

Matters Outside the Scope of Bargaining

A matter is outside the scope of bargaining if the employer has no discretion because a statute, charter provision, or bona fide court order imposes mandatory requirements.[146] But, this supersession of the duty to bargain by statute or court order applies only when immutable requirements leave the employer without any discretion or flexibility over the matter.[147] Under the EERA, PERB has concluded that matters governed by statute such as mandatory teacher classification requirements are outside the scope of bargaining.[148] Similarly, in light of a state law authorizing trial courts to close one-day per month and to meet and confer over the *impacts* of the court closure, PERB ruled that the *decision* to close the courts was vested in the trial courts, and therefore outside the scope of representation.[149] Under the SEERA, PERB has ruled that changes to state prison physician and dentist performance appraisal systems were outside the scope of bargaining when imposed in response to a court order to reform the prisons' performance appraisal system in order to provide constitutionally required health care to inmates.[150] The California Supreme Court also decided that alternate grievance/arbitration discipline procedures negotiated into the various state MOUs were unconstitutional under the civil service scheme established by the California Constitution.[151]

In addition to supersession, each set of public sector labor relations statutes has a slightly different test for determining whether a matter is a management prerogative that is outside the scope of bargaining.

PERB has determined that the following subjects are employer prerogatives, not within the scope of bargaining: determination of the work to be performed[152] and level of service to be provided;[153] decision to create or abolish a job class;[154] changes in class specifications for promotion into a classification;[155] assignment of job duties that are reasonably related to the job classification or contemplated in the job description;[156] employees' reporting location;[157] hiring;[158] decision to lay off employees;[159] no-cost employee assistance plans;[160] non-discrimination policies regarding students;[161] prison staffing levels;[162]

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[146] See *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865, 191 Cal.Rptr. 800; *United Steelworkers of America v. Bd. of Education* (1984) 162 Cal.App.3d 823, 209 Cal.Rptr. 16, superseded by statute as stated in 163 Cal.App.4th 387; *California Teachers Assn. v. Governing Bd.* (1991) 229 Cal.App.3d 695, 704-705, 280 Cal.Rptr. 286.

[147] *Centinela Valley Union High School Dist.* (2014) PERB Dec. No. 2378, 39 PERC 7.

[148] *San Francisco Unified School Dist.* (2009) PERB Dec. No. 2040, 33 PERC 114.

[149] *Santa Clara County Superior Ct.* (2014) PERB Dec. No. 2394-C, 39 PERC 56.

[150] *Union of American Physicians and Dentists v. State of Cal. (Dept. of Corrections)* (2008) PERB Dec. No. 1967-S, 32 PERC 109.

[151] *State Personnel Bd. v. Dept. of Personnel Admin*. (2005) 37 Cal.4th 512, 36 Cal.Rptr.3d 142.

[152] *Davis Joint Unified School Dist.* (1984) PERB Dec. No. 393, 8 PERC ¶ 15136; *City and County of San Francisco* (2004) PERB Dec. No. 1608-M, 28 PERC 139.

[153] *Los Angeles Superior Ct.* (2010) PERB Dec. No. 2112-I, 34 PERC 94; *Mount Diablo Unified School Dist.* (1983) PERB Dec. No. 373, 8 PERC ¶ 15017.

[154] *Alum Rock Union Elementary School Dist.* (1983) PERB Dec. No. 322, 7 PERC ¶ 14184.

[155] *City of Alhambra* (2010) PERB No. 2139-M, 34 PERC 160.

[156] *San Francisco Unified School Dist.* (2009) PERB Dec. No. 2057, 33 PERC 145; *Desert Sands Unified School Dist.* (2010) PERB Dec. No. 2092, 34 PERC 39; *City and County of San Francisco* (2007) PERB Dec. No. 1932-M, 32 PERC 14, citing *City and County of San Francisco* (2004) PERB Dec. No. 1608-M, 28 PERC 139, and *Davis Joint Unified School Dist.* (1984) PERB Dec. No. 393, 8 PERC ¶ 15136; *Sacramento Housing and Redevelopment Agency* (2008) PERB Dec. No. 1939-C, 32 PERC 38.

[157] *San Francisco Unified School Dist.* (2009) PERB Dec. No. 2048, 33 PERC 123; but see criticism of the reasoning of this decision in *Rio Hondo Community College Dist*. (2013) PERB Dec. No. 2313, 37 PERC 197.

[158] *San Mateo City School Dist.* (1984) PERB Dec. No. 375, 8 PERC ¶ 15021.

[159] *Bellflower Unified School Dist.* (2014) PERB Dec. No. 2385 at p. 13, 39 PERC 17; *California Dept. of Forestry and Fire Prevention* (1993) PERB Dec. No. 999-S, 17 PERC ¶ 24112.

[160] *California State U.* (2004) PERB Dec. No. 1642-H, 28 PERC 178.

[161] *California State U.* (2005) PERB Dec. No. 1751-H, 29 PERC 91.

[162] *State of Cal. (Dept. of Corrections)* (2006) PERB Dec. No. 1848-S, 30 PERC 150, see criticism of reasoning of this

medical benefits for current retirees;[163] makeup and dissemination of student test scores;[164] a university's decision to eliminate courses;[165] and "whistleblower" policies that do not have a direct impact on discipline or employee privacy.[166] The decision to implement a computer resource policy or make similar policy changes may be a managerial prerogative and therefore not negotiable; however, the identified effects on wages, hours, and terms and conditions are bargainable.[167] In addition, the length and content of a student day and calendar are not bargainable matters, but the impact of changes in these student matters is within the scope of representation.[168] The decision to reelect probationary school teachers and grant them tenure is outside the scope of bargaining, but claims that such decisions were based on unlawful discrimination will be considered by PERB, DFEH, EEOC, and the courts.[169] A proposal to allow observers in bargaining is not a mandatory subject of bargaining, because the *de facto* rule is that bargaining sessions are private, not public.[170]

In addition, court cases interpreting the MMBA have determined that public agencies are not required to bargain about subjects within management's prerogative,[171] promotional rules required by anti-discrimination laws,[172] changes in the prior practice of allowing law enforcement employees under investigation to review internal affairs files before participating in investigative interviews,[173] subjects that another law leaves the agency little discretion,[174] illegal subjects,[175] interest arbitration requirements,[176] or subjects that have only a "trivial" effect on mandatory subjects.

Duty to Meet and Clarify

When the negotiating parties disagree about scope of bargaining issues, they have a duty to meet to try to clarify the disagreement. When there is ambiguity about whether a proposal is within the scope of bargaining, the "failure to seek clarification is, in itself, a violation of the duty to negotiate in good faith."[177] This obligation applies to scope disputes in effects bargaining as well as decision bargaining. PERB has explained, "Refusing an effects bargaining demand without first attempting to clarify ambiguities . . . violates the duty to bargain in good faith."[178] And, the duty to meet and clarify also applies to requests related to the duty to consult.[179] This clarification process requires a meeting with the union; "such

decision in *County of Santa Clara* (2013) PERB Dec. No. 2321-M, 38 PERC 30.

[163] *El Centro Elementary School Dist.* (2006) PERB Dec. No. 1863, 31 PERC 10.

[164] *Newark Unified School Dist.* (2007) PERB Dec. No. 1895, 31 PERC 78.

[165] *California State U. (San Diego)* (2008) PERB Dec. No. 1955-H, 32 PERC 74.

[166] *California State U.* (2004), *supra*, PERB Dec. No. 1658-H.

[167] *Desert Sands Unified School Dist.* (2010) PERB Dec. No. 2092, 34 PERC 39; *California State U.* (2007) PERB Dec. No. 1926-H, 31 PERC 152.

[168] *Salinas Union High School Dist.* (2004) PERB Dec. No. 639, 28 PERC 176.

[169] See e.g., *Sunnyvale Unified School Dist. v. Jacobs* (2009) 171 Cal.App.4th 168; *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal 4th 269, 281.

[170] *Petaluma City Elementary School Dist./Joint Union High School Dist.* (2016) PERB Dec. No. 2485, 41 PERC 23.

[171] *Building Material & Construction Teamsters' Union Local 216 v. Farrell* (1986) 41 Cal.3d 651, 660, 663, 224 Cal.Rptr. 688; *Solano County Employees Assn. v. County of Solano* (1982) 136 Cal.App.3d 256, 263-264, 186 Cal.Rptr. 147; *San Jose Peace Officers Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, 144 Cal.Rptr. 638, rehg. den. (1978), review den. (1978).

[172] *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 42 Cal.Rptr.3d 868.

[173] *Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29, 158 Cal.Rptr.3d 135.

[174] *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 585, 68 Cal.Rptr.2d 205, review den. (1998); *United Public Employees v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021, 1029, 62 Cal.Rptr.2d 440; *San Francisco Fire Fighters v. City and County of San Francisco* (1992) 3 Cal.App.4th 1482, 1494, 5 Cal.Rptr.2d 176 (consent decree). See, for example, the ALJ decision regarding the extent of employer's discretion in FMLA regulations in *California State U.* (2005), PERB Order No. LA-CE-799-H, 29 PERC 161.

[175] *City of Hayward v. United Public Employees, Local 390* (1976) 54 Cal.App.3d 761, 764, 767, 126 Cal.Rptr. 710; *Building Material & Constructions Teamsters' Union, Local 216 v. Farrell* (1986) 41 Cal.3d 651, 659, 224 Cal.Rptr. 688; *Social Services Union, Local 535 v. Board of Supervisors* (1978) 82 Cal.App.3d 498, 506, 147 Cal.Rptr. 126, review den. (1978).

[176] *DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, 104 Cal.Rptr.3d 93; see also *City of Palo Alto* (2017) PERB Dec. No. 2388a-M (no duty to bargain regarding interest arbitration proposals in MOU, but agency must meet and consult before modifying local rules involving interest arbitration).

[177] *Healdsburg Union High School Dist. and Healdsburg Union School Dist./San Mateo City School Dist.* (1983) PERB Dec. No. 375, at pp. 8-10, 8 PERC ¶ 15021.

[178] *Rio Hondo Community College Dist., supra*, PERB Dec. No. 2313, p. 6.

[179] *City of Palo Alto*, *supra*, PERB Dec. No. 2388a-M.

clarification should occur within the meet-and-confer process, not merely by the exchange of legal positions through correspondence or in comments between party representatives at public meetings of the governing authority of the agency."[180] But, PERB ruled there is no duty to meet and clarify when the union unambiguously sought to meet and confer over a non-negotiable decision, made no impact bargaining demand, and rebuffed the California Judicial Council's offers to meet and confer over the impacts of the decision.[181]

Procedural Requirements for Raising Scope of Bargaining Issues

The traditional method for raising scope of bargaining issues is filing an unfair practice charge alleging refusal to bargain in good faith. A party may ask to meet and confer about non-mandatory topics and make proposals about them, but that party cannot insist on a non-mandatory subject to the point of impasse.[182] And PERB has added a procedural requirement that, before a party can bring an unfair practice charge alleging that another party insisted on a non-mandatory subject to the point of impasse, the charging party must first inform the other party that the charging party will refuse to bargain over the permissive topic.[183]

MMBA Duty to Meet and Consult on Local Rules

The MMBA has a unique provision that allows local agencies to adopt local rules and regulations for administering the MMBA. Government Code section 3507 allows agencies to adopt these local rules only "after consultation in good faith" with affected employee representatives. The meet and consult duty is very much like the duty to meet and confer.[184] The only distinction between the duty to meet and consult and the duty to meet and confer is that the scope of consultation is limited to the nine items specifically listed in section 3507. Relying on a series of appellate court decisions, PERB has summarized the duty to consult as follows:[185]

"Thus, we conclude that a public agency's consultation obligations under MMBA section 3507 arise sufficiently in advance of the agency's adoption of rules and regulations for the administration of employer employee relations, to permit completion of consultation discussions prior to such adoption. We conclude as well that pursuant to MMBA section 3507 a public agency must: (1) provide reasonable written notice to each employee organization affected by the rule or regulations proposed for adoption or modification by the agency; and (2) afford each such organization a reasonable opportunity to meet and discuss the rule or regulations prior to the agency's adoption. Finally, we conclude that section 3507 imposes on a public agency and on recognized employee organizations several mutual obligations in the conduct of consultation, which are to: (1) meet and confer regarding consultation subjects promptly upon the request by either party; (2) continue meeting and conferring for a reasonable period of time in order to exchange freely information, opinions and proposals; and (3) endeavor to reach an agreement."

PERB has not decided, though, whether impasse procedures, including fact-finding, apply to this meet and consult obligation.[186]

GOOD FAITH BARGAINING

Because "good faith" is a subjective attitude that requires a genuine intent to reach agreement, it is difficult to prove. The NLRB and the courts in the early stages designed objective legal tests for proving "good faith." To decide whether either party has bargained in good or bad faith, both the California courts and PERB will examine the "totality of circumstances" surrounding a particular action;[187] or, in appropriate cases, they will

[180] *Id.* at p. 34.
[181] *Santa Clara County Superior Ct*. (2014) PERB Dec. No. 2394-C, at pp. 21-22, fn. 17, 39 PERC 56.
[182] *Chula Vista City School Dist*. (1990) PERB Dec. No. 834, 14 PERC ¶ 21162.
[183] *City of Selma* (2014) PERB Dec. No. 2380-M, 39 PERC 11; *City of Glendale* (2012) PERB Dec. No. 2251-M, 36 PERC 157; *Chula Vista City School Dist., supra*, PERB Dec. No. 834.
[184] *City of Palo Alto*, *supra*, PERB Dec. No. 2388a-M.
[185] *Id.* at p. 20; see fn. 14 for discussion of the appellate court decisions.
[186] *Id.* at p. 22, fn. 16.
[187] *Placentia Fire Fighters v. City of Placentia,* (1976) *supra; Oakland Unified School Dist*. (1982) PERB Dec. No.

also apply a "*per se*" test to determine when a single act violates a party's bargaining obligation.[188]

"Per Se" Test

Although the courts and PERB generally use the "totality of circumstances test" to review bad faith bargaining allegations, certain acts by themselves violate the duty because the conduct involved is presumed to prevent "full communication between public employers and their employees."[189] Both the courts and PERB have found *per se* bad faith in the following circumstances:

Unilateral Changes

A unilateral change occurs when an employer or union[190] takes any action that affects a matter within the scope of bargaining without giving the other party notice and an opportunity to bargain before it implements the change.[191] And, if the other party makes a timely demand to bargain, an illegal unilateral change occurs if the action is taken on the matter before completion of the bargaining process, including any impasse procedures.[192]

The prohibition against unilateral changes applies not only during a collective agreement's effective dates, but also after a collective agreement expires, through the point of impasse.[193] The duty also encompasses a reasonable opportunity to bargain the proposed change before the employer makes a firm decision regarding the alteration.[194] Unilateral change is the most commonly alleged employer violation brought to PERB. The remedy for unilateral change is to undo the change and take any other actions necessary to return to the status quo, such as reinstatement of programs, employees, and back pay.[195]

No unlawful unilateral change occurs if the employer makes changes only to matters outside the scope of bargaining.[196] Similarly, the parties are not required to maintain the status quo on matters outside the scope of bargaining, even if those matters were previously contained in an expired collective bargaining agreement.[197]

If the subject of the change is outside the bargaining scope, such as a decision to lay off employees, the parties must still negotiate the decision's effects upon matters within the scope. Failing to provide notice and an opportunity to negotiate about reasonably foreseeable effects violates the duty to bargain in good faith.[198] After receiving reasonable notice of a non-negotiable decision that has reasonably foreseeable effects on mandatory subjects of bargaining, a union must demand to bargain or risk waiver of the right to negotiate the effects on mandatory subjects.[199]

Minor unilateral changes — changes that have only a brief impact or a minimal effect

275, 7 PERC ¶ 14029; *Stockton Unified School Dist*. (1980) PERB Dec. No. 143, 4 PERC ¶ 11189; *Pajaro Valley Unified School Dist.* (1978) PERB Dec. No. 51, 2 PERC ¶ 2107.

[188] *Vernon Fire Fighters, Local 2312 v. City of Vernon* (1980) 107 Cal.App.3d 802, 823, 165 Cal.Rptr. 908.

[189] *Ibid.*

[190] *Standard School Dist.* (2005) PERB Dec. No. 1775, 29 PERC 162; *San Francisco Superior Ct. & Region 2 Court Interpreter Employment Relations Committee* (2018) PERB Dec. No. 2609-1 (union did not make an unlawful unilateral change or repudiate the parties' no sympathy strike clause in their MOU by advising employees that they could request a reassignment to avoid crossing a picket line.); *County of Kern* (2018) PERB Dec. No. 2615-M.

[191] *City of Montebello* (2016) PERB Dec. No. 2491-M, 41 PERC 30; *California State Employees Assn. v. Public Employment Relations Bd*. (1996) 51 Cal.App.4th 923, 934-935, 59 Cal.Rptr.2d 488, 496; *Vernon Fire Fighters, Local 2312, supra*; *City and County of San Francisco* (2017) PERB Dec. No. 2540-M.

[192] *Pasadena Area Community College Dist.* (2015) PERB Dec. No. 2444, 40 PERC 37; *Selma Firefighters Assn. v. City of Selma* (2014) PERB Dec. No. 2380-M, 39 PERC 11.

[193] *San Joaquin Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 207 Cal.Rptr. 876.

[194] *Victor Valley Union High School Dist.* (1986) PERB Dec. No. 565, 10 PERC ¶ 17079.

[195] *Fairfield-Suisun Unified School Dist.* (2012) PERB Dec. No. 2262, 36 PERC 176 (zero tolerance policy rescinded, and terminated employees ordered reinstated with back pay and interest); *Lucia Mar Unified School Dist*. (2004) PERB Order. No. LA-CE-4194-E, 28 PERC 105 (reinstatement of bus service); *University of Cal.* (2004) PERB Dec. No. 1689-H, 28 PERC 252 (reinstatement of medical plans and back pay).

[196] *City of Pinole* (2012) PERB Dec. No. 2288-M, 37 PERC 90; see also *State of Cal. (Dept. of Forestry & Fire Protection, SPB)* (2013) PERB Dec. No. 2317a-S, judicial appeal pending (State Personnel Board not obligated to bargain before making regulatory changes affecting disciplinary appeal procedures applicable to all civil service employees, because it was exercising its regulatory functions for all state employees, not acting as an employer.)

[197] *Berkeley Unified School Dist.* (2012) PERB Dec. No. 2268, 37 PERC 7.

[198] *Newark Unified School Dist.* (1982) PERB Dec. No. 225, 6 PERC ¶ 13164; *County of Santa Clara*, *supra*, PERB Dec. No. 2680-M.

[199] *County of Santa Clara* (2013) PERB Dec. No. 2321-M, 38 PERC 30.

on employees — may be considered an indication of bad faith rather than a *per se* violation. Courts sometimes consider these matters to be outside the scope of representation because they are so minor.[200]

To prevail before PERB on an unfair practice charge alleging unilateral change, a union must establish, by a preponderance of the evidence,[201] that: (1) the employer altered an established or negotiated practice,[202] which was (2) within the scope of representation, without (3) giving required notice or opportunity to bargain over the change,[203] and completing the bargaining process, including any impasse procedures,[204] and (4) the change was not isolated or transitory, but has a continuing impact on unit members' terms and conditions.[205] The breach of an MOU provision constitutes an unlawful unilateral changes only if it amounts to a change in policy – that is, the change must have a generalized effect or continuing impact on terms and conditions of employment.[206] But, no unilateral change occurs when the action is consistent with applicable rules or regulations, even if those rules were not always followed previously.[207]

For example, PERB has found all of the following to constitute unlawful unilateral changes: unilaterally imposing ground rules before bargaining,[208] attempted rescission of a wage provision of an MOU,[209] elimination of step increases,[210] implementation of a mandatory overtime policy,[211] change to production standards used in performance evaluations,[212] change to holiday pay provisions in a collective bargaining agreement,[213] changing of a bargaining unit position into a non-bargaining management position,[214] issuance of a performance improvement plan ("PIP") to an individual employee when the MOU and prior practice did not provide for the use of PIPs, and the employer asserted a generalized right to do so,[215] and repudiating a contractual agreement to restore frozen step movement upon expiration of an MOU.[216]

An unlawful unilateral change may result from the violation of an MOU provision on a mandatory subject of bargaining even if there has been a continuing past practice of violating the MOU provision. "When parties' past practice conflicts with the wording of their CBA, each party 'still maintains the right

[200] *Social Services Union, Local 535 v. Board of Supervisors of Santa Barbara County* (1978) 82 Cal.App.3d 498, 147 Cal.Rptr. 126.
[201] *City of Montebello* (2016) PERB Dec. No. 2491-M, 41 PERC 30.
[202] *City of Davis* (2016) PERB Dec. No. 2494-M, 41 PERC 33 (no violation when MOU gives employer the right to act, but single violation can constitute a policy change when employer asserts right to act); *County of San Joaquin* (2016) PERB Dec. No. 2490-M, 41 PERC 29 (no established practice if supervisors not aware of the practice); *County of Sonoma ("Sonoma II")* (2012) PERB Dec. No. 2242-M, 36 PERC 131(no unilateral change because no clear past practice altered); *County of Sonoma ("Sonoma I")* (2011) PERB Dec. No. 2173-M, 35 PERC 61; *County of Riverside* (2003) 106 Cal.App.4th 1285, 131 Cal.Rptr.2d 454, review den. (2003) 2003 Cal.LEXIS 4780; *California State U.* (2005) PERB Dec. No. 1760-H, 29 PERC 105.
[203] See *Omnitrans* (2009) PERB Dec. No. 2001-M, 33 PERC 34, holding that employer's evidence that union president communicated agreement with rule book changes demonstrated that employer had provided notice and an opportunity to bargain the change.
[204] *County of Riverside* (2014) PERB Dec. No. 2360-M, 38 PERC 138.
[205] *City of San Juan Capistrano* (2012) PERB Dec. No. 2238-M, 36 PERC 125 (finding violation of personnel rules to be an isolated breach); *State of Cal. (Dept. of Veterans Affairs and Personnel Admin.)* (2009) PERB Dec. No. 1997-S, 33 PERC 27 (finding union's violation of no strike clause was isolated breach with no continuing impact); *Grant Joint Union High School Dist.* (1982) PERB Dec. No. 196, 6 PERC ¶ 13064; *California Dept. of Forestry and Fire Protection* (1993) PERB Dec. No. 999-S, 17 PERC ¶ 24112; see also *County of Yuba* (2004) PERB Dec. No. 699-M, 28 PERC 266, and *Stockton Unified School Dist.* (2005) PERB Dec. No. 1759, 29 PERC 10; *King City Joint Union High School Dist.* (2005) PERB Dec. No. 1777, 29 PERC 164.
[206] *University of Cal*. (2014) PERB Dec. No. 2398-H, 39 PERC 64.
[207] *Petaluma City Elementary School Dist./Joint Union High School Dist*. (2016) PERB Dec. No. 2485, 41 PERC 23.
[208] *City of Arcadia* (2019) PERB Dec. No. 2648-M.
[209] *San Diego Unified School Dist.* (2007) PERB Dec. No. 1883, 31 PERC 59.
[210] *County of Riverside* (2014), *supra*, PERB Dec. No. 2360-M.
[211] *County of Ventura* (2006) PERB Order No. LA-CE-231-M, 30 PERC 146.
[212] *County of Kern* (2018) PERB Dec. No. 2615-M (in finding the employer violated the MMBA by making a unilaterally imposed revised production standard and using it in an employee's performance evaluation, PERB rejected the employer's "dynamic status quo" defense that the changes to its production standard and performance evaluation was consistent with its past practice and devoid of non-discretionary changes).
[213] *Bellflower Unified School Dist.* (2015) PERB Dec. No. 2455, 40 PERC 65.
[214] *City of Solvang* (2006) PERB Order No. LA-CE-248-M, 30 PERC 145.
[215] *City of Davis* (2010), *supra*, PERB Dec. No. 2494-M.
[216] *County of Tulare* (2015) PERB Dec. No. 2414-M, p. 5, 39 PERC 111, vacated in part *County of Tulare* (2016) PERB Dec. No. 2414a, as ordered by *County of Tulare v. PERB* Court of Appeal unpublished decision in Docket No. F071240 (7-11-16).

to adhere to and enforce the contractual language of the CBA.'"[217]

A refusal to grant released time for a PERB unfair practice conference did not constitute an unlawful change.[218] No unilateral change occurs when an employer participates in impasse procedures in good faith and unilaterally imposes provisions that were reasonably comprehended in the LBFO made after completion of the impasse procedures.[219] But, employers may not unilaterally impose no-strike, separability/savings, or term clauses; such clauses require agreement.[220]

Refusing to Meet and Confer

Another *per se* violation under the MMBA is an absolute refusal to meet and confer on the other party's demand.[221] For example, PERB has ruled that a union unlawfully refused to renegotiate provisions in a side letter regarding leave for the union president when the side letter had no defined term and was therefore subject to renegotiation at any time.[222] But refusing to negotiate on matters outside the scope is not an unfair practice.[223] If a party's refusal is based on the belief that the subject matter is outside the scope of representation, however, PERB requires the refusing party to seek clarification of the request to bargain before refusing to meet.[224] Also, PERB has ruled that a party's refusal to schedule bargaining sessions on specific dates does not itself demonstrate bad faith.[225]

PERB distinguishes between an outright refusal to bargain and "hard bargaining." "Hard bargaining" is where the employer's proposal to maintain a firm position is supported by some rational arguments communicated during bargaining.[226] Explaining the firmly held position is an important element of lawful hard bargaining. PERB has explained, "an adamant refusal to agree *without some* justification is no less an unfair practice than a flat refusal to discuss a negotiable subject at all."[227]

Finally, PERB has ruled that when a party erroneously asserts that a matter is outside the scope of bargaining, but nonetheless makes proposals and actually engages in bargaining over the matter, it does not violate the duty to bargain in good faith.[228]

Failure to Provide Information

Failure to provide information by itself can constitute bad faith bargaining. Under the EERA and MMBA, knowingly providing an exclusive representative with inaccurate information regarding the financial resources of the employer is deemed a refusal to bargain in good faith.[229]

The duty to provide information is based on the premise that without relevant information, a party is unable to properly perform its duties. Under PERB rulings, an employer must disclose information necessary and relevant to negotiations or grievance processing unless the employer can establish that the information is plainly irrelevant, or excessively burdensome to produce, or that a compelling reason exists not to disclose the information.[230] Necessary and relevant information must be provided in a timely fashion, and PERB has found a six-week delay (even during the off-duty

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[217] *City of Davis* (2010), *supra*, PERB Dec. No. 2494-M; *County of San Bernardino* (2015) PERB Dec. No. 2423-M, 39 PERC 165, at p. 53, quoting *Stockton Unified School Dist.* (2005) PERB Dec. No. 1759, 29 PERC 104.

[218] *California State U.* (2007), *supra*, PERB Dec. No. 1926-H.

[219] *Saddleback Valley Unified School Dist.* (2013) PERB Dec. No. 2333, 38 PERC 52.

[220] *Fresno County In-Home Support Services Public Authority* (2015) PERB Dec. No. 2418-M, 39 PERC 133.

[221] *Dublin Professional Fire Fighters, Local 1885* (1975), *supra*, 45 Cal.App.3d at p. 118. *Boling* (2018), *supra*, 5 Cal.5th 898 (A charter city must negotiate before allowing an initiative that affects mandatory subjects of bargaining to be placed on the ballot when the sponsor or a primary supporter of the initiative is also an agent of the City who would otherwise be obligated to bargain over the mandatory subjects. City officials cannot use the procedure of citizen initiative as a straw man to avoid a City's bargaining obligations under the MMBA.).

[222] *City of Torrance* (2008) PERB Dec. No. 1971-M, 32 PERC 126.

[223] *Healdsburg Union High School Dist.* (1980) PERB Dec. No. 132, 4 PERC ¶ 11112.

[224] *Compton Community College Dist.* (1990) PERB Dec. No. 790, 14 PERC ¶ 21051.

[225] *Southwestern Community College Dist.* (1998) PERB Dec. No. 1282, 22 PERC ¶ 29153.

[226] *University of Cal.* (2010) PERB Dec. No. 2094-H, 34 PERC 41.

[227] *County of San Luis Obispo* (2015) PERB Dec. No. 2427-M, 39 PERC 176.

[228] *Ibid.*

[229] Gov. Code, §§ 3506.5 and 3543.5(c).

[230] *Stockton Unified School Dist.* (1980) PERB Dec. No. 143, 4 PERB ¶ 11189, *State of Cal. (Dept. of Personnel and Transportation)* (1997) PERB Dec. No. 1227-S, 22 PERC ¶ 29007.

summer months in a school district) to be a *per se* violation of the duty to bargain in good faith.[231]

In some cases, the party may be entitled to more information than it would under other statutes, such as the Public Records Act. For instance, PERB-administered statutes may require the production of copies of arguably private and confidential information such as unredacted employee disciplinary reports, and entail an employer creating new public records to answer a relevant information request to the extent that the employer cannot show the request is unduly burdensome.[232]

Even where the requested information would be unduly burdensome for the employer to produce, the duty to bargain requires an employer to negotiate with a union to try and reach an accommodation with the union.

Likewise, under PERB-administered statutes, an employer has an obligation to meet-and-negotiate over employer privacy and confidentiality concerns. This holds true even if the third party's privacy rights outweigh the union's presumptive right to the information. In such a case, the employer cannot unilaterally refuse to furnish the information or to dictate unilaterally how relevant information is to be provided (for instance, by redaction). Rather, the employer must negotiate with the union over accommodating the union's need for information vis-à-vis the third party's privacy interests.[233] The employer may even need to negotiate a confidentiality agreement regarding disclosure where redaction is not the best method.[234] Further, PERB noted that an employer must timely raise any privacy concerns[235] related to the investigation so that the parties can negotiate over accommodating those concerns before the union's time to file a grievance has expired.

Investigative reports regarding unit members can be relevant, despite claims of confidentiality and attorney-client privilege.[236] On the other hand, investigative reports about non-unit members or private citizens have not been considered relevant to a union's representation obligations.[237] MMBA unit members' home phone numbers and addresses are considered relevant for union representation purposes, and unlike school district and state employees, MMBA employees are not exempt from disclosure by the Public Records Act.[238]

Information pertaining directly to mandatory subjects of bargaining is presumptively relevant, but the exclusive representative bears the burden of establishing that other information is relevant to its statutory representational responsibilities.[239] An employer will not commit a *per se* violation of the duty to bargain when it partially complies with a union's information request, asks for clarification from the union on the remaining information requests, and the

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[231] *Petaluma City Elementary School Dist./Joint Union High School Dist*. (2016) PERB Dec. No. 2485, 41 PERC 23.
[232] *California State U.* (2004) PERB Dec. No. 1591-H, 28 PERC 68. *Sacramento City Unified School Dist*. (2018) PERB Dec. No. 2597 (school district engaged in bad faith bargaining by treating the union's information request as Public Records Act request and unilaterally determining the terms by which the district would produce requested relevant information and the degree the district would redact it).
[233] *County of Tulare* (2020) PERB Dec. 2697-M.
[234] *Sacramento City Unified School Dist*. (2018), *supra*, PERB Dec No. 2597.
[235] *County of Tulare, supra,* PERB Dec. 2697-M (County engaged in bad faith bargaining by failing to raise privacy concerns far enough in advance of the deadline for the union to file a grievance so that the Union could serve its representative function. The County failed to notify the County of its privacy concerns in time for the Union to evaluate whether the parties can reach an accommodation of the County's privacy concerns and to address those concerns if valid (for instance, through redaction or a confidentiality agreement), so as to enable the Union to review the withheld information contained in the investigative report prior to the deadline to file a grievance so as to allow the Union to make an informed decision on whether to file a grievance based on the report.).
[236] *State of Cal. (Dept. of Veterans Affairs)* (2004) PERB Dec. No. 1686-S, 28 PERC 250; *Sacramento City Unified School Dist.* (2018), *supra,* PERB Dec No. 2597; *County of Tulare, supra,* PERB Dec. 2697-M (County engaged in bad faith bargaining by failing to provide an investigatory report alleging hostile working conditions in a county department.).
[237] *State of Cal. (Dept. of Consumer Affairs)* (2004) PERB Dec. No. 1711-S, 28 PERC 15; but see *Sacramento City Unified School Dist*. (2018), *supra,* PERB Dec No. 2597 (finding relevant a copy of a charge, a settlement agreement returning an employee to work in another unit under allegedly similar circumstances, all school district reports and police reports in connection with the incident and issued to an employee in another bargaining unit).
[238] *Golden Empire Transit Dist.* (2004) PERB Dec. No. 1704-M, 29 PERC 7.
[239] *Ventura County Community College Dist.* (1999) PERB Dec. No 1340, 23 PERC ¶ 30147.

union fails to respond to the clarification request.[240]

The following are some examples of PERB's application of these rules. An employer has an obligation to provide information about employee parking fees and location.[241] An employer also must provide information about the application of its rules and disciplinary actions to assist the union in representing its members in disciplinary actions, even when the collective bargaining agreement does not explicitly require the provision of such information.[242] An employer also has an obligation to provide a union with enough information about the nature of any allegations against an employee in advance of the employee's initial investigatory interview to provide the employee sufficient time to consult with the union so that the union can provide the employee with "meaningful" representation during the interview.[243] However, this does not entitle the union to a copy of the underlying written complaint.[244] But PERB has ruled that an employer does not have an obligation to provide information about non-unit discipline procedures,[245] nor to provide an automatic notice to the union of every bargaining unit disciplinary action.[246] PERB found no unfair practice associated with a County's refusal to provide information on the "target savings" from a bargaining unit during concession bargaining even though the information may have been necessary and relevant, because the County had not previously calculated the amount.[247] PERB has excused a party whose failure to provide information was due to a third party vendor, when the party made a good faith effort to supply the information.[248]

"Piecemeal" or Fragmented Bargaining

Citing a body of NLRB decisions, PERB announced that piecemeal bargaining can constitute bad faith bargaining. Unlawful piecemeal bargaining occurs when "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." In order to bargain in good faith, a party "may not condition its willingness even to discuss a particular mandatory subject on prior agreement over other subjects."[249] Piecemeal bargaining constitutes a *per se* violation of the duty to bargain because it amounts to the refusal to bargain on particular matters. PERB has described piecemeal bargaining as holding negotiations on one topic "hostage" to agreement on another, and has found no piecemeal bargaining when an employer refused to merge layoff bargaining into full MOU bargaining when the employer engaged fully in both sets of bargaining and had good reasons for refusing to combine the two bargaining processes.[250]

Coalition Bargaining

It is unlawful to require coalition bargaining by requiring bargaining units to meet jointly and condition settlement with one group on settlement by others. But, PERB has ruled that simply making a uniform set of concession proposals to all bargaining units is not unlawful coalition bargaining. Such "coordinated" bargaining is lawful.[251]

Insisting on Permissive and Illegal Bargaining Subjects

In the courts' and PERB's view, a party automatically violates its duty to bargain by insisting to impasse on non-mandatory or illegal subjects.[252] For example, it is *per se* bad faith for an employer to insist on a non-

[240] *Los Angeles Superior Ct.* (2010) PERB Dec. No. 2112-I, 34 PERC 94; *County of Sierra* (2007) PERB Dec. No. 1915-M, 31 PERC 119.
[241] *California State U.* (2006) PERB Dec. No. 1876-H, 31 PERC 40.
[242] *City of Burbank* (2009) PERB Dec. No. 1988-M, 33 PERC 11.
[243] *Contra Costa Community College Dist.* (2019) PERB Dec. No. 2652-M.
[244] *Ibid.*
[245] *University of Cal.* (2006) PERB Dec. No. 1870-H, 31 PERC 34.
[246] *City of Los Altos* (2007) PERB Dec. No. 1891-M, 31 PERC 74.
[247] *County of Solano* (2014) PERB Dec. No. 2402-M, 39 PERC 78.
[248] *University of Cal.* (2010) PERB Dec. No. 2094-H, 34 PERC 41.
[249] *City of San Jose* (2013) PERB Dec. No. 2341-M, 38 PERC 94.
[250] *Salinas Valley Memorial Healthcare System* (2015) PERB Dec. No. 2433-M, 40 PERC 4.
[251] *County of Solano* (2014), *supra*, PERB Dec. No. 2402-M.
[252] *City of Pinole* (2012) PERB Dec. No. 2288-M, 37 PERC 90; *International Assn. of Fire Fighters, Local 55 v. City of San Leandro* (1986) 181 Cal.App.3d 179, 226 Cal.Rptr. 238; *Lake Elsinore School Dist.* (1986) PERB Dec. No. 603, 11 PERC ¶ 18022.

mandatory subject, such as a proposal that is less than the statutory requirement,[253] or for a union to insist on proposing a "union shop" clause or a proposal that violates constitutional rights.[254] This rule applies even if a party insists to impasse on maintaining a non-mandatory subject in a collective bargaining agreement that had previously been included in the expired agreement.[255] Provisions that are outside the scope of bargaining are not part of the status quo that the parties must maintain after a collective bargaining agreement expires. In order to establish an unfair practice, PERB has required negotiating parties to clearly communicate their objection to negotiating non-mandatory subjects.[256]

Totality of Circumstances Test

The other test of good faith bargaining involves evaluating the totality of circumstances. Federal courts, state courts, and PERB consider the factors discussed below as indicia of bad faith. Any combination of these indicia may constitute bad faith. Under most circumstances, a single indicator of bad faith bargaining will not alone be sufficient to prove an unfair practice charge,[257] but PERB has ruled that if a single indicator of bad faith is sufficiently egregious, it alone can establish bad faith under the totality of circumstances test.[258]

Refusing to Exchange Proposals or Make Concessions

A party's intent to bargain in good faith may be discerned from its willingness to exchange reasonable proposals and make concessions during the bargaining process. A party's refusal to exchange proposals or make concessions may indicate bad faith. But, an employer can reasonably defer making economic proposals when its financial situation is uncertain.[259] The courts and PERB also agree that a party's insistence on a firm position is not necessarily evidence of bad faith because the "law merely requires the parties to maintain a sincere interest in reaching an agreement."[260] Hard bargaining is not unlawful, although PERB requires parties to explain their reasons for standing firm.[261] Remaining adamant on an issue throughout the entire negotiations can be mere hard bargaining.[262]

Dilatory Tactics

Parties must meet and negotiate promptly upon either party's request. This duty applies throughout negotiations, and the parties may not use delaying tactics such as evasion or attending meetings unprepared.[263]

Negotiators' Lack of Authority

PERB precedent requires an agency to give negotiators sufficient authority to reach an agreement.[264] PERB decisions also have required that negotiation team members support tentative agreements. Both parties must take the agreement to their respective principals to secure ratification. Generally, a failure to recommend and support the tentative agreement violates the duty to bargain in good faith.[265] However, if the bargaining teams do not have an agreement to recommend tentative agreements, then the union team's failure to recommend

[253] *California State U.* (2006) PERB Dec. No. 1823-H, 30 PERC 75. See also *Union of American Physicians and Dentists v. Los Angeles County Employee Relations Com.* (2005) 131 Cal.App.4th 386, 32 Cal.Rptr.3d 547, review den. (2005) 2005 Cal.LEXIS 11350.
[254] *City of Hayward v. United Public Employees, Local 390* (1976) 54 Cal.App.3d 761, 126 Cal.Rptr. 710.
[255] *Berkeley Unified School Dist.* (2012) PERB Dec. No. 2268, 37 PERC 7.
[256] *State of Cal. (DPA)* (2010) PERB Dec. No. 2081-S, 34 PERC 10.
[257] *Santa Monica Community College Dist.* (2012) PERB Dec. No. 2243, 36 PERC 132.
[258] *City of San Jose* (2013), *supra*, PERB Dec. No. 2341-M.
[259] *State of Cal. (DPA)* (2009) PERB Dec. No. 2078-S, 34 PERC 11.
[260] *Public Employees Assn. of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 806, 213 Cal.Rptr. 491, 496; see also *Berkeley Unified School Dist.* (2008) PERB Dec. No. 1954, 32 PERC 73; *Oakland Unified School Dist.* (1982) PERB Dec. No. 275, 7 PERC ¶ 14029.
[261] *Placentia Fire Fighters v. City of Placentia* (1976), *supra*; *Oakland Unified School Dist.* (1982), *supra*, PERB Dec. No. 275; *Jefferson School Dist.* (1980) PERB Dec. No. 133, 4 PERC ¶ 1117.
[262] *University of Cal.* (2010) PERB Dec. No. 2094-H, 34 PERC 41; *County of Riverside* (2005) PERB Dec. No. 1715-M, 29 PERC 21; see also *State of Cal. (Board of Prison Terms)* (2005) PERB Dec. No. 1758-S, 29 PERC 103.
[263] Gov. Code, § 3505. See also *Stockton Unified School Dist.* (1980) PERB Dec. No. 143, 4 PERC ¶ 11189; *Gonzales Union High School Teachers Assn.* (1985), *supra*, PERB Dec. No. 480; *Oakland Unified School Dist.* (1983) PERB Dec. No. 326, 7 PERC ¶ 14195.
[264] *Oakland Unified School Dist.* (1982), *supra*, PERB Dec. No. 275; *Chino Valley Unified School Dist.* (1999) PERB Dec. No. 1326, 23 PERC ¶ 30097.
[265] *Kern High School Dist*. (1998) PERB Dec. No. 1265, 22 PERC ¶ 29094; *Chino Valley Unified School Dist*. (1999), *supra*, PERB Dec. No. 1326.

ratification of a tentative agreement is not a violation.[266]

Imposing Unlawful Conditions ("Conditional Bargaining")

Parties to negotiations may impose reasonable conditions on the bargaining process, such as ground rules for conducting sessions. But imposing unlawful conditions during negotiations indicates bad faith. For example, under the MMBA, a party cannot condition continuing negotiations on the other party's agreement to accept mediation in the event of impasse.[267] Mediation is voluntary and the duty to meet and confer does not include the duty to agree to mediation.[268] A party may make conditional proposals, but only as long as these proposals are not maintained to impasse.[269]

Likewise, PERB has found it unlawful to condition agreement over economic matters upon agreement on non-economic matters,[270] to insist on specifying who may be on the opposing negotiating committee,[271] to condition an agreement on a wage package to a proposal waiving a statutory right,[272] or to condition economic items upon the union's withdrawal of certain grievances or unfair practice charges.[273]

On the other hand, an employer may, under certain circumstances, condition a wage proposal upon acceptance within a specified time without engaging in unlawful conditional bargaining provided the employer can demonstrate a legitimate need for the time limit.[274] Bad faith bargaining is not established by evidence that the employer conditioned negotiation of economic matters on the resolution of non-economic matters when all matters are within the scope of bargaining and the union has the authority and control over both issues.[275] Similarly, an employer may lawfully condition acceptance of a non-economic provision like binding grievance arbitration on the settlement of an overall agreement including compensation.[276]

Unilateral Changes

As discussed above, an employer's unilateral change in a mandatory bargaining subject may, without additional evidence, constitute a *per se* violation of the duty. But unilateral changes also may be included with other bad faith indicia as part of an overall "totality of the circumstances" analysis.[277]

Bypassing Representatives

Bypassing representatives generally indicates bad faith. Bypassing a union team is tantamount to avoiding negotiations and failing to recognize a selected representative. Directly negotiating with employees instead of the union,[278] or directly communicating with employees in an attempt to persuade them of management's bargaining posture,[279] illustrate unlawful direct dealing. Similarly, a union's attempt to directly negotiate with a governing board indicates unlawful bypassing of the designated representative. However, a union has the right to engage in direct or indirect advocacy of its proposals to an employer's elected and unelected officials so long as the advocacy does not include making collective bargaining proposals that the union has not already made to the employer's chosen bargaining representatives.[280] PERB has allowed union representatives to appear at public meetings

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[266] *Newark Unified School Dist.* (2007) PERB Dec. No. 1895, 31 PERC 78.
[267] *Campbell Municipal Employees Assn. v. City of Campbell (*1982) 131 Cal.App.3d 416, 182, 182 Cal.Rptr. 461.
[268] Gov. Code, § 3505.2.
[269] *Desert Area Teachers Assn.* (2001) PERB Dec. No. 1425, 25 PERC ¶ 32049.
[270] *Fremont Unified Dist. Teachers Assn., CTA/NEA* (1980) PERB Dec. No. 136, 4 PERC ¶ 11118.
[271] *Gilroy Unified School Dist.* (1984) PERB Dec. No. 471, 9 PERC ¶ 16042.
[272] *California State U.* (2006) PERB Dec. No. 1823-H, 30 PERC 75.
[273] *Lake Elsinore School Dist.* (1986) PERB Dec. No. 603, 11 PERC ¶ 18022.
[274] *City of Arcadia* (2019), *supra,* PERB Dec. No. 2648-M (noted an example of a legitimate need for a deadline for acceptance of a proposal was where meeting the deadline was necessary to realize the net savings the county needed in its overall concessionary economic proposal to permit the wage increase). *California State U.* (2006) PERB Dec. No. 1871-H, 31 PERC 35.
[275] See e.g., *Anaheim Union High School Dist.* (2016) PERB Dec. No. 2504, 41 PERC 146.
[276] *County of Solano* (2014) PERB Dec. No. 2402-M, 39 PERC 78.
[277] *Stationary Engineers, Local 39 v. San Juan Suburban Water Dist*. (1979) 90 Cal.App.3d 796 at p. 802.
[278] *Lake Elsinore School Dist.* (1987) PERB Dec. No. 646, 12 PERC ¶ 19012.
[279] *Omnitrans* (2010) PERB Dec. No. 2143-M, 34 PERC 171; *City of San Diego (Office of City Attorney)* (2010) PERB Dec. No. 2103-M, 34 PERC 63; *Placentia Fire Fighters* (1976), *supra*.
[280] *County of Tulare* (2020) PERB Dec. 2697-M.

to advocate the union's position, as long as actual bargaining does not occur.[281] PERB precedent also permits employer communications that are factual and contain no threats or promises,[282] or that do not disparage the union.[283]

The MMBA provides special instances where employers may deal directly with bargaining unit employees,[284] but that right to self-representation does not grant an individual the right to bargain employment terms and conditions with the local government employer.[285]

Withholding Information

Withholding relevant information or providing misinformation also can be an indication of bad faith bargaining.[286] (See prior discussion regarding refusing to provide relevant information.)

Regressive Bargaining

Moving further away from agreement, rather than closer to a meeting of the minds, may indicate bad faith. PERB has found that reneging on tentative agreements and withdrawing proposals may be regressive.[287] But changed circumstances can justify the regressive bargaining or refusal to adopt a tentative agreement.[288]

Surface Bargaining

Surface bargaining occurs when an employer meets and confers with employee representatives, but merely goes through the motions of bargaining. For example, an employer can fail to act on a union's proposals or to make its own substantive proposals.[289] On the other hand, hard bargaining (*i.e.*, maintaining a firm position) does not constitute surface bargaining.[290] PERB and courts are reluctant to label an employer's conduct as surface bargaining if the union is equally, or more intransigent,[291] if the union's own bad faith causes the breakdown in negotiations,[292] or if the charging party fails to show that the actions "subverted the bargaining process."[293]

A party's *per se* violations can provide evidence of subjective bad faith to support a surface bargaining charge, but only if that separate *per se* violation contributed to the bargaining deadlock, was relatively close in time, or otherwise demonstrates the party's state of mind.[294]

Finally, factual allegations if proven and presented at hearing, but not included in the complaint, may support a surface bargaining allegations but will not suffice to constitute a separate and independent unfair practice absent the contract being amended or the

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[281] *San Ramon Valley Unified School Dist.* (1982) PERB Dec. No. 230, 6 PERC ¶ 13184.
[282] *Charter Oak Unified School Dist.* (1991) PERB Dec. No. 873, 15 PERC ¶ 22067.
[283] *California State U.* (2006) PERB Dec. No. 1871-H, 31 PERC 35.
[284] Gov. Code, §§ 3502, 3503.
[285] *Relyea v. Ventura County Fire Protection Dist.* (1992) 2 Cal.App.4th 875, 3 Cal.Rptr.2d 614.
[286] See *California State U*. (2010) PERB Dec. No. 2151-H, 35 PERC 14 (discussing misinformation under totality of circumstances test and concluding that employer not prohibited from "spinning" facts in fact-finding presentation).
[287] *Charter Oak Unified School Dist.* (1991) PERB Dec. No. 873, 15 PERC ¶ 22067. *City of Palo Alto* (2019) PERB Dec. No. 2664-M (City engaged in bad faith regressive bargaining by withdrawing its bifurcated LBFO on economics, previously agreed to and ratified by the Union membership at City's request, because the Union did not later agree to the City's "predictably unacceptable" non-economic proposals.).
[288] *City and County of San Francisco* (2009) PERB Dec. No. 2064-M, 33 PERC 160; *Temple City Unified School Dist.* (2008) PERB Dec. No. 1972, 32 PERC 132; *County of Tulare* (2020) PERB Dec. 2697-M (Union did not engage in regressive bargaining when it included proposals for a newly recognized bargaining unit in ongoing negotiations where the union justified its action based on changed circumstances, and there was nothing in the ground rules precluding this.).
[289] *Gonzales Union High School Dist.* (1985) PERB Dec. No. 480, 9 PERC ¶ 16057; *Muroc Unified School Dist*. (1978) PERB Dec. No. 80, 3 PERC ¶ 10004.
[290] *Anaheim Union High School Dist*. (2016) PERB Dec. No. 2504, 41 PERC 146; *County of Tulare* (2015) PERB Dec. No. 2461-M, 40 PERC 81; *County of Solano* (2014) PERB Dec. No. 2402-M, 39 PERC 78; *City of Glendale* (2012) PERB Dec. No. 2251-M, 36 PERC 157; *University of Cal.* (2010) PERB Dec. No. 2094-H, 34 PERC 41; *State of Cal. (Dept. of Corrections & Rehabilitation and Dept. of Personnel Admin.)* (2010) PERB Dec. No. 2115-S, 34 PERC 99; *State of Cal*. (DPA) (2009) PERB Dec. No. 2078-S, 34 PERC 11; *City of Fresno* (2006) PERB Dec. No. 1841-M, 30 PERC 126.
[291] Morris, *The Developing Labor Law* (3rd ed., 1992) pp. 616-620; see also Zerger, *California Public Sector Labor Relations*, Release No. 11, 2000, pp. 10-1 to 10-28; *Fresno County In-Home Support Services Public Authority* (2015) PERB Dec. No. 2418-M, 39 PERC 133.
[292] *Petaluma City Elementary School Dist./Joint Union High School Dist*. (2016) PERB Dec. No. 2485, 41 PERC 23.
[293] *Fresno County In-Home Support Services Public Authority, supra*; *City and County of San Francisco* (2007) PERB Dec. No. 1890-M, 31 PERC 72; see also *Anaheim Union High School Dist.* (2016) PERB Dec. No. 2504, 41 PERC 146.
[294] *Fresno County In-Home Support Services Public Authority, supra.*

unalleged violation doctrine being satisfied.[295]

Premature Impasse Declarations

Allegations that an employer or union has bargained in bad faith by prematurely declaring impasse are decided under the "totality of circumstances" test.[296] PERB weighs all the facts to determine whether the conduct at issue as a whole indicates an intent to subvert the negotiating process or merely a legitimate position adamantly maintained.[297] PERB also has ruled that filing an impasse declaration itself does not show bad faith absent other indicia of bad faith.[298]

Suspending the Duty to Bargain

The duty to bargain persists for the life of the parties' relationship, even after a collective agreement is signed or the employer unilaterally implements terms and conditions following impasse. But the duty may be suspended by several means:

Waiver by Agreement

Any waiver of the obligation to bargain must be "clear and unmistakable."[299] And, the evidence must demonstrate an intentional relinquishment of the right to bargain.[300]

Under certain circumstances, both the courts and PERB recognize several methods for meeting this clear and unmistakable standard: a contract "zipper clause;"[301] a complete contract provision that covers the topic;[302] a provision establishing a clear and limited timeline during which bargaining may occur;[303] a negotiating history that reflects a party's conscious abandonment of the right to bargain over the topic;[304] and an encompassing management rights clause that clearly covers the issue in dispute.[305] For example, a union waived its right to bargain over a decision to contract out work after specified fiscal conditions occurred by agreeing to an MOU provision stating that no layoffs or new outsourcing would occur during the term of an MOU "except if the State eliminates" specified funding.[306] Similarly, PERB has ruled that a union clearly and unmistakably waives its right to bargain management's decision to contract out work by agreeing to a management rights clause stating that the district "retains all of its powers and authority to direct, manage, and

[295] *Davis City Employee Assn. v. City of Davis* (2018) PERB Dec. No. 2582-M (PERB will consider an unalleged violation if: "(1) adequate notice and opportunity to defend has been provided to respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue.

[296] *City of San Ramon* (2018) PERB Dec. No. 2571-M (City prematurely declared impasse when the City engaged in bad faith bargaining by presenting its proposals with a take-it-or-leave-it attitude, performed only a perfunctory review of union proposals, and refused to extend bargaining into the next fiscal year despite union offer to extend wage freeze, thereby short-circuiting any meaningful bargaining).

[297] *City of Selma* (2014) PERB Dec. No. 2380-M, 39 PERC 11; *Kings In-Home Supportive Services Public Authority* (2009) PERB Dec. No. 2009-M, 33 PERC 52; *Rio School Dist.* (2008) PERB Dec. No. 1986, 33 PERC 8.

[298] *Rio School Dist.* (2008), *supra*, PERB Dec. No. 1986.

[299] *Independent Union of Public Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 488, 195 Cal.Rptr. 206; *Santa Ana Unified School Dist.* (2013) PERB Dec. No. 2332, 38 PERC 51; *Amador Valley Joint Union High School Dist*. (1978) PERB Dec. No. 74, 2 PERC ¶ 2192; *Modoc County Office of Education* (2019) PERB Dec. No. 2684.

[300] *Ibid.* (no clear and unmistakable waiver of a union's right to bargain over a reduction in employees' hours where the contract provides a procedure to reduce employees' hours but is silent on how the decision to reduce hours is to be made).

[301] *County of San Bernardino* (2015) PERB Dec. No. 2423-M, 39 PERC 165; *Inglewood Teachers Assn*. (2012) PERB Dec. No. 2290, 37 PERC 96; *Independent Union of Public Service Employees* (1983), *supra*; *Cupertino Union School Dist*. (1993) PERB Dec. No. 987, 17 PERC ¶ 24069; *California State U. (San Marcos)* (2004) PERB Dec. No. 1584-H, 28 PERC 61.

[302] *California State Employees Assn.*, *supra*, 51 Cal.App.4th at pp. 938-940; *Placentia Unified School Dist*. (1986) PERB Dec. No. 595, 10 PERC ¶ 17181; *Modoc County Office of Education (2019)*, *supra*, PERB Dec. No. 2684 (no clear and unmistakable waiver found based solely on the union's acquiescence in prior unilateral changes).

[303] *Santa Clara County Correctional Peace Officers' Assn. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 169 Cal.Rptr.3d 228.

[304] *Stockton Police Officers Assn. v. City of Stockton* (1988) 206 Cal.App.3d 62, 253 Cal.Rptr. 183; *Placentia Unified School Dist.* (1986), *supra*.

[305] *Independent Union of Public Service Employees County of Sacramento* (1983), *supra*; *Antelope Valley Union High School Dist.* (1998) PERB Dec. No. 1287, 22 PERC ¶ 29168.

[306] *City of Milpitas* (2015) PERB Dec. No. 2443-M, 40 PERC 36. But in *Inland Empire Utilities Agency* (2019) PERB Dec. No. 2658-M, PERB found that an employer violated the MMBA by unilaterally narrowing the grievance provision in an MOU by denying the union the ability to grieve an employer's application of its anti-retaliation policies where neither the grievance provisions in the MOU nor the anti-retaliation provisions clearly and unmistakably waived the union's right to grieve retaliation allegations. In contrast, PERB noted that the MOU explicitly precluded the grieving of discipline.).

control to the full extent of the law, including the exclusive right to contract out work."[307] But, a general management rights clause is unlikely to clearly and unmistakably waive the right to bargain.[308] And, PERB has concluded that an MOU's layoff and bumping rights provisions applied only when services are discontinued, and would not serve to waive the right to bargain over the effects of a layoff resulting from the transfer of unit work.[309] Moreover, any waiver conferred by a negotiated management rights clause in an MOU ends with the MOU's termination.[310]

In the context of effects bargaining, PERB has explained that in order to succeed with a waiver claim an employer must demonstrate (a) that it met its obligation to seek clarification of the union's effects bargaining demand, and (b) that even as clarified, the union's demand was inadequate – *i.e.*, it failed to indicate a desire to bargain effects, as opposed to the decision, or it failed to identify effects within the scope of bargaining.[311]

The passage of budget deadlines does not extinguish the employer's duty.[312] A union's decision to withdraw a proposal from consideration is not a waiver, but instead returns that topic to the status quo without giving the agency the right to make unilateral changes.[313] If a lawful waiver exists, even a mutual mistake of fact regarding a contract provision does not create a duty to reopen or renegotiate the provision.[314] PERB has ruled that a settlement agreement or side letter without a specific term does not waive the duty to bargain and can be renegotiated at any time,[315] and side letters do not automatically expire upon adoption of a collective bargaining agreement.[316] Finally, unilateral imposition of terms and conditions of employment under the MMBA does not establish a waiver or bargaining hiatus.[317]

Waiver by Inaction

The duty to bargain also may be suspended by inaction — by a party's failure to request negotiations.[318] PERB has ruled that a union waives its right to meet and confer about a proposed change by failing to respond, by issuing a response that does not indicate the specific topics that the union wishes to negotiate,[319] by demanding to bargain a non-negotiable decision rather than demanding to bargain the negotiable effects of the decision,[320] by a protracted dispute about the location of negotiations,[321] by conditioning a proposal to negotiate upon granting recognition,[322] or by refusing to negotiate.[323] But, PERB also has refused to find waiver of the duty to bargain based on a union's delay tactics.[324] In addition, PERB rulings emphasize that a union's duty to request bargaining arises only if the employer's notice of proposed changes is adequate.[325]

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[307] *Barstow Unified School Dist.* (1996) PERB Dec. No. 1138, 20 PERC ¶ 27044; *Long Beach Community College Dist.* (2008) PERB Dec. No. 1941, 32 PERC 37; but see *Bellflower Unified School Dist*. (2018), *supra*, PERB Dec. No. 2544 (*Bellflower II*)(management rights clause contained in the MOU permitting unilateral subcontracting terminated with termination of MOU).

[308] *Omnitrans* (2010) PERB Dec. No. 2143-M, 34 PERC 171.

[309] *City of Sacramento* (2013) PERB Dec. No. 2351-M, 38 PERC 104.

[310] *City of Calexico* (2017) PERB Dec. No. 2541-M.

[311] *Rio Hondo Community College Dist*. (2013), *supra*, PERB Dec. No. 2313, p. 6.

[312] *Dublin Professional Fire Fighters, Local 1885* (1975), *supra*; California Dept. of Personnel Admin. (1986) PERB Dec. No. 569-S, 10 PERC ¶ 17089.

[313] *Los Angeles Community College Dist*. (1982) PERB Dec. No. 252, 6 PERC ¶ 13241.

[314] *Berkeley Unified School Dist.* (2008) PERB Dec. No. 1976, 32 PERC 138.

[315] *City of Torrance* (2008) PERB Dec. No. 1971-M, 32 PERC 126.

[316] *Council of Classified Employees/AFT, Local 4522 v. Palomar Community College Dist.* (2011) PERB Dec. No. 2213, 36 PERC 69.

[317] *Operating Engineers Local 3 v. City of Santa Rosa* (2013) PERB Dec. No. 2308-M, 37 PERC 182; See *City and County of San Francisco* (2017) PERB Dec. No. 2540-M (PERB found Charter City's adoption of a regulation that retroactively invalidated all side letters and past practices was an unlawful unilateral change in violation of the MMBA as it unilaterally abrogated the results of previous meet and confers.).

[318] *Metropolitan Water Dist. of Southern Cal*. (2009) PERB Dec. No. 2055-M, 33 PERC 144; *City of Sacramento* (2013), *supra*, PERB Dec. No. 2351-M; *Stockton Police Officers Assn. v. City of Stockton* (1988) 206 Cal.App.3d 62, 253 Cal.Rptr. 183.

[319] *Ibid.*; *Newman-Crows Landing Unified School Dist.* (1982) PERB Dec. No. 223, 6 PERC ¶ 13162.

[320] *Santa Clara County Superior Ct.* (2014) PERB Dec. No. 2394-C, 39 PERC 56; *County of Sacramento* (2013) PERB Dec. No. 2315-M, 37 PERC 206.

[321] *California State U.* (2006) PERB Dec. No. 1842-H, 30 PERC 125.

[322] *Diablo Water Dist*. (2003) PERB Dec. No. 1545-M, 27 PERC 114.

[323] *California State U*. (2007) PERB Dec. No. 1926-H, 31 PERC 152.

[324] *County of Riverside* (2014) PERB Dec. No. 2360-M, 38 PERC 138.

[325] *City of Sacramento* (2013) PERB Dec. No. 2351-M, 38 PERC 104; *Beverly Hills Unified School Dist.* (1990) PERB

The union need not request bargaining if the request would be futile.[326] Nor will a waiver be found if the employer has already made a firm decision,[327] or has already implemented the change.[328] However, by refusing to negotiate the effects of the policy that is a managerial prerogative, a union waives the right to bargain those effects, and the employer can implement the policy without bargaining.[329] And a waiver that is effective on one occasion does not operate as a waiver for all times.[330] PERB has ruled that a contract clause stating merely that the clause lasts "for the duration of the agreement" is not sufficient to show a union's intent to waive the duty to negotiate on that topic.[331]

Successor Union Not Bound By Prior Union's Waiver

Relying on NLRB precedent,[332] PERB has found that a successor union is not bound by a prior union's waiver of bargaining rights after the prior union was decertified.[333]

Bona Fide Impasse

A bona fide impasse occurs when the parties, after bargaining in good faith, reach the point at which further discussions would be fruitless. The impasse declaration triggers any applicable impasse procedures. If procedures include binding interest arbitration, then matters within the scope of the arbitration clause will be submitted to an arbitrator for a final and binding decision.

The duty to bargain continues during impasse procedures. It is a *per se* violation of the duty to bargain for an employer to implement any matter subject to impasse before completing those procedures.[334]

The MMBA specifically permits an agency to implement its "last, best, and final offer" ("LBFO") after impasse procedures, including any applicable mediation and fact-finding procedures are concluded.[335] However, as part of the impasse procedure, the MMBA requires after fact-finding and before imposition of an LBFO, that the employer, at a minimum, provide the public with adequate notice of the employer's intention to consider imposing terms and conditions on employees, and to allow the public to comment concerning the proposed implementation.[336] But, even if the employer satisfies these requirements, statements made at the hearing and the decision imposed by the agency may still demonstrate bad faith bargaining during negotiations and impasse procedures.[337]

PERB has found that the agency is not required to unilaterally implement its LBFO, nor to notify the union that it will not unilaterally impose the LBFO.[338] The MMBA also prohibits an agency from implementing a memorandum of understanding or a multi-year proposal, and recognizes that implementation does not terminate the parties' duty to bargain.[339] Specifically, implementation does not "deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation."[340]

Dec. No. 789, 14 PERC ¶ 21042; *Los Angeles Community College Dist.* (1982) PERB Dec. No. 252, 6 PERC ¶ 13241.

[326] *San Francisco Community College Dist.* (1979) PERB Dec. No. 105, 3 PERC ¶ 10127.

[327] *Morgan Hill Unified School Dist.* (1985) PERB Dec. No. 554a, 10 PERC ¶ 17071.

[328] *Arcohe Union School Dist*. (1983) PERB Dec. No. 360, 7 PERC ¶ 14294; *Arvin Union School Dist.* (1983) PERB Dec. No. 300, 7 PERC ¶ 14119.

[329] *City of Sacramento*, *supra*, PERB Dec. No. 2351-M, pp. 5-8.

[330] *San Jacinto Unified School Dist.* (1994) PERB Dec. No. 1078, 19 PERC ¶ 26036.

[331] *State of Cal. (Dept. of Personnel Admin.)* (1998) PERB Dec. No. 1296-S, 23 PERC ¶ 30009.

[332] *USC University Hospital & National Union of Healthcare Workers* (2012) 358 NLRB No. 132 and *Eugene Iovine, Inc.* (1999) 328 NLRB 294.

[333] *Salinas Valley Memorial Healthcare System* (2017) PERB Dec. No. 2524-M, 41 PERC 154.

[334] *Moreno Valley Unified School Dist. v. PERB* (1983) 142 Cal.App.3d 191, 200, 191 Cal.Rptr. 60; *City of Yuba City* (2019) PERB Dec. No 2603-M.

[335] Gov. Code, § 3505.7; *Stationary Engineers, Local 39 v. El Dorado County Superior Ct*. (2018) PERB Dec. No. 2589-C. (employer did not engage in bad faith bargaining by eliminating Employer Paid Member Contributions (EPMC) following exhaustion of impasse procedures).

[336] *City of Yuba City* (2019), *supra*, PERB Dec. No 2603-M.

[337] *Ibid.*; Gov. Code, § 3505.7.

[338] *County of Tulare* (2015) PERB Dec. No. 2414-M, p. 5, 39 PERC 111, vacated in part *County of Tulare* (2016) PERB Dec. No. 2414a, as ordered by *County of Tulare v. PERB* July 11, 2016 Fifth District Court of Appeal unpublished decision in Docket No. F071240.

[339] See discussion in *State of Calif. (Dept. of Personnel Admin.)* (2010) PERB Dec. No. 2130-S, 34 PERC 137.

[340] Gov. Code, § 3505.7; *City of San Ramon*, *supra*, PERB Dec. No. 2571.

Note that an impasse can be broken if one party changes its position on a key issue, which then resurrects the duty to bargain.[341] In these instances, a party cannot cease bargaining until it has provided a reasonable response to the other party's concession.[342] But once impasse procedures have been exhausted, there is no duty to recycle the impasse process after the duty to bargain is revived by changed circumstances and a subsequent impasse is reached.[343] See more detailed discussion of impasse procedures and requirements in Chapter 4.

Emergencies, Business Necessity, and Strikes

The duty to bargain may be suspended in a bona fide emergency in which the employer needs to take immediate unilateral action. Unilateral action is allowed as long as the employer provides notice to the employee organization, and an opportunity to meet as soon as practicable.[344] When courts have considered agencies' authority to declare emergencies, they treat the agencies' emergency power as a discretionary duty and set aside emergency declarations only if an agency abused its discretion.[345] PERB recognizes the possibility that the duty to bargain may be suspended as the result of an unanticipated financial problem.[346] But, PERB has explained, "to establish 'operational necessity' or 'business necessity' as a defense to a unilateral change, that the employer must establish an actual financial or other emergency that leaves no alternative to the action taken and allows no time for meaningful negotiations before taking action."[347] The alleged business necessity "must be the unavoidable result of a sudden change in circumstance beyond the employer's control,"[348] and "'emergency' is not synonymous with expedient, convenient, or in the best interest of the employer."[349] A budget deadline or economic exigency that does not amount to a bona fide emergency does not waive the duty to bargain.[350] The deadline to place an initiative on the ballot does not excuse an employer from negotiating regarding mandatory subjects of bargaining included in the initiative.[351]

Finally, in the private sector, an employer's duty to bargain may be suspended during the pendency of a strike or other concerted union activities. This is not the case under California public sector labor law.[352] But a union's strike during impasse procedures may constitute bad faith bargaining, and may be enjoined.[353] See further discussion of strike issues in Chapter 4.

New Developments 2021

DUTY TO BARGAIN

County Violated the MMBA by Unilaterally Creating and Imposing a Mandatory Overtime Policy.

The *County of Merced* excepted to a decision of an Administrative Law Judge ("ALJ") finding that the County violated its duty to bargain in good faith by changing its mandatory overtime policy for correctional officers without providing the Union with advance notice and an opportunity to bargain over the decision and the negotiable effects of the decision. PERB affirmed the decision.[354]

[341] *PERB v. Modesto City Schools Dist*. (1982) 136 Cal.App.3d 881, 889, 186 Cal.Rptr. 634; *City of San Ramon*, *supra*, PERB Dec. No. 2571.
[342] *Orange Unified School Dist*. (2000) PERB Dec. No. 1416, 25 PERC ¶ 32021.
[343] *El Dorado County Superior Ct.* (2017) PERB Dec. No. 2523-C, 41 PERC 152.
[344] Gov. Code, §§ 3504.5 (MMBA), 3516.5 (Dills Act), 71634.1(b) (TCEPGA); 110024 (IHSS-EERA).
[345] *Sonoma County Organization, Local 1707 v. County of Sonoma* (1992) 1 Cal.App.4th 267, 274-9, 1 Cal.Rptr.2d 850.
[346] *University of Cal.* (1998) PERB Dec. No. 1255-H, 22 PERC ¶ 29066.
[347] *County of San Bernardino* (2015) PERB Dec. No. 2423-M, 39 PERC 165, at p. 54, citing *Calexico Unified School Dist.* (1983) PERB Dec. No. 357, 7 PERC ¶ 14291.
[348] *Id.* at p. 54, *citing Lucia Mar Unified School Dist.* (2001) PERB Dec. No. 1440, 25 PERC ¶ 32073.
[349] *Id.* at p. 54, *citing Sonoma County Organization, Etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267.
[350] *City of Selma* (2014) PERB Dec. No. 2380-M, 39 PERC 11; *County of Riverside* (2014) PERB Dec. No. 2360-M, 38 PERC 138.
[351] *County of Santa Clara* (2010) PERB Dec. No. 2114-M, 34 PERC 97.
[352] *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 196-206, 193 Cal.Rptr. 518; *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 207 Cal.Rptr. 1; *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn., Local 600* (1985) 38 Cal.3d 564, 214 Cal.Rptr. 424.
[353] *San Diego Teachers Assn. v. Superior Ct.* (1979) 24 Cal.3d 1, 8, 154 Cal.Rptr. 893.
[354] (2020) PERB Dec. 2740M.

The County operates two correctional facilities. The County's practice was to require the least senior correctional officers on the preceding shift to holdover and work an additional shift if there was insufficient coverage. This practice was memorialized in a 2010 policy. In 2014, the parties included language in their MOU that provided that "overtime shall be assigned on an equal basis." This did not result in the parties changing their policy or practice of assigning overtime on the basis of seniority.

In October 2016, the Union expressed concern that the overtime policy was resulting in fewer senior female officers being assigned a significant proportion of the overtime. Between March and April 2017, the County and the Union held at least three informal department-level meetings discussing the County overtime policy. At the last of these meetings, the Union's legal counsel stated they believed that seniority should continue to be the basis for assigning overtime, but that they would discuss presenting a proposal with membership.

On April 13, 2017, the County emailed the Union stating that "the department is going to move forward with updates to the overtime policy" and provided the Union a copy of a new overtime policy.

Shortly thereafter, the Union advised the County that the parties had not completed bargaining and proposed additional dates for meeting. The County did not respond to this request.

Instead, the County wrote the Union and indicated "if we are unable to agree to changes to the overtime policy ... we will be forced to eliminate the current overtime policy." The County then demanded that the Union provide a proposal.

Three days later and without waiting for a proposal, the County issued a memorandum to all correctional officers that effective June 1, 2017, "Merced County Sheriff Correction's Policy 1.12 (Overtime) will be eliminated." The County implemented its policy which assigned mandatory overtime to officers with the least amount of overtime worked over the prior three month period and used seniority only for tie-breaking purposes.

In July or August of 2018, the parties engaged in successor negotiations but they could not reach agreement on a mandatory overtime policy. The County, thereafter, imposed its LBFO which included a mandatory overtime policy substantially similar to the policy the Department unilaterally adopted and implemented in 2017.

PERB rejected each of the County's defenses. First, PERB rejected the County's argument that it was privileged to change its policy and past practice of assigning mandatory overtime based on reverse seniority without bargaining to agreement or impasse because it conflicted with the parties' MOU which the County argued unambiguously required it to assign all officers an equal amount of overtime. However, PERB found the language "on an equal basis" in the MOU was ambiguous and susceptible to more than one interpretation, including the parties' practice for the past three years after "on an equal basis" was added to the MOU. Thus, the MOU is not a defense because the County changed its past practice, interpreted an existing policy in new way, and established a new policy.

Second, PERB rejected the County's assertion that it engaged in good faith negotiations with the Union and implemented the change in overtime policy only after bargaining to impasse between October and April 2017. PERB noted that there was no evidence that the County provided the Union with notice of its eventual proposed change to its overtime policy in these meetings between March and April 2017, which the County characterized as informal meetings and not negotiations. PERB then noted that even if these discussions constituted negotiations, the County failed to complete the negotiations. PERB found that the Union's legal counsel at their final meeting indicated that she would discuss making a possible counter- proposal to the County. Rather than wait for a response from the Union, the County provided the Union with a new overtime policy and said that it was moving forward with its policy. The Union's legal counsel responded by stating that the parties were not at impasse and proposed additional dates for bargaining. The County did not respond to the request for additional

bargaining but instead responded a month later demanding that the Union provide a proposal. Three days later, without waiting for a Union proposal, the County reconfirmed its prior decision to unilaterally implement a new overtime policy by announcing the new policy to affected employees. Thus, the County failed to establish that the parties had completed negotiations before it unilaterally implemented its policy.

Third, PERB rejected the County's argument that the Union waived its right to bargain over the overtime policy because the Union never demanded bargaining over the decision or impacts of the decision. PERB noted that a union is not obligated to request bargaining where an employer makes a firm decision to implement a policy before the employer provides a union with notice of and an opportunity to bargain over a proposed change, nor is it obligated to accept an employer's offer to bargain after the decision is made. Here, PERB found that the County's e-mail to the Union stating that "the department is going to move forward with updates to the overtime policy" first presented the Union on that same date demonstrated that the County had already reached a firm decision to change policy without completing bargaining. PERB then noted that the County reconfirmed that it had made a firm decision to implement the policy when it announced the policy to the correctional officers without completing bargaining. PERB concluded that either communication individually demonstrated that decision to implement the change in policy was a fait accompli foreclosing the Union's ability to bargain over the change and obviating the Union's need to request bargaining. In any event, PERB noted that the Union explicitly requested bargaining on April 18 undermining any claim that the Union did not request bargaining. PERB also noted that the County was in error if it believed that it was sufficient to negotiate by email and issue an ultimatum.

Finally, PERB rejected the County's argument that it should not order the County to reinstate the status quo that existed prior to its June 2017 change in policy because the County bargained to impasse in 2018 before implementing its latest policy. PERB noted an employer's right to impose terms following impasse is dependent on good faith negotiations, and this required the County to begin negotiations from the status quo that existed prior to the underlying unfair labor practice, which occurred when the County unilaterally changed its mandatory overtime policy in June 2017. The County failed to do this.

County Engaged in Surface Bargaining By Failing and Refusing to Bargain over Mandatory Bargaining Subjects.

In *County of Sacramento*, PERB concluded that the County violated its obligation to bargain in good faith by engaging in surface bargaining over its revisions to the Airport Operations Dispatcher class specification.[355]

The County's Department of Airports employs dispatchers. Prior to 2018, neither the MOU nor the employees' job specification required the dispatchers to receive Emergency Medical Dispatch ("EMD") certification. In 2016, the County's Emergency Medical Service Agency ("EMS Agency") notified the County that any dispatcher units accepting calls for emergency medical assistance would be required to use an updated dispatch procedure and that all emergency medical dispatchers must obtain and maintain an EMD certification.

The County offered to bargain with the Union over proposed changes to the class specifications including requiring EMD certification for its dispatchers. The County elected to conduct these negotiations outside of concurrent successor negotiations for a new MOU.

The parties met two times and reached agreement on a number of changes to the class specifications, but as part of these negotiations, the Union wanted a ten percent wage increase in exchange for the EMD certification. At the initial negotiation session, the County's lead negotiator stated it was not appropriate to negotiate wage increases during the negotiations over revised class specifications and mandatory EMD certification and advised the Union to

[355] (2020) PERB Dec. 2745M.

raise the issue in the successor negotiations. The County also refused to bargain over a wage increase for the EMD certification requirement in successor negotiations. When the Union raised its request for a wage increase for a second time at the second negotiation session for class specification negotiations, the County caucused, withdrew the agreements that the parties' previously reached on the specifications, stopped bargaining, and asserted that it could unilaterally implement the EMD certifications. The County, thereafter, unilaterally implemented the EMD certification requirement.

First, PERB rejected the County's assertion that it was not obligated to negotiate with the Union over the EMD certification requirements because the County was simply complying with an externally required law that set an inflexible standard or insured an immutable provision. While acknowledging the legal standard, PERB disagreed with the County's assertion, noting that the Emergency Medical Services Act did not mandate that County's dispatchers all receive EMD certification. The EMS Agency exercised its discretion to require EMD certification. Thus, there was no inflexible standard. Additionally, PERB noted that the EMS Agency is part of the County, and as such, the law was not external law imposed upon the County but was self-imposed by the County Agency. Thus, the County was obligated to bargain over mandating EMD certification for all dispatchers.

PERB also rejected the assertion that the County was not obligated to bargain over the Union's wage proposal because the zipper clause in the parties' MOU permitted the parties to refuse to negotiate over subjects and matters covered by the MOU during the life of the MOU. PERB concluded that it would be unfair to require bargaining over the changes to the classification and EMD certification requirement and then use the zipper clause to refuse to bargain over a Union's related proposal. PERB noted that once the County proposed the revised class specification, it was obligated to negotiate at the same table over any proposals by Union on related matters within the scope of representation, including its wage proposal.

Second, PERB concluded that the County engaged in unlawful surface bargaining, noting that a party cannot simply go through the motions of bargaining while simultaneously engaging in conduct that delays or prevents agreement. PERB found the following factors supported a finding of unlawful surface bargaining:

The County exhibited a take-it-or-leave-it attitude with regard to the specification revision and EMD certification revisions by asserting that it was not obligated to bargain over the EMD certification and refusing to bargain over the Union's wage proposal. Then after refusing to bargain over the wage proposal, the County unilaterally terminated the negotiations without explanation and without offering any counter proposals.

Another indicia of bad faith bargaining occurred at the parties' second negotiation session over the revised specification when the County without reviewing the Union's wage proposal responded that it would not consider the proposal, suggesting that the negotiating team was without authority to negotiate a wage increase.

PERB also noted that the County terminated the negotiations without further explanation and withdrew its proposals.

Further, the County engaged in per se violations of the MMBA. The County refused to negotiate over EMD certification which is a mandatory subject of bargaining. Similarly, because the MOU's zipper clause did not privilege the County to decline to bargain over the Union's wage proposal, its refusal to do so constituted a per se refusal to bargain. These per se violations also supported a finding that the County unlawfully engaged in surface bargaining.

Finally, PERB concluded that because the parties had not bargained to a bona fide impasse when negotiations ended on May 31, 2018, the County was not privileged to implement any of its proposed revisions to the Airport Operations Dispatcher I/II class specification, including the EMD Certification requirement. This, too, was an indicia of bad faith.

City Did Not Engage in Bad Faith Bargaining Where it Presented a Proposal Identical to Policy Previously Withdrawn as Part of a Settlement Agreement Because the City Explained its Proposal, Remained Flexible in its Negotiations, and Invited the Union to Offer its Own Proposals.

In *City of San Diego*, California Teamsters 911 ("Union) alleged that the City engaged in bad faith bargaining during negotiations pursuant to a grievance settlement agreement. PERB concluded that the City did not bargain in bad faith.[356]

The underlying dispute concerned the City's process for dispatching rescue personnel for inland water rescues. Prior to 2016, the City's Police Dispatch would transfer calls that appeared to involve inland water rescues, such as lakes and rivers, directly to Lifeguard Communication Center ("LCC"), who in turn would dispatch lifeguards. On December 15, 2016, the City changed its dispatch policy. The new policy required police dispatchers to transfer inland water rescue calls first to Emergency Command and Data Center ("ECDC"), which was responsible for dispatching paramedics and firefighters, and then to conference in LCC. Under the new policy, the City converted LCC from secondary dispatch to tertiary dispatch center for inland water rescue calls. Operating under the new dispatch policy, ECDC dispatchers began to send firefighters to certain calls as the primary responder where in the past had been lifeguards had been the primary responder. The Union perceived this as a loss of work.

In response, the Union filed a grievance alleging that the City breached the MOU by implementing the new dispatch policy. The City and the Union executed a settlement agreement in which the Union agreed to dismiss its grievance and the City agreed to rescind its policy change. The settlement agreement also required the parties to meet and confer on a dispatch procedure for inland water rescues. Pursuant to the settlement, the City rescinded its December 2016 dispatch policy and reverted to directing calls to the LCC consistent with the settlement.

The parties thereafter met on four occasions between August and December 2017 to negotiate over the inland water rescue dispatch procedure without reaching agreement. The Union did not request further bargaining on the subject, the parties did not declare impasse, and the City did not attempt to change its dispatch procedure from that used before December 15, 2016.

In September 2017 and during negotiations, the Union filed the unfair practice charge. PERB rejected the Union's contention that the City engaged in bad faith bargaining by (1) failing to explain its bargaining position adequately; (2) making a predictably unacceptable proposal; (3) failing to return to the status quo which preceded the 2016 Dispatch Policy; and (4) abandoning negotiations.

First, PERB rejected the Union's contention that it failed to adequately explain its proposal and rejected the Union's argument that the City's dispatch proposal indicated bad faith bargaining because the proposal was predictably unacceptable given the Union's opposition to the City's Dispatch Policy. PERB concluded that the City's proposal did not frustrate negotiations because the City explained the rationale for its proposal and showed flexibility with its proposals. The City requested a counterproposal from the Union, acknowledged the Union believed the proposal was an incursion into the lifeguards traditional work jurisdiction, and suggested that the parties convene a study group involving lifeguards and other experts to formulate a proposal. The parties thereafter met three more times and discussed the issues, with both sides expressing the belief progress was made.

Even after the City rejected the Union's December 6, 2017 proposal because it restricted the level of personnel and equipment that the City could use to respond to a call and because it went beyond the scope of the negotiations, the City continued to attempt to reach agreement. In this regard, the City proposed what it believed to

[356] (2020) PERB Dec. 2747M.

be a Union-approved "interim agreement" regarding dispatching in severe weather and to defer the more contentious dispatching issues to successor MOU negotiations. The Union declined the City's proposal and did not request further bargaining on the issue.

Second, PERB rejected the Union's contention that the City demonstrated bad faith by failing to return to the status quo before the City implemented the Dispatch Policy. PERB noted that both City and Union witnesses testified that the City revoked the Dispatch policy and returned to the status quo.

Finally, PERB rejected the Union's contention that the City engaged in bad faith bargaining by abandoning negotiations. PERB noted that the City did not declare impasse prematurely, in fact it did not declare impasse at all. Nor did the City refuse to bargain further over dispatch procedures or make any unilateral changes. The City tried to offer a dispatch counterproposal that it believed acceptable to the Union, and when that did not work, the City maintained the status quo and left further negotiations over dispatch procedures for negotiations for a successor MOU. Moreover, the City did not abandon negotiations, but rather, the Union did not request further negotiations on dispatch, and instead turned its attention to other subjects. As such, there was no evidence the City abandoned bargaining.

School District Violated the EERA by Unilaterally Deciding not to Arbitrate a Dispute Allegedly Covered by a CBA without Providing the Union Advance Notice and an Opportunity to Bargain to Agreement or Exhaustion of Impasse Procedures.

In *Sacramento City Unified School District*, the Sacramento County Teachers Association ("Union") alleged, in relevant part, that the School District violated the EERA by unilaterally changing the parties' contractual grievance arbitration procedure by refusing to arbitrate a grievance.[357]

The grievance-arbitration provision in the parties' MOU provided a multi-step grievance resolution process that ends in binding arbitration pursuant to American Arbitration Association's voluntary rules. The CBA also expressly incorporated by reference a previously negotiated agreement between the parties entitled the "Framework Agreement" that addressed, among other things, bargaining unit employee salary schedules.

In August 2018, a dispute arose between the parties over the meaning of the salary schedule provision in the Framework Agreement and how that provision should be interpreted and applied. The Union contended that the salary schedule provision obligated the District to adopt the certificated salary schedules that the Union proposed during collective bargaining, subject to an expenditure cap of 3.5% of District expenditures during that 2018-19 year only. The District contended that the salary schedule provision merely required it to adopt a new salary schedule with a total cost of not more than 3.5% of District expenditures in each year of the schedule. The Union requested arbitration. Thereafter, the parties selected an arbitrator and began scheduling a hearing. From the outset, the District reserved all potential defenses, including arbitrability.

The District then sought a judicial declaration that the salary schedule agreement did not constitute a valid contract and that the District was not obligated to arbitrate the dispute. The District notified the Union and the designated arbitrator that it could not agree to the arbitration unless or until the Superior Court determined the District must arbitrate the dispute. The Superior Court did just this. It ordered the District to arbitrate, ruling that pursuant to AAA's voluntary rules incorporated into the CBA, the arbitrator had the power to rule on his or her own jurisdiction to arbitrate the dispute as well as the power to determine the existence or validity of a contract of which an arbitration clause forms a part. The Court, therefore, concluded whether the salary adjustment provision is void or enforceable is one to be determined by the arbitrator and ruled in favor of the Union.

[357] (2020) PERB Dec. 2749E.

The Union then filed the instant unfair practice charge. The ALJ found that the District unilaterally changed the grievance arbitration procedure in violation of the EERA, and the District filed exceptions. PERB adopted the ALJ's decision. In so finding, PERB noted that it has long ruled that an employer's failure or refusal to process a grievance in accordance with collectively bargained procedures may be reviewed as a unilateral change.

The District contended that even if it breached the parties' CBA when it refused to arbitrate the salary schedule, it did not implement a policy change in violation of the EERA. According to the District, this was because the District did not explicitly indicate whether or not it would act similarly in future grievances, and that its conduct amounted to at most an isolated contract breach.

PERB rejected the District's argument noting that a single contract breach may qualify as a deviation from the status quo or change in policy, if either of two circumstances are present: (1) the contract breach changes a policy or employment term applicable to future situations; or (2) the employer acts unilaterally based upon an incorrect legal interpretation or insistence on a non-existent legal right that could be relevant to future disputes. Here, PERB concluded that the District changed established past practice, and enforced existing policy in a new way because it asserted a nonexistent legal right to decide for itself whether the salary schedule agreement was a binding contract, whether related disputes were arbitrable, and when and to what extent it might follow the same interpretation in the future.

PERB also noted that the District not only committed an unlawful unilateral change in violation of the EERA by trying to remove from the arbitrator the duty to determine arbitrability under the MOU, but the District separately committed a per se violation of the EERA by repudiating the salary schedule by arguing that the salary schedule did not constitute a valid enforceable contract.

University Required to Engage in Effects but Not Decisional Bargaining over the Implementation of a Mandatory Influenza Vaccination during COVID-19 Pandemic.

In *Regents of the University of California*, PERB ruled that the University's decision to require that employees be vaccinated for influenza for the 2020-2021 influenza season was outside the scope of representation and, therefore, the University was not obligated to bargain over the decision with affected unions.[358] More specifically, PERB found that "the vaccination policy was outside the scope of representation because under the unprecedented circumstances of a potential confluence of the COVID-19 and influenza viruses, the need to protect the public health was not amenable to collective bargaining or, alternatively, outweighed the benefits of collective bargaining over the policy as to University employees."[359] However, PERB ruled that the University was still obligated to bargain over the effects of the decision and that it violated the HEERA by failing to do so.

The University issued an Executive Order, effective for the 2020-2021 influenza season, requiring that "students, faculty, and staff who are living, learning, or working" at any University location be vaccinated against influenza by November 1, 2020. With regard to employees, the Executive Order further provided "no person employed by the University or working onsite at any location owned, operated, or otherwise controlled by the University may report to that site for work unless they have received the 2020-2021 flu vaccine or an approved medical exemption."[360] PERB noted that some employees in all of the bargaining units represented by American Federation of State, County & Municipal Employees Local 3299 ("AFSCME"), University Professional and Technical Employees, Communication Workers of America, Local 9119 ("UPTE"), and Teamsters Local 2010 (collectively "the (Unions") were unable to work remotely and needed to be on site at their respective campus, medical center, or other University location to perform their work. Thus, these

[358] (2021) PERB Dec. 2783H.
[359] *Id.* at pp.2-3.
[360] *Id.* at p.10.

employees could not work without a vaccination or a medical exemption.

The University, thereafter, sent an e-mail to the Unions announcing the new Executive Order. The Unions demanded to bargain over the decision and effects of the decision to implement a mandatory influenza vaccination policy. In response to these bargaining demands, the University said it would not bargain the decision to issue the new influenza vaccination policy on the grounds that it was not a mandatory subject of bargaining, but it would bargain over effects of the policy.

UPTE and AFSCME argued the University was required to bargain in good faith over both the decision to require an influenza vaccination and the foreseeable effects of that decision, and that the University did neither. The University admits that it refused to meet and confer over the decision to adopt the vaccination policy because the decision was outside the scope of representation. The University also argues that it satisfied its obligation to negotiate with AFSCME and UPTE over the foreseeable effects of the decision.

PERB noted that under the HEERA, a subject is within the scope of representation if: "(1) it involves the employment relationship, (2) it is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not unduly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission."[361]

PERB found that the University's mandatory influenza vaccination did not satisfy the second or third prong of the test and, therefore, the mandatory vaccination policy was not within the scope of representation.

Specifically, PERB found that the mandatory influenza vaccination does not satisfy prong 2 because the policy is not an issue that tends to create conflict between employees and management that could be resolved through collective bargaining. PERB reached this conclusion relying on *Riverside Unified School District*[362] (wherein PERB concluded that an indoor smoking ban was not within the scope of representation because an indoor smoking ban is intended to address a public health hazard, is not a subject that divides people along management-union lines, but rather tends to split smokers and nonsmokers into two camps, and is not amenable to bargaining).

As with a smoking ban, PERB concluded that the decision to require influenza vaccinations was in response to a public health hazard, was one that affects not just employees but students and the general population, and was, therefore, not amenable to collective bargaining.

As to the third prong, PERB noted that existing case law and PERB precedent have found that "a public employer's concern for employee and public safety can outweigh the benefits of bargaining citing *County of Santa Clara*.[363]

PERB determined that the University implemented the policy because of concerns raised by health care experts that the 2020-2021 flu season, combined with the ongoing COVID-19 global pandemic, had the potential to overwhelm its hospitals and result in "potential catastrophic outcomes and needless loss of life due to the two viruses."[364] This potential catastrophe affected not just University employees, but also its students and the general public who may have needed to use University hospitals. Thus, PERB concluded that it was not appropriate to require the University to engage in decisional bargaining in these specific circumstances and consequently the University did not violate the HEERA by failing to do so.

Although PERB found that the University need not bargain over the decision, it did need to bargain the effects of the decision. PERB noted that once a firm non-negotiable decision is made, the employer must "provide unions notice and a meaningful

[361] *Id.* at p. 23.
[362] (1989) PERB Dec No. 750.
[363] (2019) PERB Dec. No. 2670-M.
[364] *Regents of the U. of Cal., supra,* at PERB Dec. 2783H at 25.

opportunity to bargain over the reasonably foreseeable effects of its decision before implementation, just as it would be required to do before making a decision on a mandatory subject of bargaining,"[365] except where the employer satisfies the three prongs set forth in *Compton Community College District*. Under Compton, an employer is privileged to implement a non-negotiable decision before completing effects bargaining where the employer satisfies all of the following: (1) the implementation date of the non-negotiable decision is based on an immutable deadline or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the decision; (2) the employer gives sufficient advance notice of the decision; and (3) the employer negotiates in good faith prior to implementation and continues to negotiate afterwards as to the subjects that were not resolved by virtue of implementation.[366]

PERB found that in this case, the University was not privileged to implement its vaccination policy prior to exhausting its effects bargaining obligation because the University failed to satisfy prong 3 of Compton because the University failed to negotiate over possible alternatives to discipline or being placed on unpaid leave for failing to be vaccinated. Thus, PERB never negotiated in good faith over discipline or wages as requested by the Unions before implementing. Therefore, PERB concluded that the University did not bargain in good faith over the effects of the vaccination policy and as a result, the University was found to have violated its duty to engage in good faith effects bargaining.

IMPACT OF NEW DEVELOPMENTS

- Employers need not bargain over the decision to require mandatory influenza vaccination during COVID-19 pandemic but are required to bargain over the effects of the decision. PERB emphasized that it reached this decision because of the confluence of the risk to both employees' and the public's health brought about not just by influenza but also by COVID-19. PERB did not rule on whether a mandatory COVID-19 vaccination would be treated similarly, but we believe this to be a logical assumption.
- It is not an indicia of bad faith bargaining for an employer to present a proposal that it knows a union strongly opposes where the employer explains its proposal, remains flexible in negotiations, and invites the union to make counterproposals.
- The failure or refusal to process a grievance in accordance with collectively bargained procedures may be reviewed as an unlawful unilateral change and not just a breach of contract.

[365] *Regents of the U. of Cal., supra,* at PERB Dec. 2783H at 28 *citing County of Santa Clara, supra,* at PERB Dec. 720 at 12.

[366] *Regents of the U. of Cal., supra,* at PERB Dec. 2783H at 28-29.

Protected Union and Employee Rights

SUMMARY OF THE LAW

Employee and union rights would have little meaning if employers penalize employees who exercise those rights or reward employees who refrain from exercising them. Recognizing this, the MMBA, EERA, SEERA, HEERA, Trial Court Act, and Court Interpreter Act all prohibit employers from interfering with, intimidating, restraining, or coercing employees in their exercise of their rights and from discriminating against employees because of their exercise of their rights.[1] PERB and the courts enforce these provisions through the unfair labor practice mechanism. Frequently, an employee and/or a union will file an unfair labor practice charge in addition to other defense strategies in a discipline case, or with claims of discrimination based on race, sex, national origin, or religion.

ACTIVITIES PROTECTED BY LABOR RELATIONS STATUTES

Employee Rights

The MMBA, EERA, SEERA, HEERA, Trial Court Act, Court Interpreter Act, and IHSS-EERA with little variation, provide covered employees the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations; and the equal right to refrain from joining employee organizations or from participating in union activities.[2]

Protected employee activities encompass "a wide range of union-related activities."[3] They include organizing; joining or refraining from joining a particular employee organization or any organization at all; and participating in union and employment relations activities.[4]

The EERA also guarantees public school employees "the right to *represent themselves individually* in their employment relations with the public school employer."[5] The right of self-representation is also found in four other PERB-administered statutes, MMBA,[6] HEERA,[7] Dills Act,[8] Trial Court Act,[9] and Trial Court Interpreter Act.[10] Under the MMBA this right does not extend to bargaining if the individual employee is in a represented unit.[11] There is a similar protected right to self-representation under the EERA.[12] Under the SEERA, an employee's right to self-representation does not include the right to be represented by private counsel or to

[1] See Gov. Code, §§ 3506, 3543.6 (EERA), 3519, 3519.5 (SEERA), 3571, 3571.1 (HEERA), 71635.1 (TCEPGA); 71822 (TCIELRA). PERB regulations provide that the same unfair practices enumerated in the EERA, HEERA, and SEERA are similarly prohibited under the MMBA. Cal. Code Regs, tit. 8, §§ 32602, 32603, 32604.

[2] See Gov. Code, §§ 3502 (MMBA), 3543 (EERA), 3515 (SEERA), 3565 (HEERA), 71630 (TCEPGA), 71813 (TCIELRA). For rights of dissident employees' protection from unions, see, for example, *California Employees Assn. (Hard)* (2002) PERB Dec. No. 1479-S, 26 PERC ¶ 33065.

[3] *Social Workers Union, Local 535 v. Alameda County Welfare Dept*. (1974) 11 Cal.3d 382, 387-388, 113 Cal.Rptr. 461.

[4] Gov. Code, § 3502; *City of Hayward v. United Public Employees, Local 390* (1976) 54 Cal.App.3d 761, 766, 126 Cal.Rptr. 710; *Ball v. City Council of the City of Coachella* (1967) 252 Cal.App.2d 136, 141-142, 60 Cal.Rptr. 139; *International Assn. of Fire Fighters, Local 1396 v. County of Merced* (1962) 204 Cal.App.2d 387, 392, 22 Cal.Rptr. 270.

[5] *Ibid.* (emphasis added).

[6] Gov. Code, § 3502.

[7] Gov. Code, § 3581, granting the right to supervisory employees.

[8] Gov. Code, §3515.

[9] Gov. Code, § 71631.

[10] Gov. Code, § 71813.

[11] Gov. Code, §§ 3502, 3503; *Relyea v. Ventura County* (1992) 2 Cal.App.4th 875, 879, 882, 3 Cal.Rptr.2d 614; *Alameda County Medical Center* (2004) PERB Dec. No. 1620-M, 28 PERC ¶ 142.

[12] Gov. Code, § 3543 (a).

meet-and-confer with the state.[13] Under all PERB jurisdictions, an individual union member may not assert the union's right to negotiate.[14] In a decision decided under the EERA that may also impact other public employers under those statutes, PERB has declared that a charge alleging that an individual employee acting alone engaged in protected activity must be analyzed under both the "form, join, and participate" standard and the right of self-representation standard, as two separate but equally valid sources of protection[15].

The courts and PERB[16] look to federal labor law for guidance in defining a protected right.[17] The following employee activities are traditionally considered protected: participation in representation elections;[18] participation in negotiations,[19] including impasse procedures; participation in the contractual grievance process; participation in informal employee organizations, that is, organizations other than the exclusive employee representative, such as an African American firefighters union or ad hoc committee; participation in general criticism of the employer's management and service quality,[20] as well as participation in complaints and criticism of management relating to working conditions;[21] and the right to representation in both disciplinary and non-disciplinary meetings with the employer.[22] Serving as a witness in support of a fellow employee's complaint against a supervisor is protected participation in union activity when a union is representing the complainant, and, regardless of union participation, it is protected individual employee-to-employee activity to provide mutual aid or protection.[23]

Peaceful picketing, including distribution of leaflets or other materials, are among the statutorily guaranteed rights of employees and employee organizations. The right to concerted employee activities and union access rights are subject to reasonable time, place and manner standards, but may not be banished altogether. Restrictions on employee solicitation, including distribution of union literature, during non-work time and in non-work areas are invalid unless the employer shows special circumstances to such rules necessary to maintain production or discipline.[24] Further, content-based restrictions require that the employer show operational necessity or that no alternative was available.[25]

Some union activities, however, such as teachers wearing union advocacy buttons in the classroom, can be limited or superseded by other statutory provisions.[26] For example, a trial court employee's right to due process termination is not within PERB's jurisdiction because it is specifically covered by other statutory provisions.[27] Similarly, state employees have no right protected by the Dills Act to present collectively bargained discipline settlements to the State Personnel Board.[28] Also, some aspects of union membership are internal union business that do not give rise to individual employee rights.[29] (See "Duty of Fair Representation"

[13] *State of Cal. (Dept. of Consumer Affairs)* (2005) PERB Dec. No. 1762-S, 29 PERC ¶ 121.
[14] *Peralta Community College Dist.* (2003) PERB Dec. No. 1576, 28 PERC ¶44; *Bay Area Air Quality Management Dist.* (2006) PERB Dec. No. 1807-M, 30 PERC ¶ 51.
[15] *Walnut Valley School Dist. (Marcoe)* (2016) PERB Dec. No. 2495, 41 PERC 34.
[16] *El Rancho Unified School Dist. v. NEA* (1983) 33 Cal.3d 946, 953, 192 Cal.Rptr. 123.
[17] *Fire Fighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608, 615, 617, 116 Cal.Rptr. 507; *Building Material & Construction Teamsters' Union, Local 216 v. Farrell* (1986) 41 Cal.3d 651, 658, 224 Cal.Rptr. 688.
[18] *Clovis Unified School Dist.* (1984) PERB Dec. No. 389, 8 PERC ¶ 15119.
[19] *San Leandro Unified School Dist.* (1983) PERB Dec. No. 288, 7 PERC ¶ 14079.
[20] *San Leandro Teachers Assn. v. Governing Bd. of the San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 95 Cal.Rptr. 3d 164.
[21] *California State U.* (2005) PERB Dec. No. 1755-H, 29 PERC ¶ 97; *Contra Costa Community College District* (2019) PERB Dec. No. 2669-E, 44 PERC ¶66.
[22] *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382.
[23] *Trustees of the Cal. State U.* (2017) PERB Dec. No 2522-H, 41 PERC 150.
[24] *Petaluma City Elementary School Dist./ Joint Union High School Dist.* (2016) PERB Dec. No. 2485, 41 PERC 23, citing *State of California (Employment Development Dept.)* (2001) PERB Order No. 1365a-S, 25 PERC 32057.
[25] *Petaluma City Elementary School Dist./ Joint Union High School Dist., supra* at p. 51, citing *Long Beach Unified School Dist.* (1987) PERB Dec. No. 608, 11 PERC 18029.
[26] *Turlock Joint Elementary School Dist. v. Public Employment Relations Bd.* (2003) 112 Cal.App.4th 522, 5 Cal.Rptr.3d 308, review den. and ordered not published by (2004) Cal.LEXIS 455.
[27] *Lake County Superior Ct.* (2005) PERB Dec. No. 1782-C, 30 PERC ¶ 7.
[28] *State of Cal. (State Personnel Bd.)* (2006) PERB Dec. No. 1864-S, 31 PERC ¶ 11.
[29] *Antelope Valley College Federation of Teachers* (2004) PERB Dec. No. 1624, 28 PERC ¶ 146; *California State*

below.) And finally, some employee rights that initially are protected lose that protection because, in the process of exercising their rights, the employee violates other laws, the collective bargaining agreement, or lawful work policies. (See "Limits on Protected Activities" below.)

Protected Activities Under EERA

The EERA contains unique language specifically recognizing the right of public school employees "to be represented by the organization in their *professional and employment* relationships with public school employers."[30] Other public employee labor relations statutes administered by PERB, such as the MMBA, the Dills Act, and the Trial Court Act refer only to the *employment* relationship between public employees and their public agency employers. PERB has observed,

"Consistent with this broader protection, EERA specifically protects the right of certificated employees [teachers] to be afforded 'a voice in the formulation of educational policy.' In furtherance of this right, the statutory provision defining the 'scope of representation' under EERA states that 'the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent those matters are within the discretion of the public school employer under the law.'"[31]

Because the EERA protects teachers' right to be represented in both their professional and employment relationship with their public school district employer, including a right to have a voice in formulating educational policy, PERB concluded that filing a complaint about curriculum is protected activity under the EERA. Seeking information as a union steward about the PAR program, which is a collectively-bargaining remedial program for teachers who receive unsatisfactory evaluations, is also protected activity under the EERA.[32]

Unlike other public employment relations statutes under PERB's jurisdiction, the EERA specifically protects applicants for employment or reemployment.[33] "Blacklisting" a former employee because of the former employee's protected activities to prevent the former employee from obtaining a new job violates the EERA prohibition against interference, discrimination, and retaliation. Other public employers should be aware that PERB has hinted that it could potentially reach a similar result under the other statutes under its jurisdiction. PERB has noted that the NLRB has ruled that "former employees" are included in the prohibition on retaliating against "employees" under the NLRA.[34]

Union Rights

In addition to employee rights, the MMBA, EERA, SEERA, HEERA, Trial Court Act, and Court Interpreter Act also guarantee recognized employee organizations' rights, including an organization's basic right to represent its members in their employment relations with public agencies,[35] to access employees' telephone numbers,[36] to access employer property to confer with employees in non-work areas during employees' non-work time, to access some employer communication systems,[37] to receive information from the employer, to receive released time for union representatives,[38] and to contact the employer's outside health plan about health benefits.[39] A school

Employees Assn. (2003) PERB Dec. No. 1551-S, 28 PERC ¶ 4.

[30] Gov. Code, § 3540.

[31] *Berkeley Unified School Dist. (Crowell)* 2015 PERB Dec. No. 2411, 39 PERC 98 (citations omitted).

[32] *Id.*

[33] See Gov. Code, § 3543.5.

[34] *Monterey Peninsula Unified School Dist. (Moberg)* (2017) PERB Dec. No. 2530, 42 PERC 2.

[35] See Gov. Code, §§ 3503, 3505.3, 3507 (MMBA), 3543.1 (EERA), 3515.5, 3518.5(SEERA), 3568, 3569, 3581.7 (HEERA), 71633 (TCEGPA), 71815 (TCIERA).

[36] See, for example, *State Center Community College Dist.* (2001) PERB Dec. No. 1471, 26 PERC ¶ 33027.

[37] See, for example, *San Diego Community College Dist.* (2001) PERB Dec. No. 1467, 26 PERC ¶ 33014; and *San Leandro Unified School Dist.* (2005) PERB Dec. No. 1772, 29 PERC ¶ 145; *University of Cal. (AFSCME, Local 3299)* (2012) PERB Dec. No. 2300-H, 37 PERC ¶ 141, employers may not decide how much access a union "needs."

[38] See Gov. Code, §§ 3505.3 (MMBA), 3518.5 (SEERA), 3543.1(c) (EERA), 3569 (HEERA), 71635 (TCEPGA), 71815 (TCIELRA).

[39] *Hilmar Unified School Dist.* (2004) PERB Dec. No. 1725, 29 PERC ¶ 35.

district, however, may prohibit a union from using the school district's mail system to distribute political literature under a statutory provision that prohibits the use of school district or community college district funds, services, supplies, or equipment for political advocacy regarding a ballot measure or candidate.[40]

The MMBA requires public employers to give paid time off to a reasonable number of employees in order to participate in negotiations with the employer on behalf of the recognized employee organization.[41] PERB has ruled that the right to paid release time also can extend to reasonable time spent in preparation for negotiation sessions.[42] The MMBA also requires public agencies to provide reasonable paid time off to employee representatives of unions for the following *additional* activities:

- Testifying or appearing as the designated representative of the employee organization in conferences, hearings, or other proceedings before PERB, or PERB agents in matters relating to a charge filed by the employee organization against the public agency or by the public agency against the employee organization; and
- Testifying or appearing as the designated representative of the employee organization in matters before a personnel or merit commission.[43]

The union is required to provide reasonable notification to the employer of the need for paid release time.[44] Any additional paid release time desired by the union is a negotiable matter with the employer.

Although the MMBA, unlike the EERA or HEERA, contains no express union access rights, PERB decided that a union has a right of access by union employee representatives and non-employee union representatives to other employees on non-work time and in non-work locations, subject to an MMBA agency's reasonable rules and regulations.[45] Non-work time includes paid time when employees are on a break or on standby time and not currently working. Consistent with its conclusions regarding the access rights of unrecognized employee organizations under EERA, HEERA, and the Dills Act, PERB had decided that unrecognized employee organizations enjoy access under the MMBA.[46]

However, union access to employer-provided bulletin boards may be limited by the negotiated agreement.[47] A union president's active support of a mayoral candidate and the union's involvement in the election are protected activities under the MMBA.[48]

PERB has ruled that because "work time is for work," an employer may restrict non-business activities during work time, but it may not single out union activities for special restriction, or enforce general restrictions more strictly with respect to union activities.[49]

PERB cases establish that an exclusive representative is entitled to all information that is necessary and relevant for the union to carry out its duty of representation. Once a union makes a valid request, the employer's response must be timely. An unreasonable delay in providing the information is treated the same as a failure to provide the information. The fact that the employer eventually provides the requested information does not excuse an unreasonable delay.[50]

The California Supreme Court balanced a union's right to obtain information that it needs to represent employees with employees' right of informational privacy, and concluded that a union's interest in

[40] *San Leandro Teachers Assn. v. Governing Bd.* (2009) 46 Cal.4th 822, interpreting Ed. Code, § 7054(a); *Conejo Valley Unified School Dist.* (2009) PERB Dec. No. 2054, 33 PERC ¶ 136.
[41] Gov. Code, § 3505.3.
[42] *Oroville Union High School Dist.* (2019) PERB Dec. No. 2627, 43 PERC ¶ 141, judicial appeal pending.
[43] *Id.*
[44] *Id.*
[45] *Omnitrans* (*ATU Local 1704*) (2009) PERB Dec. No. 2030, 33 PERC ¶ 91; *County of Riverside* (2012) PERB Dec. No. 2233, 36 PERC ¶ 113.
[46] *County of San Bernardino* (2018) PERB Dec. No. 2556, 42PERC ¶ 114.
[47] *University of Cal.* (2006) PERB Dec. No. 1854-H, 30 PERC ¶ 156.
[48] *City of Torrance* (2008) PERB Dec. No. 1971-M, 32 PERC ¶ 126.
[49] *County of Orange* (2018) PERB Dec. No. 2611, 43 PERC ¶ 101; *Regents of the U. of Cal. (Irvine)* (2018) PERB Dec. No. 2593, 43 PERC ¶ 69.
[50] See, e.g., *Turlock Unified School Dist.* (2017) PERB Dec. No. 2543, 42 PERC ¶ 61, *Children of Promise Preparatory Academy* (2018) PERB Dec. No. 2558, 42 PERC ¶ 124.

communicating with employees outweighs non-union members' privacy interests; consequently, a union has a right to the home addresses and telephone numbers of all employees in a bargaining unit represented by the union. The public employer and union may bargain an opt-out procedure to protect the privacy of non-union members who object to disclosure of their contact information.[51] Similarly, a union is entitled to the names and work locations of bargaining unit members who are reassigned pending the employer's investigation of the employees' alleged misconduct.[52]

In City and County of San Francisco,[53] the union claimed that the City refused to provide them with a timely and minimally redacted version of an investigation report for use in its representation of an employee's grievance. PERB, applying prior precedent, ruled that the City violated the MMBA by providing a redacted version of the investigation report without first raising its asserted third-party privacy concerns, and without then meeting and conferring with the union over them. Contrary to its legal obligations, the City never notified the union of its privacy concerns in connection with a mandatory bargaining subject, and instead unilaterally redacted the document on two occasions, thereby denying the union timely access to the information to assist the union in handling the grievance.

Under PERB case law, both employees and unions have a protected right to take steps to enforce negotiated agreements.[54] In a significant extension of prior PERB decisions under the EERA, PERB concluded that a union has a right under the MMBA to file grievances on behalf of the union even though this right is not expressed in the grievance procedure.[55]

In *Janus v. AFSCME*, the U.S. Supreme Court concluded that a requirement that public employees pay agency fees "violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."[56]

The *Janus* decision renders unenforceable the agency fee provisions of California public sector labor relations laws, including the MMBA, EERA, SEERA ("Dills Act"), HEERA, Trial Court Act, Court Interpreter Act, IHSSERA, the Judicial Council Employer-Employee Relations Act ("JEERA"), and TEERA.[57]

Right of Individual Employees to Union Representation

PERB has concluded that two strands of individual rights to union representation exist under California's public employee labor relations statutes: (1) *Weingarten* rights, narrowly based on an employer-initiated interview to investigate circumstances that reasonably cause the employee to fear disciplinary action;[58] and (2) a broader strand, based on the labor relations statutes' general right to participate in union activities.[59] In other words, the right of an individual to union representation is much broader and not directly related to *Weingarten* rights under PERB administered statutes. The right to representation is not limited only to the employer's investigation of suspected employee misconduct.

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[51] *County of Los Angeles v. Los Angeles County Employee Relations Commission and SEIU (Local 721)* (2013) 56 Cal.4th 905.
[52] *Los Angeles Unified School Dist.* (2015) PERB Dec. No. 2438, 40 PERC 26.
[53] *City and County of San Francisco* (2020) PERB Dec. 2698-M, 44 PERC ¶143.
[54] *San Leandro Unified School Dist.* (2005), *supra*, PERB Dec. No. 1772.
[55] *Omnitrans* (2009) PERB Dec. No. 2010-M, 33 PERC ¶ 54.
[56] *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (2018) 138 S.Ct. 2448, (Majority opinion at p. 2486).
[57] See *Legal Trends,* Chapter 1, p. 1-1 for a description of the subset of California public employees covered by these statutes.
[58] See *National Labor Relations Bd. v. Weingarten, supra*, which ruled that an employee who has a reasonable fear that discipline may result from an investigatory or disciplinary meeting with the employer has a right to union representation at such a meeting. This rule has been adopted for California public sector labor relations statutes by subsequent PERB and court decisions. But as PERB describes in this case, Weingarten constitutes only the "narrow strand" of individual rights to union representation.
[59] The MMBA, EERA, HEERA, and Trial Courts Act all have provisions similar to the EERA § 3543 in giving employees "the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

Under the bargaining statutes, an employee organization's right to represent employees extends beyond the negotiations table to meetings between the employer and employee that ultimately could lead to discipline,[60] whether or not the discipline relates to the exercise of protected rights.[61] The right of union representation at disciplinary meetings belongs to both the employee and the organization.[62] The general rule under PERB-administered statutes is that a represented employee is entitled to union representation when the following three conditions are met:

1. The employee requests representation;
2. The employer requests an investigatory meeting (not the run-of-the-mill shop-floor conversations as, for example, giving instructions or training or needed corrections of work techniques); and
3. The employee (not the supervisor) reasonably believes a meeting might result in disciplinary action.[63]

PERB holds that the burden is on the employee to request representation – the employer does not have to offer it.[64] An employee must make an affirmative request for union representation; expressing reluctance to attend an investigatory interview with an employer is insufficient, without more, to trigger the right to union representation.[65] Although no "magic words or specific behavior" are required to request union representation, the employee's request for union representation should be clearly indicated.[66] An employee who requests representation is entitled to have an organization representative attend the meeting, but an employee is not entitled to demand a specific union representative.[67] The employer *may not* insist on an interview without the employee's requested union representative or threaten the employee with discipline for declining to participate in the interview without representation.[68] An employee does not waive the right to union representation by proceeding to answer a supervisor's questions because once an employee communicates the request for representation, the employer must terminate the discussion, absent objective evidence that the employee has knowingly waived the right to representation.[69] Additionally, before an investigatory interview is conducted, and if the union requests it, an employer must provide the union with "sufficient information" regarding the nature of the charges against the represented employee, but the employer is not necessarily required to provide the underlying complaint.[70]

The right to representation attaches to interviews that are disciplinary in nature, as well as investigative interviews and other meetings where the results might lead to disciplinary action.[71] In some instances, employees also have a right to request representation before and during a body search,[72] before discussing a negative performance evaluation with the employer,[73] when required by the employer to submit a written statement,[74] and at meetings addressing the employee's

[60] *Social Workers' Union, Local 535*, *supra*, at pp. 389-390.
[61] *Civil Service Assn., Local 400 v. City and County of San Francisco* (1978) 22 Cal.3d 552, 566-568, 150 Cal.Rptr. 129; *Robinson v. State Personnel Bd.* (1979) 97 Cal.App.3d 994, 1000, 159 Cal.Rptr. 222.
[62] See, for example, *City of Monterey* (2005) PERB Dec. No. 1766-M, 29 PERC ¶ 130.
[63] *Capistrano Unified School Dist.* (2015) PERB Dec. No. 2440, 40 PERC 24.
[64] *California Dept. of Forestry* (1988) PERB Dec. No. 690-S, 12 PERC ¶ 19122.
[65] *San Bernardino County Public Defender (Shelton)* (2009) PERB Dec. No. 2058-M, 33 PERC ¶ 148.
[66] *Capistrano Unified School Dist.* (2015) PERB Dec. No. 2440, 40 PERC 24.
[67] *Los Baños Unified School Dist.* (2008) PERB Dec. No. 1935, 32 PERC ¶ 17.
[68] *County of San Bernardino (Office of the Public Defender)* (2015) PERB Dec. No. 2423-M, 39 PERC 165.
[69] *Capistrano Unified School Dist.* (2015) PERB Dec. No. 2440, 40 PERC 24.
[70] *Contra Costa Community College Dist*. (2019) PERB Dec. No. 2652, 44 PERC ¶ 18.
[71] *Rio Hondo Community College Dist.* (1982) PERB Dec. No. 260, 7 PERC ¶ 14010.
[72] *State of Cal. (Dept. of Corrections & Rehabilitation)* (2018) PERB Dec. No, 2598, judicial appeal pending, p. 11, 43 PERC ¶ 78
[73] *Redwoods Community College Dist.* (1983) PERB Dec. No. 293, 7 PERC ¶ 14098, disapproved on other grounds in *Redwoods Community College Dist. v. PERB* (1984) 159 Cal.App.3d 617, 626, 205 Cal.Rptr. 523.
[74] *San Bernardino Community College Dist.* (2018) PERB Dec. No. 2599, 43 PERC ¶ 85; *County of San Joaquin (Sheriff's Dept.)* (2018) PERB Dec. No. 2619, 43 PERC ¶ 114.

contractual leave entitlement,[75] salary, or classification.[76]

Generally, the right to individual representation does not extend to non-disciplinary[77] and non-investigatory meetings[78] where the employer gives employees instructions; to casual meetings where grievances might be mentioned;[79] or to meetings strictly for the purpose of delivering a counseling memorandum.[80] Similarly, there is no right to union representation when the purpose of the meeting is merely to deliver notice of discipline. Nor does an employee who failed to request a union representative have a right to a "redo" meeting where the union representative is present.[81]

PERB precedents establishing the broader strand of rights include the right to union representation in grievance meetings, in meetings to discuss individual terms and conditions of employment, and in matters involving contractual rights. Significantly, this strand of employee and union rights also provides for representation rights during interactive ADA/FEHA meetings.[82] An employee must request union representation in order to trigger the right to be represented in an ADA/FEHA interactive meeting. A union, on its own request, cannot trigger the representation. It is unclear whether the employer must provide notice to the individual of the right to be represented by a union in an ADA interactive meeting.[83]

Right to Wear a Union Logo

PERB has ruled: "[T]he right of employees to wear union insignia at work is a time-honored, legitimate form of union activity. It derives from employees' fundamental right to communicate with one another regarding self-organization at the jobsite."[84] PERB also has relied on NLRB decisions that specifically extend the right to wear a union logo beyond buttons and pins to armbands, baseball caps, decals on hardhats, jackets, t-shirts, and caps.

California public employees under the MMBA, EERA, HEERA, and Dills Act have a right to wear a union logo on the job, except under "special circumstances." Under the Trial Court Act, the Court of Appeal found that a trial court's unique role in administering justice and interest in appearing impartial constitutes special circumstances justifying restrictions on clothing and adornments worn by court employees.[85] Under well-established PERB law, an employee's classification or occupation may warrant a prohibition or limitation on the right to wear union insignia at work upon a concrete, fact-based evidentiary showing that the union logo would detract from an employee's professional appearance, interfere with any command structure, intrude on any managerial prerogative including the need to maintain discipline and assure safety at the worksite, or otherwise cause any problems or difficulties for the employer in providing services. To justify a "no union logo" rule, the agency must base its decision on concrete, fact-based evidence.[86]

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[75] *Fremont Union High School Dist.* (1983) PERB Dec. No. 301, 7 PERC ¶ 14130.
[76] *University of Cal.* (1984) PERB Dec. No. 403-H, 8 PERC ¶ 15161.
[77] *Berkeley Unified School Dist.* (2002) PERB Dec. No. 1481, 26 PERC ¶ 33071; but see *Simi Valley Unified School Dist.* (2004) PERB Dec. No. 1714, 29 PERC ¶ 19.
[78] *County of Santa Clara* (2007) PERB Dec. No. 1877-M, 31 PERC ¶ 42.
[79] *Los Angeles County Office of Education* (1999) PERB Dec. No. 1360, 24 PERC ¶ 31016; *University of Cal. (Berkeley)* (1983) PERB Dec. No. 305-H, 7 PERC ¶ 14139.
[80] *University of Cal. (Los Alamos National Laboratory)* (2003) PERB Dec. No. 1519-H, 27 PERC ¶ 67, *Capistrano Unified School Dist.* (2015) PERB Dec. No. 2440, 40 PERC 24.
[81] *University of Cal.* (2006) PERB Dec. No. 1843-H, 30 PERC ¶ 124.
[82] Other PERB decisions finding a right to representation in non-disciplinary, non-investigative circumstances include: *Fremont Union High School Dist.* (1983) PERB Dec. No. 301, 7 PERC ¶ 14130 (discussion of leave entitlements); *Placer Hills Union School Dist.* (1984) PERB Dec. No. 377, 8 PERC ¶ 15037 (right to consult with union representative prior to signing documents to be placed in personnel file, likely to be reviewed by superiors when determining promotions or transfers), *Rio Hondo*, PERB Dec. No. 272, 7 PERC ¶ 14028; *Santa Paula*, PERB Dec. No. 505, 9 PERC ¶ 16128), or in meetings initiated by employees to discuss terms and conditions of employment with the employer (*University of Cal.* (1984), PERB Dec. No. 403-H, 8 PERC ¶ 15161, *Berkeley Unified School Dist.* (2002), PERB Dec. No. 1481, 26 PERC ¶ 33071)).
[83] *Sonoma County Superior Ct.* (2017) PERB Dec. No. 2532-C, 42 PERC 6. *Sonoma County Superior Ct.* (2015) PERB Decision No. 2409-C, 39 PERC 88.
[84] *County of Sacramento* (2014) PERB Dec. No. 2393-M, 39 PERC 54.
[85] *Superior Ct. of Fresno County v. PERB* (2018) 30 Cal.App.5th 158.
[86] *County of Sacramento*, *supra*.

Right to Use Employer's Email System

In a case under the EERA, PERB recognized that e-mail is now a fundamental forum for employee communication, and ruled that employees who have rightful access to their employer's e-mail system in the course of their work have a right to use the e-mail system to engage in EERA-protected communications on nonworking time."[87] PERB specifically tied this right to the right of employees under the EERA to "form, join, and participate in the activities of employee organizations." Thus, the same conclusion inarguably applies to all PERB-administered statutes that mirror this language. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights.

TESTS FOR VIOLATIONS OF PROTECTED RIGHTS

Through published case decisions, PERB and the courts have developed separate tests to establish: (1) *interference* with protected rights; (2) *discrimination* because of an individual employee's exercise of protected rights; and (3) discrimination between two groups of employees because one group participated in protected activities.

Interference

To determine whether an employer has interfered with protected rights of employees under the MMBA, EERA, SEERA, HEERA, and the Trial Court Acts, PERB uses the following test:

- where the union or employees as the charging party establishes that the employer's conduct tends to or does result in some harm to protected employee rights, a *prima facie* case is deemed to exist; and
- where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity PERB will balance the competing interest of the employer and the rights of the employees; and
- where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available.[88]

Unlike the discrimination charge described below, the charging party in an interference case need not show that the employer intended to interfere with protected rights.[89] However, irrespective of the three-part test described above, PERB will sustain a charge where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose, or intent.[90]

Under all the bargaining statutes, the courts and PERB apply a variable test depending on the degree of harm the interference causes.[91] If the conduct's effect on the employees' exercise of their rights is "comparatively slight" and the employer is able to justify the conduct by proof of substantial, legitimate business reasons, then PERB will balance the employees' rights against the employer's. If, on the other hand, the employer's conduct is sufficiently egregious to be "inherently destructive" of the employees' rights, then the employer's action will be excused only if the circumstances were beyond the employer's control.[92]

For example, PERB has ruled, under the EERA, that a community college district unlawfully interfered with protected employee rights and union rights by insisting that a union membership meeting, held in a campus facility during non-work time, not include a planned discussion of the pending college trustee election. In situations where unions or employees are engaged in organizational or recognition activities, more protective

[87] *Napa Valley Community College Dist.* (2018) PERB Dec. No. 2563, 42 PERC 154.

[88] *Carlsbad School Dist.* (1979) PERB, Dec. No. 89, 3 PERC ¶ 10031.

[89] *Novato Unified School Dist.* (1982) PERB Dec. No. 210, 6 PERC ¶ 13114; see also *Public Employees Assn. v. Bd. of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807, 213 Cal.Rptr. 491.

[90] *Carlsbad Unified School Dist., supra*.

[91] *Id.*

[92] *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 423, 182 Cal.Rptr. 461; *NLRB v. Erie Resistor Corp*. (1963) 373 U.S. 221, 228, 83 S.Ct. 1139; *NLRB v. Great Dane Trailers* (1967) 388 U.S. 26, 33, 87 S.Ct. 1792.

interference rules apply. In another example, an employer improperly interferes with employees' right to participate in forming and joining an employee organization when the employer conveys disapproval in questioning employees about their vote in a representation election.[93] Warning employees about union activity is unlawful, whether or not the employees subjectively feel threatened or discouraged from participating.[94]

PERB has adopted the NLRB *Banner Health* rule under the National Labor Relations Act[95] and found that an employer's "boilerplate" directive to an employee placed on administrative leave pending an investigation prohibiting communication with other employees during the investigation interfered with protected rights because it could be reasonably interpreted to prohibit protected activities such as contacting union members and representatives, filing a grievance, or communicating with co-workers regarding concerns about employment conditions. Although an employer may have the right to insist on confidentiality during an investigation, *e.g.* to protect evidence from being destroyed or to prevent a cover-up, the employer has the burden to demonstrate that a legitimate business justification supports a rule that interferes with employees' protected rights. A confidentiality directive to an employee should be tailored to clarify the specific conduct that is prohibited to preserve the investigation's integrity and to avoid interfering with protected employee communications.[96]

Employers need to exercise immense caution and care when it comes to issuing "no-contact" directives to union-represented employees. Directives that prohibit or restrict communications with other employees must be precisely tailored to the particular circumstances to be justified. Employers should not assume that the inclusion of carve-outs that allow communications with union representatives will be sufficient to lawfully justify broad "no-contact" directives.[97]

Under statutes that specifically prohibit employers from "encourag[ing] employees to join any organization in preference to another,"[98] PERB has imposed on employers "an unqualified requirement of strict neutrality" in representation elections.[99] Neutrality prevents employers from engaging in conduct that tends to influence the election, including expressing a preference for one employee organization over another,[100] providing material assistance to one organization but not to others,[101] or reducing employee or organization benefits during an election campaign.[102] Employers must also avoid making threats or promises regarding union election consequences.[103] A county chief executive officer's statement to union organizers that he would be dead or the county would be out of business before employees got a union violated the MMBA by interfering with the union's right to represent employees. PERB also concluded that the public statements of three members of the county board of supervisors that they would support eliminating a program and hiring temporary employees from outside agencies if the union organizing efforts continued were not supported by any legitimate business justification, and consequently interfered with both employee and union

[93] *Clovis Unified School Dist*. (1984) PERB Dec. No. 389, 8 PERC ¶ 15119; *City of Santa Maria* (2020) PERB Dec. 2736-M, 45 PERC ¶ 17 (employer investigation of union members' non-malicious communications to job applicants interfered with protected rights); *Trustees of the Cal. State U. (Northridge)* (2019) PERB Dec. No. 2687-H, 44 PERC ¶ 109 (investigations into employee misconduct might not necessarily serve a legitimate business purpose).
[94] *Long Beach Community College Dist.* (1998) PERB Dec. No. 1278, 22 PERC ¶ 29147.
[95] *Banner Health System* (2012) 358 NLRB No. 93.
[96] *Los Angeles Community College Dist. (Perez)* (2014) PERB Dec. No. 2404, 39 PERC 82.
[97] *Claremont Unified School District* (2019) PERB Dec. 2654-E, 44 PERC ¶ 24.
[98] Gov. Code, §§ 3519(d), 3543.5(d), 3571(d).
[99] *Santa Monica Community College Dist.* (1979) PERB Dec. No. 103, 3 PERC ¶ 10123; *Long Beach Community College Dist.* (1998) PERB Dec. No. 1278, 22 PERC ¶ 29147.
[100] *Clovis Unified School Dist.* (1984) PERB Dec. No. 389, 8 PERC ¶ 15119, *State of Cal.* (1985) PERB Dec. No. 542-S, 10 PERC ¶ 17014.
[101] *Ibid.*
[102] *State of Cal.* (1986) PERB Dec. No. 601-S, 11 PERC ¶ 18020; *State of Cal.* (1985) PERB Dec. No. 542-S, 10 PERC ¶ 17014; *Pittsburg Unified School Dist.* (1983) PERB Dec. No. 318, 7 PERC ¶ 14176.
[103] *Rio Hondo Community College Dist.* (1980) PERB Dec. No. 128, 4 PERC ¶ 11089.

rights in violation of the MMBA.[104] The intent behind the employer's conduct or communication is not relevant, and no actual impact on the election outcome need be shown.[105]

Discrimination or Retaliation

Within the labor relations context, discrimination or retaliation occurs when an employer rewards or punishes employees or employee organizations because of their participation in protected activities. Discrimination is proved by showing that:

- the employee engaged in protected activity;
- the employer was aware of the employee's protected activity;
- the employer took some adverse action against the employee; and
- the employer took the action *because of* the employee's engagement in protected activity.[106]

Regarding the last element, the employer's motivation, the charging party must make a *prima facie* showing that the employer's adverse action was motivated, at least in part, by the employee's protected activity. The burden then shifts to the employer to show that it would have taken the adverse action even if the employee had not engaged in the protected activity. When faced with a *prima facie* case of retaliation, an employer must prove two things – (1) that it had a non-discriminatory reason for the adverse action, *and* (2) that it took the adverse action because of the non-discriminatory reason.[107] An employee's protected union activity will not protect the employee from adverse employment actions motivated by legitimate business reasons.[108]

Although public employers have discretion to terminate probationary and at-will public employees with or without cause, probationary and at-will employees have the right to engage in protected labor relations activities without retaliation. PERB repeatedly has emphasized that an employee's "at-will" status does not alter the *prima facie* elements of the employee's case or the legal elements of the employer's defense in a case charging that an employer has retaliated or discriminated against an employee because of the employee's protected activities.[109] Consequently, if a charging party establishes a *prima facie* case of unlawful retaliation against a probationary or at-will employee, to prevail, the employer will have the same burden of proof, in spite of the employee probationary or at-will status.[110] PERB will excuse the employer from an unfair labor practice if the adverse action would have occurred regardless of the exercise of protected rights.[111] Meeting the employer's burden to establish an affirmative defense in a retaliation case is a greater burden than the employer is required to meet to sustain a routine termination of an at will or probationary employee in the absence of an allegation of unlawful motivation.[112] Frequently, employees and unions file discrimination claims with PERB believing that PERB can provide a remedy because the alleged discrimination is employment related. If PERB determines that an employer's adverse action against an employee does not violate a labor relations statute, PERB has no authority to determine whether the adverse action was otherwise just and proper.[113] PERB continues to dismiss claims of hostile work environment or race discrimination,[114] or alleged violations of the Education Code, the First Amendment, or

[104] *County of Riverside* (2010) PERB No. 2119-M, 34 PERC ¶ 108.
[105] *Santa Monica Community College Dist.*, *supra*, PERB Dec. No. 103.
[106] *Novato Unified School Dist.*, *supra*.
[107] *County of Orange* (2013) PERB Dec. No. 2350-M, 38 PERC 100. See also, *Chico Unified School Dist.* (2015) PERB Dec. No. 2463, 40 PERC 106.
[108] *State of Cal. (Dept. of Social Services) (Menaster)* (2009) PERB Dec. No. 2072-S, 33 PERC ¶ 177; *Omnitrans (*2010) PERB No. 2121-M, 34 PERC ¶ 110; *City of Alhambra* (2011) PERB No. 2161-M, 35 PERC ¶ 36.
[109] *Los Angeles Unified School Dist. (Peters)* (2016) PERB Dec. No. 2479, 40 PERC 166; *County of Santa Clara* (2019) PERB Dec. No. 2629, 43 PERC ¶ 145.
[110] *Palo Verde Unified School Dist.* (2013) PERB Dec. No. 2337, 38 PERC 69.
[111] *Moreland Elementary School Dist.* (1982) PERB Dec. No. 227, 6 PERC ¶ 13171; *Novato Unified School Dist.* (1982) PERB Dec. No. 210, 6 PERC ¶ 13114; see also *Las Virgenes Unified School Dist.* (2004) PERB Dec. No. 1605, 28 PERC ¶ 92; *San Bernardino City Unified School Dist.* (2004) PERB No. 1602, 28 PERC ¶ 88; *Bellevue Union Elementary School* (2003) PERB Dec. No. 1561, 28 PERC ¶ 24; *Oakland Unified School Dist.* (*Gregory)* (2009) PERB Dec. No. 2061, 33 PERC ¶ 153.
[112] *Harris v. Quinn* (2014) 134 S.Ct. 2618.
[113] *University of Cal. (Estes)* (2012) PERB Dec. 2302-H, 37 PERC ¶ 149, affirming 37 PERC ¶ 42.
[114] *Torrance Unified School Dist.* (2009) PERB Dec. No. 2007, 33 PERC ¶ 51.

matters covered by the California Fair Employment and Housing Act.[115] For example, filing a claim for disability benefits is not protected under the MMBA, and discrimination complaints under FEHA or workers' compensation claims do not involve rights under the MMBA, and consequently, are not protected activity under the MMBA.[116] Similarly, PERB has concluded that the HEERA does not address, and PERB has no jurisdiction over, claims of defamation, misrepresentation of scholarly status, and breach of employment contract.[117] Similarly, PERB has concluded that it had no jurisdiction over claims by an individual that the union discriminated against her and failed in its duty of fair representation because of her age and marital status,[118] or a complaint that the union failed to assist an employee with a racial discrimination complaint against the employer.[119] Concluding that the factual allegations do not support a violation of the EERA based on any viable legal theory, PERB affirmed the dismissal of a charge alleging that a school district harmed protected activities and created mistrust of the teachers' union by hiring the president of the local teachers' union to fill the position of Director of Human Resources for the District.[120] PERB has also concluded that reporting cheating by teachers is not protected conduct under the EERA.[121] Whistleblowing in K-12 public schools is protected under the Education Code,[122] and PERB does not have jurisdiction to enforce either the whistleblower statutes or other Education Code violations.[123]

ISSUES IN PROVING DISCRIMINATION BECAUSE OF THE EXERCISE OF RIGHTS

Employer's Knowledge of Protected Activity

PERB does not require direct proof that an employer knew that an employee engaged in protected conduct; circumstantial evidence is sufficient.[124] But closeness in time between the protected conduct and the employer's adverse action is not enough by itself to show knowledge.[125]

Requirement of Adverse Action

The alleged "adverse action" must result in actual harm, such as a reduction in wages or hours, an undesirable reassignment,[126] placement of adverse materials in an employee's personnel file,[127] or enforcement against an employee of rules that are not otherwise enforced.[128] An employer's adverse action may be imputed to the employer even though the threats were undertaken by a rank and file staff member known to be closely linked to the employer.[129] An employee's subjective reaction to the employer's conduct does not make that conduct adverse.[130] PERB decisions emphasize an "objective" test to determine whether an employer's action was adverse to the employee's interests, *i.e.*, whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the person's employment.[131]

[115] *Los Angeles Unified School Dist.* (2009) PERB Dec. No. 2011, 33 PERC ¶ 55.
[116] *Metropolitan Water Dist. of So. Cal. (Lollett Jones-Boyce)* (2009) PERB Dec. No. 2066-M, 33 PERC ¶ 165.
[117] *University of Cal.* (*Yi-Kuang Liu*) (2010) PERB No. 2153-H, 35 PERC ¶ 21.
[118] *Baldwin Park Education Assn.* (2011) PERB Dec. No. 2223, 36 PERC ¶ 90.
[119] *California School Employees Assn.* (*Milner*) (2011) PERB Dec. No. 2224, 36 PERC ¶ 91.
[120] *Chula Vista Elementary School Dist.* (2013) PERB Dec. No. 2306, 37 PERC ¶ 175.
[121] *Coachella Valley Unified School Dist.* (2013) PERB Dec. No. 2342, 38 PERC 95.
[122] Ed. Code, §§ 44100 et seq.
[123] *Coachella Valley Unified School Dist.*, *supra*, PERB Dec. No. 2342.
[124] *California State U. (San Francisco)* (1986) PERB Dec. No. 559-H, 10 PERC ¶ 17043.
[125] *Moreland Elementary School Dist.* (1982) PERB Dec. No. 227, 6 PERC ¶ 13171.
[126] *Palo Verde Unified School Dist.* (1988) PERB Dec. No. 689, 12 PERC ¶ 19121.
[127] *Woodland Unified School Dist.* (1987) PERB Dec. No. 628, 11 PERC ¶ 18121.
[128] *Woodland Unified School Dist.* (1990) PERB Dec. No. 808, 14 PERC ¶ 21101.
[129] *Compton Unified School Dist.* (2003) PERB Dec. No. 1518, 27 PERC ¶ 56.
[130] *Palo Verde Unified School Dist*. (1988), *supra*; *Newark Unified School Dist.* (1991) PERB Dec. No. 864, 15 PERC ¶ 22023; see , e.g., *San Francisco Unified School Dist.* (2009) PERB Dec. No. 2057, 33 PERC ¶ 145.
[131] *Palo Verde Unified School Dist.* (1988) *supra*; *Newark Unified School Dist.* (1991) *supra* (involuntary transfer was an adverse action).

Unlawful Employer Motivation

PERB may base an inference of unlawful motivation on the timing of an adverse action if it couples with other evidence.[132] Unlawful motivation may also be demonstrated by circumstantial evidence. Other evidence of unlawful motivation can consist of the employer's disparate treatment of employees engaged in protected activities,[133] departure from established procedures in responding to employees' protected conduct,[134] providing inadequate or contradictory justification for employer conduct,[135] conducting a cursory investigation of an employee's conduct,[136] offering contradictory or conflicting justifications,[137] expressing animosity toward union activists, exhibiting anti-union bias,[138] or providing in an initial response to an unfair labor practice charge exaggerated descriptions of an employee's conduct that are inconsistent with the employer's actions at the time of the conduct.[139] Employers who obtain evidence from an unlawfully motivated search can be precluded from using that evidence to defend itself against discrimination and retaliation charges.[140]

PERB Clarifies Three Longstanding Tests for Unlawful Discrimination and Interference Based on Protected Activities.

PERB used a 2011 case to clarify and harmonize both Court of Appeal and PERB decisions regarding the legal tests for proving discrimination and interference. This clarification of three types of employer offenses involving employee-protected rights under PERB-administered statutes is significant when responding to and defending against discrimination and interference claims:

1. The Novato discrimination/retaliation test applies where the employer takes adverse action against an *individual* employee because of the employee's participation in a protected activity. Once the charging party establishes that the employer's action was motivated in part by the employee's protected activities, the employer is guilty of discrimination unless the employer can prove that it would have taken the adverse action even if the employee had not engaged in protected activities.
2. The *Carlsbad* interference test applies where an employer is alleged to have interfered with or restrained employees in the exercise of protected rights. The employees/union must demonstrate that the employer's conduct tends to or does result in harm to employee rights. If the harm is slight, the employer's actions are excused if the employer's business necessity outweighs the harm to the employees' rights. If the harm is inherently destructive of employee rights, the employer's conduct will be excused only if the employer shows that the circumstances were beyond the employer's control and the employer had no alternative course of action.
3. The *Campbell* discrimination test applies where an employer is alleged to have discriminated between *two groups* of employees because one group participated in protected activities. Although labeled a "discrimination" test because the Court of Appeal used that term in the 1982 *City of Campbell* case,[141] the *Campbell* test is the same as the *Carlsbad* test, but involves two groups of employees. Although labeled a "discrimination" test, the *Campbell* test is

[132] *Charter Oak Unified School Dist.* (1984) PERB Dec. No. 404, 8 PERC ¶ 15162; *Moreland Elementary School Dist.* (1982), *supra*.
[133] *San Diego Community College Dist.* (1983) PERB Dec. No. 368, 8 PERC ¶ 15009 (refusal to ratify grievance settlements for union officials while ratifying settlements for other employees); *Belridge School Dist.* (1980) PERB Dec. No. 157, 5 PERC ¶ 12015 (reprimanding union official but not others for identical misconduct).
[134] *Santa Clara Unified School Dist.* (1979) PERB Dec. No. 104, 3 PERC ¶ 10124.
[135] *Novato Unified School Dist.* (1982) PERB Dec. No. 210, 6 PERC ¶ 13114.
[136] *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553, 127 Cal.Rptr. 856.
[137] *Oakland Unified School Dist.* (2007) PERB Dec. No. 1880, 31 PERC ¶ 45.
[138] *San Leandro Police Officers Assn.*, *supra*; *Sacramento City Unified School Dist.* (2010) PERB Dec. No. 2129, 34 PERC ¶ 134.
[139] *West Contra Costa County Healthcare Dist.* (2011) PERB Dec. No. 2164-M, 35 PERC ¶ 45.
[140] *State of Cal. (Cal. Correctional Health Care Services)* (2019) PERB Dec. No. 2637, 43 PERC ¶ 164.
[141] *City of Campbell* (1982) 131 Cal.App.3d 416.

different in substance and application than the *Novato* discrimination test.[142]

RELATED MATTERS

Remedies

The usual remedy for unlawful interference or discrimination is to order the violating party to cease and desist the unlawful activity, and when appropriate, to remove all disciplinary materials,[143] to reinstate the employee with back pay[144] and front pay,[145] or to rescind a tainted election.[146] Under unusual circumstances, PERB may also grant injunctive relief before the unfair labor practice hearing is completed.[147] In one unusual case, PERB ruled that the employer violated the union's access rights by having a union officer forcibly removed from the employer's property and jailed overnight. As part of the remedy, PERB granted attorney fees for defending the union official on the criminal trespass charge, and ordered the employer to make a good faith effort to have the union official's criminal record expunged.[148]

The primary reason that employees and unions file these claims on behalf of employees is to obtain reinstatement from some disciplinary action that often involves an employer's mixed motives – a bona fide business reason mixed with discriminatory intent. These cases often lead to different results depending upon the strength of the bona fide business reason. For example, compare a PERB order to reinstate a probationary teacher who received outstanding evaluations before filing a grievance[149] or an order to expunge the disciplinary record of a county employee[150] to the dismissal of a county employee's claim of retaliatory termination.[151] In each instance, sufficient evidence is required to prove that the employer's actions would not have been taken but for the employee's engagement in union activity.

Procedural Issues

The time limit for filing an unfair labor practice charge regarding discrimination or interference with protected rights that result in an employee's termination is six months from the date of the actual dismissal.[152] It is reasonable to assume that this rule may also apply to the imposition of discipline short of dismissal.

Limits on Protected Activity

Employees and unions have the right to engage in protected activities so long as they do so lawfully. Activities lose their statutory protection when employees resort to unlawful conduct or attempt to cloak unlawful motives in the guise of legitimate representational pursuits. For example, a school bus driver cannot stop his bus in order to exhort student riders to support his union in an ongoing labor dispute. Although asking students to support a position is not necessarily unlawful, the driver's method — in effect holding the students hostage — is unlawful.[153] Also, although filing a grievance is a protected activity, filing a fraudulent grievance is not.[154] Similarly, a union's order to violate management directives does not

[142] *State of Cal. (Dept. of Personnel Admin.)* (2011) PERB Dec. No. 2106a-S, 35 PERC ¶ 59. See *Regents of the Univ. of Cal. (Berkeley)* (2018) PERB Dec. No. 2610-H for another thorough discussion and clarification of *Novato, Campbell* and *Carlsbad* tests.

[143] *Alisal Union Elementary School Dist.* (2000) PERB Dec. No. 1412, 25 PERC ¶ 32007; *Capistrano Unified School Dist.* (2015) PERB Dec. No. 2440, 40 PERC 24.

[144] See, for example, *State of Cal. (Dept. of Social Services)* (2000) PERB Dec. No. 1413-S, 25 PERC ¶ 32008, and *Los Angeles School Unified Dist.* (2001) PERB Dec. No. 1431, 25 PERC ¶ 32061; see also *Rainbow Municipal Water Dist.* (2004) PERB Dec. No. 1676-M, 28 PERC ¶ 220, and *County of Riverside (Brewington)* (2009) PERB Dec. No. 2090-M, 34 PERC ¶ 45.

[145] *Los Angeles Unified School Dist.* (2001) PERB Dec. No. 1469, 26 PERC ¶ 33023.

[146] *Chula Vista Elementary School Dist.* (2004) PERB Dec. No. 1647, 28 PERC ¶ 184.

[147] *County of San Joaquin (Health Care Services)* (2001) PERB Order No. 1055-M, 25 PERC ¶ 32109.

[148] *ATU Local 1704 v. Omnitrans* (2009) PERB Dec. No. 2030-M, 33 PERC ¶ 91.

[149] *Larkspur Elementary School Dist.* (2002) PERB Order No. HO-U-805, 26 PERC ¶ 33089.

[150] *County of San Joaquin (Health Care Services)* (2002) PERB Order No. SA-CE-19-M, 26 PERC ¶ 33066; *County of San Joaquin (Health Care Services*) (2003) PERB Dec. No. 1524-M, 27 PERC ¶ 74.

[151] *County of Sacramento (Mental Health Treatment Center)* (2001) PERB Order No. HO-U-795-M, 26 PERC ¶ 33033.

[152] *University of Cal.* (2004) PERB Dec. No. 1585-H, 28 PERC ¶ 62.

[153] *Konocti Unified School Dist.* (1982) PERB Dec. No. 217, 6 PERC ¶ 13152.

[154] *State of Cal. (Dept. of Corrections)* (2006) PERB Dec. No. 1826-S, 30 PERC ¶ 82.

create a protected activity,[155] nor does refusing to perform a valid term or condition of employment, even on a union representative's advice.[156]

On the other hand, employers should be cautious when disciplining a shop steward for the employee's behavior in meetings representing other employees. PERB's basic rule for shop stewards, namely, that the behavior may not be "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption or material interference with operations" tends to protect behavior that employers may find objectionable, but that does not cause substantial disruption or material interference with the employer's operations.[157] PERB has further clarified that when the context of employee speech is at issue, speech related to matters of legitimate concern to employees is protected activity unless the speech is demonstrably false and the employee knew the speech was false or acted with reckless disregard for whether it was false.[158]

Otherwise protected conduct may also lose its statutory protection if it violates an applicable negotiated agreement. PERB declined to protect an employee who refused an assignment that he believed violated the collective bargaining agreement, because the contract required employees to grieve possible violations, not to refuse orders.[159]

Finally, other statutory provisions may restrict some rights of union access to employers' means of communication with employees. For example, the Education Code prohibits a union's access to teachers' school district mailboxes for political activities.[160]

Chapter 4 discusses whether or not participation in strikes and other concerted activities results in loss of protection for employees or unions.

Employer Speech and Protected Rights

Employer communication in the labor relations context is often a delicate matter. When an employer's communication to employees tends to bypass union negotiating teams it can constitute an unfair labor practice.

Federal decisions allow employers to communicate factual information and predict the consequences of particular union or employee decisions where the employer will have no control over those consequences.[161] Employers may, for example, inform employees about the legal consequences of their actions.[162] Employers may also express opinions about pending matters, provided the statements contain no threats or promises.[163]

PERB has adopted this federal standard for employer "free speech." PERB will find an unfair labor practice where employer speech tends to harm, or does harm, employee rights.[164] PERB measures "harm" in terms of the communication's impact on a person who stands in the relationship of employee and consequently may be "more susceptible to intimidation or receptive to the coercive import of the employer's message."[165] The test is objective. The employee's subjective reaction to the communication is not controlling.[166] An employer may escape culpability for unlawfully coercive statements by making a timely, sincere retraction.[167]

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[155] *State of Cal. (Dept. of Corrections)* (2004) PERB Dec. No. 1723-S, 29 PERC ¶ 28.
[156] *Los Angeles Unified School Dist.* (2004) PERB Dec. No. 1657, 28 PERC ¶ 196.
[157] *State of California (Dept. of Corrections)* (2012) PERB Dec. No. 2285-S, 37 PERC ¶ 72.
[158] *Chula Vista Elementary School Dist.* (2018) PERB Dec. No. 2586, 43 PERC ¶ 60.
[159] *Mammoth Unified School Dist.* (1983) PERB Dec. No. 371, 8 PERC ¶ 15015.
[160] *San Leandro Unified School Dist.* (2005) PERB Dec. No. 1772, 29 PERC ¶ 145.
[161] 29 U.S.C. § 158(c).
[162] *Modesto City Schools* (1983) PERB Dec. No. 291, 7 PERC ¶ 14090.
[163] *Rio Hondo Community College Dist.* (1980) PERB Dec. No. 128, 4 PERC ¶ 11089.
[164] See e.g., *City of Oakland* (2014) PERB Dec. No. 2387-M, 39 PERC 23 for a comprehensive discussion of employee and employer protected speech and the examples of actions to avoid during negotiations that undermine the collective bargaining process and could support a union's unfair practice charge.
[165] *Ibid.*
[166] *Chula Vista City School Dist.* (1990) PERB Dec. No. 834, 14 PERC ¶ 21162; *National Education Assn.-Jurupa* (2014) PERB Dec. No. 2371, 38 PERC 156, citing *AFT Part-Time Faculty United, Local 6286 (Peavy)* (2011) PERB Dec. No. 2194, 36 PERC 28, applying the *Novato* retaliation/discrimination test, see *Novato Unified School Dist.* (1982) PERB Dec. No. 210, 6 PERC ¶ 13114.
[167] *Inglewood Unified School Dist.* (1987) PERB Dec. No. 624, 11 PERC ¶ 18114.

OTHER UNION STATUTORY RIGHTS

Union Access to New Employee Orientations

The Public Employee Communication Chapter ("PECC")[168] requires public employers under PERB's jurisdiction to provide employees' exclusive representative access to the employer's new employee orientations. An employer usually must provide the union with not less than 10 days advance notice of a new employee orientation. The date, time, and place of a new employee orientation may not be disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation.[169] A new employee orientation is defined as "the onboarding process of a newly hired public employee, whether in person, online, or through other means or mediums, in which employees are advised of their employment status, rights, benefits, duties and responsibilities, or any other employment-related matters."[170]

At the request of either the union or the employer, the parties must negotiate regarding the "structure, time, and manner" of the union's access to the new employee orientation.[171] An employer and union may mutually agree to new employee access terms that differ from the law, but in the absence of a mutual agreement, the new law's requirements prevail.[172]

If an employer and union fail to reach agreement about the "structure, time, and manner" of the union's access to new employee orientations, the dispute will be decided by mandatory binding interest arbitration.[173] The law encourages both parties to make reasonable proposals during bargaining by prohibiting either party from submitting any proposal to compulsory arbitration that was not the party's final proposal during bargaining.[174] The PECC establishes specific and short timelines for the mandatory arbitration procedure, and contains other provisions designed to prevent delay.

The law establishes an arbitrator selection process.[175] The arbitrator is given a statutory list of criteria to guide the decision which must provide the exclusive representative with reasonable access to the employer's new employee orientations.[176]

Providing Unions Expanded Access to Employee Contact Information

Within 30 days of hiring a new bargaining unit employee or by the first pay period of the month following the employee's hire, a public employer must provide an exclusive representative of a bargaining unit of agency employees with the name; job title; department; work location; work, home and personal cellular telephone numbers; personal email addresses on file with the employer; and home address of any newly hired employee. And, the employer must provide the exclusive representative with this information for all bargaining unit employees every 120 days, unless the union and employer have negotiated a different time period. Finally, the Public Records Act was amended to provide that employees' home addresses, and home and personal cellular telephone numbers are not public records open to public inspection[177] and that personal email addresses are not public records unless used by the employee to conduct public business.[178]

Providing Union Stewards and Representatives Reasonable Paid Leave

Under recent amendments to the PECC, employers are required, when requested by a union, to grant "reasonable" leaves of absence with full pay and benefits to employees to serve as union stewards or officers.[179] Union steward or officer leave may be granted on a full-time, part-time, periodic, or intermittent basis,[180] and such leave is in addition to other leaves provided

[168] Gov. Code, § 3555-3559. Note that the PECC contains certain exceptions for certain state and in-home support services employers that are not addressed here.
[169] Gov. Code, § 3556, amended by Stats. 2018, c. 53 (SB 866).
[170] Gov. Code, § 3555.5(b)(3).
[171] Gov. Code, § 3557(a).
[172] Gov. Code, § 3557(d).
[173] Gov. Code, § 3557(a).
[174] Gov. Code, § 3557(b)(1)(A).
[175] Gov. Code, § 3557(b)(2-4).
[176] Gov. Code, § 3555.5(b)(2).
[177] Gov. Code, § 6254.3(a).
[178] Gov. Code, §§ 6254.3(a), (b)(1).
[179] Gov. Code, § 3558.8.
[180] Gov. Code, § 3558(a).

by statute or by collective bargaining agreement.[181]

Enforcement of the PECC

PERB has jurisdiction over alleged violations of the PECC. (In Los Angeles County and the City of Los Angeles, though, their respective employee relations commissions have jurisdiction over violations of the law.)[182] Although questions remain regarding the implementation of the PECC, it is anticipated that PERB will approve staff recommendations to process alleged violations of the new law the same as any other unfair practice charge, using the existing procedures and investigation process familiar to its constituents.

Public Employers Prohibited From Deterring or Discouraging Union Membership.

A brief addition to the Government Code provides, "A public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization. This is declaratory of existing law." The public employers subject to this law include employers covered by the MMBA, SEERA EERA, HEERA, the Trial Court Act, the Court Interpreter Act, JCEERA, TEERA, public employers of in-home supportive services providers, and public transit districts. PERB has jurisdiction over violations of this statute.[183]

Post-Janus Statutes Regarding Union Dues Deductions and Employer Communications to Employees Regarding Joining Unions

In response to the anticipated *Janus* decision, the state legislature amended and expanded the state's public employee labor relations statutes to regulate how public employers and unions manage union membership dues and membership-related fees and how public employers communicate with their employees regarding their rights to join or support, or refrain from joining or supporting unions.

Managing Union Dues Deductions

With respect to union dues and dues deductions from public employees' paychecks, generally, the law requires or prohibits the following:

- The recognized employee organization, not the individual employee, will notify the employer of the employee's dues deduction authorization.
- The employer must honor employee authorizations for dues deductions provided by the union.
- If a recognized employee organization certifies that it has and will maintain individual employee authorizations, it shall not be required to provide a copy of an individual authorization unless a dispute arises about the existence or terms of the dues deduction authorization.
- The employer must direct employee requests to cancel or change deductions to the employee organization.
- The revocability of a dues deduction authorization is determined by the terms of the written authorization and the employer must rely on the information provided by the employee organization regarding whether an employee's request to revoke a dues authorization conforms to the written authorization.
- The employee organization must indemnify the public employer for any claims made by an employee for deductions the employer made in reliance on the information provided by the employee organization.

Restrictions on Public Employers' Communications Concerning Union Membership

- Government Code section 3553 provides, "If a public employer chooses to disseminate mass communications to public employees or applicants to be public employees concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization, it shall meet and confer with the exclusive representative concerning the content of the mass communication."

[181] Gov. Code, §§ 3558(b), (g), (h).
[182] Gov. Code, § 3555.5(c).
[183] Gov. Code, §§ 3550-3552, added by Stats. 2017, c. 567 (SB 285).

- If the public employer and exclusive representative cannot agree on the content of the communication, and the employer still chooses to disseminate the communication, the employer's communication must be disseminated with a communication provided by the exclusive representative. The exclusive representative is charged with providing the employer with sufficient copies. Interestingly, "mass communication" is defined as "a written document, or script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees."

UNION'S DUTY OF FAIR REPRESENTATION

Description of the Duty of Fair Representation

A union has a duty to fairly represent all bargaining unit employees in activities the union is required by statute to perform. This duty requires a union to represent everyone fairly and in a manner that is not "arbitrary, discriminatory, or in bad faith."[184] The duty of fair representation ("DFR") covers both negotiations with an employer over a collective bargaining agreement's terms and the agreement's enforcement through the grievance process.

The EERA, HEERA, and SEERA have language expressly requiring a duty of fair representation.[185] The MMBA does not expressly impose a DFR on unions. Appellate courts disagree as to whether or not the duty exists because the MMBA provides for exclusive representation.[186] In the absence of clear direction, however, PERB has administratively imposed a DFR on unions recognized under the MMBA.[187] PERB has also extended a DFR to the Trial Court Act.[188]

The DFR usually does not extend to forums outside the collective bargaining agreement, such as pre-termination (*Skelly)* meetings,[189] Education Code rights,[190] non-contractual discipline and other employee legal rights,[191] EEOC hearings,[192] teacher credentialing commissions,[193] PERB proceedings,[194] the State Personnel Board,[195] local personnel boards,[196] and courts,[197] because the union does not have exclusive control over these proceedings.[198] PERB has found that a union owed no DFR where the duty to represent conflicted with the legal obligation to report threats. The DFR does not extend to representing employees in non-contractual requests for medical leave involving state

[184] *Vaca v. Sipes* (1967) 386 U.S. 171, 190, 191, 87 S.Ct. 903; *Rocklin Teachers Professional Assn.* (1980) PERB Dec. No. 124, 4 PERC ¶ 11055; see also Gov. Code, §§ 3515.7(g), 3578.

[185] Gov. Code, §§ 3544.9 (EERA), 3578 (HEERA), 3515.7(g) (SEERA).

[186] *Golden v. International Assn. of Firefighters, Local 55* (9th Cir. 1980) 633 F.2d 817; *Lane v. IUOE Stationary Engineers, Local 39* (1989) 212 Cal.App.3d 164, 260 Cal.Rptr. 634 (imposing DFR); *Andrews v. Bd. of Supervisors of Contra Costa County* (1982) 134 Cal.App.3d 274, 184 Cal.Rptr. 542 (finding no DFR).

[187] *International Assn. of Machinists (Attard)* (2002) PERB Dec. No. 1474-M, 26 PERC ¶ 33041.

[188] *Service Employee Internat. Union Local 721 (Oliver)* PERB Dec. No. 2462-C, 40 PERB 89.

[189] *Service Employees Internat. Union, Local 99* (1998) PERB Dec. Nos. 1219 and 1219a, 22 PERC ¶ 29056; *Bay Area Air Quality Management Dist. Employees Assn*. (2006) PERB Dec. No. 1808-M, 30 PERC ¶ 52; *Service Employees Internat., Local 1021 (Horan)* (2011) PERB No. 2204-M, 36 PERC ¶ 50.

[190] *East Side Teachers Assn., CTA/NEA* (1997) PERB Dec. No. 1236-E, 22 PERC ¶ 29019; *Beaumont Teachers Assn./CTA* (2012) PERB Dec. No. 2259, 36 PERC ¶ 171.

[191] *San Bernardino Teachers Assn., CTA/NEA* (2000) PERB Dec. No. 1387, 24 PERC ¶ 31099.

[192] *California School Employees Assn.* (2001) PERB Dec. No. 1444, 25 PERC ¶ 32084.

[193] *Capistrano Unified Education Assn., CTA/NEA* (2001) PERB Dec. No. 1422, 25 PERC ¶ 32041.

[194] *California School Employees Assn. (Vinclet)* (2002) PERB Dec. No. 1487, 26 PERC ¶ 33097; *Service Employees Internat. Union, Local 790, AFL-CIO* (2004) PERB Dec. No. 1636-M, 28 PERC ¶ 159; *Teamsters, Local 228* (2006) PERB Dec. No. 1845, 30 PERC ¶ 129; *United Teachers of Los Angeles* (2011) PERB Dec. No 2205, 36 PERC ¶ 52.

[195] *California State Employees Assn.* (2001) PERB Dec. No. 1421-S, 25 PERC ¶ 32040; *California State Employees Assn.* (2004) PERB Dec. No. 1694-S, 28 PERC ¶ 258; *Teamsters, Local 228* (2006) PERB Dec. No. 1845, 30 PERC ¶ 129.

[196] *CSEA, Chapter 130 (*2003) PERB Dec. No. 1550, 28 PERC ¶ 5; *SEIU, Local 790* (2005) PERB Dec. No. 1774-M, 29 PERC ¶ 150.

[197] *California Teachers Assn. and Oakland Ed. Assn.* (2006) PERB Dec. No. 1850, 30 PERC ¶ 152.

[198] *California Union of Safety Employees* (1994) PERB Dec. No. 1064-S, 19 PERC ¶ 26004; *San Francisco Classroom Teachers Assn.* (1985) PERB Dec. No. 544, 10 PERC ¶ 17016; *Professional Engineers in Cal. Government* (1989) PERB Dec. No. 760-S, 13 PERC ¶ 20190; *Alameda County Probation Peace Officers Assn.* (2004) PERB Dec. No. 1709-M, 29 PERC ¶ 13; see also *Greene v. Pomona Unified School Dist.* (1995) 32 Cal.App.4th 1216, 38 Cal.Rptr.2d 770.

and federal regulations.[199] Enforcement of union bylaws is an internal union affair outside of PERB's jurisdiction.[200]

Internal union affairs, such as contract ratification, the composition of negotiating teams,[201] and joint union-management teams,[202] removal from union office,[203] and internal union discipline[204] are also exempt from a DFR analysis unless they substantially impact unit members' relationships with their employers.[205] A union may restrict the right to vote to union members as long as the union considers non-members' viewpoints.[206]

A union violates the DFR only if its conduct is arbitrary, discriminatory, or in bad faith.[207] Arbitrary conduct exists where the union's decision "is without a rational basis or is devoid of honest judgment,"[208] or if the union simply does not bother to carry out its duties. Although a union's failure to provide adequate information about the terms of a proposed agreement does not violate the DFR, intentional misrepresentation of a fact or term of a contract in order to secure member votes for ratification does.[209] Generally, the union's actions need not be intentional, but more than mere negligence is required to breach the DFR. For example, a union's behavior was arbitrary, thus violating the union's duty of fair representation, when both a head custodian and the employees whom he supervised were represented by the same union. The union helped employees under the head custodian's supervision register complaints about him, and when the head custodian requested union representation at a meeting with management, the union failed to provide representation.[210] A union's negligent conduct breaches the DFR only when it completely ends the employee's right to pursue his or her claim.[211]

Discriminatory conduct occurs if the union represents one employee or group unfairly in relation to others. For example, a union may breach its duty if it refuses to pursue an employee's grievance to arbitration, but takes similar grievances on behalf of other employees to arbitration without a reasonable basis for different treatment. Discriminatory representation may be based on race, gender, or some other protected status. Discriminatory representation may also occur when the employee is not a union member, or has spoken out against the union. A union owes a duty to provide new employees with notice that union membership is not required, only an agency fee, and that non-members have a right to object to paying any portion of union dues not used for bargaining representation.[212]

Bad faith conduct occurs when a union intentionally harms employees through unfair acts in its representational duties. A DFR claim will be dismissed if it does not assert enough facts to show how the union's

[199] *Service Employees Internat. Union Local 1021* (Harris) (2012) PERB Dec. No. 2275, 37 PERC ¶ 23.
[200] *Barstow College Faculty Assn.* (2012) PERB Dec. No. 2256, 36 PERC ¶ 167.
[201] *Antelope Valley College Federation of Teachers* (2004), *supra*; *California State Employees Assn.* (2003), *supra*.
[202] *Chula Vista Elementary Educators Assn.* (2003) PERB Dec. No. 1554, 28 PERC ¶ 9.
[203] *Coalition of Univ. Employees* (2006) PERB Dec. No. 1855-H, 30 PERC ¶ 157.
[204] *SEIU Local 1000 (Hernandez)* (2009) PERB Dec. No. 2049-S, 33 PERC ¶ 129.
[205] *Los Rios College Federation of Teachers, Local 2279 CFT/AFT* (1996) PERB Dec. No. 1142, 20 PERC ¶ 27058; see also *Los Rios College Federation of Teachers, Local 2279* (1996) PERB Dec. No. 1137, 20 PERC ¶ 27042; see, also, *Peter A. Burke v. Ipsen, et al.* (2010) 189 Cal.App.4th 801, 34 PERC ¶ 163; *Cal. School Employees Assn. & Its Chapter 724 (Walker)* (2011) PERB Dec. No. 2220, 36 PERC ¶ 84.
[206] *Melanie Stallings Williams v. Public Employment Relations Bd.* (2012) 204 Cal.App.4th 119.
[207] *Golden v. Internat. Assn. of Firefighters, Local 55* (9th Cir. 1980) 633 F.2d 817; *Lane v. IUOE Stationary Engineers, Local 39* (1989) 212 Cal.App.3d 164, 260 Cal.Rptr. 634 (imposing DFR); *Andrews v. Bd. of Supervisors of Contra Costa County* (1982) 134 Cal.App.3d 274, 184 Cal.Rptr. 542 (finding no DFR); see also *Conkle v. Jeong* (9th Cir. 1995) 73 F.3d 909, cert. den. (October 7, 1996) 117 S.Ct. 56; *Paulsen v. Local No. 856 of Internat. Brotherhood of Teamsters* (2011) 193 Cal.App.4th 823, 35 PERC ¶ 57 (MMBA implicitly contains a duty of fair representations, the breach of which is an unfair labor practice.)
[208] *California State Employees Assn.* (2004) PERB Dec. No. 1696-S, 28 PERC ¶ 261 (standard is whether union's decision is "without rational basis or devoid of honest judgment"); see also *Cal. Teachers Assn. and Oakland Education Assn.* (2006) PERB Dec. No. 1850, 30 PERC ¶ 152.
[209] *San Juan Teachers Assn.* (1999) PERB Dec. No. 1322, 23 PERC ¶ 30093.
[210] *Service Employees Internat. Union, Local 221 (Meredith)* (2008) PERB Dec. No. 1982, 32 PERC ¶ 157.
[211] See, e.g., *SEIU Local 1021* (2009) PERB Dec. No. 2076-M, 33 PERC ¶ 185.
[212] *Office & Professional Employees Internat. Union, Local 29* (2012) PERB Dec. No. 2236-M, 36 PERC ¶ 120.

action or inaction lacked a rational basis or honest judgment.[213]

A union's DFR does not automatically terminate when an employee hires a private attorney. But PERB has found that a union did not breach the DFR by discontinuing its representation of a member when the member hired an attorney, where the union did not act arbitrarily or in bad faith.[214]

The six-month statute of limitations applies to DFR charges.[215] In duty of fair representation cases based on a "pattern of conduct" theory, "a violation may be established based on inaction that occurred more than six months before the charge was filed, provided the inaction was part of the same course of conduct as inaction within the statutory limitations period."[216]

Grievance Processing and the Duty of Fair Representation

In the grievance process, a union might fail to adhere to deadlines, introduce important evidence, make key arguments, or inform grievants of their appeal rights. Isolated instances of incompetence,[217] mere negligence, or misunderstandings[218] do not constitute a breach of the DFR.[219] But a continuing pattern of conduct or a particularly egregious mistake may create a breach of that duty.[220]

When an unfair practice charge alleges that a union breached its DFR by failing to act on an employee's behalf, PERB will examine the overall pattern of the union's conduct to see if the union's cumulative actions demonstrate an arbitrary failure to fairly represent the employee, even if no single union action, standing alone, would constitute a breach of the DFR.[221]

In general, courts and PERB give unions considerable discretion to determine a particular grievance's merits. A union may refuse to pursue a grievance to arbitration without breaching the DFR if it bases its decision on an honest, reasonable determination that the grievance lacks merit or may not succeed before an arbitrator.[222] A union may even refuse to pursue a meritorious grievance if doing so would not be in the bargaining unit's best interest,[223] or may refuse to assist in a grievance that was subsequently won.[224] A breach of the DFR is not established where the exclusive representative attempts to resolve the underlying disputes of an individual party's grievance for the benefit of the bargaining unit as a whole.[225] Where a grievance procedure allows an employee to file and present grievances without the assistance or participation of the union, the union does not violate its DFR when the employer rejects the grievance filed by the employee as untimely.[226]

A union is not required to provide an attorney for an arbitration hearing.[227] A union, however, does have an obligation to explain in writing why it decided not to

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[213] *Mt. San Jacinto College Faculty Assn., CTA/NEA* (1996) PERB Dec. No. 1147, 20 PERC ¶ 27064; see also *Oakland Education Assn.* (1995) PERB Dec. No. 1128, 20 PERC ¶ 27016; *Orange Unified Education Assn.* (2003) PERB Dec. No. 1569, 28 PERC ¶ 35; *Service Employees Internat. Union, Local 250* (2004) PERB Dec. No. 1610-M, 28 PERC ¶ 125; *International Union of Operating Engineers, Local 39* (2004) PERB Dec. No. 1618-M, 28 PERC ¶ 132.

[214] *United Educators of San Francisco* (2005) PERB Dec. No. 1764, 29 PERC ¶ 124.

[215] *United Teachers of Los Angeles* (2010) PERB Dec. No. 2150, 35 PERC ¶ 13.

[216] *Mt. Diablo Ed. Assn.* (2010) PERB Dec. No. 2127, 34 PERC ¶ 125.

[217] *Coalition of Univ. Employees (Buxton)* (2003) PERB Dec. No. 1517-H, 27 PERC ¶ 51.

[218] *Oakland Education Assn.* (2004) PERB Dec. No. 1646, 28 PERC ¶ 181.

[219] *California School Employees Assn.* (1984) PERB Dec. No. 427, 8 PERC ¶ 15211; *Fremont Unified Dist. Teachers Assn.* (2003) PERB Dec. No. 1572, 28 PERC ¶ 39; *Service Employees Internat. Union, Local 250* (2004) PERB Dec. No. 1693-M; 28 PERC ¶ 257.

[220] *San Francisco Classroom Teachers Assn.* (1984) PERB Dec. No. 430, 8 PERC ¶ 15215.

[221] See, e.g., *Service Employees Internat. Union, Local 1021* (Schmidt) (2009) PERB Dec. No. 2080-M, 34 PERC ¶ 12.

[222] See, e.g., *AFSCME Local 2620* (1988) PERB Dec. No. 683-S, 12 PERC ¶ 19105; *International Assn. of Firefighters, Local 55* (2004) PERB Dec. No. 1621-M, 28 PERC ¶ 143; *United Teachers* of *Richmond* (2004) PERB Dec. No. 1604, 28 PERC ¶ 91; *Service Employees Internat. Union Local 790* (2004) PERB Dec. No. 1666-M, 28 PERC ¶ 233; *International Brotherhood of Electrical Workers, Local 1245* (2010) PERB Dec. No. 2146-M, 35 PERC ¶ 9; *Service Employees Internat. Union, Local 1021 (Warren)* (2011) PERB Dec. No. 2215-M, 36 PERC ¶ 77.

[223] *Castro Valley Unified School Dist.* (1980) PERB Dec. No. 149, 5 PERC ¶ 12006; *Madera Unified Teachers Assn.* (2004) PERB Dec. No. 1719, 29 PERC ¶ 25.

[224] *Bay Area Air Quality Management Dist. Employees Assn.* (2006) PERB Dec. No. 1808-M, 30 PERC ¶ 52.

[225] See *County of Alameda* (2004) PERB Dec. No. 1708-M, 29 PERC ¶ 12.

[226] *Beaumont Teachers Assn./CTA* (2012) PERB Dec. No. 2260, 36 PERC ¶ 172.

[227] *Patterson v. International Brotherhood of Teamsters, Local 959* (9th Cir. 1997) 121 F.3d 1345, cert. den. (1998) 118 S.Ct. 1675.

process a grievance.[228] The union's written explanation of why it did not process a grievance may be a summary statement, as long as the union's decision not to process the grievance has a rational basis. A simple summary statement suffices even where the grievant brings multiple claims.[229] Absent a showing that the union's conduct was arbitrary, discriminatory, or in bad faith, PERB will not find a violation of the DFR.[230] Similarly, when a union discovered additional evidence one week before the arbitration, it did not violate the DFR when the union withdrew the grievance.[231]

Bargaining and the Duty of Fair Representation

Unions must have the ability to compromise during negotiations. Accordingly, courts grant unions wider discretion in carrying out bargaining duties than in pursuing grievances.[232] A union does not violate the DFR by failing to make a particular proposal at the bargaining table, even if the union was aware that management would be receptive to the proposal.[233] The exclusive representative is accorded a broad range of discretion and latitude in bargaining.[234] But if the union acts without any rational basis and harms unit members through negotiations, it may breach the DFR. To state a *prima facie* breach of the DFR by misrepresenting facts to secure contract ratification, a charging party must show that: (1) the union made an untrue assertion of fact; (2) the union knew its assertion was false when it was made; (3) the union made the untrue statement in order to secure contract ratification; and (4) the untrue factual assertion must have a substantial impact on the relationships of the unit members to their employer.[235]

New Developments 2021

Proof of Support Documents Are Confidential

The Bellflower City Employees Association ("BCEA") filed a decertification petition in an effort to decertify and replace AFSCME Local 3745 as the exclusive representative of three City bargaining units. During the process, AFSCME requested that the City provide it with copies of BCEA's authorization forms. In response, the City provided AFSCME with unredacted copies of the authorization forms that BCEA submitted with its petitions. The City did so without notifying BCEA or receiving its consent.

The ALJ found that the City violated the Meyers-Milias-Brown Act ("MMBA") by failing to treat as confidential the proof of support documents BCEA submitted with its Petition.

In *City of Bellflower*,[236] PERB noted that under six of California's public sector labor relations statutes, employers are not permitted to adopt local rules regarding representation petitions, and parties must file such petitions with PERB.

The MMBA and two statutes governing trial court labor relations—the Trial Court Employment Protection and Governance Act and the Trial Court Interpreter Employment and Labor Relations Act, allow employers to establish local rules regarding representation petitions. Further, only Educational Employment Relations Act ("EERA") and Childcare Provider Act ("CCPA") explicitly provide that proof of support documents are confidential.

The City relied on the absence of confidentiality language in the MMBA.

PERB explained that all California labor relations statutes provide the same level of confidentiality for proof of support

[228] *Oakland Education Assn.* (1984) PERB Dec. No. 447, 9 PERC ¶ 16011; *Public Employees Union, Local 1* (2005) PERB Dec. No. 1780-M, 29 PERC ¶ 170.
[229] *United Faculty Assn. of North Orange County Community College Dist.* (1998) PERB Dec. No. 1269, 22 PERC ¶ 29109.
[230] *American Federation of State, County and Municipal Employees (Martin)* (1999) PERB Dec. No. 1321-E, 23 PERC ¶ 30091.
[231] *California School Employees Assn. (Dunn)* (2009) PERB Dec. No. 2028, 33 PERC ¶ 89.
[232] *Rocklin Teachers Professional Assn.* (1980) PERB Dec. No. 124, 4 PERC 11055.
[233] *Union of American Physicians & Dentists* (2006) PERB Dec. No. 1846-S, 30 PERC ¶ 130.
[234] *Rocklin Teachers Professional Assn.*, *supra*; *Service Employees Internat. Union, Local 250*, *supra*, PERB Dec. No. 1610-M ; *International Union of Operating Engineers, Local 39*, *supra*, PERB Dec. No. 1618-M; see, for example, *Stationary Engineers Local 39* (2010) PERB Dec. No. 2098-M, 34 PERC ¶ 52.
[235] *Santa Ana Educators Assn.* (2009) PERB Dec. No. 2087, 34 PERC ¶ 31, p. 126.
[236] (2021) PERB Dec. No. 2770-M.

documents, and that an employer may not apply its local rules in a contrary manner.

PERB stated that confidentiality is required "to the extent needed to enforce the MMBA's broad protection of employee and union rights." Citing to federal precedent, PERB reasoned "that employees may be chilled if they know that their proof of support authorizations could be disclosed to others." PERB ruled "that such proof of support documents may be shared only to the extent that the requesting party demonstrates a compelling need for them."

PERB explained that a union is presumptively entitled to information that is necessary and relevant in exercising its right to represent bargaining unit employees regarding mandatory subjects of bargaining and where a union's request is presumptively relevant, but would invade legally protected confidentiality or privacy interests, the employer must bargain with the requesting union to accommodate the union's interest in the information and the legally protected privacy right. In such negotiations, narrowly tailored redactions can be an appropriate solution, if privacy rights outweigh the union's need for the redacted information. Here, the City did not engage in discussions with either union over AFSCME's request for proof of support documents, and the City did not weigh countervailing interests.

Ultimately, PERB found that AFSCME did not have a need for the documents that outweighed employee confidentiality interests. Therefore, PERB affirmed the ALJ's finding that the City violated the MMBA by interfering with protected rights when it shared unredacted proof of support documents with AFSCME.

PERB also explained that this instant case illustrates how responding to an information request can violate the duty of strict neutrality. PERB explained that MMBA section 3506.5, subdivision (d) consists of three clauses, providing that public agencies shall not: (1) "dominate or interfere with the formation or administration of any employee organization," (2) "contribute financial or other support to any employee organization," or (3) "in any way encourage employees to join any organization in preference to another." PERB has consistently ruled that this provision requires an employer to remain strictly neutral when two unions are in competition with one another.

PERB explained that "an employer does not tend to tilt the scales toward or away from a union if it merely complies with its legal duty to provide information, or, conversely, honors legally protected privacy rights by instead negotiating an appropriate accommodation of privacy and the union's need for the information." Here, however, PERB found that the City deviated from such an approach and thereby tilted the scales toward AFSCME. PERB ruled that the City violated its duty of strict neutrality in representation matters.

PERB Articulates a New Test for Determining Whether the Public Employers Deterring or Discouraging Union Membership Law Has Been Violated.

Regents of the University of California,[237] is a case of first impression regarding recently enacted Prohibition on Public Employers Deterring or Discouraging Union Membership, ("PEDD"), codified in Government Code section 3550 *et seq.* In this decision, PERB articulated a new test for determining whether the PEDD has been violated and then applied it.

The PEDD provides that "[a] public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization."[238] PERB found that "deter or discourage" means to "tend to influence an employee's free choice regarding whether or not to (1) authorize union representation, (2) become or remain a union member, or (3) commence or continue paying union dues or fees."

PERB announced the test for determining whether section 3550 has been violated. First, it is a charging party's burden only to

[237] (2021) PERB Dec. No. 2755-H, 45 PERC ¶ 81.
[238] Gov. Code, § 3550.

make a *prima facie* case that the employer's conduct or communication is reasonably likely to deter or discourage employee free choice, not that the conduct actually did deter or discourage. This test is objective. PERB explained that section 3550 prohibits public employer conduct which tends to influence employee choices as to *whether or not* to authorize representation, become or remain a union member, or commence or continue paying dues or fees. Once a *prima facie* case has been made, an employer can raise a business necessity argument as an affirmative defense, which the employer has the burden to plead and prove.

As with traditional interference claims, the degree of likely influence dictates the employer's burden. If the likely influence is "inherently destructive" of employee free choice, then the employer must show that the deterring or discouraging conduct was caused by circumstances beyond its control and that no alternative was available. For conduct that is not inherently destructive, the employer may attempt to justify its actions based on operational necessity and PERB will balance the employer's asserted interests against the likelihood of influencing employee free choice.

Alternatively, a charging party can raise a rebuttable presumption that the employer violated section 3550 by presenting a *prima facie* case under section 3553. This requires the charging party to demonstrate that the employer failed to "meet and confer in good faith with the charging party before issuing a mass communication concerning public employees' rights to join or support, or to refrain from joining or supporting, an employee organization." The employer may rebut the presumption by showing that although the communication required section 3553 negotiations pre-publication, it does not meet the threshold *prima facie* test for deterring or discouraging employee decisions protected under section 3550. In other words, a section 3553 violation shifts the burden to the employer to prove the mass communication does not tend to influence employee free choice.

PERB applied these standards and found that the University of California violated the PEDD. The American Federation of State, County & Municipal Employees Local 3299, University Professional and Technical Employees, Communication Workers of America, Local 9119, and Teamsters Local 2010 (collectively "Unions") filed similar unfair practice charges alleging that the Regents violated PEDD when it circulated documents regarding the impact of the United States Supreme Court's decision in *Janus v. AFSCME* ("*Janus*").[239]

Specifically, the University issued a mass communication letter to its employees informing them about the ruling in *Janus* and that the University would no longer deduct agency fees from the paychecks of union nonmembers, and also included a Frequently Asked Questions ("FAQ") document. The University did not meet and confer with representatives from each of the Unions before disseminating the *Janus* letter and FAQ. The University refused the Unions' multiple demands to meet and confer before the mass communication was issued.

PERB found that the Unions successfully met their burden to show the *Janus* letter and FAQ "tended to influence employee free choice by attaching a financial disincentive to union membership without context, and by actively and presumptively subverting the Unions' participation in conversations with bargaining unit employees." PERB also noted that the likely impact of the communications was compounded by an FAQ which directed employees with questions about the status of their union membership solely to the University's local labor relations office, which tended to influence employee free choice.

PERB also noted that the University distributed the communications unilaterally and in isolation, notwithstanding the Unions requests to meet and confer and this increased the tendency to influence.

Finally, PERB considered the relevance of a number of additional contextual factors, including: mode of communication (including the University's unusual decision to translate this communication into Spanish when it had refused to translate other such communications in the past), timing, and frequency. PERB concluded that the Unions met their burden of proving a *prima facie*

[239] *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (2018) 138 S.Ct. 2448.

case and then considered the Regents affirmative defense.

The Regents asserted the following business purpose for distributing the *Janus* letter and FAQ: "that, as an employer, it has both an obligation and a right to communicate with its employees regarding their terms and conditions of employment." Specifically, the Regents asserted the "need to get information about *Janus'* impact to employees before any changes were reflected in their paychecks."

Ultimately, PERB found that the University had not proven a business necessity affirmative defense. PERB concluded that the University's stated reasons did not constitute a business necessity and were not compelling enough to outweigh the tendency to harm free choice, in part due to the contextual factors.

PERB Applies the New Test For Determining Whether PEDD Has Been Violated.

In *Regents of the University of California*,[240] Teamsters Local 2010 alleged that the University violated the PEDD. The Teamsters alleged that the University violated the PEDD by posting a document on its website in response to a Teamsters organizing flyer.

The Teamsters is the exclusive representative of several the University's bargaining units, and was seeking to organize the administrative professionals, most of whom are unrepresented. As part of its organizing efforts, the Teamsters distributed a flyer which asserted that for fiscal years 2010-2011 through 2021-2022, the Teamsters had negotiated 33% in wage increases and that total was approximately three times greater than the comparable total for unrepresented employees during the same timeframe. The flyer also asserted that union-represented employees enjoy the following benefits: "Guaranteed Raises"; "Union Contract & Protections"; "Bargaining & Ratification by Members"; "Grievance Procedure"; and "Union Representation." The flyer made parallel assertions about unrepresented employees: "Raises when Management Feels like It"; "No Protections at Work"; "You have No Voice"; "No Rights"; and "You're on Your Own."

The University responded to the Teamsters' flyer by publishing a document on its website that provided different wage information. Specifically, the University asserted that between fiscal years 2007-2008 and 2018-2019, unrepresented employees received approximately 25% in wage increases. The University also disputed the statements in the Teamsters' flyer by claiming that: (1) "UC has a demonstrated commitment to paying market wages and providing regular pay raises to policy-covered employees"; (2) "UC has numerous policies to ensure equitable treatment and to protect employees' rights"; (3) "There are numerous policies, procedures and personnel to ensure that employees' concerns and complaints are taken seriously and addressed"; and (4) "Various personnel and programs exist to support and advocate for employees, including HR and ombuds offices, employee assistance programs, and local staff assemblies and interest groups."

PERB explained that the new test announced in *Regents of the University of California*,[241] applies to all public employees, including represented and unrepresented employees.

PERB found that under this new test, the Teamsters' unfair practice charge states a *prima facie* case that the University's posting tends to influence employee free choice.

PERB focused on the context, specifically that the University published the communication during an organizing campaign in direct response to the Teamsters' communication seeking employee support.

The University offered an affirmative defense, but PERB found the presence of material factual disputes, and therefore remanded the case so that a hearing could be held. Accordingly, PERB ordered the matter remanded and for a complaint to be issued alleging that the University's posting deterred or discouraged public employees from authorizing union representation and/or becoming union members in violation of section 3550.

[240] (2021) PERB Dec. No. 2756-H, 45 PERC ¶ 82.

[241] (2021) PERB Dec. No. 2755-H, 45 PERC ¶ 81.

PERB Found That a Lifeguard Chief's Emails Praising a Lieutenant For Opposing Union Leadership Constitutes Unlawful Interference Under the MMBA.

In *City of San Diego,*[242] California Teamsters 911 ("Union) alleged that the City retaliated against the Union for their protected activities and sent three emails that constituted unlawful interference with MMBA rights. PERB concluded that the Union established that two of the three challenged e-mails interfered with protected rights, but the Union did not establish its retaliation claims.

The City's Police Department receives all emergency 911 calls. Prior to December 15, 2016, dispatchers would transfer emergency calls to the Emergency Command and Data Center (ECDC) to dispatch firefighters and paramedics, or the Lifeguard Communications Center (LCC) to dispatch lifeguards.

On December 15, 2016, the City changed its dispatch policy to require dispatchers to route inland water rescue calls to ECDC in the first instance. Under the new policy, ECDC dispatchers began to send firefighters as the primary responders to certain calls, though in the past lifeguards had been the primary responders. The Union perceived this as a loss of work and filed a grievance.

The Union also protested the policy change in a January 2017 letter to City Councilmembers and a February 2017 letter to Brian Fennessy, the City's Fire Chief.

On March 14, 2017, the Union held a press conference and claimed that the new dispatch policy had contributed to a young child drowning in the City's Model Boat Basin, in Mission Bay Park. Chief Steward Ed Harris was the main Teamsters spokesperson at the press conference.

Soon thereafter, the City held its own press conference to present its view of the tragedy. In e-mail correspondence with the fire chief of another city, Fire Chief Fennessy called the information conveyed in the Union's press conference "patently inaccurate," and described Mr. Harris as a "real nut job" based on his presentation at the press conference.

At a morning briefing after the Union's press conference, Rick Wurts the City's Lifeguard Chief and head of the Lifeguard Division told those assembled, including Marine Safety Lieutenant John Sandmeyer, that the Union's performance at the press conference displeased Department management and each lifeguard participant would be held accountable.

On March 16, 2017, Lt. Sandmeyer e-mailed other lifeguards using the subject heading "Lifeguard Union Fail." Lt. Sandmeyer drafted the e-mail in reaction to what he considered "an example of the Union leading a poor high-profile press conference that ... just sort of sullied our reputation." Lt. Sandmeyer opened his e-mail by stating "Teamsters 911 let down San Diego Lifeguards in a huge way" and taking aim for "manipulating the facts and context to serve halftruths." Lt. Sandmeyer then forwarded his e-mail to Lifeguard Chief Wurts, who responded with an e-mail stating: "Thanks John. Very powerful! Thank you for your leadership. This Division needs the wisdom and direction of people like you."

On June 12, 2017, the City and the Union executed a settlement agreement requiring the Union to dismiss the 2016 dispatch policy grievance. In exchange, the City agreed to rescind the new dispatch policy and restore the status quo that existed prior to December 15, 2016. The parties also agreed to meet and confer in accordance with the MMBA on the mandatory subjects of bargaining.

In accordance with the grievance settlement agreement, the parties met to negotiate on several occasions. On September 6, 2017, the Union sent a letter to the City Attorney protesting the City's "re-proposing" the terms in the rescinded policy. The Union filed an unfair practice charge. Ultimately, the City maintained the same dispatch policy it had followed prior to December 15, 2016, and did not attempt to re-implement the 2016 dispatch policy.

The City and the Union were also engaged in a dispute involving the positions within the City's special teams. The State of California Office of Emergency Services (CalOES) sponsors 13 Swiftwater/Flood Water Rescue

[242] (2020) PERB Dec. No. 2747-M; 45 PERC ¶ 45.

Teams, including a City team. As early as 2012, Fire Chief Fennessy and Assistant Fire Chief Christopher Webber were involved in discussions to change the composition of the SWR Team. Fire Chief Fennessy told City Battalion Chief David Gerboth, the SWR Team program manager that he wanted to change the composition of the City's team so that it included half firefighters and half lifeguards.

The City also has a rescue team known as California Task Force 8, which is an urban search and rescue (USAR) task force sponsored by the Federal Emergency Management Agency (FEMA).

In August 2017, Hurricane Harvey hit Texas. FEMA issued an activation order deploying California Task Force 8. The City's SWR Team did not assist in the Hurricane Harvey recovery because the Texas governor never requested such assistance.

On August 27, 2017, the day after Task Force 8 deployed, Lt. Sandmeyer sent an e-mail to State fire chiefs and other CalOES officials noting that even though Task Force 8 had deployed, there were no lifeguards on that team, and the City SWR Team, comprised of 11 lifeguards plus three firefighters, had the resources and personnel to field an additional search and rescue team. Fire Chief Fennessy was not copied on Lt. Sandmeyer's e-mail and was embarrassed to learn about it when Kim Zagaris, the CalOES Fire and Rescue Chief, forwarded it to him that same day. Chief Zagaris wanted Lt. Sandmeyer and Fire Chief Fennessy to know that it was best if such communications went "through the chain of command within San Diego City Fire/Rescue."

Fire Chief Fennessy responded to Chief Zagaris, stating that the City SWR Team, if requested, "will be 50/50 mix of firefighters and lifeguards. If Lifeguard Labor organization challenges, we may need to consider dropping lifeguards from the team." That same day, Fire Chief Fennessy e-mailed Assistant Fire Chief Webber as follows:

> "I know we considered waiting, but Wurts and Sandmeyer need to know now that any future CalOES request for the SWR Team will be a mix of firefighters and lifeguards. If this is unacceptable, then the lifeguards will be removed from our CalOES SWR roster.
>
> "Within the City, we will comply with the intent of the MOU when responding to SWR. However, for State or FEMA taskings, we will operate consistent with all other agencies that have been provided equipment by FEMA and CalOES. If we want to include Lifeguards on the CalOES SWR team, I'm okay with it, but no more than 50%.
>
> "Better meet with Rick and Sandmeyer and get them squared away on how the system works."

Shortly after that and on the same day, Fire Chief Fennessy emailed the City's chief labor negotiator:

> "I've directed Chief Webber to meet with Wurts and Sandmeyer to explain how the State mutual aid system works and that we want to be inclusive and will continue to allow lifeguards to participate on the CalOES SWR team, but only if the ... team is a 50/50 mix of firefighters and lifeguards. We had planned this anyway, but need to inform them now before the rainy season begins.
>
> "We will continue to comply with the City/Department agreed upon MOU with L911 concerning SWR within the City. Lifeguards are the 'primary' responders to swiftwater rescue within the City. However, if L911 takes issue with including firefighters on the CalOES SWR Team as firefighters were in the past, I will have the lifeguards removed from the CalOES SWR team and it will be staffed by firefighters only."

On August 29, 2017, the Union held another press conference to protest what was characterized as Fire Chief Fennessy's blocking the City SWR Team from responding to Hurricane Harvey. The City issued its own press statement in response.

On September 6, 2017, Fire Chief Fennessy e-mailed Chief Zagaris regarding future staffing of the City SWR Team. Fire Chief Fennessy wrote: "To be clear, staffing 50/50

has been a consideration of mine and staff since last year." Fire Chief Fennessy also stated: "I have ordered that any future CalOES SWR San Diego team deployments be a 50/50 mix of SND firefighters and lifeguards."

On September 7, 2017, Lt. Sandmeyer e-mailed an internal Union distribution list with the subject heading "Union Fail Part V." Lt. Sandmeyer did so because he "thought the Union had let down the Lifeguard Division." In his e-mail, Lt. Sandmeyer referenced a letter from Sacramento Fire Chief Walt White, which criticized the Union's comments at the press conference. He also wrote, that as a result of the press conference, "[b]y order of [Fennessy], your represented members have just been reduced in numbers by 40% from the CalOES team." Lifeguard Chief Wurts, responded: "That is one of the most well written letters I have ever read. Well done!" Lifeguard Chief Wurts also forwarded Lt. Sandmeyer's e-mail to Fire Chief Fennessy and Assistant Fire Chief Webber.

PERB considered the Union's retaliation claim that the City reduced the number of lifeguards on its SWR Team in retaliation for protected activities. PERB found that the Union could establish a prima facie case of retaliation. PERB explained that there is no question the Union engaged in the four protected activities described in the amended complaint: filing a grievance in January 2017, holding press conferences in March and August 2017, and issuing a September 2017 letter to the City Attorney protesting the City's "re-proposing" the terms in the rescinded 2016 dispatch policy. At issue is whether the Union established adverse action, whether one or more of the protected activities noted in the amended complaint were at least a motivating cause for the alleged adverse action, and, if so, whether the City has proven that it would have followed exactly the same course of action even absent those protected activities.

In his separate August 27, 2017 e-mails to Chief Zagaris, Assistant Fire Chief Webber, and the City's chief labor negotiator, Fire Chief Fennessy made clear that future SWR Team deployments would be staffed by equal numbers of firefighters and lifeguards, consequently decreasing the number of lifeguards on any team. On September 6, 2017, Fire Chief Fennessy sent a further e-mail to Chief Zagaris confirming this fact.

PERB found sufficient evidence to conclude that had the City SWR Team deployed after September 2017, it would have consisted of seven firefighters and seven lifeguards. Fire Chief Fennessy instructed Assistant Fire Chief Webber to inform Lifeguard Chief Wurts and Lt. Sandmeyer about the change, and Lifeguard Chief Wurts did in fact inform Lt. Sandmeyer, who was at that point still a bargaining unit employee. Moreover, Lt. Sandmeyer relayed the information to other lifeguards in his September 7, 2017 e-mail.

Ultimately PERB found that Fire Chief Fennessy was already contemplating the change for legitimate reasons that predated any protected activity, and it was Lt. Sandmeyer's unauthorized e-mail to Chief Zagaris—more than any protected activity—that was the but-for cause leading Fire Chief Fennessy to make a final decision.

PERB then considered the Union's retaliation claims. The amended complaint alleges that the City violated the MMBA when Lifeguard Chief Wurts: (1) responded to Lt. Sandmeyer on March 16 and September 7, 2017, praising e-mails that Lt. Sandmeyer had sent to other bargaining unit lifeguards and (2) forwarded Lt. Sandmeyer's September 7, 2017 e-mail to Fire Chief Fennessy and Assistant Fire Chief Webber.

PERB found that Lifeguard Chief Wurts' March 16 and September 7, 2017 e-mails to Lt. Sandmeyer tended to interfere with, restrain, and coerce protected employee and employee organization rights in violation of the MMBA. First, PERB found Lifeguard Chief Wurts' September 7 e-mail endorsed a link between the reduction of lifeguards on the SWR Teams and protected activity. Second, PERB found that a reasonable lifeguard learning of Lifeguard Chief Wurts' two praising e-mails to Lt. Sandmeyer might reasonably infer that he or she might avoid adverse action and/or obtain preferential treatment for opposing Union leadership. PERB found that this is particularly true in light of Lifeguard Chief Wurts' statement that

any lifeguard participating in the Union's press conference would be held accountable.

PERB therefore found that the City, through its agent, Lifeguard Chief Wurts, unlawfully interfered with internal union affairs.

IMPACT OF NEW DEVELOPMENTS

- Proof of support documents are confidential and an employer may not apply its local rules in a contrary manner.
- PERB has articulated a new test for evaluating claims brought under the PEDD, sections 3550 and 3553 of the Government Code. PERB highlighted that section 3550 prohibits public employer conduct which tends to influence employee choices as to whether or not to authorize representation, become or remain a union member, or commence or continue paying dues or fees.
- PERB's new articulated test for evaluating claims brought under the PEDD, applies to all public employees, including represented and unrepresented employees.
- A manager's emails praising an employee who opposes Union leadership can constitute unlawful interference under the MMBA.

Impasse, Revival of Negotiations, Post-Impasse Implementation, Strikes, and Other Concerted Activities

SUMMARY OF THE LAW

THE GOOD FAITH CONTINUUM

The Duty to Bargain Includes Impasse and Impasse Procedures.

The MMBA, the EERA, the SEERA, the Trial Courts Acts, and the HEERA all require negotiating parties to participate in good faith in the established impasse procedures.[1] The duty to bargain in good faith continues through the impasse process, which includes any post-impasse revival of the negotiations due to changed circumstances.[2] In addition, after the factfinders' report has been issued under the EERA or the HEERA, and before a final offer can be implemented, the parties are required to consider the factfinders' report as a basis for a settlement.[3]

Continuation of the Status Quo and the Duty to Bargain After Expiration of Contract/MOU.

In the California public sector, a bona fide bargaining impasse triggers specified statutory or local impasse procedures (mediation, factfinding, and/or interest arbitration) in which parties are required to participate.[4] The employer may not take unilateral action during the pendency of impasse proceedings.[5] PERB has long ruled that an employer's unilateral change in terms and conditions of employment before reaching impasse in negotiations or completing the statutory impasse procedures is a per se violation of the duty to bargain.[6] If impasse has not been reached, the employer must continue the status quo, even when facing the threat of a strike. Any changes in strike preparation items such as discipline rules, benefits, leaves, or health benefits must still be negotiated.[7]

Upon expiration of a collective bargaining agreement, an employer is not free to make unilateral changes in existing terms and conditions of employment. The duty to bargain requires maintaining the status quo on mandatory subjects of bargaining until the parties have bargained to impasse.[8] There are four exceptions to the prohibition on making unilateral changes in the terms and conditions of employment upon expiration of a collective agreement/MOU: union security and dues check-off provisions, no strike clauses, grievance-binding arbitration covenants, and waiver (zipper) provisions do not survive expiration of the negotiated contract and do not continue in effect during bargaining without the consent or mutual agreement of both parties. These

[1] See Gov. Code, §§ 3548.4 (EERA), 3594 (HEERA), 3517, 3519, 3519.5 (SEERA); see also *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 182 Cal.Rptr. 161; *Rio School Dist.* (2008) PERB Dec. No. 1986, 33 PERC ¶ 8; and *Moreno Valley Unified School Dist. v. Public Employment Relations Bd*. (1983) 142 Cal.App.3d 191, 191 Cal.Rptr. 60.
[2] *Public Employment Relations Bd. v. Modesto City Schools Dist*. (1982) 136 Cal.App.3d 881, 899; 186 Cal.Rptr. 634.
[3] *Modesto City Schools* (1983) PERB Dec. No. 291, 7 PERC ¶ 14090, p. 351; *Charter Oak Unified School Dist.* (1991) PERB Dec. No. 873, 15 PERC ¶ 22067, pp. 191-193.
[4] See footnotes 7 through 20, *infra*.
[5] *Moreno Valley, supra,* 142 Cal.App.3d 191; *Modesto City Schools, supra*, PERB Dec. No. 291, 7 PERC ¶ 14090.
[6] *Pajaro Valley Unified School Dist.* (1978) PERB Dec. No. 51, 2 PERC ¶ 06107; *Rowland Unified School Dist.* (1994) PERB Dec. No. 1053, 18 PERC ¶ 25126; *County of Sonoma* (2010) PERB Dec. No. 2100-M, 34 PERC ¶ 54.
[7] See for example, *Santee Elementary School Dist.* (2002) PERB Order No. LA-CE-4268-E, 26 PERC ¶ 33133.
[8] *Pajaro Valley Unified School Dist., supra*, PERB Dec. No. 51; *NLRB v. Katz* (1962) 369 U.S. 736.

provisions are "contract-bound," or involve statutorily guaranteed rights, so they cannot be imposed upon a party absent its agreement.[9] In the California public sector, some of these provisions, such as agency fee, may also have a statutory basis for being maintained.[10] For covered state employers, the SEERA/Dills Act and other rules govern which provisions survive an expired contract.[11]

STATUTORY IMPASSE PROVISIONS

Both the EERA and the HEERA contain definitions of "impasse,"[12] and set forth procedures for mediation,[13] factfinding,[14] and PERB's role in the event of impasse.[15] Unlike the EERA and the HEERA, though, the SEERA, the MMBA, the Trial Court Act, the Court Interpreter Act, the SEERA/Dills Act, and the transit labor dispute statutes (other than the TEERA) generally do not define "impasse."

The EERA, HEERA, and MMBA include provisions for factfinding.

The SEERA/Dills Act does have a provision for mediation,[16] while the MMBA, the Trial Court Act, the Court Interpreter Act, the TEERA, and the transit labor dispute statutes allow public agencies and unions to adopt mediation on a voluntary basis.[17] Under the SEERA/Dills Act, after impasse has been completed, the state employer may implement the final offer,[18] but any item that requires an expenditure of funds or a change in statute must be submitted to the Legislature for approval.[19]

The Public Transportation Labor Disputes Act does not contain factfinding provisions but does require the appointment of a mediator at the request of either party. At the request of either party, and whenever the Governor believes a threatened or actual strike or lockout may significantly disrupt public transportation services and endanger public health or safety, the Governor may appoint a "board of investigation" to investigate the issues and make a written report. The Governor may then seek to enjoin any action for a 60-day cooling off period.[20]

Other than the MMBA, the other statutes are silent on post-impasse unilateral implementation requirements.

MMBA IMPASSE PROCEDURES

The MMBA mandates factfinding for local agencies that have reached negotiations impasse if the union requests factfinding. Government Code sections 3505.4, 3505.5, and 3505.7 require factfinding very similar to the procedures required for school employers under the EERA and for higher education employers under HEERA.[21]

Specifically, the MMBA:

- Requires the appointment of a three-person factfinding panel, if a mediator is unable to resolve the differences within 30

[9] *Litton Financial Printing Div. v. NLRB* (1991) 501 U.S. 190 (*Litton*); *McClatchy Newspapers* (1996) 321 NLRB 1386, enf'd *McClatchy Newspapers v. NLRB* (D.C. Cir. 1997) 131 F.3d 1026; *Los Angeles County Assn. of Environmental Health Specialists v. County of Los Angeles* (2002) 102 Cal.App.4th 1112.

[10] See e.g., Gov. Code, §§ 3515.7(a) (the SEERA/Dills Act), 3540.1(i)(1)(2) (EERA), 3583.5 (HEERA).

[11] Prior to 2001, the parties' obligations under the SEERA/Dills Act differed from other public sector collective bargaining statutes administered by PERB. When Dills Act parties bargain to impasse and the existing agreement expired, any statutes superseded by the negotiated MOU under Gov. Code § 3517.6 were no longer superseded. The statutory provisions became effective again, and the state employer could implement only terms not covered by § 3517.6 or those specified as subject to collective bargaining. In 2001, Gov. Code § 3515.7 was amended and § 3517.8 added to the SEERA/Dills Act, authorizing continued grievance-binding arbitration and fair share fee collection upon expiration of the MOUs until a successor agreement was reached or implementation of the state employer's LBFO, whichever occurred first. In *State of Cal. (DPA)* (2008) PERB Dec. No. 1985-S 32 PERC ¶ 160, PERB decided that the SEERA/Dills Act §§ 3515.7 and 3517.8 do not require the State employer to collect fair share fees after implementation of its LBFO. In *State of Cal. (Dept. of Personnel Administration)* (2009) PERB Dec. No. 2018-S, 33 PERC ¶ 71, PERB determined the state employer's failure to implement increases in reimbursement rates for business-related automobile travel required the expenditure of funds, and required approval by the Legislature.

[12] See Gov. Code, §§ 3540.1 (EERA), 3562 (HEERA).

[13] See Gov. Code, §§ 3548, 3548.4 (EERA), 3590, 3594 (HEERA).

[14] See Gov. Code, §§ 3548.1-3548.3 (EERA), 3591-3593 (HEERA).

[15] See Gov. Code, §§ 3541.3, 3548-3548-4 (EERA), 3563 (HEERA).

[16] See Gov. Code, § 3518.

[17] See Gov. Code, §§ 3505.2 (MMBA), 71634.4 (Trial Court Act), 71820 (Court Interpreter Act), 99568 (TEERA), Lab. Code, § 1137.1(d) (transit labor disputes).

[18] Gov. Code, § 3518.8.

[19] Gov. Code, § 3517.8.

[20] Lab. Code, §§ 1137-1137.6.

[21] Gov. Code, §§ 3540 et seq.

days of appointment, **and** if the employee organization requests factfinding.
- Makes factfinding available to employee organizations in all situations, regardless of whether the parties have engaged in mediation, and provides that an employee organization's procedural right to request factfinding cannot be expressly or voluntarily waived.
- Requires an appointed factfinding panel to investigate, hold hearings, and issue findings of fact and recommendations covering the unresolved issues through the application of eight listed criteria, including, most significantly: (1) comparison of wages in other comparable public agencies; (2) the agency's financial ability; (3) the change in the Consumer Price Index; and (4) local rules, regulations, or ordinances.
- Requires the parties to share equally the costs of the process, including the expenses of the neutral chair of the factfinding panel.
- Provides that the factfinding panel's factual findings and recommended settlement terms are advisory to the negotiating parties.
- Allows the employer, after holding a public hearing, to unilaterally adopt its last, best, and final offer no earlier than 10 days after the factfinding report is made public.

The MMBA also provides that where applicable impasse procedures are exhausted, a public agency may implement its final offer unless required to proceed to interest arbitration.[22] The MMBA's meet-and-confer duty also requires local rules, ordinances, or mutually agreed-upon procedures to include adequate time for impasse resolution.[23]

The MMBA factfinding requirements do not apply to charter city or county bargaining units covered by binding interest arbitration.[24]

[22] Gov. Code, § 3505.4.
[23] Gov. Code, § 3505.
[24] Gov. Code, § 3505.5.

MMBA Factfinding Applies to All Disputes Over Mandatory Subjects of Bargaining.

PERB has consistently maintained that the MMBA factfinding procedures enacted in 2012, like the EERA and HEERA factfinding procedures, apply to all impasses over mandatory subjects of bargaining, and are not limited to bargaining impasses over the terms of a new or successor comprehensive MOU.[25]

In two cases, the Court of Appeal agreed with PERB and concluded that factfinding under the MMBA applies to all bargaining impasses over mandatory subjects of bargaining, not just impasses arising in new or successor MOU bargaining. The Court also rejected constitutional challenges to the MMBA factfinding provisions. The California Supreme Court denied review of both cases; consequently, these cases are the definitive law unless the legislature amends the factfinding provisions.[26]

Resumption of Bargaining Does Not Impact Union's Factfinding Request.

After the City and County of San Francisco informed SEIU that the parties were at an impasse in meeting and conferring about the effects on employees' terms and conditions of employment of the City's decision to institute biometric time clocks at the City's Fine Arts Museums, SEIU filed a request for factfinding. Determining that SEIU's request was timely and that factfinding applied to the dispute, the Office of the General Counsel ordered each party to select its factfinding panel member.

On appeal of the administrative determination, the City argued that SEIU's factfinding request was moot because the parties resumed bargaining about effects of the City's unilateral implementation of the biometric time clocks after the City's impasse declaration. PERB rejected the argument noting that neither the MMBA nor PERB

[25] *County of Contra Costa* (2014) PERB Order No. Ad-410-M, 38 PERC ¶ 154; *County of Fresno* (2014) PERB Order No. Ad-414-M, 39 PERC ¶ 8.
[26] *San Diego Housing Com. v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 1, review den. July 13, 2016; *County of Riverside v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 20, review den. July 13, 2016.

regulations provide for a factfinding request to be mooted by later negotiations.

Under the MMBA, either party's written declaration of impasse and the union's timely request for factfinding trigger the appointment of a factfinding panel, and PERB has no independent authority to determine whether an impasse exists. Consequently, PERB stated that if the City believed that the impasse had been broken, the City should have withdrawn its impasse declaration, which would have removed a precondition for appointment of a factfinding panel. Because the City had not withdrawn its impasse declaration, PERB concluded that SEIU's impasse request was not moot."[27]

Similarly, in a case where the union withdrew a factfinding request, resumed bargaining, and subsequently declared a second impasse, PERB found that the union's second factfinding request was untimely because it was made more than 45 days after selection of the mediator in the initial impasse. PERB strictly construes the MMBA factfinding timelines and noted that the union should have withdrawn the original impasse declaration in order to allow factfinding after a subsequent impasse.[28]

Scope of PERB's Role in Receiving MMBA Factfinding Requests.

Under the MMBA, PERB's role in reviewing a factfinding request is limited to ascertaining that the minimal statutory requirements have been met: "either participation in mediation or, absent mediation, a declaration of impasse by one of the parties, plus a request by the exclusive representative for factfinding, accompanied by a statement that the parties have been unable to effect a settlement." Other matters, such as scope of bargaining arguments,[29] an employer's defenses to its duty to bargain or the scope of the factfinding request are left to discussions between the parties and for resolution through an unfair practice proceeding if either party files a charge. PERB will not consider a public agency's allegations that the union engaged in bad faith bargaining or any of the agency's defenses to its duty to bargain. Similarly, in reviewing a factfinding request, PERB will not consider whether an impasse is broken, or prematurely declared, or even exists. PERB can address these issues only if a party files an unfair labor practice charge.[30]

A written communication from an employer that does not contain the term "impasse" can, nonetheless, be sufficient to trigger the MBA factfinding process. PERB will look to the substance of a party's words to determine their legal effect.[31]

Mediator's Need to Reschedule Mediation Date Does Not Reset the MMBA Window for Requesting Factfinding.

Both the MMBA[32] and PERB regulations[33] require that a request for factfinding by an exclusive representative be filed "not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator ... ." If the mediation dates change, a union has the option of requesting factfinding during the initial window period to avoid the risk of losing the opportunity for factfinding, and the union bears the responsibility of keeping track of the statutory window period and to request factfinding within the window period, regardless of whether mediation dates change.[34] PERB holds unions strictly accountable for failing to meet the factfinding timelines.[35]

[27] *City and County of San Francisco* (2014) PERB Order No. Ad-419-M, 39 PERC ¶ 72.
[28] *City of Watsonville* (2017) PERB Order. No. Ad-445-M, 42 PERC ¶ 9.
[29] *City of Oakland* (2018) PERB Order No. Ad-462-M, 42 PERC ¶ 141, citing *Workforce Investment Bd.* (2014) PERB Order No. Ad-418-M and *County of Ventura* (2018) PERB Order No. Ad-461-M.
[30] *Workforce Investment Bd. of Solano County* (2014) PERB Order No. Ad-418-M, 39 PERC ¶ 105; *Santa Cruz Central Fire Protection Dist*. (2016) PERB Order No. Ad-436-M, 40 PERC ¶ 174.
[31] *City of Salinas* (2018) PERB Dec. No. Ad-457-M.
[32] Gov. Code, § 3505.4(a).
[33] Cal. Code Regs., tit. 8, § 32802(a)(1).
[34] *Lassen County In-Home Supportive Services Public Authority* (2015) PERB Order No. Ad-426-M, 40 PERC ¶ 20.
[35] See e.g., *Santa Cruz Central Fire Protection Dist.* (2016), *supra*; *County of Solano* (2018) PERB Order No. Ad-458-M, 42 PERC ¶ 78.

PERB Has Jurisdiction to Appoint a Factfinder for MMBA Disputes Involving Peace Officers or Management Employees.

The MMBA provides that certain of PERB's powers and duties do not apply to "management employees," as defined by the statute, and do not apply to "peace officers," as defined.[36] Specifically, MMBA sections 3509(f) and 3511 provide that the powers and duties granted to the Board by section 3509(a) (e.g., unfair practice charges) do not extend to management employees and peace officers. Analyzing the legislative history of the statutory provisions creating the "management employee" and "peace officer employee" exceptions to PERB's broad powers and the statute's actual language, PERB has concluded that a different provision of the MMBA, section 3505.4, is the source of the Board's authority to appoint a factfinder and that section 3505.4 contains no language indicating that the Board's powers under this statute are subject to either the "management employee" or the "peace officer" exceptions. Consequently, PERB has determined that it has jurisdiction to appoint a factfinder for MMBA disputes involving peace officers or management employees.[37]

DECLARING AND DETERMINING IMPASSE

Definition of "Impasse"

Impasse during bargaining is the point at which parties have exhausted prospects of concluding an agreement and further discussions would be fruitless or futile.[38] In the California public sector, whether the parties are at impasse may be determined initially by PERB (e.g., under the EERA and the HEERA), or may be decided by the parties on an ad hoc basis. A party may be guilty of bad faith bargaining by a premature declaration of impasse in those situations requiring ad hoc determinations.[39]

[36] Gov. Code, §§ 3509(f), 3511.
[37] *City of Redondo Beach* (2014) PERB Order No. Ad-409-M 38 PERC ¶ 152.
[38] *Modesto City Schools*, *supra*, PERB Dec. No. 291.
[39] *Kings In-Home Supportive Services Public Authority* (2009) PERB Dec. No. 2009, 33 PERC ¶ 52.

PERB's Determination of Impasse

If PERB is called upon under the EERA or the HEERA to determine if a genuine impasse exists during negotiations, it will consider the following factors: the number and length of the parties' negotiating sessions; the time period over which negotiations occurred; the extent to which the parties made and discussed proposals and counterproposals; the extent to which the parties reached tentative agreement on issues; the extent to which unresolved issues remain; and other relevant information.[40] In evaluating these criteria, PERB will seek evidence that the parties have negotiated in good faith to the point that further negotiations are futile.[41] In appropriate cases, if the parties are deadlocked on major issues, PERB will find an impasse exists even if the parties are able to negotiate about minor matters.[42]

BREAKING IMPASSE AND REVIVING NEGOTIATIONS

Once a bona fide bargaining impasse has been reached, either side may lawfully refuse to bargain further. After any applicable impasse procedures, including any applicable factfinding procedures, are completed, the employer may then take unilateral action and impose working conditions from its LBFO to the union, and the union may then engage in concerted activities.

The parties' good faith bargaining obligation is not extinguished during impasse; it is suspended until it is revived by "changed circumstances." Offers by either the employer or the union to make concessions sufficient to break the impasse are "changed circumstances" that renew the duty to bargain.[43] This revival of the duty to bargain can occur either before or after the utilization of impasse procedures.

[40] Cal. Code Regs., tit. 8, § 32793(c).
[41] *Mt. San Antonio Community College Dist.* (1981) PERB Order No. Ad-124, 6 PERC ¶ 13023.
[42] *California State U.* (1990) PERB Dec. No. 799-H, 14 PERC ¶ 21072.
[43] *PERB v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881. For an example of the application of *Modesto* to an MMBA jurisdiction, see *County of Orange* (2005) PERB Order No. LA-CE-197-M, 29 PERC ¶ 149; see also *California Correctional Peace Officers Assn. v. State of Cal. (DPA)* (2010) PERB Dec. No. 2130-S, 34 PERC ¶ 137.

If the impasse procedures are exhausted without breaking the deadlock, and the parties remain at impasse and/or reach another impasse, the parties may decline to bargain further, and the employer may implement policies,[44] including changes "reasonably comprehended/contemplated" within its LBFO or previous offers made and negotiated between the parties.[45] In order to revive negotiations after impasse due to changed circumstances, a union must articulate "changed circumstances" that involve the nature of the union's proposals, not related to the employer's circumstances.[46] An employer's or a union's duty to bargain does not permanently cease after exhaustion of the statutory or local impasse procedures. After all the impasse procedures have been utilized, the impasse can still be broken by "changed circumstances," again reviving the bargaining obligation.[47]

Changed circumstances sufficient to break an impasse and revive the duty to bargain require a significant concession by either party. For example, PERB has explained that "a handful of non-substantive email exchanges exploring the parties' interest in and availability for a meeting does not rise to the level of changed circumstances sufficient to revive the bargaining obligation. There is no evidence that either party made a substantial concession from an earlier position and was genuinely committed to a new bargaining position. As a matter of settled law, the parties were still at impasse at the time of the second strike … ." Consequently, PERB found that a union's post-impasse strike did not violate its good faith bargaining duty, and PERB affirmed dismissal of the employer's unfair practice charge.[48]

The good faith bargaining continuum extends throughout this entire process of impasse, suspension, revival, re-deadlock, suspension, and revival. But this linear continuum does not require a return to the beginning point of the impasse process (e.g., mediation, factfinding).[49] And, if the employer previously unilaterally and lawfully implemented its LBFO, then the revived negotiation will take place from the new status quo defined by the unilaterally adopted terms and conditions of employment.

Government Code section 3505.4 of the MMBA provides, in part, that "unilateral implementation of a public agency's LBFO shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation."[50] PERB has rejected arguments that this provision establishes a "cooling off period" that excuses bargaining for one year after a unilateral imposition.[51] PERB also has rejected arguments that section 3505.4 opens a second window for requesting factfinding after an impasse was declared during an earlier period of bargaining.[52]

The duty to bargain in good faith continues throughout the impasse process, including through mediation and factfinding. Agencies should avoid actions that might demonstrate bad faith bargaining; PERB's standard remedy, restoration of the status quo ante with back pay, can more than offset the budget savings anticipated from concessions sought in bargaining.[53] Agencies also should avoid "self-help," even if the union is delaying the process.

Agencies covered by mandatory factfinding can learn from the City of Davis' experience under voluntary factfinding. Frustrated by a

[44] *Covina Valley Unified School Dist.* (1993) PERB Dec. No. 968, 17 PERC ¶ 24030, p. 78.
[45] *Modesto City Schools*, *supra*, PERB Dec. No. 291; *Charter Oak Unified School Dist*. (1991) PERB Dec. No. 873, 15 PERC ¶ 22067; *Rowland*, *supra*, PERB Dec. No. 1053; *County of Sonoma*, *supra*, PERB Dec. No. 2100-M; *City of El Cajon v. El Cajon Police Officers Assn*. (1996) 49 Cal.App.4th 64; *Social Services Union v. Bd. of Supervisors* (1990) 222 Cal.App.3d 279; *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416; *Atlas Tack Corp.* (1976) 226 NLRB 222.
[46] *California Correctional Peace Officers Assn. v. State of Cal.* (DPA) (2010) PERB Dec. No. 2102-S, 34 PERC ¶ 62.
[47] *PERB v. Modesto City Schools Dist*., *supra*, 136 Cal.App.3d 881.
[48] *County of Trinity* (2016) PERB Dec. No. 2480-M, 40 PERC ¶ 171.
[49] *Id.*
[50] Gov. Code, § 3505.4.
[51] *Operating Engineers, Local 3 v. City of Santa Rosa* (2013) PERB Dec. No. 2308-M, 37 PERC ¶ 182.
[52] *City of Watsonville* (2017) PERB Order No. Ad-445-M, 42 PERC 9.
[53] *City of Selma* (2014) PERB Dec. No. 2380-M, 39 PERC ¶ 11.

scheduling dispute about dates for a factfinding hearing, the City decided that the union was engaging in delay tactics. Although the parties eventually agreed to a hearing date, the City cancelled the factfinding on the basis that the union's dilatory tactics had effectively waived factfinding, unilaterally adopted the LBFO and imposed 12 furlough days.

PERB concluded that the union did not unreasonably delay the process, and even if the union had used dilatory tactics, the City was not entitled to unilaterally cancel the factfinding process. PERB also found that the City's unilateral cancellation of the factfinding hearing constituted a per se violation of the MMBA. Finally, PERB rejected the City's claim that the budget deadline in MMBA section 3505 required action before the City's budget adoption. According to PERB, the City should have participated in the factfinding process and filed an unfair labor practice charge with PERB about the union's delay tactics. PERB ordered the City to restore the status quo ante by rescinding the 12 furlough days, paying retroactive pay with interest for the unilaterally imposed furlough days, and submit the issues at impasse to a factfinding panel.[54]

Last, Best, and Final Offer Requirements

A public employer is not required to implement its LBFO while the parties are at true impasse.[55] Further, an employer is not required to notify the exclusive representative that the employer will not implement the LBFO and to provide the exclusive representative with an opportunity for further negotiation.[56] But if the employer plans to implement an LBFO, the employer's right to unilaterally implement depends on the existence of a bona fide impasse and the employer's good faith bargaining from the beginning of negotiations through exhaustion of the statutory or local impasse procedures.[57] An employer need not implement changes absolutely identical with its LBFO on any given issue, but the unilaterally adopted terms and conditions of employment must be reasonably comprehended within the employer's pre-impasse proposals.[58] PERB will not dissect a package proposal to separately compare each provision of a package to prior proposals.[59]

The State employer under the SEERA/Dills Act may implement "any or all" of the provisions within its LBFO.[60] Any proposal in the State's LBFO that conflicts with existing law or requires the expenditure of funds must be presented to the Legislature for approval.

City Complied with MMBA Public Hearing Requirement before Imposing LBFO.

The MMBA requires a public agency to hold "a public hearing regarding the impasse" before implementing its LBFO at the conclusion of any applicable mediation and factfinding procedures.[61] In *City of Yuba City*, Public Employees Union Local 1, which represented Yuba City's Miscellaneous Unit, alleged that the City violated the MMBA by failing to hold a public hearing about the parties' bargaining impasse before imposing its LBFO. The case presented PERB with its first opportunity to consider the public hearing requirement as a stand-alone violation of the MMBA.[62]

The City Council's May 19, 2015 regular meeting agenda included an invitation to the public to comment on agenda items as they are called. The agenda for the public portion of the meeting listed an item described as "Local 1 Imposition" and included a summary

[54] *Davis City Employees Assn. v. City of Davis* (2012) PERB Dec. No. 2271-M, 37 PERC ¶ 12.
[55] *City of Clovis* (2009) PERB Dec. No. 2074-M, 33 PERC ¶ 179.
[56] *County of Tulare* (2015), PERB Dec. No. 2461-M, 40 PERC 81.
[57] *Temple City Unified School Dist.* (1990) PERB Dec. No. 841, 14 PERC ¶ 21186; *Charter Oak*, *supra*, PERB Dec. No. 873; *Rio School Dist*., *supra*, PERB Dec. No. 1986; *Sonoma County Law Enforcement Assn. v. County of Sonoma* (2010) PERB Dec. No. 2100-M, 34 PERC ¶ 54.
[58] *PERB v. Modesto City Schools Dist., supra*, 136 Cal.App.3d 881; *City of Roseville* (2016) PERB Dec. No. 2505-M, 41 PERC 97; *Modesto City Schools, supra*, PERB Dec. No. 291; *Laguna Salada Union School Dist.* (1995) PERB Dec. No. 1103, 19 PERC ¶ 26095; *Charter Oak, supra,* PERB Dec. No. 873; *CSEA v. Saddleback Valley Unified School Dist.* (2012) No. LA-CE-5467-E, 36 PERC ¶ 173.
[59] *Charter Oak, supra*, PERB Dec. No. 873; *County of Sonoma, supra,* PERB Dec. No. 2100-M.
[60] Gov. Code, § 3517.8.
[61] Gov. Code, § 3505.7.
[62] *City of Yuba City* (2018) PERB Dec. No. 2603-M. 43 PERC ¶ 90.

of the staff recommendation that the Council "adopt a resolution implementing the City's Last, Best, and Final Offer to Public Employees' Union, Local 1 effective June 13, 2015." The staff report attached to the agenda described the parties' bargaining and impasse history, including mediation and factfinding, the terms of the City's LBFO, and the estimated fiscal impact of imposing the LBFO.[63]

When the agenda item was called, the City's Human Resources Director presented the "Local 1 Imposition" item, described the parties' negotiations and impasse proceedings, and summarized the LBFO. The Mayor then stated that he was opening the "public hearing" and invited public comment. A Local 1 representative spoke to the agenda item. The Mayor then closed the public comment period. The Council voted to impose the City's LBFO and directed staff to return to the bargaining table with Local 1 as soon as possible.[64]

In the unfair practice case, Local 1 argued that the City violated the MMBA public hearing requirement because: (1) the agenda item listed "Local 1 Imposition" instead of a public hearing on the impasse, and (2) the agenda item focused on unilateral imposition rather than the disputed issues. Local 1 also argued that the City did not intend to hold a public hearing because the "Local 1 Imposition" agenda item did not appear on the agenda where a City ordinance requires public hearings to be listed on the agenda. Additionally, Local 1 argued that the City violated the Brown Act.[65]

PERB rejected Local 1's arguments that the City did not provide adequate notice of a public hearing under the Brown Act, noting that it has no authority to enforce the Brown Act or the local ordinance regarding City Council agendas. PERB decided, "For purposes of interpreting MMBA section 3505.7, it is enough to conclude – as we do – that the City adequately informed the public that the City Council would be considering imposition of the City's LBFO, and gave an opportunity for public comment." Failing to use the terms "public hearing" or "impasse" on the agenda did not establish a violation of the public hearing requirements.[66]

PERB stated, "At a minimum, the employer must provide adequate notice to the public that it intends to consider imposing terms and conditions of employees, and to allow public comment concerning the proposed imposition." Although concluding that the City met these minimums, in a cautionary note for public agencies to consider in the future, PERB noted, "Even where those minimums are met, the manner in which the public hearing proceeds, statements made by the employer's representatives and governing body during the hearing, and the decision ultimately imposed may be evidence of whether the employer has acted with the requisite good faith during negotiations and impasse procedures."[67]

In this case, PERB dismissed the union's allegations regarding the public hearing requirements.

Unilateral Adoption of a Duration Clause Cannot Waive a Union's Right to Negotiate.

The duration of a collective bargaining agreement is a mandatory subject of bargaining.[68] The duration provision of a contract defines the period of time during which the parties will not be required to negotiate on the specific terms included in the contract.[69] A contract cannot be unilaterally imposed, as a contract by its very nature requires the voluntarily consent of two parties.[70] An employer may not unilaterally adopt an MOU that waives a union's right to bargain.[71] By adopting an LBFO, however, an employer resets the status quo to the next phase of bargaining.

[63] *Id.* at pp. 6-7.
[64] *Id.* at pp. 7-8.
[65] *Id.* at p. 18.
[66] *Id.* at p. 19.
[67] *Id.* at p. 19, fn. 11.
[68] *NLRB v. Yutana Barge Lines, Inc.* (1963) 315 F.2d 524; see also *Rowland Unified School Dist.*, *supra*, PERB Dec. No. 1053.
[69] *Placentia Unified School Dist.* (1986) PERB Dec. No. 595, 10 PERC ¶ 17181; see also, *California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 937-938, 59 Cal.Rptr.2d 488; *State of Cal. Dept. of Personnel Administration (DPA)* (1998) PERB Dec. No. 1296-S, 23 PERC ¶ 30009.
[70] See, for example, Civ. Code, § 1550, which requires as one of four essential elements the consent of a party capable of contracting; see also, Gov. Code, § 3505.4.
[71] Gov. Code, § 3505.4.

PERB has determined that an employer may unilaterally implement a provision defining a multi-year period for which terms and conditions are effective; however, the employer's unilateral definition of the duration cannot bar negotiations during that specified term.[72] Nor does it constitute a waiver of the union's statutory right to bargain.[73] PERB supports a strong public policy against waivers by inference.[74] Any waiver of the statutory right to bargain must be clear and unmistakable.[75] There must be clear evidence of an intentional relinquishment of the union's rights.[76] The employer bears the burden of proving this affirmative defense.[77] Even if the employer specifies a time period for the LBFO, or part of the LBFO, the employer must be available to bargain at any time that the union demonstrates a legitimate "change in circumstances" that revives negotiations.[78]

INTEREST ARBITRATION IMPASSE PROCEDURE

In 2003, the Legislature amended California's public safety binding interest arbitration statute[79] in an effort to comply with the California Supreme Court's decision in *County of Riverside v. Superior Court*.[80] The Court ruled that the statute violated the state Constitution by improperly delegating public agency compensation decisions to a private arbitrator. The 2003 amendments sought to restore the ultimate decision-making authority to the agency by providing that the arbitration award could be overturned by a unanimous decision of a county board of supervisors or city council. This amended statute was also ruled unconstitutional.[81]

A number of local agencies under the MMBA have locally-adopted interest arbitration provisions. If an MMBA agency has adopted a local interest arbitration provision as part of its impasse mechanism, then the local procedure defines the scope of what is subject to arbitration. Nevertheless, a promotion proposal normally subject to bargaining cannot be submitted to interest arbitration if it conflicts with the policies necessary to ensure compliance with anti-discrimination laws.[82]

Local MMBA impasse rules and interest arbitration provisions adopted under the MMBA[83] are subject to PERB's initial exclusive jurisdiction. When a dispute arises over the application or enforcement of a local charter's impasse procedure, PERB, not the local superior court, has initial jurisdiction to enforce the charter's provisions.[84] PERB's broad powers in this area have been curbed by recent legislation that gives the superior courts jurisdiction over the interpretation and application of local interest arbitration provisions for firefighters.[85]

STRIKES AND RELATED ISSUES

Strikes and other union concerted activities are part of traditional labor relations. In the public sector, distinguishing whether a strike is "legal" or "illegal" and whether it is "protected" or "unprotected" is important. These distinctions are important because the courts can enjoin an illegal strike, and employees can be disciplined for engaging in unprotected concerted activities. But not all public employee strikes are unlawful, and

[72] *Rowland Unified School Dist*., *supra*, PERB Dec. No. 1053; see also *California Correctional Peace Officers Assn. v. State of Cal*. (*DPA*), *supra*, PERB Dec. No. 2130-S.
[73] *Roosevelt Memorial Medical Center and Am. Federation of State, County, and Municipal Employees* (AFSCME) (2006) 348 NLRB 1016.
[74] *Long Beach Community College Dist.* (2003) PERB Dec. No. 1568, 28 PERC ¶ 33.
[75] *Amador Valley Joint Union High School Dist.* (1978) PERB Dec. No. 74, 2 PERC ¶ 2192; *Independent Union of Public Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482.
[76] *San Francisco Community College Dist.* (1979) PERB Dec. No. 105, 3 PERC ¶ 10127; *Los Angeles Community College Dist.* (1982) PERB Dec. No. 252, 6 PERC ¶ 13241; *State of Cal. (Dept. of Forestry and Fire Protection)* (1993) PERB Dec. No. 999-S, 17 PERC ¶ 24112; State of Cal. (DPA), *supra*, PERB Dec. No. 1296-S; *California State Employees Assn. v. Public Employment Relations Bd*. (1996) 51 Cal.App.4th 923.
[77] *Long Beach Community College Dist*., *supra*, PERB Dec. No. 1568; *Fullerton Joint Union School Dist*. (2004) PERB Dec. No. 1633, 28 PERC ¶ 155.
[78] See footnotes 18 and 19 above.
[79] SB 440, codified at Code Civ. Proc., § 1299.7(c).
[80] (2003) 30 Cal.4th 278, 132 Cal.Rptr.2d 713.
[81] *County of Sonoma v. Superior Ct.* (2009) 173 Cal.App.4th, 93 Cal.Rptr.3d 39.
[82] *San Francisco Firefighters, Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 42 Cal.Rptr.3d 868.
[83] Gov. Code, § 3509.
[84] *City and County of San Francisco v. Internat. Union of Operating Engineers, Local 39* (2007) 151 Cal.App.4th 938, 60 Cal.Rptr.3d 516.
[85] *Operating Engineers, Local 3 v. City of Santa Rosa* (2012) No. SF-CE-768-M, 36 PERC ¶ 154.

determining which activities are both legal and protected is significant.

The California Supreme Court has given PERB initial exclusive jurisdiction over concerted activities that arguably are unfair labor practices under the EERA.[86] PERB will initially decide whether a strike is unlawful and subject to injunction, or whether a strike resulted from an employer's unfair labor practice and thus is protected. The Supreme Court has also decided that under the MMBA, PERB has initial exclusive jurisdiction over strikes, including strikes that allegedly create a substantial and imminent threat to public health or safety,[87] and PERB has demonstrated its willingness to seek an injunction to prevent public employees who provide critical public services from participating in a strike.[88]

Illegal Strikes

A strike is illegal when the common law or a statute prohibits the strike. Strikes by some employees are illegal, including:

- all strikes by firefighters;[89]
- strikes that create a substantial and imminent threat to public health or safety;[90] and
- at least some strikes by law enforcement employees.[91]

PERB has rejected the contention that *any* strike against a public health institution under the HEERA is unlawful, stating that the HEERA does not prohibit strikes, and that PERB will decide on a case-by-case basis whether a strike against a public health care institution would pose an imminent threat to public health or safety.[92]

[86] *San Diego Teachers Assn. v. Superior Ct*. (1979) 24 Cal.3d 1, 154 Cal.Rptr. 893.
[87] *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 110 Cal.Rptr.3d 718.
[88] *Id.*
[89] Lab. Code, § 1962.
[90] *County Sanitation Dist. v. Los Angeles County Employees Assn*. (1985) 38 Cal.3d 564, 569, 585-586, 214 Cal.Rptr. 424, cert. den. (1985) 474 U.S. 995.
[91] Compare *City of Santa Ana v. Santa Ana Police Benevolent Assn*. (1989) 207 Cal.App.3d 1568, 1571-1573, 255 Cal.Rptr. 688 (strikes by law enforcement personnel are per se illegal), with Code Civ. Proc., § 1299.4(d), as added by SB 402, Stats. 2000, Ch. 906, and *County Sanitation Dist., supra.*
[92] *California Nurses Assn. v. University of Cal. Regents* (2010) PERB Dec. No. 2094-H, 34 PERC ¶ 41.

Union's Exemption of Essential Employees from Strike Can Be Sufficient to Preclude PERB from Seeking Injunction with Regard to Those Positions.

In *San Mateo County*, PERB applied the analysis set forth in *San Mateo County Superior Court* to deny the County's request to enjoin American Federation of State and Municipal County Employee's Local 521's planned strike after the parties reached impasse in negotiations.[93]

The County requested that PERB seek injunctive relief in superior court to enjoin 40 employees that the County claimed were essential from participating in a two-day strike called by Local 521. Local 521 agreed to exempt 32 of the employees.[94] Thus, Local 521 refused to exempt only eight health benefits analysts from the strike. PERB denied the County's request that PERB seek to enjoin these 40 positions in light of Local 521's exemption of 32 of the 40, and because it concluded that the absence of the eight remaining benefit analysts for the two-day strike would not imminently and substantially threaten the public health or safety.

PERB found the following questions relevant in its analysis:

- Was the position staffed 24 hours a day seven days a week?

A position that is staffed 24/7 is more likely to be found essential to the public health or safety than one that is not. For instance, PERB found Communication Dispatchers in the Public Safety Communications Department essential because they handled 9-1-1 calls and dispatched emergency services 24 hours a day and seven days a week. The County scheduled no fewer than 21 employees in these classifications per

[93] *County of San Mateo* (2019) PERB Dec. No IR-61-M.
[94] Local 521 previously planned a strike during the underlying negotiations, but called it off and returned to the bargaining table. The County reached agreement with Local 521 with respect to all units except HSU. This unit subsequently called a strike. The County asked PERB to enjoin 40 employees from striking—26 of whom PERB had previously found essential and determined it would seek an injunction for had Local 521 initially struck. Local 521 elected to exempt those 26 employees PERB previously found essential plus six of the 14 benefits analysts the County requested PERB seek to enjoin.

shift, and there were no available replacement options for these classifications. Thus, PERB found that all 21 dispatchers were essential and needed to report for their shift. Had Local 521 not exempted these employees from striking, PERB would have sought injunctive relief in superior court for these 21 employees.

Likewise, PERB found that Juvenile Shelter Care Counselors and Group Home Administrators were essential because these positions were staffed 24 hours a day, seven days a week, and that there were mandated staffing levels for the positions. Local 521 exempted these employees as well.

In contrast, PERB concluded that school-based Mental Health Program Specialists were not essential for the two-day strike, in part, because the service these employees provide were not provided every day, undercutting the idea that these employees absence for a two day strike was essential to the school children's health or safety.

- How did the County staff this position on weekends and holidays?

Similarly, PERB noted that it will look to how the employer staffs the position on holidays and weekends. If the employer does not employ the alleged essential employees on holidays and weekends, it undercuts the argument the position is essential, particularly for the two day strike at issue here. But even if the position is essential, the employer's staffing levels on weekends and holidays suggests a minimum staffing level.

Here, PERB declared just two cooks "essential" to staff Sheriff's Office and Probation Department for the strike because PERB only employed two cooks over the weekend and holidays — shorter than a typical holiday weekend in which the County needed only two cooks.[95] PERB failed to show why the strike required greater staffing.

- To what extent could the work be performed in advance of the strike or be performed by supervisors, managers, other non-bargaining unit positions, contractors, or strike replacements?

PERB refused to require two utility workers from working during the strike, in part, because the County failed to demonstrate the extent to which the utility workers' work could be performed in advance of the strike or be covered by supervisors, managers, or other non-bargaining-unit employees.

Likewise, PERB declined to enjoin four Psychiatric Social Worker/Marriage Family Therapists at the County's Access Call Center, despite finding the position essential because the County failed to demonstrate clear and sufficient evidence that the County could not use the contractors it employs during certain weekend hours to cover the two day strike.

- What is the minimum staffing necessary to secure the public health or safety?

Even where PERB determines a position essential, PERB will enjoin a sufficient number of employees only to ensure that there is no imminent and substantial threat to the public health or safety. Thus, PERB may seek to enjoin a lesser number of employees than the employer seeks. Here, the County requested that one Hazmat Emergency Response Team Leader be enjoined from striking to ensure there was a leader to respond if there is a hazardous materials spill or other similar emergency. PERB found that the position "essential" and noted that the position was not replaceable by managers/supervisors. However PERB also noted that the normal weekend staffing for the position is one on-call employee. Consequently, PERB concluded that the public health or safety required only one employee to be on-call for the strike, consistent with the County's weekend staffing. PERB noted that the County failed to demonstrate it needed additional staffing to prevent a substantial and imminent threat to the public health or safety.

- Are there local or national strike replacement registries that provide qualified strike replacements, and has the employer attempted to use the registries to meet staffing needs the strike prior to requesting injunctive relief?

[95] This applies even at institutions like acute care hospitals and involves essential positions. Staffing levels for weekends and holidays for essential positions should be adequate for a strike similar in length to a weekend or holiday absent evidence to the contrary.

PERB will consider these registries relevant in determining whether PERB should grant an employer's request that certain positions be enjoined to the extent the registries can provide coverage for any striking essential employees. This is true even though the use of such registries might result in the public employer incurring substantial additional costs. Here, the County argued that the use of striker replacements in its acute care facilities could cost in excess of $1 million per day. PERB rejected the County's refusal to consider the use of a registry, noting that the very purpose of the economic strike is to break any impasse in bargaining by imposing economic costs on the employer to pressure it to meet the union's demands.

PERB noted that a public employer must first seek to adequately staff for the strike with either its non-bargaining unit employees or through the use of strike replacement companies, and only where that is insufficient request that PERB seek to enjoin certain positions or employees from striking. Thus, an employer seeking injunctive relief must provide PERB with its specific request to local and national registries that are capable of providing replacement employees, as well as the responses from any companies on those registries. The failure to show that these companies cannot provide strike replacements, either in whole or in part for the strike, will undercut any employer request for injunctive relief.

Strikes During Impasse Procedures

A strike's timing and nature are important factors in determining whether a strike is unprotected. Under PERB decisions, a strike is unprotected and constitutes an unfair labor practice if the strike occurs during the negotiations process, which includes exhaustion of impasse procedures.[96] As explained in Chapter 2, Duty to Bargain, and earlier in this Chapter, the obligation to negotiate in good faith continues until all applicable impasse procedures are exhausted. A strike before the impasse procedures are exhausted violates this good faith bargaining duty.

Under PERB's analysis, a strike during negotiations creates a "rebuttable presumption" of bad faith. Even threatening or preparing to strike while negotiations are ongoing may constitute bad faith if these actions have a tendency to coerce or intimidate management in its exercise of its bargaining rights[97] or were intended to pressure the employer to make economic concessions during bargaining.[98] A union can avoid a finding of bad faith bargaining if it shows that the strike occurred because of the employer's unfair labor practices.[99]

Post-Impasse Strikes

Strikes after impasse procedures are exhausted do not present the same threat to an employer's right to bargain. For example, a union did not commit an unfair labor practice by striking for three days after a school district implemented its LBFO at the conclusion of impasse procedures.[100] In that case, PERB reasoned that the strike did not present an imminent threat to public health or safety because the strike did not hamper the school district's ability to provide basic education. The district was able to notify parents about the strike and to recruit substitute teachers.

Surprise Strikes

Surprise strikes occur without prior notice to the employer. PERB deems surprise strikes both unprotected and unlawful. For example, surprise strikes deprive an educational employer of the ability to notify parents about a pending walkout and to hire substitutes. Surprise strikes violate the public's interest in ensuring minimal disruption of services, and PERB will, at an employer's request, seek an injunction to prevent surprise strikes.[101]

Intermittent Strikes

PERB deems intermittent strikes both illegal and unprotected. Intermittent strikes

[96] *Fresno Unified School Dist.* (1982) PERB Dec. No. 208, 6 PERC ¶ 13110.

[97] *South Bay Union School Dist.* (1990) PERB Dec. No. 815, 14 PERC ¶ 21118.

[98] *California Nurses Assn., supra*, PERB Dec. No. 2094-H.

[99] *Sacramento City Unified School Dist.* (1987) PERB Order No. IR-49, 11 PERC ¶ 18053.

[100] *Vallejo City Unified School Dist.* (1993) PERB Dec. No. 1015, 17 PERC ¶ 24166. See also *County of Trinity* (2016) PERB Dec. No. 2480-M, 40 PERC ¶ 171.

[101] *San Ramon Valley Unified School Dist.* (1984) PERB Order No. IR-46, 8 PERC ¶ 15187.

constitute an unlawful pressure tactic because employees participating in intermittent strikes have the unfair advantage of determining when they will and will not work, and they do not experience the same loss of income that presumably discourages longer, ordinary strikes. Employers experiencing intermittent strikes cannot recruit regular substitutes or ensure continuity of public services. PERB finds intermittent strikes to be unfair labor practices even when they occur post-impasse.[102]

Wildcat Strikes

Wildcat strikes are ad hoc labor actions that the employee organization does not sanction. Under federal law, wildcat strikes are both illegal and unprotected.[103] Although PERB has not considered the legality of wildcat strikes, PERB will likely find them both illegal and unprotected.

Sympathy Strikes

Sympathy strikes are concerted actions in which employees in one bargaining unit honor the picket lines from another bargaining unit engaged in a primary strike. PERB has ruled that sympathy strikes are protected by the MMBA and cannot be prohibited by a City Charter.[104] California statutory law prohibits sympathy strikes by on-duty firefighters.[105] Any other limitation on sympathy strikes would be contained in individual collective agreements. But even then, employees have a right to engage in sympathy strikes unless the collective bargaining agreement clearly and unmistakably waives that right.[106] In most instances, the collective bargaining agreement/MOU language must refer specifically to sympathy strike activities. At the very least, negotiations history must clearly demonstrate that the language covers work stoppages that honor primary strikes.[107] PERB will not infer that a general no-strike clause includes sympathy strikes, because any waiver of a right guaranteed by the MMBA must be clear and unequivocal.[108]

Strike Vote and Strike Preparation

During negotiations and impasse, a union may lawfully engage in strike authorization votes, preparation for a post-impasse strike, and public announcement of a potential strike. Likewise, during the impasse process, an employer may lawfully prepare for a potential strike, including discussion of those preparations in the public. However, if a union is engaged in voting and preparing for a strike before exhausting the impasse procedures, the public employer still can seek injunctive relief through PERB if the employer has clear evidence that the union is not fully engaged in a good faith attempt to reach agreement through the impasse process.[109] And, engaging in actual work stoppages before the exhaustion of impasse procedures is unlawful.

Remedies for Unlawful Strikes

In the wake of a 2010 PERB decision concluding that the California Nurses Association was responsible for monetary damages directly resulting from the union's unlawful pre-impasse strike threat against the University of California,[110] legislation was enacted to specify that PERB has no authority to award strike-preparation expenses as damages, or to award damages for costs, expenses, or revenue losses incurred as the result of an unlawful strike. The courts, however, may award damages for unlawful conduct during a strike.[111]

OTHER CONCERTED ACTIVITIES

PERB and the federal courts have determined that the following concerted activities are unprotected on the grounds that employees

[102] *Fremont Unified School Dist.* (1990) PERB Order No. IR-54, 14 PERC ¶ 21107.
[103] *Confectionery & Tobacco Drivers v. NLRB* (2d Cir. 1963) 312 F.2d 108, 112; *National Labor Relations Bd. v. Draper Corp*. (4th Cir. 1944) 145 F.2d, 199, 202.
[104] *City & County of San Francisco* (2017) PERB Dec. No. 2536-M, 42 PERC 14.
[105] Lab. Code, § 1963.
[106] *Children's Hospital Medical Center of Northern Cal. v. Cal. Nurses Assn*. (9th Cir. 2002) 283 F.3d 1188.
[107] *University of Cal.* (2004) PERB Dec. No. 1638-H, 28 PERC ¶ 162.
[108] *City & County of San Francisco, supra,* PERB Dec. No. 2536-M*; Oxnard Harbor Dist.* (2004) PERB Dec. No. 1580-M, 28 PERC ¶ 56.
[109] *Sweetwater High School Dist. v. Sweetwater Education Assn*., CTA/NEA (2014) PERB Dec. No. IR-58, 39 PERC ¶ 31.
[110] See *California Nurses Assn*., *supra*, PERB Dec. No. 2094-H.
[111] Gov. Code, §§ 3509, 3514.5, 3541.3, 3563.3, 71639.1, 71825, and Pub. Util. Code, § 99561.

who accept full pay should provide full service:[112]

- *Slowdowns.* Employees do not perform all of their duties, but collect full pay.
- *Partial strikes.* Partial strikes are similar to slowdowns. Employees may decline to perform certain services or, if the partial strike is a sympathy strike, they may refuse to perform work related to the striking bargaining unit.
- *Sit-ins.* Employees "seize" the employer's property or premises, preventing the employer from using substitute workers to provide services.
- *Work-to-rule.* Work-to-rule is essentially a public sector concept similar to a partial strike or slowdown. Employees who "work to rule" perform only the minimum work required. Employees may lawfully refuse to perform truly voluntary work (e.g., voluntary extra assignments), but they have no right to refuse to perform "discretionary" job duties as part of a concerted activity rather than as an exercise of their professional discretion. PERB will determine whether an activity is truly voluntary on a case-by-case basis.[113]

On the other hand, peaceful informational picketing is both legal and protected,[114] provided picketing employees are not on duty or, if required by the employer to be present at the picketing location, have no particular duties to perform.[115] Application of the general rule that employees have a right to peacefully protest on non-work time and in non-work locations can become complicated in contemporary work sites. For example, an office building has non-work areas such as lunch rooms and break areas, but many employees take breaks within their immediate office space. In this instance, PERB will allow peaceful protests in the office area while employees are on breaks only if the activities are not interconnected with working employees and the activities do not interfere with the office's work flow.[116] Although the MMBA does not contain a specific prohibition against public employees' "secondary boycotts" at neutral work sites, and PERB will protect employees' non-disruptive picketing, on a case-by-case basis PERB may conclude that picketing neutral, private sector work sites, unrelated to the public employer, is unlawful.[117]

Also, an employer unlawfully interferes with employee rights by unilaterally adopting a policy stating that it would take action against employees engaged in "any strike, walk-out, slowdown, or other such strike-related type activities."[118]

Finally, PERB will not enforce a general no-strike clause against non-disruptive picketing unless the union has "clearly and unmistakably" agreed to such a prohibition.[119]

New Developments 2021

PERB CASES

PERB Constricts an Agency's Ability to Change Overtime Policy without Negotiating with Bargaining Unit by Narrow Interpretation of the term "Equal"

In *County of Merced,*[120] PERB ruled that Merced County's unilateral change to overtime policy amounted to an unfair labor practice.[121] PERB pointed out that the parties were not at impasse when the policy change was made and the employer's attempt to implement the new policy without negotiating "unlawfully undermined subsequent reopener negotiations by unilaterally implementing [the policy]."[122]

Relying on the longstanding precedent that an employer may lawfully take unilateral

[112] *Palos Verdes Peninsula Unified School Dist*. (1982) PERB Dec. No. 195, 6 PERC ¶ 13061.
[113] *Ibid.*
[114] *Pittsburg Unified School Dist. v. California School Employees Assn.* (1985) 166 Cal.App.3d 875, 892-893, 213 Cal.Rptr. 34.
[115] *Mt. San Antonio Community College Dist., supra*, PERB Order No. Ad-124.
[116] *State of Cal. (Employment Development)* (2001) PERB Dec. No. 1365a-S, 25 PERC ¶ 32057.
[117] *City of San Jose v. Association of Building, Mechanical, and Electrical Inspectors* (2010) PERB Dec. No. 2141-M, 34 PERC ¶ 167.
[118] *Santee Elementary School Dist.* (2006) PERB Dec. No. 1822, 30 PERC ¶ 72.
[119] *University of Cal., supra*, PERB Dec. No. 1638-H.
[120] *County of Merced* (2020) PERB Dec. No. 2740-M, 45 PERC 29.
[121] *Ibid.*
[122] *Ibid.*

action on a matter within the scope of representation if it can establish as an affirmative defense that an MOU clearly and unambiguously shows the union waived its right to negotiate over changes to the employment term, the County argued that the following language in the MOU was clear and unambiguous: "Overtime shall be assigned on an equal basis."[123] To support its position, the County presented a dictionary definition of the term "equal," but PERB noted that the term "equal" has several meanings including "same" and "impartial."[124]

PERB ultimately sided with the union in finding that the overtime policy change altered a policy that was ambiguous in the MOU, and that the policy change occurred through alteration of past practice and existing policy as well as creation of new policy. As such, the County was required to reopen negotiations regarding the new overtime policy.

PERB Finds that Request for Factfinding One Day After Impasse was Proper Under the Brown Act Even Though the Request Did not Follow Local Rules.

In *County of Santa Clara,*[125] the union and the County were negotiating a successor agreement for their expired MOU.[126] After four months of negotiations without agreement, the union sent a declaration of impasse to the County and filed a factfinding request with PERB the next day.[127] The PERB Office of General Counsel ("OGC") approved the request, and the County appealed the approval to PERB alleging that the union was required to follow the County's local rules requiring mediation before requesting factfinding.[128]

PERB upheld the OGC grant of factfinding request ruling that under Government Code section 3505.4 and PERB Regulation 32802, the OGC was entitled to find the factfinding request timely where the request was made one day following impasse notwithstanding the County's local rules[129]

IMPACT OF NEW DEVELOPMENTS

- Implementing policy revisions that impact MOU provisions that may be subject to more than one interpretation are subject to reopening negotiations. PERB holds a high bar for determining that a provision is actually "clear and unambiguous."
- Agencies should be aware that once a declaration of impasse is filed, a Union is entitled to factfinding if the union files a factfinding request in timely fashion regardless of the agency's local rules.

[123] *Ibid.*
[124] *Ibid.*
[125] *County of Santa Clara and Santa Clara-San Benito Counties Building and Construction Trades Council* (2020) PERB Dec. A483M, 45 PERC 69.
[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid.*
[129] *Ibid.*

Recognition and Unit Determination

SUMMARY OF THE LAW

EERA, HEERA, AND SEERA

PERB controls the recognition and unit determination processes for employees covered by the EERA, SEERA, and HEERA. PERB also has limited jurisdiction over recognition and unit determination for employees covered by the MMBA, the Trial Court Act, the Court Interpreter Act, and TEERA.[1]

The EERA, HEERA, and SEERA all require employees to be grouped in appropriate units for purposes of representation in collective bargaining,[2] and each statute contains specific unit determination criteria.[3]

Each statute establishes the principle of granting exclusive representation on matters of employment relations by a single employee organization chosen by a majority of the employees voting in the appropriate bargaining unit.[4] Employers must maintain strict neutrality regarding employees' choices of representation.[5] PERB may stay an election in a decertification or representation matter in response to allegations of unfair practices that would so affect an election process that it prevents employees from exercising free choice in the election.[6] After PERB recognizes or certifies a union, only that employee organization can represent employees on matters of employment relations as specified in the respective statute.

The processes for recognition and unit determination under PERB are complex, rule driven, and formally controlled. The outcome in many cases depends on the specific issues presented to PERB. We will not attempt to detail either the statutory scheme or the PERB rules in this chapter. For more information on recognition or unit determination law, please refer to *California Public Sector Labor Relations*, Representation and Recognition.[7]

MMBA

Unit determination and recognition of unions under the MMBA is less formal, less uniform, and less rule-driven than under the EERA, SEERA, and HEERA. Under the MMBA, the power to establish appropriate units and to grant recognition is vested in most part with the local agency and the respective employee organizations. But, the MMBA gives PERB power, as appropriate, to:

- determine, in disputed cases, appropriate bargaining units;[8]
- arrange and supervise representation elections;[9]
- determine contested matters regarding recognition, certification, and decertification of employee organizations;[10] and

[1] Gov. Code, §§ 3509 (MMBA), 71639.1 (Trial Court Act), 71825 (Court Interpreter Act), and 99561 (TEERA).
[2] Gov. Code, §§ 3512 (SEERA), 3540 (EERA), 3562(p) (HEERA).
[3] Gov. Code, §§ 3521 (SEERA), 3545 (EERA), 3579 (HEERA).
[4] Gov. Code, §§ 3513(b) (SEERA), 3540.1(e), (1) (EERA), and 3560(e), 3562(c), (j) (HEERA); see *County of Imperial* (2007) PERB Dec. No. 1916-M, 31 PERC 120 finding local rule violated MMBA by requiring vote by majority of employees in the unit rather than a majority of votes cast.
[5] *Long Beach Community College Dist.* (1998) PERB Dec. No. 1278, 22 PERC ¶ 29147.
[6] *Children of Promise Preparatory Academy* (2015) PERB Order No. Ad-428, 40 PERC 23.
[7] Zerger, Kay, et al., *California Public Sector Labor Relations* (Release No. 27-6/2016) Chapters 5, 6, 7, and 15.
[8] Gov. Code, §§ 3509, 3541.3(a).
[9] Gov. Code, §§ 3509, 3541.3(c).
[10] Gov. Code, §§ 3509, 3541.3(l).

- establish regulations for review of proposed changes to unit determinations.[11]

But PERB's authority regarding matters of recognition and unit determination is somewhat limited under the MMBA. PERB's authority to conduct representation proceedings under the MMBA applies only when a public agency has not adopted local rules governing the issue.[12] PERB must enforce and apply local rules and regulations.[13] PERB also must interpret the MMBA "consistent with and in accordance with" existing judicial interpretations of MMBA law.[14] The MMBA "grandfathers" bargaining units in existence on July 1, 2001, unless those units are changed in accordance with local rules.[15]

Under the MMBA, any party may use PERB's unfair practice proceedings to challenge a local agency decision regarding unit determination, representation, recognition, or election by alleging that the decision fails to comply with local rules,[16] or interferes with employee or employee organization rights.[17] The validity of local rules may also be filed as unfair practice charges alleging violations of the MMBA.[18] For example, contractual bars to decertification and strict employer neutrality must meet PERB's definition of MMBA standards.[19] But, because the MMBA grants authority to local agencies to determine appropriate bargaining units pursuant to adopted local rules, PERB's remedial authority is limited. When PERB finds that a local agency decision or local rule on unit determination violates the MMBA, PERB refrains from ordering a specific unit modification. Instead, PERB will remand the case to the local agency with directions to apply applicable local rules in a manner consistent with the MMBA in making the unit determination decision.[20]

In the absence of local rules on a topic, PERB regulations govern a wide range of issues involving certification, recognition, decertification, severance petitions, unit modifications, and elections.[21,22]

RECOGNITION UNDER LOCAL MMBA RULES

Recognition

The MMBA permits a public agency to formally recognize an employee organization as the agency employees' representative.[23] If an employee organization exclusively represents all employees in a particular unit, then the public agency must negotiate only with that organization about representation matters, wages, hours, and employment terms and conditions.

The MMBA provides little guidance about employees selecting an exclusive representative, or about an employer recognizing employee organizations.[24]

[11] Gov. Code, §§ 3509, 3541.3(e).
[12] *County of Siskiyou/Siskiyou County Superior Ct.* (2010) PERB Dec. No. 2113-M, 34 PERC 95.
[13] Gov. Code, §§ 3507.1(a), 3509(c).
[14] Gov. Code, § 3510(a).
[15] Gov. Code, § 3507.1(b).
[16] Cal. Code Regs., tit. 8, §§ 32602, 32603; see e.g., *County of Yolo* (2013) PERB Dec. No. 2316-M, 37 PERC 208, request for reconsideration denied (Jun. 28, 2013) PERB Dec. No. 2316a-M, 38 PERC 18 [County must follow local rules requiring unit modifications to be initiated by filing of petition, and could not modify unit if not requested by anyone]; *Turlock Irrigation Dist.* (2007) PERB Dec. No. 1896-M, 31 PERC 80.
[17] Cal. Code Regs., tit. 8, § 32603(a); *SEIU-United Healthcare Workers West* (2012) PERB Dec. No. 2249-M, 36 PERC 155, reconsideration denied, PERB Dec. No. 2249a-M, 37 PERC 38 (July 16, 2012).
[18] Cal. Code Regs., tit. 8, § 32603(f).
[19] *City of Carson (AFSCME)* (2003) PERB Dec. No. Ad-327-M, 27 PERC ¶ 88. See also examples in *County of Monterey (SEIU, Local 817)* (2003) PERB Order No. SF-CE-41, 27 PERC ¶ 59; *Antelope Valley Health Care Dist.* (2002) PERB Order No. LA-CE-64-M, 26 PERC ¶ 33128; *County of Sacramento* (2002) PERB Order No. SA-CE-31-M, 27 PERC ¶ 9.
[20] *Orange County Medical & Dental Assn. v. County of Orange* (2016) PERB Dec. No. 2478-M, 40 PERC 163; *see also County of Riverside* (2012) PERB Dec. No. 2280-M, 37 PERC 51; *County of Riverside* (2011) PERB Dec. No. 2163-M, 35 PERC 42; *County of Ventura* (2009) PERB Dec. No. 2067-M, 33 PERC 166.
[21] Cal. Code Regs., tit. 8, §§ 61000 et seq.
[22] In 2021, PERB published updated regulations for each of the statutes under its jurisdiction. These revised regulations implement procedures to allow for the electronic filing and service of case-related documents and to allow for the electronic signature of union authorization cards.
[23] Gov. Code, § 3501(b).
[24] An exception to the MMBA's general rules of recognition: In any transfer of functions from county employees to superior, municipal, or justice court employees occurring on or after January 1, 1992, the court must continue to recognize the employee organization that represented the employees performing those functions at the time the duties are transferred. Gov. Code, § 3501.6(a). The court is also bound by the terms of any memorandum of understanding in effect on the date the functions are transferred, either for the agreement's duration or until the agreement is replaced by a subsequent memorandum of understanding.

Instead, the MMBA delegates to public agencies the authority to adopt rules and regulations regarding employer-employee relations after the agency consults in good faith with employee organization representatives.[25] Rules and regulations may encompass, among other things, methods for verifying that employee organizations do, in fact, represent their employees, and for exclusively recognizing organizations.[26]

Regardless of any local rules, the MMBA requires local agencies to grant "card check" recognition when an employee organization submits signed petition or verification cards demonstrating that a majority of employees in an appropriate bargaining unit desire to be represented.[27]

A public agency may not unreasonably refuse to recognize employee organizations.[28] For example, an agency cannot refuse recognition to a union that obtained the signatures of a majority of the employees based on a decision to deduct cards marked "no union" from the total expressing support for union recognition under a "card check" recognition procedure. Such a deduction is a violation of MMBA section 3507.1(c), which provides that a public agency "*shall* grant exclusive or majority recognition to an employee organization based on … authorization cards … showing that a majority of the employees … desire the representation" (emphasis added).[29] Similarly, an MMBA agency may not refuse card check recognition based on an asserted reasonable doubt that the employee organization has majority support because of attempts to revoke signed authorization cards. Unlike HEERA, the MMBA does not provide a revocation of authorization procedure, and revocation is allowed only under limited circumstances, or when the parties have agreed on a revocation process.[30]

Employees of a private entity may be entitled to organize, select an exclusive representative, and negotiate with a local agency under the MMBA when the public agency is a "joint employer" of the private company employees. To be a joint employer, the public agency must exert significant control over the employees and co-determine the essential terms and conditions of employment.[31]

Adopting Local Rules

The MMBA permits, but does not require, a public agency to adopt rules and regulations governing employee organization recognition.[32] Adopted rules and regulations must be reasonable and consistent with the MMBA. For example, a city cannot establish rules that revoke an employee organization's recognition if the organization encourages or condones a strike. Such rules would be inconsistent with the employees' statutory right to participate in organizations of their own choosing and the MMBA's aim to further good employer-employee relations.[33] Likewise, a rule requiring 50% of a unit's members' signatures to decertify a union was unreasonable, even though both the union and management agreed to the rule.[34]

In determining the reasonableness of local rules, PERB's inquiry is not whether a different rule would be more reasonable, but simply whether the rule is consistent with the purposes of the MMBA.[35] For example, PERB upheld a local rule requiring a 50% showing of support for a severance petition even though PERB's own severance regulations require only a 30% showing.[36]

Public agencies must consult with employee organizations' representatives in good faith before adopting rules and regulations governing employee organization

[25] See Gov. Code, § 3507.
[26] *Ibid.*
[27] Gov. Code, § 3507.1(c).
[28] *Ibid.*
[29] *Antelope Valley Health Care Dist.* (2006) PERB Dec. No. 1816-M, 30 PERC 60.
[30] *Morongo Basin Transit Authority* (2015) PERB Order No. Ad-430-M, 40 PERC 97; *Antelope Valley Health Care Dist.* (2006) PERB Dec. No. 1816-M, 130 PERC 60. See Cal. Code Regs, tit. 5, § 61020(f) regarding challenging proof of support on grounds of fraud or coercion.
[31] *County of Ventura*, *supra,* PERB Dec. No. 2067-M.
[32] *Ibid.*
[33] *International Brotherhood of Electrical Workers, Local Union 1245 v. City of Gridley* (1983) 34 Cal.3d 191.
[34] *Service Employees Int'l Union v. Superior Ct.* (2001) 89 Cal.App.4th 1390.
[35] *County of Orange* (2012) PERB Dec. No. 2294-M, 37 PERC 123; see also *San Bernardino County Superior Ct.* (2014) PERB Dec. No. 2392-C, 39 PERC 52 applying this principle to the Trial Courts Act.
[36] *County of Orange* (2010) PERB Dec. No. 2138-M, 34 PERC 156.

recognition.[37] An employer must consult not only with recognized employee organizations, but also with any interested organization. After adopting rules and regulations, an employer is not required to consult with an organization before applying the rules. The meet-and-consult requirement is very much like the duty to meet and confer; the only distinction between these two duties is that the scope of consultation is limited to the nine items specifically listed in Government Code section 3507.

PERB has summarized the duty to consult before adopting local rules as requiring a public agency to: (1) provide reasonable written notice to each employee organization affected by the rule or regulation proposed for adoption or modification by the agency; and (2) afford each such organization a reasonable opportunity to meet and discuss the rule or regulation prior to the agency's adoption.[38] The meet-and-consult process requires public agencies and employee organizations to "(1) meet-and-confer regarding consultation subjects promptly upon the request by either party; (2) continue meeting and conferring for a reasonable period of time in order to exchange freely information, opinions and proposals; and (3) endeavor to reach agreement."[39]

Exclusive Versus Nonexclusive Recognition

An employee organization exclusively represents all employees in a particular bargaining unit when: (1) a public agency adopts rules and regulations providing for exclusive recognition; and (2) employees vote for that organization as the exclusive representative.[40]

Nonexclusive recognition occurs when an employer does not adopt any rules or regulations, and must recognize all employee organizations representing at least some of its employees. Consequently, the employer must then meet and confer with each organization about wages, hours, and employment terms and conditions. The employer must also meet and consult with each organization about representation matters. Non-exclusive representatives have standing to file charges alleging violations of individual rights.[41]

Revocation of Recognition

Employees in a recognized unit may revoke exclusive recognition by a majority vote after a period of not less than 12 months following the recognition date.[42] An employer may not revoke recognition if revocation interferes with the MMBA's policies and purposes. But language in some court decisions suggests that an employer may revoke recognition when a majority of bargaining unit employees no longer supports the employee organization.[43]

UNIT DETERMINATION AND MODIFICATION UNDER LOCAL MMBA RULES

The MMBA permits an employer to initially determine whether a bargaining unit is appropriate.[44] The determination need not be based upon a formal agency rule or regulation, but it must be reasonable. The employer need not determine the ultimate or most appropriate unit, only an appropriate unit.

Public employers must meet and consult with recognized employee organizations before adopting and revising regulations governing unit determinations.[45] And, as discussed above, local rules must be reasonable. For example, a rule requiring a severance petition to include a showing of interest of 15% of the original bargaining units is not reasonable because the requirement would make it virtually impossible to succeed since employees who would remain in the original unit after severance have no interest in the petition.[46] PERB has found reasonable a local rule that gives the County Board of Supervisors the

[37] Gov. Code, § 3507.
[38] *City of Palo Alto* (2014) PERB Dec. No. 2388-M, 39 PERC 25.
[39] *Ibid.*
[40] Gov. Code, § 3507.
[41] *Los Angeles Unified School Dist.* (2020) PERB Dec. No. Ad-478, 44 PERC 163.
[42] Gov. Code, § 3507(b).
[43] *International Brotherhood of Electrical Workers, Local Union 1245 v. City of Gridley* (1983)*, supra.*
[44] Gov. Code, § 3507.
[45] *Ibid.*; *City of Palo Alto, supra,* PERB Dec. No. 2388-M; *County of Riverside*, *supra,* PERB Dec. No. 2280-M.
[46] *County of Riverside* (2012) PERB Dec. No. 2239-M, 36 PERC 126.

final decision-making authority in representation matters.[47]

Once the local rules are adopted, an employer is not required to meet and consult when determining whether a proposed bargaining unit is appropriate under those rules.[48] Employee organizations must comply with procedural requirements of local rules (e.g., time limits) in processing unit modification requests.[49] Unlike rules governing union recognition, local unit modification rules under the MMBA need not require a proof of support.[50] PERB consistently has explained that although employees have the right to choose which employee organization they want to represent them, they have no right to choose the bargaining unit in which their positions are placed.[51]

If a unit determination is attacked as unreasonable, the burden of proof is on the attacking party. A unit determination is presumed reasonable absent contrary proof. A union can initiate PERB's review of a local employer's unit determination decisions by filing an unfair practice charge.[52]

Standards for determining an appropriate unit often include the following traditional criteria:

- community of interest among employees;
- representation history;
- general field of work;
- employees' desires; and
- existence of actual or potential conflicts of interests among employee groups.[53]

When a representation dispute concerns an appropriate unit for an employer established by a federal statute, PERB must apply relevant federal law as required under PERB Regulation 93080.[54]

In the absence of local rules governing representation and unit determination, PERB's rules apply to "fill in the gaps."[55] Similarly, when a local rule violates the MMBA, PERB rules (even contract bar rules) will be used to fill in the gaps established by the invalidation of the local rule.[56] But PERB has no authority to conduct representation proceedings under the MMBA unless the local agency has no rules covering the topic.[57] Similarly, PERB has ruled that in the absence of an explicit local rule covering a matter, when another local rule can be applied without undue burden (e.g., unit modification rule applied to severance petition), PERB has no jurisdiction to apply its rule on the issue.[58]

Unit modification procedures may not be used to challenge an alleged unlawful transfer of bargaining unit work outside the unit. Such a claim must be addressed as an unfair practice charge. PERB also has concluded that unit modification procedures cannot be used to decertify the union representing a portion of the bargaining unit when the procedure lacks a proof of support requirement.[59]

Unlike the NLRA, the MMBA does not contain a contract bar provision. As a result, PERB decided local agency unit modification rules that do not incorporate a contract bar provision do not violate the MMBA.[60] A court had reached the same conclusion before

[47] *County of Orange*, *supra,* PERB Dec. No. 2138-M.
[48] *Turlock Irrigation Dist.*, *supra,* PERB Dec. No. 1896-M, 31 PERC 80.
[49] *County of Orange, supra*, PERB Dec. No. 2294-M.
[50] *City of Livermore* (2017) PERB Dec. No. 2525-M, 41 PERC 173.
[51] *County of Riverside, supra*, PERB Dec. No. 2280-M.
[52] *Turlock Irrigation Dist., supra,* PERB Dec. No. 1896-M.
[53] See e.g., *State of Cal. and IT Bargaining Unit 22, and Service Employees Int'l Union, Local 1000,* (2011) PERB Dec. No. 2178-S, 35 PERC 81.
[54] See Cal. Code Regs., tit. 8, § 93080, stating that "[i]n resolving questions of representation, [PERB] shall apply the relevant federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended"; *see also, San Diego Metropolitan Transit System* (2019) PERB Dec. No. 2667-P, 44 PERC 60.
[55] Gov. Code, § 3509(a); Cal. Code Regs., tit. 8, §§ 61000, 61450-61480; *City of Vallejo and Public Employees Union, Local One and Int'l Brotherhood of Electrical Workers Local 2376* (2013) PERB Dec. No. Ad-399-M, 37 PERC 205 [applying PERB regulations when City had no rules governing severance]; *County of Siskiyou/Siskiyou County Superior Ct., supra,* PERB Dec. No. 2113-M.
[56] *County of Amador* (2013) PERB Dec. No. 2318-M, 38 PERC 23.
[57] *City of Parlier* (2015) PERB Order No. Ad-421-M, 40 PERC 16; See Gov. Code, §§ 3507, 3507.1, and 3509; PERB Reg. 61000, and *County of Siskiyou/Siskiyou County Superior Ct., supra,* PERB Dec. No. 2113-M.
[58] *County of Orange*, *supra,* PERB Dec. No. 2138-M, 34 PERC 156; *City of Inglewood, Inglewood Police Civilians Assn., and Service Employees Int'l Union, Local 721* (2011) PERB Order No. Ad-390-M, 36 PERC 53, distinguishing *County of Siskiyou/Siskiyou County Superior Ct., supra,* PERB Dec. No. 2113-M.
[59] *San Francisco Housing Authority* (2015) PERB Order No. Ad-420-M, 39 PERC 150.
[60] *City of San Rafael* (2004) PERB Dec. No. 1698-M, 28 PERC 267.

jurisdiction shifted to PERB.[61] PERB has upheld application of a "window period" allowing the filing of decertification petitions within 240 and 210 days before the expiration of an MOU even when the MOU had an automatic one-year continuation provision. In a case decided under the Trial Courts Act, PERB found that as long as the MOU has a definite expiration date and discernible period for filing a decertification petition, the local rules' window period was reasonable.[62]

PERB unit determinations are not subject to judicial review except when the employer can show each of the following: (a) a novel issue is presented; (b) the issue primarily involves construction of a statutory provision unique to the statute under consideration; and (c) the issue is likely to arise frequently.[63]

Special Categories under MMBA

Management and Confidential Employees

Public employers may, subject to certain restrictions, adopt rules and regulations to determine management and confidential employee units.[64] For example, an employer may designate management or confidential employees as a unit separate from nonmanagement or nonconfidential employees, as long as the designation is reasonable.

In cases where the original justification for a management or confidential employee designation has changed, the designation may be challenged using unit modification procedures under the employer's local rules.[65] The unit modification process is also available for this purpose under the EERA to challenge confidential employee designations.[66]

Supervisory Employees

The MMBA does not expressly delineate between supervisory and management employees. The MMBA neither uses the term "supervisor" nor designates "supervisory personnel" as a management type. Citing this difference between the MMBA and other labor relations statutes, PERB has applied "community of interest" factors and allowed lead workers to be included in the same bargaining unit with nonsupervisory employees when no local rule covers the unit determination issue.[67] One court, applying a fact-based analysis, has recognized supervisory employees as management employees for unit determination purposes under the MMBA.[68]

Law Enforcement Employees

Under the MMBA, full-time peace officers have the right to join and participate in employee organizations composed solely of peace officers.[69] This is an absolute right.[70] But this requirement does not prohibit peace officers from choosing to be represented in a mixed unit. Local rules may not prohibit mixed units of safety and non-safety officers.[71] A public employer may create two or more peace officer units, such as management and nonmanagement units.

Professional Employees

Professional employees have the right to be represented separately from nonprofessional employees by an employee organization consisting solely of professional employees.[72] But the petition must be filed by an organization, not a group of individuals.[73] Moreover, different types of professionals are entitled to separate bargaining units when there is no community of interest among the different types. For example, public defenders need not be grouped with auditors, planners, and rodent inspectors.[74]

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[61] *Service Employees Int'l Union v. City of Santa Barbara* (1981) 125 Cal.App.3d 459.
[62] *San Bernardino County Superior Ct.* (2014) PERB Dec. No. 2392-C, 39 PERC 52; *City of Madera* (2016) PERB Dec. No. 2506-M, 41 PERC 98.
[63] *San Joaquin Regional Transit Dist.* (2019) PERB Dec. No. 2650a-P, 44 PERC 56, 44.
[64] Gov. Code, § 3507.
[65] *City of Beverly Hills* (2004) PERB Dec. No. 1681-M, 28 PERC 225.
[66] See, e.g., *Burbank Unified School Dist.* (2004) PERB Dec. No. 1710, 29 PERC 14; *Elk Grove Unified School Dist.* (2004) PERB Dec. No. 1688, 28 PERC 253.
[67] *City of Palmdale v. Teamsters Local 911* (2011) PERB Dec. No. 2203-M, 36 PERC 49, request for reconsideration denied, PERB Dec. No. 2203a-M, 36 PERC 98.
[68] *United Clerical Employees, Local 2700 v. County of Contra Costa* (1977) 76 Cal.App.3d 119.
[69] Gov. Code, § 3508(a) and (d).
[70] *County of Yolo, supra,* PERB Dec. No. 2316-M, request for reconsideration denied (Jun. 28, 2013) PERB Dec. No. 2316a-M, 38 PERC 18.
[71] *County of Calaveras and Calaveras County Public Safety Assn.* (2012) PERB Dec. No. 2252-M, 36 PERC 158.
[72] Gov. Code, § 3507.3; *Orange County Medical & Dental Assn. v. County of Orange, supra,* PERB Dec. No. 2478-M..
[73] *Modesto Irrigation Dist.* (2005) PERB Dec. No. 1768-M, 29 PERC 140.
[74] *Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825.

TRIAL COURT ACT AND COURT INTERPRETER ACT

The representation and unit determination provisions of the Trial Court and Court Interpreter Acts are similar to those in the MMBA.

The Trial Court Act allows trial courts to adopt local rules and regulations for the administration of employer-employee relations.[75] Like local rules under the MMBA, these rules must be reasonable[76] and can be adopted only after consultation with interested employee organizations.[77] The rules may include procedures for verifying employee organization representation and procedures for recognition and exclusive recognition of employee organizations.[78] PERB regulations apply when the trial court has not adopted its own local rules.[79] The Trial Court Act gives trial courts the authority to establish procedures for determining appropriate bargaining units pursuant to the duty to meet and confer in good faith.[80] The Act specifically allows trial court employees to be included in units with county employees.[81]

The Court Interpreter Act requires the regional court interpreter employment relations committee to adopt reasonable rules for the administration of employer-employee relations within four regional bargaining units across the state.[82] The rules must establish a single regional bargaining unit for all court interpreters employed in each of the four trial court regions across the state.[83] PERB regulations apply to matters not covered by the local rules.[84]

[75] Gov. Code, § 71636.
[76] *San Bernardino County Superior Ct.* (2014) PERB Dec. No. 2392-C, 39 PERC 52 (in determining reasonableness of local rules, PERB does not consider whether a different rule would be more reasonable, only whether the rule is consistent with the purposes of the Act).
[77] *Ibid.*
[78] *Ibid.*
[79] Gov. Code, § 71639.1(b); Cal. Code Regs., tit. 8, § 81000 et seq.
[80] Gov. Code, § 71636(d).
[81] Gov. Code, § 71639(c).
[82] Gov. Code, § 71823.
[83] *Ibid.*
[84] Gov. Code, § 71825(b); Cal. Code Regs., tit. 8, § 91000, et seq.

NEW DEVELOPMENTS 2021

Systems Administrators Were Not "Professional Employees" under the HEERA, and PERB Lacks Discretion to Require Proof of Majority Support if Proposed Unit Modification Increases the Size of the Bargaining Unit by Less than Ten Percent.

The Union filed a unit modification petition to add a newly created classification of systems administrator, into an existing bargaining unit. PERB granted the petition, but the Regents, as the employer, refused to bargain over the systems administrators' terms and conditions of employment. The Regents asserted that the systems administrators did not share a community of interest with the existing bargaining unit because the systems administrators were professional employees as defined by HEERA section 3562, while the bargaining unit consisted of nonprofessionals.[85]

The Court first discussed its role in reviewing PERB decisions. A reviewing court affords great weight to PERB's interpretation of a statute, particularly a public employee labor relations statute. However, a court maintains final authority to determine the true meaning of a statute.[86]

The Court then addressed the question of whether the systems administrators were professional employees. The Court agreed with the Regents that even though the systems administrator position did not require an advanced degree, this did not preclude them from being classified as a professional employee under the HEERA. Nonetheless, the Court analyzed whether the systems administrators had the requisite "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital", which would make them professional employees under HEERA section 3562. The Regents did not

[85] *Regents of U. of Cal. v. PERB* (2020) 51 Cal.App.5th 159. HEERA § 3562 provides a detailed definition and test to determine whether an employee meets the definition of "professional employee" under the statute.
[86] *Regents of U. of Cal., supra,* 51 Cal.App.5th at pp. 174-75.

identify any tasks performed by the systems administrators that were based on such advanced knowledge. Therefore, they were not professional employees within the meaning of the HEERA. The Court also determined there was substantial evidence to establish that the systems administrators shared a community of interest with bargaining unit employees.[87]

The Regents also argued that PERB erred by not requiring proof of majority support by the systems administrators. PERB Regulation 32781(e)(1) provides, "If the petition requests the addition of classifications or positions to an established unit, and the proposed addition would increase the size of the established unit by ten percent or more, the Board shall require proof of majority support of persons employed in the classifications or positions to be added."[88] The union represented approximately 3,900 employees in the bargaining unit, and 290 systems administrators sought to be added to the unit. Accordingly, the modification increased the unit by only 7.4 percent.[89] The Court determined that PERB could not require proof of majority support if the number of employees to be added to a unit is less than ten percent.[90]

In a Recognition Proceeding, Employer was in Possession of Proof of Employees' Revocation of Union Support, But PERB Refused to Consider this Evidence Because the Employer Delayed Submitting this Evidence Until its Appeal.

AFSCME filed a petition seeking to represent the non-managerial employees of the Central Basin Municipal Water District ("CBMWD"). CBMWD did not respond to PERB's Office of the General Counsel's ("OGC") requests to provide it with a copy of CBMWD's local rules. So, PERB followed the representation procedures under the MMBA as though the CBMWD had not adopted any local rules. The OGC reviewed the proof of support filed with the petition and concluded that a majority of unit employees had authorized AFSCME to be their exclusive representative. Thereafter, CBMWD sent a letter to AFSCME and the OGC stating that it would recognize AFSCME as the employees' exclusive representative.[91]

CBMWD abruptly changed it position and asserted that AFSCME did not have majority support. However, CBMWD did not provide any evidence of this to PERB. A week later, the OGC certified AFSCME as the exclusive representative. The OGC found that CBMWD had waived its opportunity to challenge AFSCME's proof of support by failing to comply with PERB Regulation 61020 (f). This requires any party seeking to challenge proof of support to file evidence via sworn declarations within 20 days after the petitioning party had filed its representation petition and proof of support.[92]

CBMWD appealed the OGC's decision to certify AFSCME as the exclusive representative. As proof of its position that AFSCME did not have majority support, CBMWD filed five employee declarations revoking their support of the union. PERB determined that CBMWD waived this argument at several earlier junctures. In the alternative, PERB determined that even if it was appropriate to consider the declarations, the OGC did not abuse its discretion. CBMWD did not show good cause to reopen the record to consider new evidence on appeal.[93]

PERB Considered Employer's Bad Faith Intent in Concluding that the Employer's Interpretation of its Own Local Rules was Unreasonable.

International Federation of Professional & Technical Engineers ("IOUE") sought recognition as the exclusive representative of a hospital district's clinical laboratory scientists and medical laboratory technicians. Relying on its interpretation of its local employer-employee relations ordinance, the employer refused to recognize the union as the exclusive representative. The IOUE had already filed two successful unfair practice charges against the employer

[87] *Id.* at pp. 176-77.
[88] Cal. Code Regs., tit. 8, § 32781, subd. (e)(1).
[89] *Regents of U. of Cal., supra,* 15 Cal.App.5th at pp. 168-69.
[90] *Id.* at p. 187.
[91] *Central Basin Municipal Water Dist.* (2020) PERB Dec. No. A486-M, 45 PERC 88.
[92] *Ibid.*
[93] *Ibid.*

and PERB had already ordered the employer to meet and confer with IOUE.[94]

Upon considering exceptions, PERB rejected the employer's contention that the employer could not be ordered to recognize the union as the exclusive representative. Typically, because the MMBA provides employers with authority to make unit appropriateness determinations, PERB defers to the employer's interpretation of its own local rules. In this case, however, PERB concluded that the employer's past misconduct rebutted the presumption of correctness that would ordinarily apply. PERB found that the employer never intended to recognize IOUE. PERB ordered the employer to recognize the union as the exclusive representative.[95]

IMPACT OF NEW DEVELOPMENTS

- A California Court of Appeal confirmed that PERB's interpretation of statutes within its jurisdiction is afforded significant weight.
- PERB lacks discretion to consider proof of majority support for a unit modification that increases the size of a bargaining unit less than 10% under the HEERA.
- If an employer seeks to challenge a recognition petition, it is important to provide PERB with its evidence as early as possible. Otherwise, it may waive its opportunity to present the evidence.
- Even though employers are afforded deference in interpreting their own local rules and making reasonable unit determinations, PERB may consider an employer's intent and bad faith actions in overturning such a decision.

[94] *Salinas Valley Memorial Hospital Dist.* (2020) PERB Dec. No. 2689-M, 44 PERC 119, judicial appeal pending.
[95] *Ibid.* The PERB dissent argued that the unfair practice complaint should be dismissed because an employer's intent in applying its local rules is irrelevant.

Arbitration and Related Issues

SUMMARY OF THE LAW

GRIEVANCE ARBITRATION OF LABOR RELATIONS DISPUTES

Introduction

Two types of arbitration resolve public sector employment disputes: grievance arbitration and interest arbitration. Grievance arbitration concerns disputes regarding the interpretation and enforcement of rights under an existing contract, or under an employer's policies or regulations. Interest arbitration concerns disputes over the terms of a new or reopened collective bargaining agreement or memorandum of understanding after the parties have reached an impasse in contract negotiations. (See Chapter 4, Impasse Procedure, Strikes, and Other Concerted Activities.) This chapter focuses on grievance arbitrations, which are far more common than interest arbitrations.

Grievances typically concern either discipline or contract interpretation issues. The two topics often overlap. Discipline cases may address the propriety of written reprimands, suspensions, demotions, or terminations. To determine whether discipline is warranted, however, an arbitrator may need to interpret contract provisions such as those describing attendance requirements.

A negotiated arbitration of discipline matters also involves issues of individual employee constitutional due process. An employee's constitutional due process rights will be violated if an MOU's discipline provision requires the employee to pay a portion of the arbitration's cost that is more than the cost imposed in a court hearing,[1] or if the MOU requires an employee to pay half the cost of arbitration if the employee chooses to use private counsel rather than being represented by the union.[2] The employee's due process rights are not violated if the union and the public employer share the cost of the arbitration hearing; nor does due process prohibit the union from denying a hearing while exercising its exclusive right under an MOU to decide which matters are submitted to arbitration.[3]

Contract interpretation grievances which claim that the employer violated or misapplied a contract provision may cover a variety of issues, including seniority, job assignments, promotion, pay claims, or whether or not the interpretation of a contract provision violates constitutional rights.[4] Arbitrators often must determine the parties' intent with respect to ambiguous contract language. To determine intent, the arbitrator may consider the parties' past practice and negotiating history or language in the agreement.

The Arbitrator's Authority

Arbitrators have broad authority to interpret and apply contractual terms established through collective bargaining, even when the disputed issue involves an agency's policy-making authority.[5]

[1] *Florio v. City of Ontario* (2005) 130 Cal.App.4th 1462, 30 Cal.Rptr.3d 841.

[2] *Soto v. Riverside* (2008) 162 Cal.App.4th 492, 76 Cal.Rptr.3d 21.

[3] *Jones v. Omnitrans* (2004) 125 Cal.App.4th 273, 22 Cal.Rptr.3d 706, review den. (2005) 2005 Cal.LEXIS 3919.

[4] *Service Employees Internat. Union, Local 1000 v. Department of Personnel Admin.* (2006) 142 Cal.App.4th 866, 48 Cal.Rptr.3d 457, review den. (2006) 2006 Cal.LEXIS 13745.

[5] *City of Los Angeles v. Superior Ct*. (2013) 56 Cal.4th 1086, 158 Cal.Rptr.3d 1.

In grievance arbitrations, the arbitrator derives his or her authority from the contract itself. The arbitrator has no authority to amend the contract or to create rights independent of the contract. In resolving grievances over contract application or interpretation, the arbitrator is limited to deciding what the parties intended in their agreement. Remedies, though, can extend beyond contract interpretation, and make-whole remedies are common. Indeed, a make-whole remedy can require the grievant's reinstatement to a position and/or reimbursement of wages and benefits lost as a result of a contract violation.[6] If the arbitration agreement grants an arbitrator the right to award any remedy available under California law, the arbitrator may award attorneys' fees as a sanction.[7]

Arbitrators must disclose to parties any dealings that might create an impression of possible bias, including sporadic but substantial business relationships, even in the absence of actual fraud, corruption, or partiality.[8] Additionally, an arbitrator must disclose his or her service as a neutral arbitrator in all previous non-collective bargaining matters involving either of the parties to the current arbitration.[9]

Compelling Arbitration

If a party refuses to proceed to arbitration when a collective bargaining agreement includes an arbitration agreement, the other party may petition the superior court to compel arbitration pursuant to the California Arbitration Act.[10] Courts apply a strong presumption in favor of arbitrability,[11] but will not compel arbitration when the contract provision at issue conflicts with the law or exceeds the scope of arbitration under the relevant collective bargaining statute. For example, the California Supreme Court refused to compel arbitration in a case involving a collective bargaining agreement that included provisions altering the charter school petition approval process, because the Education Code establishes the petition approval process and the EERA specifically provides that collective bargaining agreements cannot supersede the Education Code.[12] In contrast, a motion to compel arbitration may not be denied on grounds of judicial economy when the claims in a pending lawsuit are the same as those subject to arbitration.[13]

Judicial Review of Arbitration Decisions

Judicial review of an arbitrator's decision is extremely limited.[14] This is the case even when unwaivable statutory rights are involved.[15] An arbitrator's award is entitled to deference unless: (1) it does not draw its essence from the collective bargaining agreement; (2) the arbitrator exceeds the boundaries of the issues submitted; or (3) the award runs counter to public policy.[16] Courts have gone so far as to say that, if an "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision."[17] Put another way, if the arbitrator's interpretation of an MOU is plausible and not completely irrational, courts will let it stand.[18] Of course,

[6] *Kimberly Mossman v. City of Oakdale* (2009) 170 Cal.App.4th 83, 88-90, 87 Cal.Rptr.3d 764.
[7] *David v. Abergel* (1996) 46 Cal.App.4th 1281, 54 Cal.Rptr.2d 443.
[8] *Ceriale v. AMCO Ins. Co.* (1996) 48 Cal.App.4th 500, 55 Cal.Rptr.2d 685.
[9] Code Civ. Proc., § 1281.9(a)(4); *International Alliance of Theatrical Stage Employees v. Laughon* (2004) 118 Cal.App.4th 1380, 1395, 14 Cal.Rptr.3d 341.
[10] Code Civ. Proc., § 1280 et seq.; Gov. Code, § 3505.8.
[11] *Taylor v. Crane* (1979) 24 Cal.3d 442, 155 Cal.Rptr. 695.
[12] *United Teachers of Los Angeles v. Los Angeles Unified School Dist.* (2012) 54 Cal.4th 504, 142 Cal.Rptr.3d 850.
[13] *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2015) 234 Cal.App.4th 459, 183 Cal.Rptr.3d 854.
[14] *Major League Baseball Assn. v. Garvey* (2001) 532 U.S. 504, 509, 121 S.Ct. 1724, 1728.
[15] *Richey v. Autonation, Inc.* (2015) 60 Cal.4th 909.
[16] *Association of Western Pulp & Paper v. Rexam Graphic* (9th Cir. 2000) 221 F.3d 1085. For cases applying this rule, see, e.g., *California Statewide Law Enforcement Assn. v. Department of Personnel Admin.* (2011) 192 Cal.App.4th 1, 120 Cal.Rptr.3d 374 (vacating arbitrator's award because it exceeded arbitrator's power by ordering state to reclassify employees retroactively when Legislature did not approve the action as required by the Dills Act); *City of Richmond v. SEIU, Local 1021* (2010) 189 Cal.App.4th 663, 118 Cal.Rptr.3d 315 (refusing to vacate arbitrator's award reinstating sexual harasser as violation of public policy); *City of Palo Alto v. Service Employees Internat. Union, Local 715* (1999) 77 Cal.App.4th 327, 91 Cal.Rptr.2d 500.
[17] *Major League Baseball Assn., supra*, 532 U.S. at 509, quoting *Eastern Associated Coal Corp. v. Mine Workers* (2000) 531 U.S. 57, 62, 121 S.Ct. 462.
[18] *California Dept. of Human Resources v. Service Employees Internat. Union, Local 1000* (2012) 209 Cal.App.4th 1420, 1429-1430, 148 Cal.Rptr.3d 57.

the strict limits on judicial review only apply if the negotiated arbitration provision is final and binding.[19] Although this issue can be complex and nuanced, a union generally must exhaust the grievance arbitration process before resorting to the courts, even when there are constitutional questions related to the underlying contract interpretation issue.[20]

Under California's strong policy favoring arbitration, when interpreting contract provisions that deny arbitration for procedural reasons (such as the untimely transmittal of a request to arbitrate), an employer will be subject to arbitration unless the contract language specifically establishes a time limit as a precondition to arbitrate.[21]

However, in the analysis of judicial review of an arbitration agreement, the timeliness of the challenge is critical. Namely, judicial review of untimely challenges to arbitration awards are not authorized even where the challengers assert the award contravenes a statute.[22]

Finally, courts will not uphold arbitration awards that are beyond the jurisdiction of the arbitrator. For example, an appellate court would not enforce a binding arbitration award regarding a school district's teacher tenure decision because the parties did not have the authority to negotiate the tenure decision in the first place, and consequently, the court reasoned that the arbitrator had no jurisdiction over the tenure dispute.[23]

PERB DEFERRAL OF UNFAIR PRACTICE CHARGES TO ARBITRATION

What happens when an employee or union claims not only that the employer violated the collective agreement, but also that the contract violation constitutes an unfair practice claim subject to PERB? For example, suppose that a union believes a public employer violated the "hours" provision of a MOU when altering the time employees must report to work. Not only could the union submit this unilateral change to grievance arbitration, but the employer's unilateral change in a working condition, without notice and opportunity to negotiate, might also be the basis for an unfair practice charge before PERB.

The courts and PERB have been asked to answer the question of whether both the unfair practice and the arbitration must proceed on parallel tracks, or whether PERB will defer to the arbitration process. This section addresses these questions.

Statutory Provisions Regarding Deferral

The EERA, SEERA, and MMBA all contain express statutory requirements to defer an unfair practice charge to the arbitration process.[24] PERB requires deferral if the statutory criteria are met, and has determined that this statutory language limits PERB's jurisdiction.[25]

The MMBA explicitly contains a strong presumption of arbitrability and prohibits courts from refusing to order arbitration based on the argument that the conduct in question constitutes an unfair practice subject to PERB jurisdiction.[26] The MMBA also prohibits the denial of arbitration on procedural grounds, requiring that all procedural defenses must be presented to the arbitrator for resolution. If a party files an unfair practice charge based on the conduct at issue in arbitration, PERB must place the charge in abeyance and dismiss the charge at the conclusion of the arbitration process unless the charging party

[19] *American Federation of State, County & Municipal Employees, Local 1902, AFL-CIO v. Metropolitan Water Dist. of Southern Cal.* (2005) 126 Cal.App.4th 247, 24 Cal.Rptr.3d 285.
[20] *Service Employees Internat. Union, Local 1000, supra.*
[21] Gov. Code, § 3505.8; *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal. 4th 307, 24 Cal.Rptr.2d 597; see also *Napa Assn. of Public Employees v. County of Napa* (1979) 98 Cal.App.3d 263, 159 Cal.Rptr. 522.
[22] *Santa Monica College Faculty Assn. v. Santa Monica Community College Dist.* (2015) 243 Cal.App.4th 538. A party seeking to vacate an arbitration award must either (1) file and serve a petition to vacate that award not later than 100 days after the date of the service of a signed copy of the award, or (2) file and serve a timely response (that is, within 10 days) to the other party's petition to confirm the award, which seeks to vacate the award. *Id.* at 544-545.
[23] *Sunnyvale Unified School Dist. v. Jacobs* (2009) 171 Cal.App.4th 168, 89 Cal.Rptr.3d 546.
[24] Gov. Code, §§ 3505.8 (MMBA), 3541.5 (EERA), 3514.5 (SEERA).
[25] *Lake Elsinore School Dist.* (1987) PERB Dec. No. 646 p. 50, 12 PERC ¶ 19012.
[26] Gov. Code, § 3505.8 (MMBA).

demonstrates that the arbitration award is "repugnant" to the purposes of the MMBA.[27]

Because not all of the labor relations acts contain statutory references regarding deferral to arbitration, PERB has adopted by regulation, the deferral concept used in federal case law.[28] In this regard, PERB Regulation 32620 applies to disputes arising under MMBA, HEERA, TEERA, Trial Court Act, Court Interpreter Act, and IHSSEERA, and requires PERB to:

"[P]lace the charge in abeyance if the dispute arises under MMBA, HEERA, TEERA, Trial Court Act, Court Interpreter Act or IHSSEERA and is subject to final and binding arbitration pursuant to a collective bargaining agreement, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of the MMBA, HEERA, TEERA, the Trial Court Act, Court Interpreter Act or IHSSEERA, as provided in section 32661."[29]

Under all of the statutes that PERB administers, PERB requires charges to be deferred to arbitration when the following three requirements are met: (1) the dispute arises within a stable collective bargaining relationship without enmity by the respondent against the charging party; (2) the respondent is ready and willing to proceed to arbitration and agrees to waive any contract-based procedural defenses; and (3) the contract and its meaning lie at the center of the dispute.[30] Two factors must be considered to determine whether there is a stable collective bargaining environment for purposes of deferral: (1) the length of an amicable bargaining relationship between the parties; and (2) whether the respondent's conduct interferes with collective bargaining rights.[31]

[27] *Ibid.*
[28] Cal. Code Regs., tit. 8, §§ 32620(b)(6), 32661; see also *California State U.* (1993) PERB Dec. No. 986-H, 17 PERC ¶ 24068.
[29] Cal. Code Regs., tit. 8, § 32620(b)(6).
[30] *Dry Creek Joint Elementary School Dist.* (1980) PERB Order No. Ad-81a, 4 PERC ¶ 11141, overruled on other grounds; *Lake Elsinore School Dist., supra; California State U.* (*Stanislaus*) (2004) PERB Dec. No. 1659-H, 28 PERC 198; *State of Cal. (Dept. of Transportation)* (2004) PERB Dec. No. 1691-S, 28 PERC 255.
[31] *Delano Union Elementary School Dist.* (2007) PERB Dec. No. 1908, 32 PERC ¶ 111.

Pre-Arbitration Deferral

The following elements must exist before PERB will defer an unfair practice charge prior to arbitration: the arbitration provision must be a product of collective bargaining;[32] the arbitration must be binding upon the parties;[33] the collective agreement must actually prohibit the alleged conduct;[34] and the engagement in the arbitration must not be futile.[35] PERB applies the futility exception to deferral either (1) "when the employer's conduct undermines the integrity of the effectiveness of the grievance machinery," or (2) "when the representative—for whatever reason—decides that it will not arbitrate the subject of the deferred charge."[36] The futility exception also applies when technical prerequisites such as untimeliness will prevent arbitration. When the charging party is a rank-and-file employee, PERB's Office of the General Counsel determines whether both the employer and the exclusive representative are ready and willing to proceed to arbitration.[37] PERB also refuses to defer a charge to arbitration if the contractual grievance provisions do not allow the same scope of remedy as available in unfair practice proceedings.[38] Similarly, PERB will not defer to arbitration any claims under HEERA alleging retaliation for filing unfair practice charges or participating in PERB proceedings.[39] Finally, a request to defer an unfair practice charge to arbitration must be filed before beginning the hearing on the unfair practice charge.[40]

[32] *University of Cal. (San Francisco)* (1984) PERB Order No. Ad-139-H, 8 PERC ¶ 15038.
[33] *Pittsburg Unified School Dist.* (1982) PERB Dec. No. 199, 6 PERC ¶ 13069.
[34] See Gov. Code, §§ 3514.5 (SEERA), 3541.5 (EERA); see also *Santa Ana Unified School Dist.* (1994) PERB Order No. Ad-263, 19 PERC ¶ 26029; *State of Cal. (Dept. of Parks and Recreation)* (2003) PERB Dec. No. 1566, 28 PERC 31.
[35] See Gov. Code, §§ 3514.5 (a)(2) (SEERA), 3541.5 (a)(2) (EERA); *Santa Ana Unified School Dist.* (2013) PERB Dec. No. 2332, 38 PERC 51; *California State U.* (1984) PERB Dec. No. 392-H, 8 PERC ¶ 15135.
[36] *Claremont Unified School Dist*. (2014) PERB Dec. No. 2357.
[37] *Ibid.*
[38] *Santa Ana Unified School Dist., supra,* PERB Dec. No. 2332.
[39] *California State U. (East Bay)* (2014) PERB Dec. No. 2391-H.
[40] *East Side Union High School Dist.* (2004) PERB Dec. No. 1713, 29 PERC 17.

Post-Arbitration Deferral

Under the MMBA, EERA, HEERA, SEERA, and the Dills Act, after the arbitration award is issued, PERB will defer any unfair practice determination to the arbitrator's decision if the following standards are met: (1) the matters raised in the unfair practice charge were presented to and considered by the arbitrator; (2) the arbitration hearing was fair; (3) the parties to the arbitration were bound by the award; and (4) the arbitrator's decision was not repugnant to the controlling labor relations statute.[41] Before finding an arbitrator's award repugnant to the controlling labor relations statute, PERB requires that the arbitrator's award is "palpably wrong" and not susceptible to the applicable governing statute.[42] PERB generally will find that an arbitrator's award is repugnant if the award does not provide the same remedies as PERB, such as ordering the parties to bargain in good faith.[43] But, PERB does not have independent review authority over arbitration awards, and will not consider a challenge to an arbitrator's award as repugnant to the labor statutes unless the challenging party alleges that a violation of the labor statutes has occurred.[44]

ARBITRATION OF CIVIL RIGHTS AND STATUTORY CLAIMS

May an employee pursue a civil rights lawsuit if an arbitration agreement arguably subjects the underlying claim to arbitration? To resolve this question, courts distinguish between arbitration clauses contained in collective bargaining agreements and those contained in individual employment contracts.

Arbitration Provisions in Collective Bargaining Agreements

In *14 Penn Plaza, LLC v. Pyett*, the U.S. Supreme Court ruled that an arbitration clause in a collective bargaining agreement can compel union members to arbitrate their individual claims of employment discrimination.[45] The Court affirmed its previous ruling that a clear and unmistakable waiver of an employee's right to sue in federal court is required to compel civil rights claims to be pursued only under a collective bargaining agreement's general arbitration provision.[46]

California courts generally hold that arbitrating an employee's grievances under a collective bargaining agreement does not bar the employee from later filing a Fair Employment and Housing Act ("FEHA") civil rights lawsuit unless a waiver of such claims is explicit in the agreement.[47] For example, in *Carmago v. California Portland Cement Co.,*[48] the court ruled that an employee may pursue a court case unless the collective bargaining agreement clearly and unmistakably provides for binding arbitration of the employee's statutory discrimination claims under the FEHA. The arbitration agreement must also provide for the full litigation and fair adjudication of the FEHA claims.

Arbitration Provisions in Individual Employment Agreements

In the public sector, individual employment agreements are not common. Accordingly, it is unclear to what extent state and federal courts will enforce agreements to arbitrate civil rights claims that are contained in public employees' individual employment contracts. Although the cases discussed below address private sector employees, they provide useful guidance for the public sector. Courts have recognized that state and federal law have a strong policy of enforcing arbitration agreements over the

[41] *Yuba City Unified School Dist.* (1995) PERB Dec. No. 1095, 19 PERC ¶ 26081; see also *Spielberg Manufacturing Co.* (1955) 112 N.L.R.B. 1080, 1082; *Newark Unified School Dist.* (2004) PERB Dec. No. 1595, 28 PERC 77, and *Santa Ana Unified School Dist.* (2008) PERB Dec. No. 1949-H, 32 PERC ¶ 63.

[42] *Los Angeles Unified School Dist.* (2005) PERB Dec. No. 1765, 29 PERC 128; *City of Guadalupe* (2011) PERB No. 2170-M, 35 PERC 52 (applying repugnancy standard in refusing to review Personnel Commission decision).

[43] *Dry Creek Joint Elementary School Dist., supra*, PERB Order No. Ad-81a.

[44] *Ventura County Community College Dist.* (2009) PERB Dec. No. 2082, 34 PERC 14.

[45] (2009) 556 U.S. 247, 129 S.Ct. 1456.

[46] *Wright v. Universal Maritime Service Corp*. (1998) 525 U.S. 70, 119 S.Ct. 391.

[47] *Torrez v. Consolidated Freightways Corp*. (1997) 58 Cal.App.4th 1247, 68 Cal.Rptr.2d 792; *Deschene v. Pinole Point Steel Co*. (1999) 76 Cal.App.4th 33, 90 Cal.Rptr.2d 15; *Vasquez v. Superior Court* (2000) 80 Cal.App.4th 430, 95 Cal.Rptr.2d 294.

[48] (2001) 86 Cal.App.4th 995, 103 Cal.Rptr.2d 841.

disputes which the parties have agreed to arbitrate.[49]

For example, where an individual employment agreement provides for mandatory arbitration of employment claims, the U.S. Supreme Court has prohibited an employee from filing a civil rights lawsuit. This trend started in *Gilmer v. Interstate/Johnson Lane Corp.*,[50] where an employee's registration application with the New York Stock Exchange contained an agreement to submit all employment claims to arbitration. This agreement precluded the employee from filing an Age Discrimination Employment Act ("ADEA") court claim. According to the court, nothing in the ADEA or its legislative history forbade employees from waiving their rights to sue under the ADEA. Although *Gilmer* involved a registration application, and not an individual employment agreement, it established a precedent that an employee who has a specific agreement with an employer to arbitrate employment claims may not bring a civil rights lawsuit. The U.S. Supreme Court fortified *Gilmer's* impact in *Circuit City Stores, Inc. v. Adams*.[51] In that case, the court determined that the Federal Arbitration Act requires enforcement of individual agreements to arbitrate employment claims (here, FEHA claims), except where the agreement involves transportation workers.

Although an arbitration agreement may prevent an employee from submitting a discrimination claim to an administrative agency (EEOC or DFEH), it cannot override the EEOC or DFEH's statutory authority to prosecute discrimination claims.[52]

California state courts have developed another type of analysis to determine whether an individual agreement to arbitrate employment claims precludes subsequent litigation of statutory civil rights claims. The California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*, upheld a mandatory arbitration provision contained in individual employment agreements, but applied principles of contract law to find the agreements in question unconscionable and unenforceable.[53] The court declared that state discrimination claims are arbitrable, as long as the arbitration allows the employee to vindicate his or her statutory rights.[54] Vindication requires the following safeguards: (1) the arbitrator's impartiality; (2) adequate discovery; (3) a written decision that will allow for judicial review; (4) all relief that would otherwise be available in court; and (5) limitations on the cost to the employee for the arbitration. Arbitration of statutory discrimination claims may also preclude an employee from later filing common law/non-statutory discrimination claims.[55]

An arbitrator's decision pursuant to a mandatory arbitration agreement is subject to judicial review when the employee is unable to obtain an arbitration hearing on the merits of a FEHA claim or other claim of unwaivable statutory rights due to the arbitrator's legal error, such as an error in interpreting the statute of limitations.[56]

Arbitration of Other Statutory Claims

A prior binding arbitration award pursuant to a collective bargaining agreement will preclude a lawsuit for a statutory violation when the collective bargaining agreement expressly allows the specific statutory claim and clearly states that an arbitration award will have a binding effect on the employee's claim for a statutory violation.[57]

Within the context of employment agreements, courts will not compel purely statutory claims that did not arise out of the employment contract or relate to it in any way. For example, courts have refused to

[49] *Elijahjuan v. Superior Ct.* (2012) 210 Cal.App.4th 15, 147 Cal.Rptr.3d 857.
[50] (1991) 500 U.S. 20, 111 S.Ct. 1647.
[51] (2001) 532 U.S. 105, 121 S.Ct. 1302.
[52] *Preston v. Ferrer* (2008) 552 U.S. 346; 128 S.Ct. 978; *Pearson Dental Supplies, Inc. v. Superior Ct.* (2010) 48 Cal.4th 665, 680, 108 Cal.Rptr.3d 171, addressing an issue left unresolved by *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83; 99 Cal.Rptr.2d 745.
[53] *Armendariz, supra*; see also *Zullo v. Superior Ct.* (2011) 197 Cal.App.4th 477, 127 Cal.Rptr.3d 461 [arbitration agreement in employee handbook procedurally and substantively unconscionable].
[54] *Armendariz, supra.*
[55] *Wade v. Ports America Management Corp.* (2013) 218 Cal.App.4th 648, 160 Cal.Rptr.3d 482.
[56] *Pearson Dental Supplies, Inc., supra.*
[57] *Marcario v. County of Orange* (2007) 155 Cal.App.4th 397, 65 Cal.Rptr.3d 903.

compel arbitration on a dispute over whether an employer violated the Labor Code by improperly classifying employees as independent contractors, even when the employment agreement required arbitration of any dispute arising with regard to the agreement's application or interpretation.[58]

Effect of Arbitration Agreements on Representative Actions Under the Private Attorneys General Act and Class Actions

An arbitration agreement cannot waive employees' rights to bring a civil action personally and on behalf of other employees to recover penalties for Labor Code violations under the Private Attorneys General Act ("PAGA") representative actions. The California Supreme Court in *Iskanian v. CLS Transportation of Los Angeles, LLC,*[59] concluded that an employee's right to bring a PAGA action is unwaivable because such a waiver would be contrary to public policy. The Court further opined that the Federal Arbitration Act's goal of promoting arbitration as a means of private dispute resolution does not preclude the Legislature from deputizing employees to prosecute Labor Code violations on the State's behalf.[60]

In the case of *Iskanian v. CLS Transportation Los Angeles, LLC*, it was further determined that employment class action waivers are preempted by the Federal Arbitration Act.[61] However, employment class action waivers may be asserted in matters governed by the California Arbitration Act ("CAA") and not the Federal Arbitration Act.[62] Employment class action waivers therefore may be deemed invalid in matters governed by the CAA if individual arbitration or litigation could not be designed to approximate the advantages of a class proceeding.

Rule: Under Certain Conditions, Agreements to Arbitrate Are Not Illusory Just Because the Employer Can Unilaterally Modify the Handbook.

In *Harris v. Tap Worldwide, LLC,*[63] Tap Worldwide, LLC moved to compel arbitration of its former employee Dwayne Harris' complaint, relying upon an arbitration agreement that Mr. Harris acknowledged receiving but alleged that he never signed. Mr. Harris argued that, although he signed a document in the Employee Handbook acknowledging receipt of the arbitration agreement and Employee Handbook, he never signed the actual arbitration agreement contained in the Employee Handbook. Mr. Harris alternatively argued that, in accordance with *Sparks v. Vista Del Mar Child and Family Services,*[64] any agreement was unconscionable because the employer retained the right to unilaterally modify the handbook.

The Court denied the employer's motion to compel arbitration. In response to Mr. Harris' first argument, the Court found that the acknowledgement of receipt that Plaintiff signed sufficed to bind him to the arbitration agreement, and even if he hadn't signed it his active employment with Taps signified his acquiescence to their arbitration policy, as per the language in the Handbook.

The Court distinguished the *Sparks* case on two grounds. First, unlike the situation in *Sparks,* the acknowledgement form that Mr. Harris signed included acknowledging receiving *both* the Employee Handbook and the attached arbitration agreement. The acknowledgement of receipt that Plaintiff signed stated: "I hereby confirm and acknowledge receipt of [defendant's]: Alternative Dispute Resolution Agreement for current employees' and [] Personnel Policy Handbook." The arbitration agreement was specifically highlighted in the signed acknowledgement form as the Appendix to the Employee Handbook. In *Sparks*, the plaintiff received a handbook for which he acknowledged receipt, and that handbook "included in one of many clauses an arbitration clause not prominently

[58] *Elijahjuan v. Superior Ct., supra*.
[59] (2014) 59 Cal.4th 348.
[60] *Ibid.*
[61] *Ibid.*
[62] *Garrido v. Air Liquide Industrial U.S. LP* (2015) 241 Cal.App.4th 833, 838, rev. den. (Feb. 3, 2016).
[63] (2016) 248 Cal.App.4th 373, 203 Cal.Rptr.3d 522.
[64] (2012) 207 Cal.App.4th 1511, 145 Cal.Rptr.3d 318.

distinguished from the other clauses. The arbitration provision [was] not specifically highlighted, and there [was] no place for the employee to acknowledge it in writing...."[65]

Second, the Court ruled that an agreement to arbitrate may be express or implied so long as it is written. According to the Employee Handbook, upon commencing employment, the employee was deemed to have consented to the agreement to arbitrate by virtue of acceptance of the Employee Handbook, regardless of whether or not he actually signed the Handbook. This provision was not present in *Sparks*.

In addressing the illusory contract argument, the Court found that whereas the *Sparks* court ruled that an agreement to arbitrate is illusory if the employer can unilaterally modify the handbook, the instant case was distinguishable because the arbitration agreement itself contained a qualified modification provision. The arbitration agreement at issue could be modified only "to comply with future developments or changes in the law" and in a writing signed by the employer and employee. Additionally, the court had reconsidered its views in *Sparks* in light of a subsequent ruling by the California Supreme Court in *Asmus v. Pacific Bell*.[66]

An Arbitration Agreement Including Class or Collective Action Waivers of Employment-Related Disputes Is Enforceable.

The U.S. Supreme Court has affirmed that class or collective action waivers in individual employees' arbitration agreements are enforceable.

On May 21, 2018, in *Epic Systems Corp. v. Lewis*,[67] the U.S. Supreme Court, in a 5-4 decision, upheld the enforceability of arbitration agreements containing class and collective action waivers of wage-and-hour disputes. The majority, in an opinion authored by Justice Gorsuch, ruled that (1) the Federal Arbitration Act mandates the enforcement of arbitration agreements, and (2) provisions of "class and collective action waivers" included in employment-related arbitration agreements do not constitute a prohibition of "concerted activities" in violation of section 7 of the National Labor Relations Act ("NLRA").

The Court refused to rule that section 7 of the NLRA should override the Federal Arbitration Act because the majority could not find "a clearly expressed congressional intention," from the statutory language and legislative history of section 7, that "class or collective actions" were regarded as part of the "concerted activities" protected under the NLRA. The Court also rejected the employees' invocation of *Chevron* deference,[68] *i.e.*, deferring to the interpretation of the National Labor Relations Board ("NLRB"). The Court decided that it was not required to defer to the NLRB's 2012 opinion, suggesting the NLRA displaces the Federal Arbitration Act on the issue of "class or collective active waivers" because the NLRB interpreted the NLRA in a way that limited the Federal Arbitration Act, a federal statute that it did not administer.

Parties to an Arbitration Agreement Must Expressly Provide for Class-wide Arbitration to be Enforceable.

Following *Epic Systems Corp. v. Lewis*,[69] the U.S. Supreme Court, through a 5-4 decision, further explained that a class-wide based arbitration can proceed—but only when the arbitration clause at issue expressly permits such class-based arbitration.[70] Silence or ambiguity in an arbitration agreement does not suffice.

In *Lamps Plus, Inc. v. Varela*, Varela signed an arbitration agreement when he started work at Lamps Plus requiring him to arbitrate any disputes he had with Lamps Plus. A hacker impersonating a company official then tricked a Lamps Plus employee into

[65] *Id.* at 1516.
[66] In ruling that an employer could unilaterally terminate its policy as stated in the employment contract, the U.S. Court of Appeals for the Ninth Circuit ruled that "[a]n employer may unilaterally terminate a policy that contains a specified condition, if the condition is one of indefinite duration, and the employer effects the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits." (2000) 23 Cal.4th 1, 6, 999 P.2d 71, 73.
[67] (2018) 138 S.Ct.1612.
[68] See generally *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837.
[69] *Lewis, supra,* (2018) 138 S.Ct. 1612.
[70] See generally *Lamps Plus, Inc. v. Varela* (2019) 139 S.Ct 1407.

disclosing the nearly 1,300 employees' tax information. Varela brought a federal district class action against Lamps Plus for the harm he and his class members allegedly suffered. Lamps Plus moved to compel arbitration, which the court granted. However, the court granted arbitration on a class-wide basis—even though the arbitration clause at issue did not expressly refer to class-wide arbitration. The Ninth Circuit affirmed this ruling, and Lamps Plus petitioned for a writ of certiorari, which the U.S. Supreme Court granted.

The U.S. Supreme Court disagreed with the reasoning of the Ninth Circuit, which had relied on the traditional California rule that ambiguity in a contract should be construed against the drafter, a doctrine known as *contra proferentem*. The U. S. Supreme Court concluded that this doctrine did not apply to the interpretation of Lamps Plus' arbitration clause because an ambiguous arbitration agreement, much like one silent on the availability of class-wide arbitration, cannot provide the necessary contractual basis for compelling class arbitrations. The Court noted that arbitration is purely a matter of consent, and consent cannot be inferred. Because the provision did not provide expressly for class-wide arbitration, the arbitration needed to proceed on an individual basis.[71]

California AB 51: A Ban on Arbitration Agreements as a Condition of Employment.

On its face, Assembly Bill 51 ("AB 51") combats sexual harassment, but as drafted, the bill aims to prevent employers from requiring that its applicants or employees enter a mandatory arbitration agreement as a condition of employment, continued employment, or as the receipt of any employment-related benefit.

AB 51 further proposes to prohibit applicants or employees from waiving their rights to have prospective employment-related disputes heard in their choice of forum—these disputes include harassment, discrimination, civil rights-related retaliation claims, or Labor Code violations. Further, the Bill would prohibit employers from threatening, retaliating, discriminating against, or terminating applicants or employees who refuse to waive such rights.

Thus, AB 51 would serve to mandatory pre-dispute arbitration agreements and prospective class waiver agreements.

New Developments 2021

California AB 51 Signed Into Law Adding New Provisions to the Labor Code and Government Code; Law Faces Federal Preemption Challenge.

On October 10, 2019, Governor Gavin Newsom signed the above AB 51 into law. AB 51 protects individuals from retaliation when they refuse to waive the right and procedures granted to them under the FEHA and the Labor Code.

As it relates to arbitration, AB 51 prohibits any requirement that job applicants or employees waive their right to a judicial forum as a condition of prospective employment, continued employment, or the receipt of an employment-related benefit. AB 51 effectuates its purpose by adding Labor Code section 432.6 and Government Code section 12953. The latter makes it an unlawful practice for an employer to violate the newly added section 432.6.

In its analysis of the Bill, the Legislature recognized arbitration as a highly effective dispute resolution method when both parties choose it freely.[72] It noted that more than 65 percent of California employers require arbitration of any employment dispute.[73] The Legislature reasoned that forced arbitration agreements effectively deny a grievant access to help from courts and state agencies.[74] Instead, the individual enters the "employer's handpicked arbitration system" which effectively results in claim suppression because complaints "evaporate before they are ever filed."[75]

The Legislature expressly stated that AB 51 does not invalidate any arbitration

[71] *Id.* at 1416.

[72] Assembly Bill 51, Senate Rules Committee Analysis, Third Reading, May 22, 2019, p. 4.
[73] *Id.* at 5.
[74] *Id.* at 4.
[75] *Id.*

agreement enforceable under the Federal Arbitration Act, lest it be statutorily preempted by federal law.[76] Rather, as the Legislature maintained, AB 51 does not focus on the creation or enforcement of arbitration agreements; rather, it focuses on parties entering into arbitration agreements freely and voluntarily. Further, it provides that individuals may not be retaliated against for refusing to consent.[77] However, the Legislature did anticipate a possible future preemption challenge and noted that the statute could be preempted if challenged successfully.[78]

Before AB 51 went into effect on January 1, 2020, the Chamber of Commerce of America ("CCA") filed a complaint in federal court asking for a declaration that the Federal Arbitration Act preempts AB 51. CCA also filed for a preliminary injunction to enjoin the State from enforcing AB 51 until the underlying matter could be heard. The Court temporarily restrained state officials from enforcing the law and then later granted CCA's motion for a preliminary injunction. In February 2020, the State filed an appeal in the Ninth Circuit challenging the injunction.

The primary allegations in the underlying case include that AB 51 places arbitration agreements on unequal footing with other contacts and that it interferes with the Federal Arbitration Act's goals.[79] If successfully argued, AB 51 could be preempted. In interpreting the Federal Arbitration Act, the U.S. Supreme Court has identified arbitration as a matter of contract.[80] As structured, AB 51 proposes to invalidate arbitration agreements, not based on ordinary contractual defenses, but rather on legal rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.[81]

Further, the new law may be preempted if it interferes with fundamental attributes of arbitration.[82] The Supreme Court has determined that the Federal Arbitration Act's design intends to promote arbitration. Thus, any law that impedes such promotion will be preempted.

In granting the preliminary injunction, the trial court found Plaintiff's arguments persuasive that AB 51, if enforced, would place arbitration on unequal footing with other contracts and that it would interfere with the Federal Arbitration Act's manifest purpose.[83]

As noted, the State has appealed the trial court's rulings. As of this writing, AB 51 has been signed into law, but the preliminary injunction enjoins the State from enforcing its provisions. The process likely will take time as the underlying case has not been heard by the court yet, and the briefing schedule has been extended in response to COVID-19 pandemic.

PERB CASES

In *County of Santa Clara*, PERB clarified that deferral of an unfair practice charge to arbitration is not appropriate unless all factually or legally interrelated allegations are subject to deferral.[84]

SEIU alleged an unfair practice charge against the County for violating sections of the parties' Memorandum of Agreement ("MOA") by denying Anna Griffin, an SEIU steward, paid release time to attend the January 29th Board of Supervisors meeting. Specifically, on January 28, 2019, an SEIU representative emailed Ms. Griffin's supervisor to request her release time for the January 29th Board meeting.[85] Griffin attended the January 29th Board meeting.

On February 8, 2019, a second SEIU Board member emailed Griffin's supervisor requesting that she receive release time.[86] The County responded that Griffin was not authorized to take release time because she failed to follow the County's Release Time Policy ("Policy") when requesting time off. Griffin was forced to use accrued leave to cover her absences from work to attend the

[76] *Id.*
[77] *Id.* at 6.
[78] *Id.* at 6-7.
[79] *Chamber of Commerce of U.S. v. Becerra* (E.D. Cal., Feb. 7, 2020, No. 2:19-CV-02456-KJM-DB) 2020 WL 605877, at 10.
[80] *Id.* at 3, citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339.
[81] *Becerra, supra,* at 10-11.
[82] *Id.* at 11, citing *Lamps Plus, supra*.
[83] *Id.* at 14.
[84] *County of Santa Clara* (2021) PERB A485M, at p. 9-12.
[85] *Id.* at p. 2.
[86] *Id.* at p. 3.

January 29th meeting. On March 8, 2019, SEIU filed a grievance, which was denied by the County and resulted in SEIU's unfair practice charge. [87]

The PERB Office of the General Counsel ("OGC") concluded that the dispute alleged in SEIU's unfair practice charge was subject to binding arbitration under the MOA. OGC accordingly placed the charge in abeyance pending completion of the arbitration proceedings. SEIU contended that its charge should not have been deferred to arbitration because none of the allegations are appropriate for deferral. The County argued that OGC properly deferred the charge because all of the allegations centered on whether the County violated contractual release time provisions.

In reaching its decision, PERB determined that SEIU's charge arose from the same core set of facts as the grievance – the County's denial of paid release time to Griffin based on her purported failure to comply with a release time policy that the County allegedly imposed unilaterally.[88]

PERB considered each allegation in the charge separately, and in doing so, found that the charge that the County's adoption of the policy constituted unlawful direct dealing, and was not subject to deferral because in order to prove direct dealing in this context, SEIU must show that the County "dealt directly with its employees to create a new policy of general application, or to obtain a waiver or modification of existing policies applicable to those employees."[89] Further, nothing in the MOA indicated that if the arbitrator were to find the Policy inconsistent with the MOA, the arbitrator would look beyond the contract and engage in the required additional statutory analysis—whether the County dealt directly with its employees in adopting the policy. Thus, the Board found that none of the allegations were subject to deferral.[90]

In *County of Santa Clara*, a PERB agent deferred SEIU's unfair practice charge to arbitration and placed the charge in abeyance pending the completion of arbitration proceedings.[91] Specifically, the PERB agent notified the parties that she would : (1) place SEIU's charge in abeyance until the parties' contractual grievance and arbitration process was complete, and (2) dismiss the charge following arbitration unless SEIU sought a repugnancy review of the arbitrator's decision by PERB.[92] In conclusion, the PERB agent explained that the abeyance letter was an interlocutory order and thus appealable only in accordance with PERB Regulation 32200, which provides that PERB cannot consider an appeal of an interlocutory order unless the PERB agent joins the appellant's request for a ruling by PERB.[93]

SEIU appealed the PERB agent's decision to the PERB Appeals Office, which rejected the appeal as procedurally deficient because the PERB agent declined to join in the appeal.[94] SEIU then appealed the decision by the Appeals Office. PERB reasoned that with respect to procedural matters, PERB is expected to adopt "a coherent and harmonious system" that avoids arbitrary distinctions between similarly situated parties.[95]

In accordance with this expectation, PERB said that it saw no reason to treat appeals of pre-arbitration deferrals differently based on the particular statute under which the charge arose, especially when doing so would put parties governed by certain statutes at a disadvantage. Strong policy reasons thus support allowing immediate appeal of all PERB agent decisions to defer charges to arbitration.

On this basis, PERB ruled that a PERB agent's decision to defer a charge to arbitration and place it in abeyance pending completion of arbitration proceedings is not an interlocutory order, and therefore, PERB Regulation 32200 does not apply in such circumstances.[96] Rather, the abeyance letter is an administrative decision that may be

[87] *Id.* at p. 3-4.
[88] *Id.* at p. 12.
[89] *Id.* at p. 14-15.
[90] *Id.*

[91] *County of Santa Clara* (2020) PERB Ad.482-M.
[92] *Id.* at p. 3.
[93] *Id.*
[94] *Id.* at p. 5 (citing *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal. 4th 1072, 1089-1090).
[95] *Id.* at p. 10.
[96] *Id.* at 8-12.

appealed directly to PERB pursuant to PERB Regulation 32360.[97]

IMPACT OF NEW DEVELOPMENTS

- Assembly Bill 51, which protects job applicants or employees from being required to waive their right to a judicial forum as a condition of prospective employment, continued employment, or the receipt of an employment-related benefit, was signed into law. However, the bill needs to survive a statutory preemption challenge in order for the law to go into effect.

[97] *Id.*

Privacy

Summary of the Law

Issues regarding a public employee's right to privacy arise from a variety of circumstances. Public employer actions that may infringe on employees' privacy rights include, but are not limited to:

- drug and alcohol testing;
- searching an employee's personal desk, office, locker, or private electronic mail that is not generally open to other employees or the public;
- videotaping employees without their knowledge or permission;
- conducting pre-employment or promotional investigations that include questions about sexual activity or personal relationships;
- releasing personnel records; and
- imposing discipline for personal or off-duty activities that are not job-related.

This chapter addresses public employees' privacy rights under the federal and California constitutions, federal and California statutes, and common law.

U.S. Constitution

Federal Constitutional "Privacy" Rights

The term "privacy" does not actually appear in the U.S. Constitution. However, the U.S. Supreme Court has established a federal constitutional right to personal privacy.[1] The right to privacy is implicit in the Bill of Rights' prohibitions against various types of unreasonable government intrusion upon personal freedom. U.S. Constitution privacy claims usually involve one of two interests. The first is an individual's interest in independently making important personal decisions. The U.S. Supreme Court has recognized that this type of privacy right protects activities relating to marriage,[2] procreation,[3] sexual activity between consenting adults in the home,[4] contraception,[5] family relationships,[6] child rearing, and education.[7]

The second Constitutional privacy interest is an individual's interest in not disclosing personal matters. Cases involving "nondisclosure" privacy interests may arise when the government invades individual privacy during an investigation. These actions implicate Fourth Amendment protections against unreasonable search and seizure. State or federal statutes regulating disclosure or nondisclosure of personal information also shape this privacy interest.

Proving Fourth Amendment Violations

To determine whether a governmental employer violates an employee's federal constitutional privacy rights, courts weigh the employee's interest in privacy right against the employer's interest in invading that privacy interest. The scale tips in the employer's favor if the employer's interest is "compelling" and the invasion does not intrude more than is necessary to satisfy the employer's interest. An employee may have a diminished privacy expectation due to a

[1] *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678.

[2] *Loving v. Virginia* (1967) 388 U.S. 1, 12, 87 S.Ct. 1817, 1822.

[3] *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541, 542, 62 S.Ct. 1110, 1113-1114.

[4] *Lawrence v. Texas* (2003) 539 U.S. 558, 123 S.Ct. 2472.

[5] *Eisenstadt v. Baird* (1972) 405 U.S. 438, 453-454, 92 S.Ct. 1029, 1042-1044.

[6] *Prince v. Massachusetts* (1944) 321 U.S. 158, 166, 64 S.Ct. 438, 442, rehg. den. (1994) 321 U.S. 804, 64 S.Ct. 845.

[7] *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 535, 45 S.Ct. 571, 573. A recent case interpreting this privacy interest is *Fields v. Palmdale School Dist.* (9th Cir. 2005) 427 F.3d 1197, amended and reaffd. (9th Cir. 2006) 447 F.3d 1187, cert. den. (2006) 127 S.Ct. 725.

job's nature or an employer's rules or practices. In such cases, the employer may be entitled to intrude more into personal or private affairs. For example, prison employees have a diminished privacy expectation due to the close and continual scrutiny of inmates that is necessary to ensure security.[8] Similarly, employees may have a diminished expectation of privacy in their personnel files and computer files when the employer adopts policies making personnel files available to those authorized on a need-to-know basis, or reserving the right to access to the computer files stored on the employer's computers.[9]

When investigating sexual harassment claims, employers sometimes need to inquire into employees' off-duty conduct. Employers may not, however, ignore employee privacy rights during these inquiries. An "employer's obligation regarding privacy rights while investigating claims of sexual harassment is clear: when investigating off-duty personal activities relating to areas within the constitutional zone of privacy, an employer must show that: (1) these activities have an impact on job performance; and (2) the employer is investigating pursuant to narrow implementing policies designed to preserve privacy."[10]

When conducting a search, an employer need only show that the search is "reasonable." The search need not meet the higher "probable cause" standard that governs searches by law enforcement officers as long as the search is an employer-initiated administrative search and is not conducted primarily for criminal investigation or prosecution purposes.[11] For the search to be reasonable, the subject of an employer's inquiry must be work-related or must affect the employer's operations.[12] The overall context of the search also is important. For example, because of the need to maintain school safety and an effective learning environment, courts have allowed school officials broad authority to detain and question students and campus intruders, even without reasonable suspicion of wrongdoing.[13]

Privacy and Drug-Testing

Within the drug-testing context, the U.S. Supreme Court in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*[14] upheld a public school district's drug-testing policy that required all students who participate in extracurricular activities to submit to drug tests. A divided Supreme Court overturned the Tenth Circuit's decision, which found that the policy violated students' privacy rights because the school district failed to identify a substantial drug abuse problem among the group tested and failed to show that testing the group would actually redress the problem. The Tenth Circuit had relied on the Supreme Court's 1995 school drug-testing decision, *Vernonia School District 47J v. Acton*.[15]

The Supreme Court clarified that its decision in *Vernonia School District*, which upheld suspicionless drug-testing for student athletes, was not based on a finding that student athletes have a reduced expectation of privacy because they dress in communal locker rooms and routinely submit to physical examinations. Instead, the reduced expectation of privacy stems from the school setting. Public schools' custodial responsibility and authority, and unique responsibility for maintaining discipline, health, and safety, reduce students' expectations of privacy in the public school setting.

The school district's drug-testing policy in the *Earls* case involved minimally intrusive sample collection techniques. Faculty waited outside the closed restroom stall for students to produce urine samples. Test

[8] *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 59 Cal.Rptr.2d 834, review den. (1997) 520 U.S. 1124, 117 S.Ct. 1265; *Somers v. Thurman* (9th Cir. 1997) 109 F.3d 614, 620, cert. den. (1997) 522 U.S. 852, 118 S.Ct. 143.
[9] *Id.* at p. 905; *United States of America v. Ziegler* (9th Cir. 2006) 456 F.3d 1138, rehg. en banc den. (2007) 2007 U.S.App.LEXIS 14715.
[10] *Ibid.*, citing *Thorne v. City of El Segundo* (9th Cir. 1983) 726 F.2d 459, 468.
[11] *United States of America v. Jones* (9th Cir. 2002) 286 F.3d 1146; see *Meyers v. Baca* (C.D.Cal. 2004) 325 F.Supp.2d 1095.
[12] *O'Connor v. Ortega* (1987) 480 U.S. 709, 107 S.Ct. 1492.
[13] *In re Cody S.* (2004) 121 Cal.App.4th 86, 16 Cal.Rptr.3d 653; *In re Randy G.* (2001) 26 Cal.4th 556, 110 Cal.Rptr.2d 516; *In re Joseph F.* (2000) 85 Cal.App.4th 975, 102 Cal.Rptr.2d 641, review den. (2001).
[14] (2002) 536 U.S. 822, 122 S.Ct. 2559.
[15] (1995) 515 U.S. 646, 115 S.Ct. 2386.

results were kept confidential, and positive results were not turned over to law enforcement or used for discipline or academic consequences beyond disqualification for extracurricular activities. Finally, by deciding to participate in extracurricular activities, the students consented to the drug-testing. The policy served the district's important interest in preventing drug use by its students, and the policy was a reasonable means of addressing this interest.

In contexts where the expectation of privacy is high, drug-testing programs are less likely to be sustained. In *Ferguson v. City of Charleston*,[16] the U.S. Supreme Court concluded that a public hospital's drug-testing program violated the Fourth Amendment when patients did not knowingly consent to the drug tests. The Charleston, South Carolina hospital worked with police to develop a drug testing program for pregnant women that not only referred women to drug treatment programs, but also provided the test results to law enforcement officers for criminal prosecutions.

The City of Charleston unsuccessfully argued that the drug tests were reasonable in light of the City's special need to curtail pregnancy complications and medical costs associated with maternal drug use. The Supreme Court distinguished other cases that have upheld drug-testing programs when the state's special needs outweighed the privacy intrusion. The privacy intrusion in this case was more substantial because patients have a strong expectation of privacy in the results of medical tests performed for diagnostic purposes. And unlike the drug testing programs which the Supreme Court previously has upheld, Charleston's drug-testing program was implemented primarily for law enforcement purposes.

More recently, in *Lanier v. City of Woodburn*, the Ninth Circuit struck down, as an unconstitutional search under the Fourth Amendment, a broad pre-employment drug-testing policy of a public entity as it was applied to a particular position, although the court did leave open the possibility that such a policy would be acceptable as applied to certain "safety sensitive" positions.[17] In *Lanier*, the plaintiff, an applicant for a library page position, challenged the City's requirement to pass a urinalysis drug test as a condition of employment, which the City justified by arguing that drug abuse was a serious problem confronting society, that drug use has an adverse impact on job performance, and that children must be protected from those who use drugs.[18] The Court struck down the City's policy finding that "the need for suspicionless testing must be far more specific and substantial than the generalized existence of a societal problem."[19] The Ninth Circuit noted that courts have found the following jobs to be safety-sensitive, meaning that "they involve work that may pose a great danger to the public," such as: the operation of railway cars; the armed interdiction of illegal drugs; work in a nuclear power facility; work involving matters of national security; work involving the operation of a natural gas and liquefied natural gas pipelines; work in the aviation industry; and work involving the operation of dangerous instrumentalities like trucks that weigh more than 26,000 pounds, that are used to transport hazardous materials, or that carry more than fourteen passengers at a time.[20]

In a recent PERB decision, an employee's termination for failure to adhere to drug-testing protocols was overturned when PERB found that the Fairfield Suisan Unified School District's "Zero Tolerance" policy was improperly implemented without notifying the employee's bargaining unit.[21] PERB noted that the Zero Tolerance policy goes beyond the requirement under federal law that drivers holding a commercial license submit to random drug and alcohol testing. The District's collective bargaining agreement required the District to use progressive discipline with employees, except when there was a safety issue or when it was an emergency. Twelve years earlier, the District had implemented a "Zero Tolerance" drug policy stating that persons violating the

[16] (2001) 532 U.S. 67, 121 S.Ct. 1281.

[17] (9th Cir. 2008) 518 F.3d 1147.
[18] *Id.* at 1150.
[19] *Ibid.*
[20] *Id.* at 1151.
[21] *Fairfield Suisun Unified School Dist.* (2012) PERB Dec. No. 2262-E.

District's drug policies were subject to termination. When an employee, Kevin A. Campbell, was terminated in 2009 for failing to follow drug-testing protocols, Campbell and MOS filed an unfair practice charge with PERB alleging that the District could not implement its Zero Tolerance Policy because it had failed to notify the bargaining unit that it was considering the Zero Tolerance Policy, and therefore, the Policy amounted to a unilateral change that should have been bargained under the EERA, and was thus unenforceable. The District argued that even if the Zero Tolerance Policy were invalid, it could rightfully terminate Campbell under the safety exception to the requirement of progressive discipline. However, PERB ruled that failure to adhere to drug-testing protocols was not a direct safety issue. PERB further found that the District did not raise the safety exception at earlier stages of proceedings.

See the discussion below regarding California constitutional privacy issues related to drug-testing.

Privacy and Medical Examinations

Another example of a "search" that does not violate the Fourth Amendment is requiring an employee who takes inordinate amounts of sick and vacation leave for health reasons to submit to a fitness-for-duty exam. In *Yin v. State of California,*[22] the Court found that the state's interest in its workforce's productivity and stability outweighed Yin's privacy interest in being free from an unwanted medical exam. Yin had a diminished privacy interest based on the state civil service statute, the union contract, her employee status, and her unfortunate attendance record. Yin's frequent absences gave her supervisors good reason to question her ability to perform her job. The state's request that Yin undergo a medical exam was reasonable and constitutional.

Although an employer may require an employee to submit to a fitness-for-duty exam in some circumstances, it may not test employees or job applicants for sensitive medical and genetic information without the employee's or applicant's knowledge and consent.

In *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*,[23] clerical and administrative employees of Lawrence Berkeley Laboratory, a research institution, submitted to mandatory pre-employment medical examinations and periodic "health" examinations. During these examinations, the laboratory tested the employees' blood and urine for intimate medical conditions (namely syphilis, sickle cell trait, and pregnancy) without the employees' consent or knowledge and without later notifying them of the test results. The Ninth Circuit found that an individual's health or genetic make-up clearly implicate privacy interests. The court found that the conditions tested for — syphilis, pregnancy, and sickle cell trait — are highly sensitive, and invoke the highest privacy expectations and protection.[24]

Federal and state law protects an employee's right to confidentiality in communications with his or her doctor or psychiatrist. The Ninth Circuit has extended the psychotherapist-patient privilege to apply to communications between an employee and unlicensed employee assistance program counselors.[25]

See the discussion below regarding California constitutional privacy issues related to medical examinations.

Privacy and Text Messages

In *Quon v. Arch Wireless Operating Co.*,[26] the City of Ontario issued two-way pagers capable of transmitting text messages to police officer employees. Each pager was allotted a monthly maximum of 25,000 characters for texting, after which there would be an additional charge. When some employees exceeded this limit, the City obtained from the equipment provider transcripts of the employees' text messages. As a result of the City obtaining transcripts of their text messages, which revealed personal and sexual content, four City employees, including Quon, filed suit in federal court

[22] (9th Cir. 1996) 95 F.3d 864, cert. den. (1997) 519 U.S. 1114.

[23] (9th Cir. 1998) 135 F.3d 1260.
[24] *Id.* at p. 1270.
[25] *Oleszko v. State Compensation Ins. Fund* (9th Cir. 2001) 243 F.3d 1154, cert. den. (2001) 122 S.Ct. 208.
[26] (C.D.Cal. 2004) 309 F.Supp.2d 1204,

alleging, in part, unreasonable search and seizure.[27] On appeal, the Ninth Circuit first noted that privacy rights in electronic communications constitute "a new frontier in Fourth Amendment jurisprudence that has been little explored." The Court then ruled that the City employees had a reasonable expectation of privacy in their text messages, and that the City's search of the text messages was not reasonable because it was not the least intrusive procedure that the City could have used.[28]

The City appealed to the U.S. Supreme Court. In *City of Ontario v. Quon*, the Supreme Court reversed the ruling of the Ninth Circuit. Specifically, the Court ruled that the City did not violate the employees' privacy rights because the City's search of Quon's text messages was reasonable. The Court reasoned that even assuming that Quon had a reasonable expectation of privacy in his text messages, the City's search was reasonable because it was motivated by a legitimate work-related purpose and was not excessive in scope. In reaching its conclusion, the Court rejected the Ninth Circuit's "least intrusive" approach.[29]

CALIFORNIA CONSTITUTION

Privacy Rights Under the California Constitution

The California Constitution, art. 1, section 1, provides an explicit right to privacy. That provision states:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy."

Because privacy is an inalienable right under the California Constitution, state law imposes higher privacy protections than federal law. California's constitutional privacy right applies to both private and public employers. This privacy provision is directed at the:

- overbroad collection and retention of unnecessary personal information by government and business interests;
- improper use of information properly obtained for a specific purpose; and
- lack of a reasonable check on the accuracy of existing records.[30]

California's constitutional right to privacy does not give any greater protection from unreasonable search and seizure than that guaranteed by the Fourth Amendment to the U.S. Constitution and the California Constitution's parallel provision.[31]

Proving Privacy Violations Under the California Constitution

Privacy and Computer Use

The right to privacy is often implicated when employers monitor employees' computer and Internet use. Employers may reduce employees' privacy expectations and rights by adopting policies that explicitly reserve the employer's right to monitor computer and Internet use. For example, in *TBG Insurance Services Corp. v. Superior Court*, the California Court of Appeal rejected an employee's privacy claim, finding that the employee had no reasonable expectation of privacy in his computer given the company's policy, community norms in similar businesses, and the employee's explicit written acknowledgement that the company would monitor his computer as needed.[32]

Gina Holmes was in a dispute with her employer, Petrovich Development Company, and she brought a lawsuit against Petrovich which included a variety of causes of action. Holmes used a computer of the defendant company to send e-mails to her attorney. Petrovich advised its employees that its computers were to be used only for company business, and that employees were prohibited from using company computers to send or receive personal e-mail. In addition, Ms. Holmes had been warned that the

[27] (9th Cir. 2008) 529 F.3d 892.
[28] 529 F.3d at 904.
[29] (2010) 560 U.S. 746, 130 S.Ct. 2619.
[30] *White v. Davis* (1975) 13 Cal.3d 757, 120 Cal.Rptr. 94.
[31] *Smith v. Los Angeles County Bd. of Supervisors* (2002) 104 Cal.App.4th 1104, 128 Cal.Rptr.2d 700, review den. (2003).
[32] (2002) 96 Cal.App.4th 443, 117 Cal.Rptr.2d 155, review den. (June 1, 2002). For discussion of policies that reduce employees' privacy expectations in a non-computer context, see *United States of America v. Gonzalez* (9th Cir. 2002) 300 F.3d 1048.

company would monitor its computers for compliance with this policy, and that employees using company computers to create or maintain personal information or messages "have no right of privacy" with respect to that information. The Court of Appeal noted that the e-mails which Ms. Holmes sent via the company computer "were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him." The Court of Appeal ruled that not only were Ms. Holmes' emails not private, but in addition, that they were not protected from disclosure by the attorney-client privilege.[33]

Privacy and Drug-Testing

In a drug-testing case not directly involving employment, *Hill v. NCAA*,[34] the California Supreme Court articulated the elements that an individual must establish in order to prove a constitutional invasion of privacy claim:

- the individual must be able to articulate a legally protected privacy interest;
- the individual must have had a reasonable expectation of privacy in the circumstances; and
- the employer's conduct must constitute a serious privacy invasion.

An employer may prevail in a state constitutional privacy case by negating any of these three elements, or by showing that the privacy invasion is justified because it substantively furthers a countervailing interest. The employee whose privacy was invaded may then rebut the assertion of countervailing interests by showing that there are feasible and effective alternatives to the invasive conduct that have a lesser impact on privacy interests.[35]

The California Supreme Court recognized two types of legally protected privacy interests in *Hill*: "informational privacy" and "autonomy privacy." "Informational privacy" is the interest in precluding misuse of sensitive and confidential information. "Autonomy privacy" is the interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference. The court recognized informational privacy as the core value furthered by the California Constitution.

In *Hill*, student athletes claimed that the NCAA's drug-testing program violated their state constitutional privacy right. The court found that student athletes have a diminished privacy expectation because they frequently undergo physical examinations, reveal their bodily and medical conditions to coaches, and often dress and undress in same-sex locker rooms. The NCAA's legitimate regulatory objectives in ensuring nonuse of prescribed drugs outweighed this diminished privacy expectation. Because the NCAA's drug-testing rules were reasonably calculated to achieve drug-free athletic competition, the NCAA's drug-testing program did not violate the student athletes' state constitutional privacy right.

Privacy and Job Applicant Interviews

California Labor Code section 432.3 generally prohibits California employers from seeking salary history information about a job applicant. It also makes it unlawful for an employer to rely on an applicant's past salary history when deciding whether to hire an applicant. The impetus for this statute was to ensure equity in pay.

There are two exceptions under this statute. First, an employer may seek and use salary history that is disclosable under state and federal public records laws. Second, if the applicant voluntarily provides compensation history, an employer may use that information to determine what salary to offer the applicant, but may not use it to decide whether to hire the applicant. Finally, the law requires an employer to provide an applicant, "upon reasonable request," the pay scale for the position sought.

Privacy and Pre-employment Drug Tests

In a sharply divided decision, the California Supreme Court ruled in *Loder v. City of*

[33] (2011) 191 Cal.App.4th 1047, 1051, 119 Cal.Rptr.3d 878.
[34] (1994) 7 Cal.4th 1, 26 Cal.Rptr.2d 834. Another case applying the *Hill* standards is *In re Carmen M.* (2006) 141 Cal.App.4th 478, 46 Cal.Rptr.3d 117.
[35] *Ibid.*

Glendale[36] that public employers may require all potential employees to take drug and alcohol tests as a condition of employment. Chief Justice Ronald George's lead opinion made the significant distinction, however, that employers must show an "important" interest to justify testing existing employees seeking promotions.

"In light of the well-documented problems that are associated with the abuse of drugs and alcohol by employees ... an employer, public or private, clearly has a legitimate ... interest in ascertaining whether persons to be employed in any position are currently abusing drugs or alcohol," George wrote in one of five opinions issued in the case.[37] Although the same rationale could be applied to current employees seeking promotion, George said employers have other means of checking for substance abuse, such as excessive absences or tardiness or poor job performance. The Court did not prohibit promotional testing. The Court simply set aside the city's suspicionless urinalysis testing program for current employees as overbroad and left the City free to fashion a new pre-promotional drug-testing program in light of the Court's decision. For example, the City may be able to develop a pre-promotional testing program for safety sensitive positions, including police, and fire.

An appellate court applied the reasoning of *Loder v. City of Glendale* in concluding that Caltrans violated employees' privacy rights by requiring them to submit to off-duty drug tests. In *Edgerton v. State Personnel Board*,[38] employees had no reasonable expectation that they would be subject to off-duty testing given Caltrans' written policies stating that employees would be subject to testing while on duty. And Caltrans failed to show that it could not use less intrusive alternatives to accomplish its purposes.

In light of the more recent decision of *Lanier v. City of Woodburn*, public employers should exercise caution and limit pre-employment drug testing to "safety sensitive" positions, as noted above.[39]

Privacy and Asking Job Applicants about Criminal Convictions

Public employers cannot ask job applicants to disclose criminal convictions in their initial application. California's "Ban the Box" legislation, which became effective on July 1, 2014 and was codified as Labor Code section 432.9, prohibits any state or local agency from asking a job applicant to disclose criminal convictions on the initial employment application until after the agency has determined that the applicant meets the minimum qualifications for the position. Labor Code section 432.9 does not apply to positions for which a state or local agency is otherwise required to conduct a conviction history background check (*e.g.* peace officers), or any position within a criminal justice agency, as defined by Penal Code section 13101.

San Francisco adopted similar legislation – Ordinance No. 131192, known as the "Fair Chance Ordinance" – which became effective on August 13, 2014, that is much broader in scope than section 432.9. Among various procedural mandates differentiating it from the State legislation, the San Francisco Ordinance applies to housing providers as well as to employers. Additionally, the Ordinance defines "employer" as any company located or doing business in the City which employs 20 or more employees, regardless of location. This means that, unlike Labor Code section 432.9, the Ordinance applies to many private entities. The Ordinance also requires all City contractors and subcontractors to adhere to its provisions. Ironically, the Ordinance does not apply to the City and County of San Francisco itself.

Privacy and Medical Examinations

An employer may violate an employee's state constitutional privacy rights if the employer reviews an employee's medical exam results without the employee's specific consent. In

[36] (1997) 14 Cal.4th 846, 59 Cal.Rptr.2d 696, cert. den. (1997) 522 U.S. 807.
[37] The California Supreme Court's vote was 5-2 in favor of testing for job applicants, but 4-3 against testing in promotions. The ruling produced five opinions from the seven justices, totaling 129 pages.
[38] (2000) 83 Cal.App.4th 1350, 100 Cal.Rptr.2d 491, review den. (2000).
[39] *Lanier v. City of Woodburn* (9th Cir. 2008) 518 F.3d 1147.

Pettus v. Cole,[40] employee Louis Pettus requested a stress-related disability leave; the employer's disability policy required a psychiatric exam; the employer paid and arranged for the exam; Mr. Pettus did not specifically consent to release the exam results; and the physician released to the employer medical information compiled during the exam. The employer then advised Mr. Pettus that he must enroll in an inpatient alcohol treatment program as a condition of further employment. Mr. Pettus refused and was terminated.

A court ruled that Mr. Pettus had a legitimate interest in preserving the privacy of his medical history and psychological profile. He had a reasonable expectation of privacy in the detailed information that he conveyed to the physician. The physician's subsequent release of information to the employer violated Mr. Pettus's right to "informational" privacy.[41] Mr. Pettus also had an "autonomy" privacy interest in making intimate personal decisions about an appropriate course of medical treatment for his disabling stress condition, without his employer's undue intrusion or interference. The employer violated Mr. Pettus's state constitutional right to privacy when it discharged him for refusing to participate in an alcohol treatment program.

Privacy and Workplace Surveillance

Employers may violate employees' privacy rights by covertly videotaping employees. For example, police officers have a reasonable expectation that they will be free from video surveillance while changing clothes, showering, and engaging in other locker room activities.[42]

The private employer in *Hernandez v. Hillsides*,[43] suspecting that someone had been accessing pornographic Websites at night from some of the office computers, placed a motion-activated video surveillance system in two employees' shared office without informing the employees. The resulting videotape included footage of only the empty office and the individual who placed the camera in the office. The camera was removed shortly after the employees discovered it, and only the employees whose office was videotaped saw the footage.

The employees whose office was videotaped sued for invasion of privacy under both common law and Constitutional theories. The Superior Court granted summary judgment in favor of the employer, ruling that there was no intrusion into plaintiffs' reasonable expectations of privacy. The Court of Appeal reversed, but the California Supreme Court, engaging in an intensive analysis of the underlying facts, reinstated the summary judgment in favor of the employer.

Regarding plaintiffs' common law claims of invasion of privacy, the California Supreme Court noted that aside from whether plaintiffs had a reasonable expectation of privacy, their claims failed as a matter of law because the intrusion did not occur in "a manner highly offensive to a reasonable person,"[44] noting that the video surveillance was not conducted "for socially repugnant or unprotected reasons."[45] Although the *Hernandez* case involved a private employer, the Court noted that for public employers, "where a governmental search intrudes upon an enclosed office or other protected workplace, and where covert video surveillance is involved, limited but reasonable expectations of privacy may exist under the Fourth Amendment."[46]

Privacy and Release of Employee Investigation Reports and Their Contents

Public employers may be required to disclose its investigative reports of employees, as well as the contents of the investigative reports. Under the California Public Records Act, "every person[47] has a right to inspect any public record," "[e]xcept with respect to records exempt from disclosure by express provisions of law... ."[48] There are 29 categories of documents exempt

[40] (1996) 49 Cal.App.4th 402, 57 Cal.Rptr.2d 46, review den. (1996).
[41] *Id.*, citing *Hill, supra*.
[42] *Trujillo v. City of Ontario* (C.D.Cal. 2006) 428 F.Supp.2d 1094.
[43] (2009) 47 Cal.4th 272, 97 Cal.Rptr.3d 274.
[44] *Id.* at p. 15.
[45] *Id.* at p. 31.
[46] *Id.,* fn. 9, at p. 27.
[47] Public agencies are also entitled the right to obtain public records from other public agencies. *See Los Angeles Unified School Dist. v. Superior Ct.* (2007) 151 Cal.App.4th 759, 157 Cal.Rptr.3d 481.
[48] Gov. Code, § 6253(a-b).

from the requirement of public disclosure, including such documents as "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."[49] The public agency can also withhold some records if it can demonstrate "on the facts of the particular case the public interest served by not disclosing the record clearly outweigh the public interest served by disclosure of the records."[50] The following are circumstances in which courts have ordered disclosure of an employer's investigative reports and its contents:

- Complaints against a public employee may be disclosed if they are "of a substantial nature."[51] If "there is reasonable cause to believe the complaint to be well founded, the right of public access related to public records exists."[52]
- Records must be disclosed if they are relevant to charges of misconduct that have not been found true by the public agency if the documents "reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded."[53]
- An investigation may be released if it involves a public official in an important and highly visible position, and the charges against the official are significant and numerous.[54]
- If a complaint is upheld by a public agency or if discipline was imposed as a result of a complaint, the investigative report must be disclosed.[55]

PERB also has required employers to disclose investigative reports and witness statements gathered during an investigation.[56] The PERB found that, while an employer is "not obligated to provide information when disclosure of the information would compromise a recognized right of privacy or a legitimate confidentiality interest," if the employer can establish a "legitimate and substantial confidentiality interest in the information sought, PERB must balance the requestor's need for the information against the confidentiality interest."[57] In *State of California (Department of Veterans Affairs)*,[58] PERB found that an investigation report into alleged misconduct of a supervisor was necessary and relevant to the exclusive representative's duty to represent bargaining members on issues of workplace safety that arose from the supervisor's conduct. But finding an investigation necessary and relevant will not always outweigh the privacy interests of the employer. In *State of*

[49] Gov. Code, § 6254.
[50] Gov. Code, § 6255(a).
[51] *American Federation of State, County and Municipal Employees v. Regents of the U. of Cal.* (1978) 80 Cal.App.3d 913, 918.
[52] *American Federation of State, County and Municipal Employees, supra* (finding that "the superior court abused its discretion in failing to order disclosure of portions of the report concerning accusations that were not found to be without substance or unsupported by evidence.").
[53] *Bakersfield City School Dist. v. Superior Ct.* (2004) 118 Cal.App.4th 1041, 1044, 113 Cal.Rptr.3d 517 (finding that "where the charges are true, or discipline is imposed, the strong public policy against disclosure vanishes; this is true even where the sanction is a private reproval. In such cases a member of the public is entitled to information about the complaint, the discipline, and the 'information upon which it was based.'"); *cf. Chronicle Publishing Co. v. Superior Ct.* (1960) 54 Cal.2d 548, 569-575, 7 Cal.Rptr. 109 (finding that trivial or groundless complaints of wrongdoing "are to be considered as highly confidential, and as records to which public policy would forbid the confidence to be violated," but noting that "discovery" should be allowed "when the nature of the [accused] merits condemnation even though the expression of condemnation to be in minor form, that is, private").
[54] *BRV, Inc. v. Superior Ct.* (2006) 143 Cal.App.4th 742, 759, 49 Cal.Rptr.3d 519 (finding that "[b]ecause of [the superintendent's] position of authority as a public official and the public nature of the allegations, the public's interest in disclosure outweighed [his] interest in preventing disclosure of the [investigation] report." In addition to the complaint that was at issue in the CPRA request, the employer received forty tort claims based on the superintendent's alleged misconduct.).
[55] *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1274 (finding that "although disclosure is mandated if there has been a true finding by the agency, even without such a finding, if the information in the agency's files is reliable, and based on that information, the court can determine the complaint is well founded and substantial, it must be disclosed."
[56] *See City of Redding* (2011) PERB Dec. No. 2190-M (City ordered to produce report and witness statements, subject to redaction of all employee names and identifying information where union asserted access to report necessary to represent its members in being free from a hostile work environment and to work in a safe workplace); *cf. State of Cal. (Dept. of Consumer Affairs)* (2004) PERB Dec. No. SA-CE-1385-S, 28 PERC 98 (union not entitled to investigation report of a supervisor who was outside the bargaining unit); State of Cal. (Dept. of Consumer Affairs) (2004) PERB Dec. No. SA-CE-1385-S, 28 PERC 98 (no production of investigation report into applicant's threats where union claimed it wanted to determine whether investigation was "thorough").
[57] *Id.* at 6.
[58] (2004) PERB Dec. No. 1686-S.

California (Department of Consumer Affairs),[59] the PERB found that an investigation report into alleged threatening behavior by a license applicant was necessary and relevant to the exclusive representative's representational duties because the investigation involved workplace safety matters, however PERB found that the employer's privacy interests outweighed the exclusive representative's need for the report because the employer had taken action to mitigate potential danger to employees and the applicant's threatening conduct ceased after it did so.

Privacy and Release of Personnel Information to the Public Employers may violate employees' privacy rights by releasing confidential personnel information. For example, a school district superintendent's personal performance goals are protected by the California Constitution's right to privacy, and exempt from disclosure under the personnel provisions of the California Public Records Act ("CPRA").[60]

However, pursuant to recent case law, public entities are not required to assert the personnel exemption to the CPRA upon receipt of a public records request, and in fact may be required to produce personnel records in response to a request where an employee's conduct is substantial.

In *Marken v. Santa Monica-Malibu Unified School District*,[61] math teacher Ari Marken was investigated by the school district following student complaints of sexual harassment. As a result of the investigation, Mr. Marken received a reprimand for violating the District's sexual harassment policy. Two years later, a parent requested a copy of the reprimand and the investigator's report from Mr. Marken's personnel file. The District advised Mr. Marken that it had received the request and that it intended to produce the records. Mr. Marken filed a writ petition seeking an injunction and declaratory relief to prevent the release of the records, claiming his privacy interest under the personnel exemption to the CPRA outweighed the requester's right to see the documents.

The Court of Appeal affirmed the trial court's order denying Mr. Marken's petition and ruling that the public's interest in the records outweighed Mr. Marken's privacy interest. The Court noted that exemptions from mandatory disclosure under the CPRA must be narrowly construed and that a public agency is not required to assert the exemption and may decide not to utilize an exemption except where prohibited by law. Moreover, the personnel records exemption is inapplicable with respect to records regarding complaints against a public employee "if the complaint is of a substantial nature and there is reasonable cause to believe the complaint or charge of misconduct is well-found."[62]

In *Marken*, because the District concluded based on the investigator's factual findings that Mr. Marken had violated its board policy prohibiting sexual harassment, and because Mr. Marken was disciplined for that violation, the Court ruled that the complaint was "well-founded" and that the personnel exemption was inapplicable. Accordingly, release of the investigative report and disciplinary record was required under the CPRA. The Court also pointed out that "Marken occupies a position of trust and responsibility as a classroom teacher, and the public has a legitimate interest in knowing whether and how the District enforces its sexual harassment policy."[63]

This case reaffirmed that the public's right to know trumps the privacy exception in the CPRA where an employee's actions are of substantial public interest. It also reiterates that a CPRA requester may be able to review certain personnel records, and reaffirms that an employee may attempt to stop the production to protect his privacy. The personnel exemption to the CPRA is permissive, not mandatory: it allows a public entity to prevent disclosure, but does not prohibit disclosure. Employers should be aware that they may be required to produce personnel records involving an employee's

[59] (2004) PERB Dec. No. 1711-S.
[60] *Versaci v. Superior Ct.* (2005) 127 Cal.App.4th 805, 26 Cal.Rptr.3d 92, review den. (2005) 2005 Cal.LEXIS 6523.
[61] (2012) 202 Cal.App.4th 1250, 136 Cal.Rptr.3d 395.
[62] *Id.* at 1273 (citing *Bakersfield School Dist. v. Superior Ct.* (2004) 118 Cal.App.4th 1041, 1044).
[63] *Id.* at 1275.

substantial conduct despite exemptions in the CPRA.

In *Long Beach Police Officers Association v. City of Long Beach*, the California Supreme Court found that the names of officers involved in a particular shooting, as well as names of officers involved in shootings during the previous six years, were subject to disclosure under CPRA.[64] The Court ruled that officer names are not personnel information exempt from disclosure under Government Code section 6254(c), and the public's interest in disclosure outweighs the officers' interest in privacy. The names of officers in officer involved shootings are thus subject to disclosure unless the agency or union (or, presumably, officer) objecting to the request makes a "particularized showing" that the privacy interests of the officers outweighs the public's interest in disclosure. The *Long Beach* Court found that such a showing had not been made, as the Union and the City had "relied on only a few vaguely worded declarations making only general assertions about the risks officers face after a shooting."[65] Examples of such a showing, the Court noted, would include facts indicating the involved officer was working under cover, or had been the subject of specific and personal threats.[66]

Shortly after the Supreme Court's ruling in the *Long Beach* case, the California Court of Appeal ruled, in *Los Angeles Unified School District v. Superior Court*, that, in response to a records request from the Los Angeles Times, the Los Angeles Unified School District was not required to release the names of individual teachers linked to student testing scores.[67] In that case, the Court employed the same balancing test used by the *Long Beach* Court, but reached the opposite conclusion: that the public interest served by nondisclosure of teachers' names linked to students' test scores outweighed the public interest in disclosure. Because the Court found that the names need not be disclosed under the "catchall" exemption, it did not reach the personnel exemption. The Court's primary concern, and one of the ways it distinguished the facts before it from those in *Long Beach*, was the impact disclosure of the individual names could have (according to a declaration from the Superintendent) on the operations of the District.[68]

While the rulings in the *Long Beach* and *LAUSD* cases could appear inconsistent, they are instructive on the subjective nature of the balancing test required by the "catchall" and personnel exemptions of the CPRA. Although each court appeared to interpret the relevant evidence before it differently, and assign different values to the issues raised by the parties, both courts appeared to carefully consider all of the relevant factual issues. Employers are advised to thus do the same: before determining that an exemption permits nondisclosure, ensure that the factual record is fully developed.

In *Caldecott v. Superior Court*,[69] John Caldecott, a former superintendent of Newport-Mesa Unified School District requested that the District disclose documents related to his prior claim of hostile work environment and various financial improprieties against his then-supervisor, the Executive Director of Human Resources. Shortly after the investigation of his complaint, the District terminated him without cause. The District refused to disclose the documents that the former superintendent had requested, asserting various exemptions under the CPRA, including the personnel exemption.

The Court concluded that the public's interest in disclosure of the documents outweighed the Executive Director's interest in keeping them private. It granted the petition and remanded the matter to the Superior Court to conduct an *in camera* review of the documents to determine if they were protected by the attorney-client privilege. The Court reasoned that there was a strong public interest in judging how the District responded to Mr. Caldecott's claim, especially because it terminated Mr. Caldecott shortly thereafter. Likewise, the Court determined, the public had a strong interest in knowing how the District's elected

[64] (2014) 59 Cal. 4th 59, 172 Cal.Rptr.3d 56.
[65] *Id.* at p. 75.
[66] *Id.*
[67] *Los Angeles Unified School Dist. v. Superior Ct.* (2014) 2014 WL 3615855.
[68] *Id.* at pp. 15-16.
[69] (2015) 243 Cal.App.4th 212, 196 Cal.Rptr.3d 223.

board treated allegations of serious misconduct against its highest ranking administrator.

Privacy and Release of Personnel Information to the Union and Other Employees

In *County of Los Angeles v. Los Angeles County Employee Relations Commission*, the California Supreme Court ruled that the County was required to provide home addresses and telephone numbers of its employees to the union representing those employees, regardless of whether the employees are union members.[70] The Court found that the union's interest in communicating with employees within its bargaining unit significantly outweighs the employees' privacy interest in that information.

This ruling is important for public employers, as it means they are required to disclose employee contact information to the unions representing their employees. Employers should ensure that employment contracts or policies contain appropriate provisions notifying employees that this information can be shared.

In *Ignat v. Yum! Brands, Inc.*, the Court ruled that the common law tort of invasion of privacy does not require the disclosure of private information to be in writing, and that a cause of action for violation of common-law right to privacy was insufficient to allege violation of the constitutional right to privacy.[71]

Release of Police Officer Personnel Information to the Prosecution

In *People v. Superior Court of San Francisco County (Johnson),*[72] the California Supreme Court again considered the tension between the *Brady* doctrine,[73] which requires the prosecution disclose all potentially exculpatory evidence to the defense, and the *Pitchess*[74] procedures, which allow criminal defendants to seek discovery from the court of potentially exculpatory information located in otherwise confidential peace officer personnel records.

In this case, the City of San Francisco, consistent with a trend among police departments, maintains a "Brady list," on which it lists all officers who have been identified as having information in their personnel files that could constituted "Brady material." The police department discloses the list of officers, but no additional personnel information, to prosecutors so that, if the prosecutor so choses, she can bring a *Pitchess* motion seeking disclosure of the personnel information.

Previously, courts resolved this tension by ruling that a prosecutor fulfilled her Brady obligation to the defense by simply informing the defense of what the prosecutor knew – that the police officer had potentially exculpatory information in his or her file. At that point, either the prosecutor or the defense could bring a *Pitchess* motion for relevant material. The police department would review the file and, if it found any relevant information, the court would conduct an *in camera* review to determine materiality and whether the information should be disclosed to both the prosecution and the defense. Courts have long ruled that this procedure balances the criminal defendant's rights under Brady, and the police officer's privacy rights to her personnel file.

In *Johnson*, the lower court turned this procedure on its head, requiring the prosecution to make the Pitchess motion – on behalf of the defense – review the file, and determine what information (if any) should be disclosed to the defense. The court would perform an *in camera* review only if the prosecutor determined there was a "close question" as to whether any information in the personnel file should be disclosed under Brady. Both parties appealed – neither the prosecution nor the defense wanted the responsibility for requesting and reviewing police officer personnel files to fall solely on the prosecution.

The Supreme Court reversed, finding the long-standing procedure of either party being permitted to make a *Pitchess* motion, the Police Department reviewing the file and identifying relevant information, and then the Court reviewing the file *in camera* to

[70] (2013) 56 Cal.4th 905, 157 Cal.Rptr.3d 481.
[71] (2013) 214 Cal.App.4th 808, 154 Cal.Rptr.3d 275.
[72] (2015) 61 Cal.4th 696, 206 Cal.Rptr.3d 606.
[73] (1963) 373 U.S. 83, 83 S.Ct. 1194.
[74] (1974) 11 Cal.3d 531, 113 Cal.Rptr. 897.

determine materiality and information to be disclosed, should remain intact. The Court recognized that the officer's privacy interest in her personnel file supported the procedure of limiting prosecutorial access to officers' files to only that information required to be disclosed under *Pitchess*. Permitting or requiring prosecutors to review officers' entire personnel files, including information that would be irrelevant to a *Pitchess* inquiry, would violate the officers' rights to privacy in their files.

Importantly, as of January 1, 2019, police personnel records related to 1) sustained findings of dishonesty, 2) investigations of officer involved shootings and serious uses of force, and 3) sustained findings of sexual assault, are reclassified as non-confidential, thereby allowing public access.

Privacy and Public Employee Criticism

In *Baca v. Moreno Valley Unified School District*,[75] a California federal court ruled that school district governing boards have both a constitutional and a statutory obligation to permit speakers at open board meetings to criticize employee conduct, despite the employees' constitutional right to privacy. The speaker in *Baca* charged at a board meeting that two district employees, the superintendent and a school principal, failed to respond to complaints brought by minority group members. The speaker identified the employees by name and position.

The Court ruled that the school board could not legally refuse to hear the speaker's comments, which directly related to job performance, a topic clearly within the board's jurisdiction. The Court pointed out that a board has no governmental or legislative interest in protecting employees from criticism. When a board asserts employees' privacy rights, it acts not as a government agency but as an employer.

California courts have long ruled that considering critical statements intended to prompt official action is part of a governing board's legislative role.[76] The board acts in an employer capacity when it evaluates employee performance or considers disciplinary action. When acting in its employer capacity, the board protects employee privacy rights by hearing and discussing evidence confidentially, in closed session, unless the employee requests an open session hearing.[77]

Listening to public testimony, including comments that criticize employee performance, is a legislative rather than an employer function. The board must listen to comments about any matter within the board's jurisdiction. Comments criticizing employee performance may be important to fulfilling the board's legislative functions.

The *Baca* court also noted that state law directly protects comments made during board meetings, so that employees cannot sue speakers for slander or defamation.[78] The Court, reasoning that the state Legislature already balanced the respective constitutional rights of employees' privacy and speakers' freedom of speech, found in the speakers' favor.

The Court left open the possibility that it would approve a narrowly-drawn policy that permitted most critical speech while prohibiting unwarranted invasions of personal privacy such as comments directed at employees' personal lives or comments intended solely to ridicule or embarrass.

Privacy and Cell Phone Records

In *Mintz v. Mark Bartelstein & Associates, Inc.*,[79] the Court found that a former employee, Aaron Mintz, had limited expectation of privacy in his cell phone account and that the disclosure of telephone numbers and cell site information, and the date, time, and duration of calls related to the Mr. Mintz's cell phone account did not represent a significant intrusion of the employee's privacy. The employer paid for

[75] (C.D.Cal. 1996) 936 F.Supp. 719; see also *Leventhal v. Vista Unified School Dist*. (S.D.Cal. 1997) 973 F.Supp. 951.

[76] See, for example, *Brody v. Montalbano* (1978) 87 Cal.App.3d 725, 732, 151 Cal.Rptr. 206, 211, *cert. den*. (1979) 444 U.S. 844, 100 S.Ct. 87.

[77] See Gov. Code, § 54957.

[78] Civ. Code, § 47(b): "A privileged publication or broadcast is one made … (b) In any (1) legislative proceeding … (3) in any other official proceeding authorized by law…."

[79] (C.D.Cal. 2012) 885 F.Supp.2d 987.

Mr. Mintz's personal cell phone account upon the employee's request because the employer knew that Mr. Mintz used his personal cell phone for business calls. The employer issued an employment manual advising employees not to use company equipment for personal reasons and stating that the employer had the right to review all email, voice mail, and telephone messages on company equipment. Mr. Mintz, while acknowledging that he received the employment manual, alleged that he never read the manual, had no recollection of signing an acknowledgement of the terms of the manual, and believed that he never signed any such acknowledgement. Applying California law, the Court found that Mr. Mintz had a limited expectation of privacy, because the employer provided an employment manual advising employees not to use company equipment for personal reasons and that it had a right to review emails, voice mails, and telephone messages on company equipment and, since the employer paid for the Mr. Mintz's cell phone account, it is unreasonable for Mr. Mintz to believe that he retained exclusive ownership of the phone. The Court further found that the disclosure of telephone numbers and cell site information, as well as the date, time, and duration of calls does not represent a significant intrusion of the employee's privacy because the Court could issue an appropriate protective order to protect any of the employee's privacy interests.

Privacy and Social Media

Information on social networking sites is generally considered public, and because information posted on web page profiles consists of voluntary disclosures, employers are not generally restricted from accessing such information. "Social media" means an electronic service, account, or content, including, but not limited to, videos, photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, and Internet Web site profiles.[80]

Employers should be aware that not everything on the internet is infallibly true and correct. An employer may not use information gathered through social media to screen applicants based upon membership in protected classes, such as race, national origin, gender, sex, age, marital status, disabilities, or sexual orientation as that would be a violation of the California Fair Employment and Housing Act. However, once an employer discovers protected information about an applicant, it may be difficult to prove that the information did not affect an employment decision.

Employers cannot request or require employees or applicants to disclose username or passwords of social media accounts, access personal social media accounts in the presence of an employer, or divulge any personal social media.[81]

An exception is allowed when investigating employee misconduct or unlawful activity. An employer may request an employee to divulge personal social media reasonably believed to be relevant to the investigation, which can be used only for the purposes of the investigation or related proceeding.[82]

Common Law Privacy Rights

Courts also recognize common law privacy claims that develop through case precedent. Employees most commonly bring defamation claims against a public employer, alleging that their employer has invaded their privacy by disseminating false information. But courts have recognized several other claims involving intrusion into individuals' personal privacy. These claims include:

- appropriation of another's name or likeness;
- unreasonable intrusion upon another's seclusion;
- unreasonable publicity given to another's private life; and
- publicity that unreasonably places a person in a false light before the public.

These claims can arise in the workplace. Claims for unreasonable intrusion into an employee's seclusion may arise when an employer engages in surveillance of an employee. Surveillance may occur during a background check of an employee applying for a sensitive position; during an

[80] Lab. Code, § 980(a).

[81] Lab. Code, § 980.

[82] *Id.*

investigation into on-the-job drug use or sales; during an investigation into workers' compensation claims; or at other times during the course of employment.

An employer may unreasonably publicize private facts about an employee by, for example, telling others about the employee's medical condition, or that the employee has recently divorced.

Finally, an employer can place an employee in a false light by publicizing sensitive facts about the employee. Telling a group of employees that a coworker was fired for dishonesty when in fact the coworker contested the charges and resigned may infringe upon that individual's privacy where there is no proof of any dishonesty.

But governmental employers can be shielded from such liability based on immunity statutes. A public entity must raise statutory immunity as an affirmative defense or else it will be waived it not timely raised.[83] *Quigley* overturned a line of cases relied on by the defense which describe governmental tort immunity as "jurisdictional." However, the California Supreme Court concluded that statutory immunities are not jurisdictional such that they cannot be waived or forfeited but are affirmative defenses, which must be pleaded in an Answer.

STATUTORY PROTECTIONS

Federal and state statutes provide a wide range of protection against employee privacy invasions. We include a partial list of federal and state statutes that bear on privacy below.

Penal Code section 832.7

Penal Code section 832.7 offers one example of a state statute that protects privacy rights. Penal Code section 832.7(a) mandates that peace officer personnel records are confidential and in civil and criminal proceedings are subject to discovery only according to Evidence Code sections 1043 and 1046. Those Evidence Code sections require noticed motions, supported by affidavits showing good cause for disclosure. Once good cause is shown, a trial court must examine all the records sought in private ("*in camera*"), and order all relevant materials disclosed, except for complaints over five years old, the officers' "conclusions," and remote facts of little practical benefit.

As of January 1, 2019, Penal Code section 832.7 was amended to reclassify certain law enforcement personnel records as non-confidential, thereby allowing public access and diminishing the privacy protections that California agencies enjoyed over law enforcement personnel records.

Under this law, records within law enforcement personnel records relating to the following categories are no longer confidential under California law: (1) officer-involved shootings; (2) uses of force that result in great bodily injury or death; (3) sustained allegations of sexual assault against a member of the public; and (4) sustained allegations of dishonesty. Thus, materials covered by these provisions can now be obtained through a Public Records Act request.[84] All other peace officer personnel records must be obtained via a *Pitchess* motion.[85] Unlike with the *Pitchess* process, an agency will no longer be able to wait until a Court rules on whether peace officer personnel records should be released. A requestor who prevails on a writ of mandate compelling an agency to disclose records will likely be entitled to their attorney's fees[86] as a prevailing party.

Records relating to an incident in which a sustained finding was made by any law enforcement agency that a peace officer engaged in sexual assault involving a member of the public must also be disclosed. The law defines "sexual assault" as the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency, or other official favor, or under the color of authority.[87] It also includes as sexual assault "the propositioning for or commission of any sexual act while on duty."[88] This broader

[83] *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal. 5th 798).

[84] Gov. Code, §§ 6250 et seq.
[85] Pen. Code, §§ 832.7(a), 832.8; Evid. Code, §§ 1043, 1045.
[86] Gov. Code, § 6259(d).
[87] Gov. Code, § 832.7(b)(ii).
[88] Gov. Code, § 832.7(b)(ii).

definition encompasses on duty consensual relationships and contacts.

In *Becerra v. Superior Court*, the Court ruled that members of the public may inspect any public record retained by or in the possession of a state agency even if the record was not prepared, owned, or used by the particular agency.[89] Any such officer-related records in the state agency's possession are subject to disclosure regardless of whether such records concern peace officers employed by the department or by another state or local agency, no matter which agency created them.[90]

The following is a partial listing of statutes that impact public employee privacy:

Americans with Disabilities Act

The ADA[91] prohibits an employer from asking applicants direct questions concerning physical condition and medical history unless and until the employer makes a conditional job offer. Even after a job offer, the employer must limit questions to those related to job functions. Employers cannot ask applicants to list all medications taken. Employers can require a physical exam, which may include drug testing under appropriate circumstances, when they have reason to believe that the employee may not be fit for duty. See additional discussion in Chapter 13.

Privacy Act

The Privacy Act[92] prohibits the government from unwarranted collection, maintenance, use, and dissemination of federal employees' personal information contained in federal agency records. Privacy protections now extend to retrieving personal information via computer.

Federal Fair Credit Reporting Act

Federal law[93] requires any person who takes any adverse action against a consumer that is based in whole or in part on information contained in a consumer report to: (1) notify the consumer of the adverse action; (2) provide the consumer the name, address, and telephone number of the consumer reporting agency that furnished the report; and (3) inform the consumer of his or her right to obtain a copy of and dispute the accuracy of the report. Courts have applied this to employers who reject job applicants on the basis of credit reports.[94]

Fair Employment and Housing Act

The FEHA[95] prohibits employers from asking whether an employee is HIV free or has "any particular disabilities" or certain diseases or conditions. The FEHA is discussed in detail in Chapters 15-19.

California Code of Civil Procedure Section 1985.6

Code of Civil Procedure section 1985.6 requires that before serving a subpoena on an employer, the party must provide notice to all employees whose personnel records are sought.[96] The burden rests on those employees, not the employer, to protect their privacy rights by trying to block the subpoena. The statute applies to any proceeding, including PERB and civil service hearings, arbitrations, and lawsuits in state court.

California Education Code Section 49073.6

Education Code section 49073.6 requires a school district, county office of education, or charter school that considers a program to gather or maintain in its records any information obtained from social media of any pupil enrolled in the school district, county office of education, or charter school to first notify pupils and their parents about the proposed program, and to provide an opportunity for public comment at a regularly scheduled public meeting before adopting the program. The school district, county office of education, or charter school that adopts this sort of program must provide a pupil with access to any information about the pupil obtained from social media and destroy the information

[89] (2020) 44 Cal. App. 5th 897, 918, 257 Cal. Rptr. 3d 897, 908, review denied (May 13, 2020).
[90] *Ibid.*
[91] 42 U.S.C. §§ 12101 et seq.
[92] 5 U.S.C. § 552A.
[93] 15 U.S.C. §§ 1681, 1681A-1681T.
[94] *Mathews v. Government Employees Insurance Co.* (S.D.Cal. 1998) 23 F.Supp.2d 1160.
[95] Gov. Code, § 12940.
[96] Civ. Code, § 1985.6.

gathered from social media and maintained in its records.

California Labor Code

Labor Code section 96(k) gives the Labor Commissioner jurisdiction to consider claims by employees alleging loss of wages resulting from demotion, suspension, or discharge from employment for lawful conduct that occurs during nonworking hours away from the employer's premises. This statute does not establish any independent privacy rights, but simply grants authority to the Labor Commissioner to bring claims on behalf of employees for violations of recognized constitutional privacy rights.[97]

Labor Code section 432.2 prohibits requiring a job applicant to submit to a polygraph test. Although this statute does not expressly apply to public employers, the California Supreme Court extended the statute's prohibition to the public sector in *Long Beach City Employees Association v. City of Long Beach.*[98]

Labor Code section 432.7 prohibits public and private employers from asking job applicants to disclose information concerning arrests or detentions that did not result in conviction or referral to pre-trial or post-trial diversion programs. The prohibition includes criminal charges that were expunged pursuant to Penal Code sections 1203.4 and 1203.4a.[99]

Labor Code section 435 prohibits both public and private sector employers from making an audio or video recording of an employee in a restroom, locker room, or room designated for changing clothes, unless authorized by court order. Any recording that violates this law may not be used for any purpose.

Labor Code section 1051 prohibits requiring job applicants or employees to furnish photographs or fingerprints as an employment condition if the information will be provided to a third party and could be used to the applicant's or employee's detriment.

Labor Code section 980 prohibits employers from demanding user names, passwords, or any other information related to social media accounts from employees or job applicants. Employers may not discharge or discipline employees who refuse to divulge such information. However, this restriction does not apply to passwords or other information used to access employer-issued electronic devices. The statute explicitly states it is not intended to infringe on employers' existing rights and obligations to investigate workplace misconduct or employee violation of applicable laws and regulations. As currently written, section 980 applies only to private employers. Legislation that would make it applicable to public employers has been introduced, but not yet passed.

California Confidentiality of Medical Information Act

Civil Code sections 56 et seq., the Confidentiality of Medical Information Act, requires employers and medical providers to keep medical records, including drug-testing records, confidential.

Federal Health Insurance Portability and Accountability Act

The federal Health Insurance Portability and Accountability Act ("HIPAA") and its privacy regulations govern the use and disclosure of protected health information.[100]

Federal Omnibus Transportation Employees Testing Act

The federal Omnibus Transportation Employees Testing Act[101] requires certain agencies to adopt drug and alcohol testing programs covering all persons who operate commercial motor vehicles on the nation's highways, including those who work for public employers at all government levels. Federal Department of Transportation regulations cover Federal Transit Authority[102] grant recipients (primarily transit authorities), agencies subject to Federal Highway Administration[103] regulations (other commercial motor vehicle operators), and

[97] *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4th 525, 535, 6 Cal.Rptr.3d 406; *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 14 Cal.Rptr.3d 893.
[98] (1986) 41 Cal.3d 937, 227 Cal.Rptr. 90.
[99] See Lab. Code, § 432.7(a).
[100] See 42 U.S.C. §§ 1320d et seq. and 45 C.F.R. §§ 164.102 et seq.
[101] Pub. L. 102-145, Title V; 49 U.S.C. §§ 31301 et seq.
[102] 49 C.F.R. Parts 653 and 654.
[103] 49 C.F.R. Part 382.

others, including many government pilots. "Commercial motor vehicles" include trucks, school buses, motorized heavy equipment, and vehicles transporting certain hazardous materials. The rules also cover all employees in specified "safety sensitive" positions, even if the employees rarely perform actual safety sensitive functions.[104]

Federal Electronic Communications Privacy Act

The federal Electronic Communications Privacy Act ("ECPA"),[105] Title I, amended the federal Wiretap Act[106] to include nonconsensual interception of electronic communications. The Wiretap Act makes it unlawful to intercept oral, wire, or electronic communications (including e-mail) in transmission and to divulge the contents of those communications. The Act prohibits the "interception" of electronic communications while they are being transmitted, and also prohibits "eavesdropping" on active e-mail communications.[107] The ECPA's Title I applies to telephone conversations, including "conversations" with voice mail systems and messages sent over the Internet. But it does not cover stored e-mail or voice mail messages.

The ECPA, in Title II, also created the Stored Communications Act ("SCA")[108] which generally prohibits unauthorized access to and disclosure of electronic and wire communications in storage, such as e-mail and voice mail messages. The SCA specifically allows the entity that provides the electronic communication systems to access stored communications on its own electronic communication systems.[109] An employer that allows its employees to send and receive e-mail on its own internal computer network can access any e-mail message on its private system.

But the SCA permits employer access to employee communications transmitted outside the employer's intranet only when: (1) one party consents (e.g., the employee gives the employer prior consent); or (2) the interception is in the "ordinary course of business" (e.g., monitoring employee telephone conversations to monitor quality control, customer service, or illegal conduct such as discrimination).

Federal "Patriot Act"

Following the September 11 tragedy, Congress enlarged government agents' power to access suspicious communications, both in transit and in storage. Among other changes, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act")[110] amended the Wiretap Act to eliminate "storage" from the definition of "wire communication."[111] This amendment equates stored voice mail messages with stored electronic communications, which are protected by the SCA, not the Wiretap Act. This change allows law enforcement agencies to obtain judicial permission to access stored communications under the more liberal requirements of the SCA, rather than under the Wiretap Act's more stringent requirements, for a warrant to intercept communications in transmission.

The California Electronic Communications Privacy Act

Effective January 1, 2016, the California Electronic Communications Privacy Act[112] provides that, unless it has a warrant, a governmental entity shall not do any of the following: (1) compel the production of or access to electronic communication information from a service provider; (2) compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device; or (3) access electronic device information by means of physical interaction or electronic communication with the electronic device.[113]

While the Act is clearly aimed at law enforcement conducting criminal investigations, there could be implications

[104] *UPE, Local 790 v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021, 1030, 62 Cal.Rptr.2d 440, 445, as mod. (1997).
[105] Public Law No. 99-508, 100 Stat. 1848 (1986).
[106] 18 U.S.C. §§ 2510 et seq.
[107] See *Quon v. Arch Wireless Operating Co., Inc.* (C.D.Cal. 2004) 309 F.Supp.2d 1204, affd. in part, revd. in part (9th Cir. 2008) 529 F.3d 892.
[108] 18 U.S.C. § 2701-2712.
[109] 18 U.S.C. § 2701(c).
[110] Public Law No. 107-56, 115 Stat. 272 (2001).
[111] 18 U.S.C. § 2510(1).
[112] Codified at Pen. Code, §§ 1546, et. seq.
[113] Pen. Code, § 1546.1(a)(1-3).

for public employers. A broad interpretation of the Act would allow a government employee to claim that his or her government employer could not search the employee's government employer-issued and owned mobile device without a warrant. Such a broad interpretation seems unlikely but, to be on the safe side, employers should ensure that their mobile device policies clearly articulate that employees have a limited expectation of privacy in employer-issued devices.

However, because the Act requires the government entity to have a warrant to access information from an "authorized possessor," and because an employee is the "authorized possessor" of his or her personal mobile device, the Act likely does limit a government employer's ability to search an employee's personal mobile device or web-based email account.

Office of Privacy Protection

The Office of Privacy Protection in the State's Department of Consumer Affairs was established to protect the privacy of individuals' personal information by identifying consumer privacy problems, and by facilitating development of fair information practices that comply with the 1977 Information Practices Act.[114] Among other duties, the Director of the California Department of Consumer Affairs is required to receive complaints from individuals concerning any person obtaining, compiling, maintaining, using, disclosing, or disposing of personal information unlawfully or in violation of stated privacy policies.

Computer System Security Breach Notices

Civil Code sections 1798.29 et seq. require agencies that maintain computerized data to provide specified notices of security breaches when personal information may have been acquired by unauthorized persons.

Notice of Personal Information Collected on Internet

Government Code section 11015.5 requires state agencies that use the Internet to electronically collect personal information (unless otherwise authorized by the Department of Information Technology) to prominently display specified information about the information collected.

California Public Records Act

CPRA[115] prohibits public employers from disclosing information concerning public employees. The California Supreme Court, though, concluded that the public's right to access employee salary and other basic employment data outweighs public employees' privacy interests in keeping this information confidential. *International Federation of Professional and Technical Engineers, Local 21 v. Superior Court*[116] required the City of Oakland, in response to a Public Records Act request, to release names and salary information regarding city employees making over $100,000 per year. *California Commission on Peace Officer Standards and Training v. Superior Court*[117] required the California Commission on Peace Officer Standards and Training to disclose the names, employing departments, and hiring and termination dates of all California peace officers included in the commission's database.

In *City of San Jose v. Superior Court*, the California Supreme Court ruled that the private electronic devices of city officials and employees may be subject to disclosure under the CPRA if those employees use their personal accounts to communicate about the conduct of public business.[118] Employers must make "reasonable efforts" to locate public records on private accounts and devices in response to Public Records Act requests, unless an exemption under the CPRA applies.

Ralph M. Brown Act

The Brown Act[119] establishes public policy in favor of public employers openly conducting the people's business, but includes employee privacy protections.

[114] Civ. Code, §§ 1798 et seq.

[115] Gov. Code, §§ 6250 et seq.
[116] (2007) 42 Cal. 4th 319, 327.
[117] (2007) 42 Cal. 4th 278, 299.
[118] (2017) 2 Cal. 5th 608, 214 Cal.Rptr.3d 274.
[119] Gov. Code, §§ 54950 et seq.

Public Safety Officers Procedural Bill of Rights

The Public Safety Officers Procedural Bill of Rights[120] provides privacy protections to law enforcement officers with respect to the press or news media,[121] polygraph examinations,[122] certain personal financial information,[123] locker or storage space,[124] and records prohibited from disclosure pursuant to federal or state law.[125] These protections apply in criminal prosecutions against officers for off-duty conduct.[126] Chapter 10 summarizes the Public Safety Officers Procedural Bill of Rights.

Public Safety Officials' Home Protection Act

The Public Safety Officials' Home Protection Act[127] prohibits and makes it a crime in some instances to post on the Internet confidential information regarding specified public safety officials or elected or appointed officials and their spouses or children.

Citizen Complaint Act of 1997

The Citizen Complaint Act of 1997 requires that state agencies, including the California State University, make available on their Web sites a plain-language form for individuals to register complaints and/or comments relating to the state agency's performance.[128]

California Invasion of Privacy Act

The California Invasion of Privacy Act[129] prohibits intentionally taping, tapping, eavesdropping, or intercepting telephones, telegrams, and similar communications. The Act prohibits the interception of any cordless or cellular telephone communication and the wiretapping of and eavesdropping on other confidential communications. Prohibited eavesdropping must be intentional, lack the consent of all parties to the conversation, and occur as the conversation is happening. In addition, at least one of the parties must have a reasonable expectation that the conversation is not being overheard.[130]

1977 Information Practices Act

In order to protect an individual's privacy, the 1977 Information Practices Act[131] limits a state agency's indiscriminate collection, maintenance, and dissemination of personal information. The Act incorporates certain provisions of the federal 1974 Privacy Act[132] and gives individuals the right to bring a private invasion of privacy claim.

Every state department and agency must enact and maintain a permanent privacy policy consistent with the 1977 Information Practices Act, and must designate a position responsible for the privacy policy.[133]

California Consumer Privacy Act

The California Consumer Privacy Act ("CCPA") became effective January 1, 2020 and protects the privacy of California consumers by giving them greater control over businesses' use of their personal information.[134]

Within the CCPA, personal information is broadly defined as any information that identifies, relates to, or could reasonably be linked with a consumer or a consumer's household. The law grants California consumers the right to know what personal information a business collects about them and how it is used and shared, to delete personal information collected from them, to opt-out of the sale of their personal information, and to not be subject to discrimination by businesses for exercising their CCPA rights.

The CCPA applies to for-profit businesses that do business in California and meet any of the following requirements: have a gross annual revenue of over $25 million; buy, receive, or sell the personal information of 50,000 or more California residents, households, or devices; or derive 50% or

[120] Gov. Code, §§ 3300 et seq.
[121] Gov. Code, § 3303(e).
[122] Gov. Code, § 3307.
[123] Gov. Code, § 3308.
[124] Gov. Code, § 3309.
[125] Gov. Code, § 832.7; *Copley Press, Inc. v. Superior Ct.* (2006) 39 Cal.4th 1272, 48 Cal.Rptr.3d 183.
[126] *Fagan v. Superior Ct.* (2003) 111 Cal.App.4th 607, 4 Cal.Rptr.3d 239.
[127] Gov. Code, §§ 6254.21 and 6254.24, and Pen. Code § 146e.
[128] Gov. Code, §§ 8330 et seq.
[129] Pen. Code, §§ 630-637.9.
[130] *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 117 Cal.Rptr.2d 574.
[131] Civ. Code, §§ 1798 et seq.
[132] 5 U.S.C. § 522a.
[133] Gov. Code, § 11019.9.
[134] Cal. Civ. Code §§ 1798.100 et seq.

more of their annual revenue from selling California residents' personal information. The CCPA does not apply to nonprofit organizations or government agencies.

California Penal Code

Penal Code section 832.7 mandates that peace officers' personnel records, or information obtained from these records, are confidential and may not be disclosed in any criminal or civil proceeding, except by discovery under certain Evidence Code sections.[135]

Significantly, California Senate Bill 1421 modified Penal Code section 832.7 by stripping the prior confidentiality of police personnel records related to 1) sustained findings of dishonesty, 2) investigations of officer involved shootings and serious uses of force, and 3) sustained findings of sexual assault. These records can now be requested through the Public Records Act.

Records that are unrelated to these categories will continue to be evaluated pursuant to *Pitchess v. Superior Court*,[136] Penal Code sections 832.7(a) and 832.8, and Evidence Code sections 1043 and 1045. Specifically, Evidence Code sections 1043 and 1045 set forth the procedures for filing a motion for discovery of peace officers' personnel records, upon a showing of good cause (commonly referred to as a "*Pitchess* motion"). Although these motions are typically made by criminal defendants to obtain discovery of third-party complaints of past incidents of alleged misconduct by officers, the California Court of Appeal granted a criminal defendant's *Pitchess* motion seeking discovery of witness statements pertaining to the incident serving as the basis for the pending charges against him.[137] The court ruled that when the police officers' privacy interest was weighed against the criminal defendant's interest in this matter, the defendant's interest prevailed. The court went on to state: "Were it not for the fact the witnesses' statements are located in the personnel files of police officers, there would be no question but that defendant is entitled to such statements."[138]

In *Long Beach Police Officers Association v. City of Long Beach*, the Court found that, for *Pitchess* purposes, "personnel records" are limited to "only the records *generated* in connection with [] appraisal or discipline" [emphasis in original].[139] The statutes were not, the Court found, to be construed so broadly as to include "every record that might be *considered* for purposes of an officer's appraisal or discipline" [emphasis in original].[140]

Penal Code section 13326 prohibits employers from asking prospective employees to disclose their local criminal history record.

Penal Code section 632 makes it a misdemeanor to intentionally record confidential communications without the consent of all parties to the conversation. Wiretapping and other invasion of privacy crimes are contained in Penal Code sections 630 et seq.

Penal Code section 653n makes it a misdemeanor (with some exceptions) to install or maintain two-way mirrors permitting observation of any restroom, toilet, bathroom, washroom, shower, locker room, fitting room, or motel or hotel room.

Penal Code section 5029 prohibits the unauthorized removal from prisons of documents, computers, and computer data containing personal information on Department of Corrections employees, and requires prison officials to notify employees if personal information about them is missing.

California Discovery Act

Regarding privacy rights within the California Discovery Act,[141] the California Court of Appeal, in *Crab Addison v. Superior Court*,

[135] Recent interpretations of this statute include *San Diego Police Officers' Assn. v. City of San Diego Civil Service Com.* (2002) 104 Cal.App.4th 275, 128 Cal.Rptr.2d 248 [§ 832.7 prevents disclosure of peace officers' personnel records in public disciplinary hearings] and *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 131 Cal.Rptr.2d 266 (Citizens Review Board report regarding fatal shooting by officer could not be released to public because it was confidential personnel information under §§ 832.5-832.8).

[136] (1974) 11 Cal.3d 531.

[137] *Rezek v. Superior Ct*. (2012) 206 Cal.App.4th 633, 141 Cal.Rptr.3d 891.

[138] Pen. Code, § 1054.1.

[139] *Long Beach, supra*, at 72.

[140] *Id.*

[141] Code Civ. Proc., §§ 2020.010 et. seq.

ruled that within the context of a class action lawsuit alleging that Joe's Crab Shack had engaged in various violations of the Labor Code, the employer was required to provide to the plaintiff, in response to special interrogatories, the names, addresses, and phone numbers of employees who were members of the class. Essentially, the Court ruled that the employees' right of privacy did not outweigh the plaintiff's right to discovery.[142]

This ruling was parallel to that in *Puerto v. Superior Court,* where the California Court of Appeal earlier had ruled that an employer, in a case alleging wage-and-hour violations, was required to provide the names, addresses, and phone numbers of employees who were potential witnesses in the litigation, notwithstanding any privacy rights of the employees.[143]

California Evidence Code

Evidence Code sections 930 through 1070 relate to privileged information or disclosure, and contain confidentiality provisions that can apply to the workplace.

New Developments 2021

Ninth Circuit Provides Clarity Regarding the "Standalone" Disclosure Requirement under the FCRA.

Under the Fair Credit Reporting Act ("FCRA") an employer that wants to obtain a background check report about a job applicant or employee must first provide the individual with a standalone document that provides a clear and conspicuous disclosure of the employer's intention to do so and the employer must also obtain the individual's authorization. In *Walker v. Fred Meyer, Inc.*, the plaintiff claimed that the employer's FCRA disclosure violated the standalone requirement because it mentioned investigative consumer reports in addition to general consumer reports.[144] The Ninth Circuit ruled that mentioning investigative consumer reports in a disclosure does not necessarily violate the FCRA's standalone requirement because investigative consumer reports are a subcategory or specific type of general consumer report.[145] The takeaway from this case is that employers should keep their background policies and disclosures clear and conspicuous, and should periodically review them for compliance with the FCRA.

Ninth Circuit Rules that FCRA Does not Require Background Disclosure Document to be Presented at a Different Time than Other Documents.

Under the FCRA, an employer that wants to obtain a background check report about a job applicant or employee must first provide the individual with a standalone document that provides a clear and conspicuous disclosure of the employer's intention to do so. In *Luna v. Hansen and Adkins Transport, Inc.,* a plaintiff alleged that the physical standalone requirement mandated that the background check disclosure be presented at a different time than other employment documents.[146] The Ninth Circuit rejected that argument ruling that as long as the background check disclosure itself is in a standalone form, it can be presented with and at the same time as other employment documents.[147]

Ninth Circuit Grants Qualified Immunity in Juvenile Privacy Case.

California Welfare & Institutions Code section 827 generally requires that a court order be obtained from a juvenile court prior to accessing a child's juvenile records. In *Nunes v. Arata,* County Counsel for the County of Stanislaus did not believe that the Code provision applied to its release of records to its own outside counsel.[148] Plaintiffs sued under 42 U,S.C. Section 1983 alleging a violation of their right to privacy; although defendants filed a motion for summary Judgment to dismiss the action, the trial court denied the motion on the basis that a Fourth Amendment Right to privacy under section 827 following the ruling in *Gonzalez v.*

[142] (2008) 169 Cal.App.4th 958, 87 Cal.Rptr.3d 400, 413.
[143] (2008) 158 Cal.App.4th 1242, 70 Cal.Rptr.3d 701.
[144] *Walker v. Fred Meyer, Inc*. (9th Cir. 2020) 953 F 3d 1082.
[145] *Id.*
[146] *Luna v. Hansen & Adkins Transport, Inc*. (9th Cir. 2020) 956 F.3d 1151.
[147] *Id.*
[148] *Nunes v. Arata* (9th Cir. 2020) 983 F.3d 1108.

Spencer (2003).[149] The Ninth Circuit ruled that Gonzalez did not clearly establish any constitutional privacy rights regarding juvenile records.[150] As a result, the defendants were entitled to qualified immunity.[151]

California Supreme Court Rules that the Privacy Protection in Penal Code § 632.7 Applies to Parties as well as Non-Parties.

Under Penal Code section 632.7(a), it is a crime when a person "without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between" a cellular or cordless telephone and another telephone. In *Smith v. LoanMe, Inc.*, plaintiff sued alleging that a LoanMe employee illegally recorded his conversation with the employee, in violation of Penal Code 632.7, because it occurred without his permission.[152] The Court of Appeal concluded that section 632.7 applies only to nonparties and does not forbid a party to a phone call transmitted to or from a cellular or cordless telephone from recording the conversation without the consent of the other party or parties.[153] The California Supreme Court reversed and ruled that Penal Code section 632.7 prohibits parties as well as nonparties from intentionally recording a communication transmitted between a cellular or cordless phone and another device without the consent of all parties to the communication.[154]

KEY ISSUES

- The privacy of employees is protected not only by the federal and state constitutions, but also by a variety of state and federal statutes.
- A key issue in many privacy cases is whether the employee had a "reasonable expectation of privacy," and this is determined on a case-by-case basis.
- A public employer may lawfully monitor employees' use of its electronic communication systems, including text messages and emails sent through the employer's account, when the search is motivated by a legitimate work-related purpose and is not excessive in scope. However, employers should generally avoid monitoring personal communications accessed through the employer's electronic communication system, including the employee's personal email, social media accounts, and secure websites.
- A public employer may require all potential employees to take a drug and alcohol test as a condition of employment, so long as a conditional offer has been made, and any testing occurs before the employee's start date. However, the employer must show an "important" interest to justify testing existing employees seeking a promotion. Note that California's recent legalization of recreational marijuana may complicate this matter, as the law remains unclear.
- Employers may violate employees' right to privacy by covertly videotaping employees.
- Entities cannot seek social media usernames and/or passwords from employee applicants or employees, or from higher education students and student applicants, pursuant to two new statutes.
- Public employers may not ask job applicants about criminal convictions until the employer has determined the applicant meets the minimum qualifications for the job.
- An employer may violate employees' right to privacy by releasing confidential personnel information.
- A public employer is required to disclose home addresses and telephone numbers of its employees to the union representing those

[149] *Gonzalez v. Spencer* (9th Cir. 2003) 336 F.3d 832).
[150] *Id.*
[151] *Id.* at 1144.
[152] *Smith v. LoanMe, Inc.* (2021) 11 Cal. 5th 183.
[153] *Id.*
[154] *Id.*

employees, regardless of whether the employees are in the union.
- Under the California Public Records Act, the public's right-to-know can trump the privacy exception where an employee's actions are of substantial public interest.

Free Speech

SUMMARY OF THE LAW

FREE SPEECH UNDER THE U.S. CONSTITUTION

Public Employees' Free Speech Rights

The First Amendment to the U.S. Constitution protects public employees who speak out as citizens, whether in the workplace or in public, on matters of public concern. The First Amendment guarantees citizens the right to criticize government policies or practices. A citizen does not lose that right merely by becoming a public employee. But a public employee's free speech right to comment about government is more limited than the general public's right.

The First and Fourteenth Amendments prohibit government action abridging free speech. These prohibitions extend to governments in their role as employers. Before taking adverse action against an employee for making disruptive statements, a public employer should conduct a reasonable investigation and form a good faith belief that the First Amendment does not protect the employee's remarks. Adverse action can include discipline, discharge, or lesser actions (e.g., initiation of an investigation) that are reasonably likely to deter employees from engaging in speech activities.[1]

Stating a Prima Facie Case

To state a *prima facie* claim that an employer has violated First Amendment rights, a public employee must show each of the following:

- The speech involves a matter of "public concern." To constitute as speech on a matter of "public concern," it must be about public issues that are a part of a public debate, subject, or matter affecting the operation and efficiency of operation and efficiency of government services.
- A government employer's policies imposing prior restraints on their employees' speech as citizens on matters of public concern must bear a "close and rational relationship" to the employer's legitimate interests.[2]
- The U.S. Constitution does not protect matters involving an employee's purely personal grievances or interests. The U.S. Supreme Court also requires that there be adequate justification for treating the employee differently from any other member of the general public. Additionally, the speech must be made in the employee's capacity as a citizen, and not as part of official duties, to warrant First Amendment protection.[3]
- The employer took adverse employment action against the employee.
- The speech was a substantial or motivating factor for the adverse employment action.[4]

Burden on Employer After Prima Facie Case Stated

After the employee makes a *prima facie* claim, the burden shifts to the employer to show either of the following:

[1] *Coszalter v. City of Salem* (9th Cir. 2003) 320 F.3d 968.

[2] *Moonin v. Tice* (9th Cir. 2017) 868 F.3d 853.

[3] *Dahlia v. Rodriguez* (9th Cir. 2013) 735 F.3d 1060 (a police detective retains First Amendment protection when he discloses his fellow officers' misconduct).

[4] *Id.* p. 1067; *Borough of Duryea v. Guarnieri* (2011) 131 S.Ct. 2488 (a government employer's retaliatory actions against an employee do not give rise to liability under the Petition Clause of the First Amendment unless the employee's petition relates to a matter of public concern); *Karl v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062 (the deposition testimony of a City employee in a former employee's lawsuit alleging violation of constitutional rights is protected speech); *Lane v. Franks* (2014) 134 S.Ct. 2369 (a public employee's truthful testimony given under oath, pursuant to a subpoena, and outside the scope of the employee's job duties, is protected speech).

- The employer's legitimate interests outweigh the employee's free speech interests. A court will balance the public employee's interest in commenting on the issue against the government's interest, as an employer, in promoting efficient operations.[5] Legitimate public employer interests could include maintaining discipline, promoting harmony among coworkers, securing confidentiality, ensuring the proper and efficient performance of the agency's public function, and maintaining supervisor-employee relationships that call for personal loyalty and confidence.[6] Whether the employee's First Amendment rights have been violated depends on which way the balance tips. Each case must be considered on its own facts. For example, even where an issue clearly is of public concern, the U.S. Constitution may not protect a disagreement that disrupts an employee's ability to get along with coworkers. In those circumstances, the employer may dismiss or transfer the employee without impermissibly chilling the employee's constitutional rights; or
- The employer would have reached the same decision even in the absence of the employee's speech or protected conduct.[7]

Applying these rules, the U.S. Supreme Court has decided that government agencies may discipline or terminate an employee based on a reasonable expectation that the employee's speech will disrupt the agency.[8] No actual disruption is required. This broadens the standards by which public employers may assess their employees' speech.

The dismissal or disciplining of volunteers by government agencies is subject to the same analysis as that applied to paid employees if the loss of the volunteer position would constitute the loss of a valuable governmental benefit or privilege.[9]

Employees can bring claims to remedy federal free speech violations under 42 U.S.C. section 1983. When an employer disciplines an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. section 1983—even if the employer makes a factual mistake about the employee's behavior.[10]

Employees can seek injunctive relief to remedy state constitutional free speech violations, but actions for tort damages are limited when employees have meaningful alternative remedies to enforce their speech rights, when damages are difficult to ascertain, and when adverse policy consequences would result from allowing damages actions to proceed.[11]

First Amendment Protects Right to Criticize Employees at Public Meetings.

The First Amendment protects an individual's right to speak at public meetings, including the right to criticize public employees at public meetings. In *Baca v. Moreno Valley Unified School District*,[12] a federal court required a school district governing board to permit speakers at open school board meetings to criticize employee conduct, despite employees' constitutional privacy and free speech rights. Public agency governing boards, though, retain the right to maintain order and prevent disruption at

[5] See, e.g., *Hudson v. Craven* (9th Cir. 2005) 403 F.3d 691; *Cochran v. City of Los Angeles* (9th Cir. 2000) 222 F.3d 1195; *Nunez v. Davis* (9th Cir. 1999) 169 F.3d 1222, cert. den. (2000) 528 U.S. 1115, 120 S.Ct. 932.

[6] *Pickering v. Board of Education of Township High School Dist. 205* (1968) 391 U.S. 563, 88 S.Ct. 1731; *Clairmont v. Sound Mental Health* (9th Cir. 2011) 632 F.3d 1091 (an employee of an independent contractor, who provides services to a government agency may be treated like a public employee for purposes of determining whether a viable First Amendment retaliation claim has been alleged); *Barone v. City of Springfield, OR* (9th Cir. 2018) 902 F.3d 1091 (an overbroad restriction on public employee speech in "last chance" agreement may violate the First Amendment).

[7] *Keyser v. Sacramento City Unified School Dist.* (9th Cir. 2001) 238 F.3d 1132, amended and petition for rehg. den. (9th Cir. 2001) 265 F.3d 741; see also *Settlegoode v. Portland Public Schools* (9th Cir. 2004) 371 F.3d 503, cert. den. (2004) 543 U.S. 979, 125 S.Ct. 478.

[8] *Waters v. Churchill* (1994) 511 U.S. 661, 114 S.Ct. 1878; see also *Skaarup v. City of North Las Vegas* (9th Cir. 2003) 320 F.3d 1040.

[9] See *Hyland v. Wonder* (9th Cir. 1997) 117 F.3d 405, op. amended, rehg. den., and rehg., en banc, den. (9th Cir. 1997) 127 F.3d 1135, cert. den. (1998) 522 U.S. 1148, 118 S.Ct. 1166.

[10] *Heffernan v. City of Paterson, N.J.* (2016) 136 S.Ct. 1412.

[11] *Degrassi v. Cook* (2002) 29 Cal.4th 333, 342-343, 127 Cal.Rptr.2d 508.

[12] 936 F.Supp. 719; see also *Leventhal v. Vista Unified School Dist.* (S.D.Cal. 1997) 973 F.Supp. 951.

public hearings.[13] Also, members of governmental boards and agencies lack standing to challenge in court the legality of actions taken by the governmental body of which they are members.[14]

Statutes Prevent Retaliation Against Employees Who Report Illegal Activity.

A variety of statutes prohibit employers from taking adverse action against employees who report improper activities. These include whistleblower statutes,[15] the False Claims Act,[16] statutes giving state and state university employees the right to communicate with the Legislature without retaliation from employers,[17] statutes prohibiting discrimination against employees for filing complaints with the Labor Commissioner,[18] and statutes prohibiting employers from retaliating against employees for disclosing violations of law to government agencies.[19]

The standard for determining adverse employment action in state whistleblower cases is the same as the standard applied to Fair Employment and Housing Act discrimination cases, as established by the California Supreme Court in *Yanowitz v. L'Oreal USA, Inc.*[20] To be actionable, an employment action must materially affect the terms and conditions of employment. This includes both ultimate employment decisions such as hiring, firing, or demotion, and other actions that are "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career."[21]

Public Employers May Fire Policy-Making and Confidential Employees for Political Reasons.

The First Amendment does not prohibit a public employer from firing an employee for political reasons if the employee is a "policy-maker." To be a policy-maker for these purposes, a public employee need not literally make policy, but must be in a position in which political considerations are appropriate requirements for effective job performance.[22] Courts look to the following factors to determine whether an employee is a policy-maker: vague or broad responsibilities, relative pay, technical competency, power to control others, authority to speak in the name of the policy-makers, public perception, influence on programs, contact with elected officials, and responsiveness to political leaders and partisan politics.[23]

For example, in *Fazio v. City & County of San Francisco*,[24] the Ninth Circuit decided that a district attorney did not violate the First Amendment when he discharged an at-will subordinate prosecutor for deciding to challenge the district attorney in an election.

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[13] See, e.g., *McMahon v. Albany Unified School Dist.* (2002) 104 Cal.App.4th 1275, 129 Cal.Rptr.2d 184, cert. den. (2003) 540 U.S. 824, 124 S.Ct. 155.

[14] *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 51 Cal.Rptr.3d 181; *Blair v. Bethel School Dist.* (9th Cir. 2010) 608 F.3d 540 (a school district Board member who is voted out of his position as vice president of the Board by his fellow Board members cannot assert a First Amendment retaliation claim on that basis).

[15] California Whistleblower Protection Act (Gov. Code, §§ 8547-8547.15); Local Government Disclosure of Information Act (Gov. Code, §§ 53296-53299); see, e.g., *Calmat Co. v. U.S. Dept. of Labor* (2004) 364 F.3d 1117.

[16] Gov. Code, §§ 12650-12656.

[17] Gov. Code, § 19251.5.

[18] Lab. Code, § 98.6.

[19] Lab. Code, § 1102.5; *Hansen v. California Dept. of Corrections and Rehabilitation* (2008) 171 Cal.App.4th 1537, 90 Cal.Rptr.3d 381 (a retired state employee, alleging retaliation that took place after he retired, does not have standing to bring a whistleblower claim under Labor Code § 1102.5 because there is no existence of an employer-employee relationship at the time the allegedly retaliatory action occurred).

[20] (2005) 36 Cal.4th 1028, 32 Cal.Rptr.3d 436; *Jones v. University of Cal.* (2008) 164 Cal.App.4th 1072, 79 Cal.Rptr.3d 817 (a university employer who utilizes an optional whistleblower retaliation complaint form, that contains a confidentiality provision relating to the administrative matter the form commences, is not violating free speech).

[21] *Patten v. Grant Joint Union High School Dist*., *supra*, quoting *Yanowitz*, *supra*, 36 Cal.4th at p. 1054.

[22] See, e.g., *Biggs v. Best, Best & Krieger* (9th Cir. 1999) 189 F.3d 989 (finding an associate attorney in a law firm under contract with the city a policy-maker for purposes of First Amendment analysis); *Blanck v. Hager* (D.Nev. 2005) 360 F.Supp.2d 1137 (school district general counsel is policy-maker); but see *DiRuzza v. County of Tehama* (9th Cir. 2000) 206 F.3d 1304, cert. den. (2000) 531 U.S. 1035, 121 S.Ct. 624 (ruling that deputy sheriffs are not necessarily policy makers, and the particular job duties and responsibilities of the deputy sheriff in question must be considered).

[23] *Biggs, supra,* 189 F.3d at p. 995.

[24] (9th Cir. 1997) 125 F.3d 1328, cert. den. (1998) 523 U.S. 1074, 118 S.Ct. 1517; see also *Pool v. Vanrheen* (9th Cir. 2002) 297 F.3d 899 (county sheriff could demote commander for publicly criticizing sheriff's office); *Moran v. State of Washington* (9th Cir. 1998) 147 F.3d 839 (state agency head may, without personal liability for violating First Amendment rights, discharge a subordinate who refuses to carry out official agency policy).

The Court found that William Fazio, the fired assistant district attorney, acted as a policy-maker and could be fired for a strictly political reason. The Court explained that a public agency would become unmanageable if its head had to retain political enemies in positions of confidence or in positions that required exercising discretion to implement policy.

The Ninth Circuit also has applied this policy-maker concept to confidential secretaries for policy-makers.[25]

First Amendment Does Not Protect Expressions of Intent to Harm.

The First Amendment does not protect statements that a reasonable person would interpret as a serious expression of intent to harm or assault. The context and setting of the speech are important determiners of whether speech is reasonably interpreted as a serious threat. For example, courts often allow greater official control of potentially threatening or violent speech in schools.[26]

In *Elonis v. U.S.*,[27] the U.S. Supreme Court decided a case involving threatening speech posted on the social networking website Facebook on statutory grounds and therefore determined that it was not necessary to consider directly First Amendment issues. In this case, an individual using a pseudonym began posting self-styled rap lyrics on Facebook. The lyrics that were posted included graphically violent language and imagery. This material was often interspersed with disclaimers that the lyrics were "fictitious," with no intentional "resemblance to real persons," and that he was exercising his First Amendment rights.

A grand jury indicted Anthony Elonis for making threats to injure patrons and employees of the amusement park where he worked, his estranged wife, police officers, a kindergarten class, and an FBI agent, all in violation of 18 U.S.C. section 875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." He was convicted of violating this provision under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat.

Mr. Elonis appealed to the U.S. Supreme Court which ruled that his conviction cannot stand. The Supreme Court reasoned that having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—reduces culpability to negligence. The Supreme Court ruled that negligence is not sufficient to support a criminal conviction under section 875(c). The case was decided on statutory grounds and the Supreme Court therefore determined that it was not necessary to consider First Amendment issues directly.

Speech May Be Enjoined to Stop Workplace Harassment.

In *Aguilar v. Avis Rent-A-Car System, Inc.*,[28] the California Supreme Court ruled that a court may impose an injunction prohibiting employees from using racial epithets in the workplace when the court finds that the use of such epithets will contribute to the continuation of a hostile or abusive work environment that constitutes employment discrimination. In this case, a jury found that supervisors had harassed and discriminated against some of the Latino drivers, and that Avis knew, or should have known, about at least some of that harassment. The Court awarded the employees damages, and also imposed an injunction prohibiting a supervisor from using any derogatory racial or ethnic epithets directed at, or descriptive of, Latino Avis employees. The California Supreme Court ordered the trial court to clarify what it meant by "derogatory racial or ethnic epithets" by providing an exemplary list of prohibited derogatory racial or ethnic epithets.

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[25] *Hobler v. Brueher* (9th Cir. 2003) 325 F.3d 1145; *Hunt v. County of Orange* (9th Cir. 2012) 672 F.3d 606 (a Lieutenant who serves as the Chief of Police Services for a contracting City does not fall within the "policymaker" exception to the First Amendment).

[26] See, e.g., *LaVine v. Blaine School Dist.* (9th Cir. 2001) 257 F.3d 981, cert. den. (2002) 536 U.S. 959, 122 S.Ct. 2663; *Lovell v. Poway Unified School Dist.* (9th Cir. 1996) 90 F.3d 367, cert. den. (1996) 518 U.S. 1048, 117 S.Ct. 27; *Robbins v. University of Cal.* (2005) 127 Cal.App.4th 653, 25 Cal.Rptr.3d 851.

[27] (2015) 135 S.Ct. 2001.

[28] (1999) 21 Cal.4th 121, 87 Cal.Rptr.2d 132, cert. den. (2000) 529 U.S. 1138, 120 S.Ct. 2029.

Although employers can prohibit some forms of harassing or threatening speech, they cannot prohibit all harassing speech. If the speech is otherwise protected (*i.e.*, it is on a matter of public concern), an employer can limit or prohibit harassing speech only if a reasonable person would interpret the speech within the context made as a threat or serious harassment. Employers may not adopt and implement overly broad and vague policies to prohibit workplace harassment. For example, a prohibition on speech with "violent behavior overtones" is too broad and vague.[29]

Official Immunity

Public officials are entitled to qualified immunity for violations of First Amendment rights so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[30] In assessing the right to qualified immunity for violations of public employees' speech rights, a court will consider whether the right is sufficiently clear that a reasonable official would understand that his or her actions violate that right.

First Amendment Protects Employees' Religious Expression.

The First Amendment protects the right of employees to engage in religious advocacy and to post religious materials outside of their personal workspaces. In *Tucker v. California Department of Education*,[31] the Ninth Circuit ruled that the California Department of Education's order banning its employees' religious advocacy or posting of religious materials outside employees' personal workspaces violated free speech rights. (For further discussion of religion issues, see Chapters 9 and 17.)

Imposing Limits on Employees' Political Expression

Public employers may limit employees' political expression in the workplace in some circumstances. In doing so, employers must engage in the balancing of interests discussed above. For example, state law specifically allows school districts to establish rules governing employees' political activities on district property and during work time.[32] State law also prohibits the use of school district funds, services, supplies, and equipment to urge the support or defeat of ballot measures or candidates.[33] But school districts' rights to limit the political expression of their employees is limited. For example, a school district may prevent teachers from wearing political buttons during instructional time, but may not prevent teachers from wearing political buttons during non-instructional settings.[34] School districts may not prohibit employees from circulating political petitions on school grounds during off-duty time.[35]

Right to Associate with a Union

The U.S. Supreme Court has interpreted the free speech guarantee to include "freedom of association," which gives individuals the right to join with others for expressive purposes, such as participating in political organizations and labor unions. This constitutional right ensures that employers cannot fire or discipline employees for joining a union or advocating a union's formation. Employers cannot threaten or intimidate employees for joining or being active in union affairs, nor can they take any action that has a chilling effect on these rights, such as issuing reprimands or giving less desirable assignments to those who advocate union activities.[36] In addition to the

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[29] *Bauer v. Sampson* (9th Cir. 2001) 261 F.3d 775; *Mendoza v. ADP Screening and Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 107 Cal.Rptr.3d 294.

[30] *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 102 S.Ct. 2727; *Fogel v. Collins* (9th Cir. 2008) 531 F.3d 824 (city police officers are entitled to qualified immunity when it cannot be found, that at the time of the incident, all reasonable officers would have concluded that a citizen's speech was protected by the First Amendment); *Robinson v. York* (9th Cir. 2009) 566 F.3d 817 (a public employer will not have qualified immunity where it is clearly established that an employee has a right not to be retaliated against because of the exercise of First Amendment rights).

[31] (9th Cir. 1996) 97 F.3d 1204.

[32] Ed. Code, § 7055.

[33] Ed. Code, § 7054.

[34] *California Teachers Assn. v. Governing Bd. of San Diego Unified School Dist.* (1996) 45 Cal.App.4th 1383, 53 Cal.Rptr.2d 474.

[35] *Los Angeles Teachers Union v. Los Angeles City Bd. of Ed.* (1969) 71 Cal.2d 551, 78 Cal.Rptr. 723.

[36] See, e.g., *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 122 Cal.Rptr.2d 204, rehg. den. (2002) 99 Cal.App.4th 1361 (NLRA protects employees' concerted activities, including group discussions about fairness of bonus system); *American Federation of Gov. Employees Local 1 v. Stone* (9th Cir. 2007) 502 F.3d 1027, 1030 (unions have standing to raise First Amendment

constitutional protections, collective bargaining statutes also protect employees' rights to associate with unions.[37]

The right to associate with a union is not absolute. Employers may impose reasonable limits that support legitimate operational concerns. For example, an employer may limit disruption of government operations by restricting the time and place that outside organizers may come to the workplace, even though it may not prohibit employees from discussing union business off the employer's property on their own time. The extent to which a public employer may restrict conduct depends on how much the property itself functions as a "public forum:" the more the workplace is devoted to public assembly or debate or is open to the public for expressive activity, the less the employer can restrict employees from expressing their views there.[38]

Government Entities May Refuse to Subsidize Discriminatory Activities Without Infringing upon Funding Recipients' Free Speech or Association Rights.

Government entities may constitutionally require funding or subsidy recipients to provide written assurances of compliance with generally applicable nondiscrimination policies.[39] The government has the right to provide subsidies that encourage certain activities it believes are in the public interest without agreeing to fund alternative programs that deal with the same issue in a different way. This is not viewpoint discrimination.

Student Free Speech Rights

Although public school students retain free speech protections, their rights are not coextensive with the rights of adults in other settings.[40] A student's right to free speech in a public school must be balanced against the school's interest in maintaining an ordered and effective education system, and speech may be restricted when it impinges on the rights of other students or when it substantially disrupts or interferes with school activities.[41] The U.S. Supreme Court ruled that school officials may restrict speech at a school event when that speech is reasonably viewed as promoting illegal drug use.[42]

Also, state-sponsored athletic leagues do not have unlimited authority to condition membership on the relinquishment of constitutional rights, but they can impose conditions that are necessary to manage an efficient and effective state-sponsored high school athletic league.[43]

In *Frudden v. Pilling*, the Ninth Circuit ruled that the policy of Roy Gomm Elementary School, a public school, mandating uniforms for students, was subject to strict scrutiny. The Ninth Circuit remanded the case back to the trial court to apply the strict scrutiny standard. Although we have no further

claims that a member of the union would have standing to raise); *Ellins v. City of Sierra Madre* (9th Cir. 2013) 710 F.3d 1049 (a union president who leads a no-confidence vote against an agency administrator is acting as a private citizen addressing a matter of public concern).

[37] For example, see Gov. Code, §§ 3502, 3506, 3519, 3519.5, 3531, 3543.5, 3543.6, 3571, 3571.1.

[38] See, e.g., *Downs v. Los Angeles Unified School Dist.* (9th Cir. 2000) 228 F.3d 1003, cert. den. (2001) 532 U.S. 994, 121 S.Ct. 1653; *Eagle Point Education Assn. v. Jackson County School Dist. No.* (9th Cir. 2018) 880 F.3d 1097(policies prohibiting picketing on school district property, strikers from coming on school grounds, and signs and banners at school district facilities violate the First Amendment).

[39] *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 40 Cal.Rptr.3d 205, cert. den. (2006) 549 U.S. 987, 127 S.Ct. 434; *Christian Legal Society Chapter of the Univ. of Cal. v. Martinez* (2010) 561 U.S. 661, 130 S.Ct. 2971 (a public law school did not transgress First and Fourteenth Amendment constitutional limitations by requiring a student organization to choose between welcoming all students regardless of their beliefs, and foregoing the benefits of official university recognition).

[40] *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733; *Hazelwood School Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 266, 108 S.Ct. 562.

[41] *Smith v. Novato Unified School Dist.* (2007) 150 Cal.App.4th 1439, 59 Cal.Rptr.3d 508 (speech that does not incite student disruption may not be limited), cert. den. (2008) 552 U.S. 1184, 128 S.Ct. 1256; *Flint v. Dennison* (9th Cir. 2007) 488 F.3d 816 (imposing an expenditure limitation on candidates for student government does not violate the First Amendment), cert. den. (2008) 552 U.S. 1097, 128 S.Ct. 882; *Lachtman v. University of Cal.* (2007) 158 Cal.App.4th 187, 70 Cal.Rptr.3d 147 (a university student who fails to offer evidence that statements made in class are a substantial motivating factor for the university's decision to deny the student's advancement to its Ph.D. program or for the student's loss of a research position, cannot successfully make a claim for retaliation for engaging in First Amendment protected speech).

[42] *Morse v. Frederick* (2007) 551 U.S. 393, 127 S.Ct. 2618 (court ruled school did not violate a student's First Amendment rights when it disciplined him for displaying a banner across from school that said, "Bong Hits 4 Jesus").

[43] *Tennessee Secondary School Athletic Assn. v. Brentwood Academy* (2007) 551 U.S. 291, 127 S.Ct. 2489.

guidance from the trial court, policies subject to strict scrutiny—the highest level of judicial review—often do not pass constitutional muster.[44]

The school's uniform policy required all students wear red or navy polo-style shirts and tan or khaki bottoms. The shirts have the school logo on the front, as well as the written message "Tomorrow's Leaders." Students are required to wear the uniform every day, and are subject to discipline for refusal to do so. The policy is subject to certain exemptions, including an exemption for students who wear "a uniform of a nationally recognized youth organization such as Boy Scouts or Girl Scouts."[45]

The Frudden children (a fifth-grade boy and a third-grade girl) both wore, instead of the required uniforms, American Youth Soccer Organization ("AYSO") uniforms. The AYSO is a nationally-recognized youth organization which usually meets during school days. Kayann Pilling, the school principal, required the children change their uniforms. The children's parents filed a lawsuit against Pilling and the school district alleging that the uniform policy violated their children's' First Amendment rights.[46]

The Court ruled in favor of the school district, and the Ninth Circuit reversed. The Ninth Circuit found that the school uniform policy implicated protected speech for two reasons. First, the required uniforms included written speech: "Tomorrow's Leaders." This requirement distinguished the school uniforms from the nondescript uniforms, containing no writing, in cases where uniforms were found to be constitutional. Here, by requiring every student wear a written slogan, school "compels speech" in a way that implicates the protection of the First Amendment to not speak at all.[47]

Second, the school policy allows for selective exemptions. The policy exemption favors uniforms of certain youth organizations over others. It explicitly favors the uniforms of the Boy Scouts and Girl Scouts, and those of "nationally recognized" youth organizations over those of locally or regionally recognized youth organizations. The school specifically rejected AYSO uniforms. The Court reasoned that, because the exemption was selective, it necessarily was not content neutral. It must thus be subject to strict scrutiny.[48]

In *Dariano v. Morgan Hill Unified School District*, the Ninth Circuit ruled that public school officials did not violate the Constitution when they refused to let students wear American flags on their shirts during Cinco de Mayo celebrations given the history of threats and fights at the school.[49]

Morgan Hill Unified School District had an annual Cinco de Mayo celebration. During the 2009 celebration, there was an altercation on campus between a group of predominantly Caucasian students and a group of Mexican students. The students exchanged profanities and threats after a group of Caucasian students hung an American flag on campus.[50]

On Cinco de Mayo 2010, a group of Caucasian students wore American flag shirts to school. After someone reported a threat of a physical altercation, school officials directed the students to either turn their shirts inside out or take them off because the officials were concerned with student safety. The students refused to do so. School officials permitted two students to return to class because Principal Nick Boden considered their shirts, whose imagery was less "prominent," to be "less likely [to get them] singled out, targeted for any possible recrimination," and "significant[ly] differen[t] in [terms of] what [he] saw as being potential for targeting." The school officials offered the remaining students the choice either to turn their shirts inside out or to go home for the day with excused absences that would not count against their attendance records. Two students chose to go home, and neither was disciplined.[51]

The students and their parents brought suit under 42 U.S.C. section 1983 and the California Constitution against the school district, and against Boden and Assistant

[44] (9th Cir. 2014) 742 F.3d 1199.
[45] *Id.* at 1201.
[46] *Id.*
[47] *Id.* at 1205.
[48] *Id.* at 1207.
[49] (9th Cir. 2014) 767 F.3d 764.
[50] *Id.* at 767.
[51] *Id.*

Principal Rodriguez, in their official and individual capacities.

The Ninth Circuit ruled that the public school officials did not violate the First Amendment because their actions were tailored to both avert violence and protect student safety. The Court noted the history of violence among students, including the 2009 Cinco de Mayo incident, and the fact that there had been thirty fights on campus the previous six years, both between gangs and between Caucasian and Hispanic students.[52]

The Ninth Circuit stated that school officials have greater constitutional latitude to suppress student speech than to punish it. Although the students were restricted from wearing certain clothing, they were not punished. Additionally, school officials did not enforce a blanket ban on American flag apparel, but instead allowed two students to return to class when it became clear that their shirts were unlikely to make them targets of violence.[53]

THE CALIFORNIA CONSTITUTION

The California Constitution, article I, section 2(a), provides that "Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

California courts have construed the California Constitution's free speech provisions as more protective, definitive, and inclusive of rights to expression of speech than their federal counterparts.[54] The California Constitutional provisions (1) affirm that all persons may freely speak, write, and publish their "sentiments;" (2) allow for liberty once that right is abused; and (3) prohibit laws that infringe upon free speech or free press. The U.S. Constitution's First Amendment parallels only the third subpart.[55]

[52] *Id.* at 777.
[53] *Id.* at 778.
[54] See *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908, 153 Cal.Rptr. 854, affd. (1980) 447 U.S. 74, 100 S.Ct. 2035.
[55] *Gonzales v. Superior Ct.* (1986) 180 Cal.App.3d 1116, 1123, 226 Cal.Rptr. 164.

NEW DEVELOPMENTS 2021

The U.S. Supreme Court Rules that Students Can Be Disciplined for Off-Campus Speech.

As explained above, the U.S. Supreme Court ruled in the *Tinker* case that student speech is "not immunized by the constitutional guarantee of freedom of speech" when it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[56] The Supreme Court would later rule that students also possess such modified free speech rights at off-campus, school-sponsored events.[57]

In *Mahoney Area School District v. B.L. by and Through Levy*,[58] the U.S. Supreme Court expanded this modified, free-speech standard to statements made by students off-campus. In *Mahoney*, student B.L., a member of her school's junior varsity cheerleading team, did not make her school's varsity cheerleading team. Subsequently, she expressed her frustration in not making the team by and through several messages on the social media platform Snapchat. Her messages contained both vulgar language and gestures.[59] B.L.'s school subsequently suspended her from the junior varsity cheerleading team for her social media posts. B.L.'s guardians sought relief in court, contending that the school violated her free speech rights.

The trial court and the Third Circuit both ruled that the school district violated B.L.'s First Amendment free speech rights. The U.S. Supreme Court affirmed on other grounds, ruling that "[t]he special characteristics that give schools additional license to regulate student speech do not always disappear when that speech takes place off campus."[60] The Court listed examples for when a school district could rightfully regulate off-campus student speech, including instances of bullying, threats at teachers or other students, failure to follow rules concerning

[56] *Tinker, supra*, 393 U.S. at 513.
[57] *Morse, supra*, 551 U.S. at 393.
[58] *Mahanoy Area Sch. Dist. v. B. L. by & through Levy* (2021) 141 S.Ct. 2038.
[59] *Id.* at 2040.
[60] *Id.*

lessons, and breaches of school security devices.

The Court applied the *Tinker* standard with respect to student B.L., and found that her conduct did not disrupt classwork, did not post a substantial disruption of a school activing, nor did it violate the rights of others. The Court ruled that her Snapchat posts did not rise to the level of fighting words, was not directed at any particular individual, and did not even identify her school.[61]

Public Employee Speech Made in the Course of Their Job that Undermines Their Employer's Policies is Not Protected.

Greg Ohlson, a state employee who worked as a crime lab forensic scientist, brought a federal civil rights action against his supervisors, alleging retaliation in violation of the First Amendment.[62] Ohlson alleged that he was subjected to workplace discipline because he criticized his employer's workplace forensic testing policies while giving testimony in court within the scope of his professional duties. The employer contended that Ohlson was disciplined because his testimony was in violation of his supervisor's previous orders, which, among other things, required that he testify in line with his laboratory's policies.

The trial court granted summary judgment in favor of the employee's supervisors, and the Ninth Circuit affirmed.

Specifically, the Ninth Circuit ruled that the supervisors were entitled to qualified immunity, noting that Ohlson was properly subject to discipline because he was testifying as a "government employee subject to discipline for undermining agency administration and public confidence in agency operations."[63] The Court further opined that "[s]peaking in defiance of orders does not, by itself, trigger First Amendment protection[s]... because orderly government administration requires there to be some rules about employee conduct and misconduct."[64]

KEY ISSUES

- The First Amendment to the U.S. Constitution protects public employees who speak out as citizens on matters of public concern. To qualify as speech on a matter of "public concern," it must be about public issues that are a part of a public debate, subject, or matter affecting the operation and efficiency of government services.
- A variety of statutes prohibit employers from taking adverse action against employees who report unlawful activities.
- Employers can prohibit some forms of harassing or threatening speech. If the speech is otherwise protected (i.e., it is on a matter of public concern), an employer can limit or prohibit harassing speech only if a reasonable person would interpret the speech within the context made as a threat or serious harassment.
- Public officials are entitled to qualified immunity for violations of First Amendment rights so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

[61] *Id.* at 2047-2048.
[62] *Ohlson v. Brady* (9th Cir. Aug. 23, 2021) 2021 WL 3716784.
[63] *Id.* at 2.
[64] *Id.* at 7.

Religion and the Constitution

SUMMARY OF THE LAW

THE FEDERAL CONSTITUTION: FREE EXERCISE OF RELIGION VS. THE ESTABLISHMENT CLAUSE

The U.S. Constitution's First Amendment states, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] The Fourteenth Amendment applies the First Amendment to California public entities. Like many other constitutional provisions, the First Amendment is structured in broad terms often resulting in conflicts between the free exercise of religion and the Establishment Clause. Thus, public employers, prison officials, school teachers and administrators, and land use commissioners must walk a fine line between honoring the right of an individual to exercise their faith freely and protecting other employees' rights to be free from a governmentally established religion.

Free Exercise of Religion

Free exercise of religion is a fundamental constitutional right. This means that the Free Exercise Clause makes an individual's freedom of religious *belief* absolute. Individuals do not, however, have the absolute right to *practice* their religion as they please.

The right to free exercise prevents and remedies laws that are enacted with the unconstitutional purpose of targeting religious beliefs and practices.[2] Thus, it is easier for the courts to find that the government acted constitutionally when its laws or regulations are written to be *generally applicable* and *content neutral* such that the government only *incidentally* burdens the free exercise of religion.[3] Cases of this type present closer constitutional questions for courts, are the subject of more court decisions than content-specific limitations, and represents the area of free exercise law that has witnessed the most historical changes. These changes have resulted from both Congressional and judicial action.

Prior to 1997, the U.S. Supreme Court's decision in *Employment Division Department of Human Resources v. Smith* determined the applicable test for free exercise claims, ruling that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest."[4] Prior to 1997, prison regulations were judged under a reasonableness standard whereby a prison regulation need only be reasonably related to a legitimate penological interest to be constitutional.[5] Essentially, prison officials could not deny prisoners access to religious services without reasonable justification.

The Religious Freedom Restoration Act ("RFRA")[6] was enacted in direct response to the Supreme Court's ruling in *Smith*, and changed the standard for analyzing free exercise cases. After the *Smith* decision in 1990, and until 1997, the RFRA governed the extent to which all levels of government could regulate religious practice.[7] The RFRA

[1] U.S. Const. amend. I.
[2] See *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 533, 113 S.Ct. 2217, 2227 ("[A] law targeting religious beliefs as such is never permissible.").
[3] See *National Institute of Family and Life Advocates v. Harris* (2018) 138 S.Ct. 2361 (a California statute that required licensed and unlicensed pregnancy related clinics to provide a notice to its patrons stating that publicly-funded family planning services, including for contraception and abortion, are available is not narrowly tailored to a compelling state interest).
[4] (1990) 494 U.S. 872, 885, 110 S.Ct. 1595.
[5] See *Turner v. Safley* (1987) 482 U.S. 78, 89, 107 S.Ct. 2254.
[6] 42 U.S.C. §§ 2000bb to 2000bb-4.
[7] *City of Boerne v. P.F. Flores* (1997) 521 U.S. 507, 535-36.

permitted federal, state, and local governments to impose a substantial burden upon an individual's religious exercise only where the public entity can show that the burden on the free exercise of religion serves a *compelling government interest* and is the *least restrictive means available* to further the compelling interest.[8] The RFRA reestablished the standard commonly referred to as the "strict scrutiny test," which is the toughest, least deferential standard for evaluating government impingement upon individual constitutional rights. The strict scrutiny test is the most difficult standard for the government to meet. The RFRA replaced the reasonableness standard with strict scrutiny.[9] The RFRA's restrictions applies to every agency and official of the federal, state, and local governments,[10] and the RFRA applies to all federal and state law, whether adopted before or after the enactment of the RFRA,[11] which substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.[12]

In 1997, the U.S. Supreme Court declared that the RFRA was unconstitutional as it applied to the states.[13] In *City of Boerne*,[14] city authorities denied an archbishop's application for a building permit to enlarge his church. The city rejected the archbishop's application based on an ordinance that protected the church as an historical landmark. The archbishop claimed that the RFRA exempted his church from the ordinance.

The U.S. Supreme Court ruled against the archbishop, finding that the RFRA's stringent test reflected a lack of proportionality between the means adopted and the legitimate end to be achieved.[15] The U.S. Supreme Court observed that, under the RFRA, the state must demonstrate a compelling government interest and show that the law is the least restrictive means of furthering its interest if an objector shows a substantial burden on his free exercise of religion.[16] The Court further noted that such claims are often difficult to contest under the RFRA. The Court observed that the RFRA's test potentially allowed constitutionally required religious exemptions from civic obligations of almost every conceivable kind. In striking down the RFRA as applied to all levels of government except the federal government, the U.S. Supreme Court's ruling in *City of Boerne* changed the free exercise standard back to that announced in *Smith.* Additional application of the RFRA is discussed in detail below in the RFRA section of this chapter.

After the *Boerne* decision, the Ninth Circuit restored a "reasonableness" test sometimes called the "rational basis" test as the applicable standard in free exercise challenge cases involving prisoner rights.[17] Under this rational basis test, prison officials are permitted to impose a substantial burden upon a prisoner's religious exercise if the regulation is "reasonably related to legitimate penological interests."[18] The *Turner* court set four balancing factors to determine whether a prison regulation is reasonably related to legitimate penological interests: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate government interests" put forward in justification; (2) whether there are "alternative means of exercising the right that remain open to inmates;" (3) whether "accommodation of the asserted constitutional right" will have an effect on "guards and other inmates, and on the allocation of prison resources generally;" and (4) whether there is an "absence of ready alternatives" versus the "existence of obvious, easy alternatives."[19] This standard continues to be applicable to First Amendment challenges to prison regulations impinging upon an inmate's religious exercise; however, subsequent federal legislation avails prisoners with a more lenient standard than the Constitutional standard.[20]

[8] 42 U.S.C. § 2000bb-1.
[9] *Freeman v. Arpaio* (9th Cir. 1997) 125 F.3d 732, 736.
[10] 42 U.S.C. § 2000bb-2(1).
[11] 42 U.S.C. § 2000bb-3(a).
[12] 42 U.S.C. § 2000bb-1.
[13] City of Boerne, *supra*.
[14] *Id.*
[15] *Id.* at p. 533.
[16] *Id.* at pp. 533-34.
[17] *Freeman v. Arpaio* (9th Cir. 1997) 125 F.3d 732.
[18] *Turner, supra*, 482 U.S. at p. 89.
[19] *Id.* at pp. 89-90.
[20] See, e.g., *Shakur v. Schriro* (9th Cir. 2008) 514 F.3d 878,884; and see *McKenzie v. Ellis* (S.D.Cal. 2011) 2011 WL 4571674.

Congress changed this standard in 2000 by enacting the Religious Land Use and Institutionalized Persons Act ("RLUIPA") in response to the U.S. Supreme Court's decision that invalidated the RFRA, taking care to address the constitutional flaws identified by the high court's analysis. In this regard, Congress drafted the RLUIPA to apply only to regulations regarding *land use* and *prison conditions*.[21] Under the RLUIPA, the government is prohibited from imposing a "substantial burden" on the religious exercise of an inmate, even if the burden derives from a rule of general applicability, unless the government shows that the burden is the least restrictive means to achieve a compelling governmental interest.[22] The RLUIPA obliges courts to utilize the "substantial burden" test or "equal access" test for land use-related RLUIPA claims. These tests are discussed in detail below in the RLUIPA section of this chapter.

In addition to supporting a claim under the RLUIPA, precluding access to public facilities and meeting rooms for religious services also raises First Amendment speech issues in addition to free exercise claims. In *Faith Center Church Evangelistic Ministries v. Glover*,[23] the Ninth Circuit found that the meeting rooms were a limited public forum and that enforcement of the county's policy to exclude religious worship services from the meeting rooms was reasonable in light of the forum's purpose.[24]

Freedom of association is a right also secured by the First Amendment, and an individual's religious association cannot be punished by the government unless the individual is actively affiliated with a group with illegal aims and which intends to further those illegal aims.[25]

[21] *Cutter v. Wilkinson* (2005) 544 U.S. 709, 125 S.Ct. 2113, 2118.
[22] 42 U.S.C. § 2000cc-1(a)(1)-(2); and see *Shakur, supra*, 514 F.3d at p. 888.
[23] *Faith Center Church Evangelistic Ministries v. Glover* (9th Cir. 2006) 462 F.3d 1194, amended and superseded on denial of rehg. by (9th Cir. 2007) 480 F.3d 891, abrogated on separate grounds by *Winter v. Natural Res. Def. Council, Inc.* (2008) 555 U.S. 7, 129 S.Ct. 365; see also *Community Housing, Inc. v. City of Boise* (9th Cir. 2007) 490 F.3d 1041.
[24] *Id.*
[25] See *United States v. Lemon* (D.C. Cir. 1983) 723 F.2d 922, 939.

The Establishment Clause

Case law developed under the U.S. Constitution's Establishment Clause imposes duties on public employers that may appear to contradict the Free Exercise Cause. The First Amendment's "establishment of religion clause" prohibits the government from enacting a law or sponsoring an activity that has the purpose of advancing religion. For example, introducing religion into the public employer's workplace may violate the Establishment Clause. In *Lemon v. Kurtzman*,[26] the U.S. Supreme Court developed the following three-prong test to determine whether an activity violates the Establishment Clause:

- Does the law or activity have a secular purpose?
- Does the activity's principal or primary effect neither advance nor inhibit religion?
- Does the activity foster excessive entanglement with religion?[27]

If a public employer's activity satisfies all three prongs of this test, the activity does not violate the establishment clause.

The U.S. Supreme Court has taken varied approaches to the application of the Establishment Clause.[28] Two cases decided in 2005 dealing with the issue of public displays of the Ten Commandments reached seemingly different conclusions. This was the first time that the Court had addressed this issue since 1980, when it struck down a Kentucky statute requiring posting of the Commandments in every public classroom.[29]

As explained below in *Van Orden v. Perry*,[30] the U.S. Supreme Court rejected the Establishment Clause argument and found that the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds conveyed a permissible secular message. However, in

[26] (1971) 403 U.S. 602, 91 S.Ct. 2105.
[27] *Id.* at pp. 612-13.
[28] See, e.g., *Zelman v. Simmons-Harris* (2002) 536 U.S. 639, 122 S.Ct. 2460; *Good News Club v. Milford Central School* (2001) 533 U.S. 98, 121 S.Ct. 2093.
[29] *Stone v. Graham* (1980) 449 U.S. 39, 41, 101 S.Ct. 904 (per curiam).
[30] (2005) 545 U.S. 677, 125 S.Ct. 2854; see also *Vasquez v. Los Angeles County* (9th Cir. 2007) 487 F.3d 1246, *cert. den.* (2007) 128 S.Ct. 711 (Establishment Clause not violated where county removed the image of a cross from its official seal).

McCreary County, Kentucky v. ACLU,[31] the Supreme Court decided that the display of the Ten Commandments in two Kentucky county courthouses violated the Establishment Clause. These cases suggest that not only purpose but also history, location, and context are relevant in inquiries into whether the Establishment Clause has been violated.

In *Van Orden v. Perry*,[32] among the 21 historical markers and 17 monuments surrounding the Texas State Capitol stands a six-foot high monolith inscribed with the Ten Commandments. The Fraternal Order of Eagles, a national social, civic, and patriotic organization, donated the monument to Texas in 1961. Thomas Van Orden, an Austin citizen who encounters the monument during his frequent visits to the capitol, sued the state claiming that the monument's placement violated the Establishment Clause.

The Court determined that the *Lemon* test was "not useful in dealing with the sort of passive monument that Texas has erected on its capitol grounds."[33] Instead, the Court stated that its analysis "should be driven by both the monument's nature and the Nation's history."[34] The Court was careful to distinguish this case from cases involving the posting of the Ten Commandments in public schools, stating that placing the Ten Commandments monument on the Texas State Capitol grounds "is a far more passive use of those texts" than posting the Commandments in a classroom with "an improper and plainly religious purpose."[35]

In *McCreary v. ACLU*,[36] two Kentucky counties each posted large, readily visible copies of the Ten Commandments in their courthouses. The American Civil Liberties Union sued the counties. In response, the counties adopted nearly identical resolutions calling for a more extensive exhibit to show that the Commandments were Kentucky's "precedent legal code."[37] The displays were modified to include eight smaller, historical documents containing religious references as their sole common element, e.g., the Declaration of Independence's "endowed by their Creator" passage.

In ruling that the counties' displays violated the Establishment Clause, the U.S. Supreme Court declined the counties' request to abandon *Lemon*'s secular purpose test.[38] The Court found that the displays indicated a religious purpose.

The U.S. Supreme Court first addressed the constitutionality of legislative prayer in considering whether Nebraska's practice of opening its legislative sessions with an invocation violated the Establishment Clause.[39] In deciding that legislative prayer is not a *per se* violation of the Establishment Clause, the Court ruled that the content of the prayer was not the concern, as there was no indication that the prayer opportunity was being exploited to proselytize or advance any one, or disparage any other faith or belief.

The Ninth Circuit has ruled that legislative prayer or invocations that contain sectarian references are not *per se* violations of the Establishment Clause. In *Rubin v. City of Lancaster*,[40] the Ninth Circuit ruled that the single fact that "Jesus" was mentioned during a citizen-led invocation at a city council meeting was insufficient to show that the invocation proselytized, advanced, or disparaged any faith.[41]

In addition to the *Lemon* test, the U.S. Supreme Court also has applied the *endorsement* and the *coercion* test. The endorsement test effectively collapses the first two prongs of the *Lemon* test. Under the endorsement test, the government may not engage in activities that: (1) are excessively entangled with religious institutions; or

[31] (2005) 545 U.S. 844, 125 S.Ct. 2722.
[32] *Van Orden, supra*, 545 U.S. 677.
[33] *Id.* at pp. 677-78.
[34] *Id.* at p. 678; *c.f. Pleasant Grove City, Utah v. Summum* (2009) 555 U.S. 460, 129 S.Ct. 1125 (Establishment Clause not violated where Ten Commandments monument in city park included 15 other permanent monuments such that a reasonable observer would not conclude that the city favored a particular religion).
[35] *Van Orden, supra*, at p. 690, citing *Stone v. Graham, supra*, 449 U.S. 39.
[36] *McCreary, supra*, 545 U.S. 844; accord in *Rubin v. City of Burbank* (2002) 101 Cal.App.4th 1194, 124 Cal.Rptr.2d 867, *cert. den.* (2003) 123 S.Ct. 2091 (Establishment Clause violated where city council invocations include mention of Jesus Christ).
[37] *Id.*
[38] *Id.*
[39] *Marsh v. Chambers* (1983) 463 U.S. 783, 103 S.Ct. 3330.
[40] (9th Cir. 2013) 710 F.3d 1087, cert. denied, 132 S.Ct. 1097 (2012).
[41] *Id.* at pp. 1094-1095.

(2) endorse or disapprove of religion.[42] In 1992, the Court formulated the coercion test when it ruled unconstitutional the practice of including invocations and benedictions in the forms of "nonsectarian" prayers at public school graduation ceremonies.[43] The Court relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so."[44]

In *Town of Greece v. Galloway*,[45] the U.S. Supreme Court found that the Town of Greece's practice of opening its Town Board meetings with a prayer offered by members of the clergy does not violate the Establishment Clause, even though nearly all of the prayers were explicitly Christian. The Supreme Court found when the practice is consistent with the tradition long followed by Congress and state legislatures, the Town does not discriminate against minority faiths in determining who may offer a prayer, and the prayer does not coerce participation with non-adherents. The Court explained that legislative prayer is primarily for the members of the legislative body, and therefore such prayers do not coerce the public into religious observance. Though the citizens who brought the suit testified that they felt offended by these prayers, Justice Kennedy, who wrote the majority opinion, distinguished between offense and coercion, and noted that the former does not violate the Establishment Clause.[46]

The U.S. Supreme Court's position on this issue was affirmed when it declined to grant certiorari to hear an Establishment Clause appeal brought by residents of Rowan County, North Carolina who were offended by the County Board's use of prayer to begin each of its meetings.[47] The Ninth Circuit followed suit, denying rehearing in a challenge to prayer at a public school board meeting.[48]

Conflict Between Establishment Clause and Free Exercise of Religion

Often, the government's attempt to avoid violating the Establishment Clause leads to claims that the government has violated an individual's free exercise of religion. Such was the case in *Berry v. Department of Social Services*.[49] Daniel Berry, a self-described "evangelical Christian who holds sincere religious beliefs that require him to share his faith, when appropriate, and to pray with other Christians," challenged the Tehama County Department of Social Services' limitations on his exercise of religion at work. Mr. Berry's duties at the Department involved assisting unemployed and underemployed clients in their transition out of welfare programs. His duties required him to conduct client interviews, the majority of which took place in his cubicle.

The Department informed Mr. Berry that he was prohibited from talking about religion with clients, but that he could discuss religion with other employees. The Department allowed employees to display religious items, except where their viewing by clients might imply the Department's endorsement. And finally, the Department permitted its employees to hold prayer meetings in the common break room or outside, but prohibited its employees from using the conference room for social or religious meetings because such a use might convert the conference room into a public forum.

The Ninth Circuit ruled that the Department struck the proper balance between the free exercise of religion and the Establishment Clause of the First Amendment. The Department's restrictions were reasonable and the Department's reasons for imposing them outweighed any resulting encroachment on Mr. Berry's rights to religious freedom.

The law governing public employee speech in the workplace is distinct from the traditional

[42] *Lynch v. Donnelly* (1984) 465 U.S. 668, 104 S.Ct. 1355.
[43] *Lee v. Weisman* (1992) 505 U.S. 577, 112 S.Ct. 2649.
[44] *Id.* at p. 580.
[45] (2014) 134 S.Ct. 1811.
[46] *Id.* at 1815.
[47] *Rowan County v. Nancy Lund* (2018) 139 S.Ct. 46.
[48] *Freedom From Religion Found., Inc. v. Chino Valley Unified School Dist. Bd. of Education* (9th Cir. 2018) 896 F.3d 1132, 1138.
[49] (9th Cir. 2006) 447 F.3d 642.

forum-based analysis.[50] Under the traditional forum-based analysis, the government's power, at least when speech occurs in a public forum, is greater when the speech occurs in a limited public forum, and is at its greatest when the government seeks to regulate speech in a non-public forum.[51]

Where the government's role is both as a sovereign *and as an employer*, the general forum-based inquiry is inapposite. Instead, a five-step, sequential inquiry is made, and the Court will examine (1) whether the plaintiff employee spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantially motivating factor in the adverse employment action; (4) whether the public employer had an adequate justification for treating the employee differently from members of the general public; and (5) whether the public employer would have taken the adverse employment action even absent the protected speech.[52] A public employee plaintiff's failure to satisfy a single step concludes the inquiry because the five-step analysis is sequential.[53] This test attempts to strike a balance between the public employee's interest in freely expressing religious speech as a citizen and the interest of the State in performing public services through its employees.

Religious Activities in Public Schools

The same legal standards apply to free exercise of religion in the schools and colleges, but some particular issues often arise in the education context.

Prayer at Public Schools

Prayer in public schools implicates both the Establishment and Free Exercise Clauses of the First Amendment. Typically, an attempt to pray at school by either a pupil or teacher is prevented or frustrated by actions or policies of the public school attempting to regulate the school environment. Teachers and students enjoy First Amendment rights within the school environment. This has been true and recognized by courts for over eighty years.[54]

Courts balance the individual's right to freedom of expression of religious speech against the Establishment Clause.[55] On the one hand, the First Amendment protects private religious expression.[56] When a school permits the use of public facilities by groups unrelated to curriculum, it may not deny access to certain groups based on the religious content of their speech.[57] The U.S. Supreme Court struck down a university policy preventing student groups from using school facilities for religious worship and discussion as an unconstitutional restriction of student religious expression.[58] On the other hand, the Establishment Clause is generally violated where prayer appears to be sanctioned or endorsed by the public school.[59] The U.S. Supreme Court found that student-delivered prayer at high school football games was unconstitutional.[60] The Court similarly found clergy-delivered prayer at a high school graduation was unconstitutional.[61] The holding of a moment of silence for "meditation or voluntary prayer" was also found unconstitutional.[62]

The U.S. Supreme Court has upheld *reasonable* content-neutral restrictions on

[50] *Compare Cornelius v. NAACP Legal Defense & Education Fund, Inc.* (1985) 473 U.S. 788, 800, 105 S.Ct. 3439; *Hills v. Scottsdale Unified School Dist. No. 48* (9th Cir. 2003) 329 F.3d 1044, 1048, with *Pickering v. Board of Education of Township High School Dist. 205, Will County, Ill*. (1968) 391 U.S. 563, 568 88 S.Ct. 1731; *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1070; *Garcetti v. Caballos* (2006) 547 U.S. 410, 423-24; *City of San Diego, Cal. v. Roe* (2004) 543 U.S. 77, 82-83, 125 S.Ct. 521.

[51] See *Perry Education Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 44-46, 103 S.Ct. 948.

[52] *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1070.

[53] *Huppert v. City of Pittsburg* (9th Cir. 2009) 574 F.3d 696, 703.

[54] See, e.g., *West Virginia State Bd. of Education v. Barnette* (1943) 319 U.S. 624, 63 S.Ct. 1178; *Stromberg v. California* (1931) 283 U.S. 359, 51 S.Ct. 532.

[55] See, e.g., *Santa Fe Independent School Dist. v. Doe* (2000) 530 U.S. 290, 120 S.Ct. 2266; *Board of Education of Westside Community School v. Mergens* (1990) 496 U.S. 226, 110 S.Ct. 2356; *Wallace v. Jaffree* (1985) 472 U.S. 38, 105 S.Ct. 2479; *Widmar v. Vincent* (1981) 454 U.S. 263, 102 S.Ct. 269.

[56] See, e.g., *Capital Square Review & Advisory Bd. v. Pinette* (1995) 515 U.S. 753, 760, 115 S.Ct. 2440; *Board of Education of Westside Community School v. Mergens* (1990) 496 U.S. 226, 236, 248.

[57] *Board of Education of Westside Community School v. Mergens* (1990) 496 U.S. 226, 248, 110 S.Ct. 2356.

[58] *Widmar v. Vincent* (1981) 454 U.S. 263, 269-70, 277, 102 S.Ct. 269.

[59] See, e.g., *Santa Fe Independent School Dist., supra*, 530 U.S. at p. 302.

[60] *Ibid.*

[61] See *Lee, supra*, 505 U.S. at pp. 586-87.

[62] *Wallace v. Jaffree* (1985) 472 U.S. 38, 56.

protected expression in public schools so long as the restrictions *serve a legitimate governmental purpose* and leave open adequate other places for speech as alternatives.[63] When the restrictions are content-based, however, it is the same both inside and outside the public school setting; content-based restrictions must survive *strict scrutiny*, the most exacting and difficult constitutional test used by courts considering a governmental limitation to a fundamental right.[64]

Generally, the courts apply the *Lemon* test to determine whether a public school violated the Establishment Clause.[65] A public school violates the Establishment Clause where "an objective observer" would consider the school's action "a state endorsement of prayer in public schools."[66] The Establishment Clause is generally offended where prayer occurs at school-sanctioned events or in the classroom.[67] Where prayer occurs on school grounds but is private and student initiated, the Establishment Clause is typically not violated.[68] When school policy requires prayer or school prayer is public, the U.S. Supreme Court generally finds it unconstitutional; when school prayer is private, consensual, and occurs outside of the classroom, the U.S. Supreme Court generally finds it protected expression.[69]

Courts uphold reasonable forum restrictions on speech in public schools where the restrictions are content-neutral, further a legitimate government interest, and leave open adequate alternatives for speech to occur.[70] Public schools may regulate speech where "it materially and substantively interfere[s] with the requirements of appropriate discipline in the operation of the school."[71] Time, place and manner restrictions must meet strict scrutiny if they are content specific.[72]

Teacher Is Allowed to Display Classroom Banners that Convey a Judeo-Christian Viewpoint.

Poway Unified School District had a longstanding practice of allowing teachers to display personal messages on their classroom walls. A teacher, Bradley Johnson, had displayed two banners for 25 years. One stated: "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace on Thee." The other banner included the statement "All Men Are Created Equal, They Are Endowed By Their Creator." The school principal ordered Mr. Johnson to remove these two banners as they conveyed a Judeo-Christian viewpoint. Other teachers were allowed to display Islamic or Buddhist messages.

In *Johnson v. Poway Unified School District*,[73] a federal trial court applied the traditional forum-based analysis denying the school district's motion to dismiss Mr. Johnson's claim that his First Amendment rights were violated when he was ordered to remove banners from his classroom that displayed patriotic and religious messages. The same Court granted summary judgment in favor of Mr. Johnson and ordered the school district to permit Mr. Johnson to re-display the banners in his classroom.[74] The Court ruled that teachers retain their free speech rights. Specifically, the Court ruled that the display of banners in his classroom was an exercise of free speech on a subject permitted in a limited public forum, which the district created by its practice, and that the district cannot forbid the expression of a particular religious belief while allowing other religious messages.[75] The school district appealed the trial court's award of summary judgment.

[63] *Heffron v. International Society For Krishna Consciousness, Inc.* (1981) 452 U.S. 640, 647-48, 101 S.Ct. 2559.
[64] *Turner Broadcasting System v. FCC* (1994) 512 U.S. 622, 642-43, 114 S.Ct. 2445.
[65] But see *Eng, supra*, 552 F.3d at p. 1070 (Pickering-based analysis applicable where employee-delivered religious expression occurs at school and the teacher speaks as a teacher, not a private citizen making the state both sovereign and employer).
[66] See *Santa Fe Independent School Dist., supra*, 530 U.S. at p. 308.
[67] *Id.* at pp. 308-13; *Lee, supra*, 505 U.S. at pp. 586-87; *Wallace, supra*, 472 U.S. at p. 56.
[68] *Widmar, supra*, 454 U.S. at pp. 274-76.
[69] Compare *Santa Fe Independent School Dist., supra,* 530 U.S. at pp. 308-13 and *Wallace, supra*, 472 U.S. at p. 56 with *Widmar, supra*, 454 U.S. at pp. 274-76.
[70] See *Heffron, supra*, 452 U.S. at pp. 647-48.
[71] See *Tinker v. Des Moines Independent Community School Dist*. (1969) 393 U.S. 503.
[72] See *Turner Broadcasting System, supra*, 512 U.S. at pp. 642-43.
[73](S.D. Cal 2008) 2008 U.S. Dist. LEXIS 107665.
[74] *Johnson* (S.D. Cal 2010) 2010 U.S. Dist. LEXIS 25301.
[75] *Id.* at *4.

The Ninth Circuit reversed the trial court's award of summary judgment to Mr. Johnson ordering that the case be remanded with instructions to enter summary judgment in favor of Poway Unified School District and its officials on all claims. The Court found error in the trial court's application of the traditional forum-based analysis on the issue of the school district's restraint on the teacher's religious expression.[76] Instead, the Court observed that the law governing public employee speech in the workplace is distinct from the traditional forum-based analysis.[77]

Where, as here, the government's role is both sovereign *and employer*, the general forum-based inquiry is inapposite. Instead, a five-step, sequential inquiry is made, and the court will examine (1) whether the plaintiff employee spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantially motivating factor in the adverse employment action; (4) whether the public employer had an adequate justification for treating the employee differently from members of the general public; and (5) whether the public employer would have taken the adverse employment action even absent the protected speech.[78] A public employee plaintiff's failure to satisfy a single step concludes the inquiry because the five-step analysis is sequential.[79] This test attempts to strike a balance the public employee's interest in engaging in religious expression as a citizen and the interest of the State in performing public services through its employees. Applying this test, the Ninth Circuit found that Poway acted well within constitutional limits when it ordered Mr. Johnson not to speak in a manner it did not desire because the speech at issue owes its existence to Mr. Johnson's position as a teacher, and not as a citizen.[80]

As to the Establishment Clause claim, the Ninth Circuit applied the familiar *Lemon v. Kurtzman* test, and found no violation. The Court noted that particular vigilance is warranted when monitoring compliance with the Establishment Clause in elementary and secondary schools.[81] The Court further found that governmental action taken to avoid potential Establishment Clause violations have a valid secular purpose.[82]

Disclaimer Doesn't Render High School Graduation Speech Containing Religious Remarks Permissible Free Speech.

Amador Valley High School class valedictorian and devout Christian, Nicholas Lassonde, wrote a graduation speech that quoted extensively from the Bible and proselytized his Christian views.[83] In order to avoid violating the Establishment Clause, the school advised Mr. Lassonde that references to his own religious beliefs were permissible, but that proselytizing comments were not. Under protest, Mr. Lassonde omitted the proselytizing portion of his speech and instead, handed out copies of the full text of his speech just outside the site where the graduation ceremony was held.

Mr. Lassonde sued the school district, claiming that the district had violated his constitutional right to free speech, religious liberty, and equal protection. Citing its earlier decision in *Cole v. Oroville Union High School District*,[84] the Ninth Circuit ruled that the school had to censor the speech in order to avoid the appearance of government sponsorship of religion. The Court also ruled that allowing the speech would have had an impermissibly coercive effect on dissenters, requiring them to participate in a religious

[76] *Johnson* (9th Cir. 2011) 658 F.3d 954, 961.
[77] Compare *Cornelius v. NAACP Legal Defense & Educational Fund, Inc*. (1985) 473 U.S. 788, 800, 105 S.Ct. 3439; *Hills v. Scottsdale Unified School Dist.* No. 48 (9th Cir. 2003) 329 F.3d 1044, 1048, with *Pickering v. Board of Education of Township High School Dist. 205, Will County, Ill.* (1968) 391 U.S. 563, 568 88 S.Ct. 1731; *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1070; *Garcetti v. Caballos* (2006) 547 U.S. 410, 423-24; *City of San Diego, Cal. v. Roe* (2004) 543 U.S. 77, 82-83, 125 S.Ct. 521.
[78] *Eng, supra*, 552 F.3d at p. 1070.
[79] *Huppert, supra*, 574 F.3d at p. 703.
[80] *Johnson, supra*, 658 F.3d at p. 970.
[81] *Id.* at p. 972; see also *Edwards v. Aguillard* (1987) 482 U.S. 578, 583-84, 107 S.Ct. 2573 ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.").
[82] *Johnson, supra*, 658 F.3d at p. 972; accord *Nurre v. Whitehead* (9th Cir. 2009) 580 F.3d 1087, 1096 discussing *Vasquez v. L.A. County* (9th Cir. 2007) 487 F.3d 1246, 1255, *cert. den.* (2010) 130 S.Ct. 1937.
[83] *Lassonde. v. Pleasanton Unified School Dist.,* 320 F.3d. 979 (9th Cir. 2003).
[84] (9th Cir. 2000) 228 F.3d 1092, *cert. den.* (2001).

practice even by their silence. Mr. Lassonde argued that the school district should have allowed him a less restrictive alternative to complete censorship, such as a disclaimer. The Court rejected this argument, stating that in censoring Mr. Lassonde's speech, the school district had not done more than what was required, but had taken the steps necessary to avoid violating the Establishment Clause.[85]

Public Schools Must Avoid Excessive Entanglement with Religion.

In *DiLoreto v. Board of Education of the Downey Unified School District*,[86] a public school district held a fundraising event in which it sold advertising space on a billboard located in its athletic field. A local engineering firm submitted a sign featuring the Ten Commandments with no mention of the firm's name on the sign. A California appellate court applied the *Lemon v. Kurtzman* test and concluded that posting the sign would violate the Establishment Clause. The Court found that although the fundraiser's original purpose was secular, the school district could not accept signs of a religious nature that did not indicate a connection to a business, because the school's secular purpose would be subverted.

In *Santa Fe Independent School District v. Jane Doe*,[87] the Santa Fe Independent School District adopted a policy that authorized two student elections. In the first election, students voted by secret ballot to determine whether an invocation would be delivered at football games. In the second election, students voted to select the spokesperson to deliver the invocation.

The U.S. Supreme Court ruled that the school district's policy violated the Establishment Cause.

Student elections that determine, by majority vote, which expressive activities shall or shall not receive school benefits are constitutionally problematic. "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent."[88] The student election failed to protect minority views and placed the students who held minority views at the mercy of the majority.

The Court found that the school's policy violated the Establishment Clause because the only type of message endorsed was an "invocation," a term that primarily describes an appeal for divine assistance.[89] The policy established an improper majoritarian election on religion, and unquestionably had the purpose of encouraging prayer at school events.

School District and Teacher Did Not Violate the Establishment Clause by Offensive Comments Made in a High School European History Class.

In C.F. v. Capistrano Unified School District, a student alleged that his history teacher violated his rights under the Establishment Clause by making comments in his class that were hostile to religion in general, and to Christianity in particular. A federal trial Court ruled that a European history teacher's views and comments made in his class that appeared to be anti-Christian were not in violation of the Establishment Clause, with the exception of one unequivocal statement that creationism was "superstitious nonsense." For this one statement which did violate the Establishment Clause, the Court ruled that the teacher was entitled to qualified immunity. The Court further ruled that that because the student was no longer in the teacher's classroom the issue was moot.

The Ninth Circuit ruled that the trial court properly refused to grant the student's request for declaratory relief because his graduation from high school mooted his claim, and the "capable of repetition, yet evading review" exception did not apply. The Ninth Circuit further found that the teacher was entitled to qualified immunity because the law was not clearly established at the time of the events in question; the appellate

[85] *Nurre v. Whitehead* (9th Cir. 2009) 580 F.3d 1087 (school district took reasonable action to comply with the Establishment Clause where it required that all performances at graduation ceremony be secular).
[86] (1999) 74 Cal.App.4th 267, 87 Cal.Rptr.2d 791.
[87] *Santa Fe Independent School Dist., supra*, 530 U.S. 290.
[88] *Id.* at p. 2276, citing *Board of Regents of the U. Wisc. System v. Southworth* (2000) 529 U.S. 217, 120 S.Ct. 1346.
[89] *Id.* at p. 2279.

court was unaware of any prior case holding that a teacher violated the Establishment Clause by appearing critical of religion during class lectures, nor any case with sufficiently similar facts to give a teacher "fair warning" that such conduct was in violation of the Establishment Clause. The appellate court vacated the trial court's decision to the extent it decided the constitutionality of any of the teacher's statements and affirmed the trial court's decision that the teacher was entitled to qualified immunity.[90]

Recitation of the Pledge of Allegiance in Public Schools Is Not a Violation of the Establishment Clause.

In *Newdow v. Rio Linda School District*, the Ninth Circuit decided that Education Code section 52720 requiring school districts to begin the school day with an "appropriate patriotic exercise" does not violate the Establishment Clause even though it permits teachers to lead students in the recitation of the Pledge of Allegiance. An atheist parent whose child attended the elementary school argued that the words "under God" offended his belief, interfered with her right to educate her child, and indoctrinated her child. The school never requested that his child recite the Pledge. The Court ruled that the words "under God" have religious significance, but that the Pledge is an endorsement of the form of government, not of religious expression.[91]

Public Schools Must Maintain Viewpoint Neutrality.

Public schools also must be careful to maintain viewpoint neutrality when implementing their community use policies. For example, in *Good News v. Milford Central School*,[92] the community use policy at Milford Central School in New York made the school available for "social, civic, and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public."[93] Organizers of the Good News Club, a private group for children ages 6 to 12, submitted a request for the use of the school cafeteria to hold its weekly meeting. The club stated that its purpose was to have "a fun time of singing songs, hearing a Bible lesson and memorizing scripture." The school's exclusion of the club constituted impermissible viewpoint discrimination.

The U.S. Supreme Court rejected the school's argument that the club violated the Establishment Clause and found there was no danger that the community would think that the school was endorsing religion because the club's meetings were held after school hours, were not sponsored by the school, and were open only to those students who obtained parental permission. The Court emphasized that because children could not attend the club meetings without parental consent, they could not be coerced into engaging in the club's activities. The Court explained that government neutrality toward religion "...is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[94] However, when schools remain a non-public forum, school administrators are vested with the authority to limit public access based on student safety and protection against disruption.[95]

Under California law, the Civic Center Act[96] permits school and community college districts to grant the use of school facilities to religious groups "upon the terms and conditions the board deems proper... ."[97] Although many local elementary schools choose to create a "buffer zone" by allowing religious clubs to meet in school facilities only during evening hours to avoid a

[90] *C.F. v. Capistrano Unified School Dist.* (9th Cir. 2011) 654 F.3d 975, cert. den. (2012).
[91] (2010) 597 F.3d 1007; see also *Meadow v. Lefevre* (9th Cir. 2010) 598 F.3d 638 (Establishment Clause not violated by the presence on U.S. currency of the phrase "In God We Trust" because phrase is only a reference to the U.S. religious heritage).
[92] (2001) 533 U.S. 98, 121 S.Ct. 2093.
[93] *Id.* at p. 102.
[94] *Id.* at p. 114; see also *Hills v. Scottsdale Unified School Dist.* (9th Cir. 2003) 329 F.3d 1044, *cert. den.* (2004) 124 S.Ct. 1146 (school district offends Constitution by refusing to distribute literature advertising a program with underlying religious content where school district distributes similar literature for secular summer camps).
[95] *Reeves v. Rocklin Unified School Dist.* (2003) 109 Cal.App.4th 652, 135 Cal.Rptr.2d 213; *Id.*; citing *Krishna Soc. v. Lee* (1992) 505 U.S. 672, 679-680.
[96] Ed. Code, §§ 38130 et seq.
[97] Ed. Code, §§ 38131(b), 82537(b).

perception of school endorsement, this case establishes that as long as the meetings take place after school hours, no additional time buffer is necessary.

State Law School Can Enforce Non-Discrimination Policy Without Infringing First Amendment and Equal Protection Rights.

The Christian Legal Society ("CLS"), a student association at Hasting College of Law ("HCL"), sought recognition as a university-sponsored group to obtain school funds and facilities benefits. However, the CLS constitution required that members sign a "Statement of Faith" whereby they affirmed their belief that they would adhere to sexuality and morality standards disproving homosexuality. HCL denied recognition to CLS because it did not comply with its anti-discrimination policy; its policy required acceptance of "all-comers." CLS sued to enjoin HCL to officially recognize CLS. In *Christian Legal Society v. Martinez,*[98] the U.S. Supreme Court ruled that public schools can refuse recognition to student religious associations if they do not abide by non-discrimination policies.[99]

First Amendment Free Exercise of Religion and Association Applied to Students' Private, Consensual Prayers Outside the Classroom.

Two Christian community college students considered prayer to be an essential part of their beliefs. They prayed with each other and with other students outside class. On one occasion, one of these students prayed with a faculty member in her office. On another occasion, when the student and that faculty member were praying, another faculty member who shared the office walked in. He interrupted the prayer by saying, "You cannot be doing that here." The student received a disciplinary letter for having contravened the school policy which prohibits "disruptive behavior."[100]

In an unreported federal trial court order, the Court ruled that students who pray with other students outside the classroom during breaks are engaged in religious expression and association protected under the First Amendment. Also, a student-initiated, private, consensual prayer with a faculty member in his office is a protected activity that does not violate the Establishment clause.[101]

THE CALIFORNIA CONSTITUTION

The California Constitution guarantees religious rights that mirror the rights that the U.S. Constitution protects. The California Constitution, article I, section 4 provides:

"Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the state. The Legislature shall make no law respecting an establishment of religion."

The legal analysis that California courts use in Free Exercise and Establishment Clause cases is similar to the federal courts' analysis. But the California Constitution is more comprehensive than the U.S. Constitution with respect to government regulation of religion in the workplace.[102]

The California Constitution, like the United States Constitution, does not merely proscribe an establishment of religion. Instead, all laws "respecting an establishment of religion" are forbidden. The California Constitution also guarantees that religion shall be freely exercised and enjoyed "without discrimination or preference." Thus, "preference" is forbidden under the California Constitution even when there is no discrimination. Case law interpreting the U.S. Constitution does not suggest protections as comprehensive as California's.

The legal analysis that California courts use in Free Exercise and Establishment Clause cases is similar to the federal analysis.

[98] (2010) 130 S.Ct. 2971, 177 L.Ed.2d 838 (U.S. Supreme Court, in a 5-4 vote, affirmed the Ninth Circuit ruling).
[99] *Id.* at pp. 2993-94.
[100] *Kyriacou v. Peralta Community College Dist.* (N.D.Cal. 2009) 2009 WL 890887 slip op. at *1.
[101] *Id.* at *4.
[102] *Fox v. City of Los Angeles* (1978) 22 Cal.3d 792, 150 Cal.Rptr. 867.

California's Guarantees of Religious Freedom Did Not Exempt Physician from Complying with the California Unruh Act's Prohibition Against Sexual Orientation-Based Discrimination Where Doctor Claimed Free Exercise Clause Permitted Him to Refuse to Provide Artificial Insemination to Lesbian Couple.

In *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*,[103] the California Supreme Court considered a case that presented a conflict between a physician's right of religious free exercise and California anti-discrimination laws. A patient, Guadalupe Benitez, sued a medical group and two of its employee physicians alleging their refusal to perform artificial insemination on her violated the Unruh Civil Rights Act, a California law. Benitez was a lesbian and defendant doctors, citing their religious beliefs, refused to perform artificial insemination on the patient because of her sexual orientation. The question specifically before the Court was whether the physicians' First Amendment right to free exercise of religion exempted them from conforming their conduct to the Unruh Act's requirement to provide "full and equal accommodations, advantages, facilities, privileges or services."[104] The state high Court ruled that rights of religious freedom as guaranteed in both the federal and the California Constitutions, do not exempt a medical clinic's physicians from complying with the California Unruh Act's "prohibition against discrimination based on a person's sexual orientation.[105]

"No Preference" Clause

The "no preference" clause of the state Constitution guarantees free religious preference. The "no aid" clause prohibits the government from "mak[ing] an appropriation, or pay[ing] from any public fund whatever, or grant anything to or aid of any religious sect, church, creed, or sectarian purpose."[106] The California Supreme Court, characterizing the No Preference Clause, observed that "[i]t would be difficult to imagine a more sweeping statement of the principle of government impartiality in the field of religion" than that found in the No Preference Clause.[107]

Mount Soledad is an 822-foot hill in La Jolla, California, which has had a Latin cross atop Mount Soledad since 1913, but was subsequently destroyed. The cross was rebuilt in 1954 standing twenty-nine feet high and twelve feet across. The current cross was dedicated as a memorial to American service members and a tribute to God's "promise of everlasting life." Two Vietnam veterans sued the city to prevent the cross from remaining on city land.[108] Ultimately the trial court issued an injunction prohibiting the city from displaying the cross as a violation of the No Preference Clause of the California Constitution.[109] The Ninth Circuit affirmed the injunction in *Ellis v. City of Le Mesa*[110] holding that the cross was a "sectarian war memorial carry[ing] an inherently religious message and creat[ing] an appearance of honoring only...serviceman of [a] particular religion," to the extent that the cross could even be characterized as a memorial.[111] The Ninth Circuit ruled that this appearance violated the California Constitution because it embodied a preference for only serviceman of a particular religion. At the time, the constitutionality of the cross under the federal Constitution was not before the court.

There is no requirement in the California Constitution that each religion always be represented to avoid the governmental endorsement of a particular religion in violation of the "no preference" clause. This is true for cases involving religious *displays*, and California courts also have applied this principle in other scenarios including the placing of one version of the Bible, such as the King James version, in a public school library. Specifically, one California Court of Appeal ruled that a California public school

[103] (2008) 44 Cal.4th 1145, 81 Cal.Rptr.3d 708.
[104] *Id.* at p. 1154.
[105] *Id.* at p. 1150.
[106] Cal. Const., art. XVI, § 5.
[107] *Sands v. Morongo Unified School Dist.* (1992) 53 Cal.3d 863, 281 Cal.Rptr. 34.
[108] *Murphy v. Bilbray* (S.D.Cal. 1991) 782 F.Supp. 1420, 1424.
[109] *Id.* at p. 1438.
[110] (9th Cir. 1993) 990 F.2d 1518, 1527-28 *cert. den.* by (1994) 512 U.S. 1220.
[111] *Id.* at p. 1527.

did not offend the "no preference" clause by placing a particular version of the Christian Bible in its library even where not all versions of the Bible or all religious texts are not also placed in the library.[112] In so ruling, the Court of Appeal underscored that the inclusion of a religious text in a public school library does not make the character of the text *secular*; instead, such texts have a *non-secular* purpose because it is placed in the library for *reference* purposes and is not used by the public school for instruction. For this reason, it was irrelevant to the Court that the book at issue was a Christian religious text and the Court's ruling permits a California public school to place religious texts of less than all of the world's religions in the school library without violating the California Constitution's "no preference" clause.

"No Aid" Clause

Bond financing agreements are also subject to review to insure that agreement does not violate the California Constitution. Article XVI, section 5, provides that state and local governments shall not grant anything "in aid of any ... sectarian purpose, or help[ing] to support or sustain any school, college, university, hospital, or other institution controlled by any ... sectarian denomination whatever." Despite this provision, for more than 30 years courts have permitted California public entities to issue revenue bonds to raise private funds for campus improvements at religiously affiliated colleges if the bond proceeds would not be used for specified religious purposes.[113] There remained a question, however, whether the rule would apply if a college were "pervasively sectarian," that is, if the college devoted a substantial portion of its functions to its religious mission.

In *California Statewide Communities Development Authority v. All Persons Interested in the Matter of the Validity of a Purchase Agreement*,[114] the California Supreme Court answered the question, ruling that the tax-exempt revenue bonds at issue were permissible under the state Constitution if the substance of the education the schools provided was such that they offered a broad curriculum in secular subjects and provided information and coursework that was neutral with respect to religion. The purpose of this dual-pronged inquiry is to ensure that the state's interest in promoting the intellectual improvement of its citizens is advanced through the teaching of secular information, and that the expression of a religious viewpoint in otherwise secular classes will provide a benefit to religion that is merely incidental to the bond program's primary purpose of promoting secular education. If so, provision of tax-exempt status to the bonds would not violate article XVI, section 5 of the California Constitution.

The Court also concluded that a public bond program that complied with the California Constitution would not violate the Establishment Clause of the First Amendment of the U.S. Constitution. The Court applied the *Lemon* test, concluding that if the school offered a broad curriculum in secular subjects and provided information that was neutral with respect to religion, then: (1) the government bond program would have a "secular legislative purpose"; (2) the program's principal or primary effect would not advance or inhibit religion; and (3) the program would not foster excessive government entanglement.

In *Barnes-Wallace v. City of San Diego*,[115] the Ninth Circuit used the analytical framework set forth in *Statewide* to determine whether two public-land leases executed between the City of San Diego and the Boy Scouts of America, an organization which generally prohibits atheists, agnostics, or homosexuals from volunteering or becoming members,[116] violated provisions of the California and federal Constitutions relating to the establishment of religion and equal protection. Applying the four-part *Statewide*

[112] See *Evans v. Selma Union High School Dist. of Fresno County* (1924) 193 Cal. 54, 60.
[113] See, e.g., *California Education Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 116 Cal.Rptr. 361; see also *California Statewide Community Development Authority v. All Persons Interested in Matter of Validity of Purchase Agreement* (2007) 40 Cal.4th 788, 803-04.
[114] *California Statewide Community Development Authority, supra*, 55 Cal.Rptr.3d 487.
[115] (9th Cir. 2012) 704 F.3d 1067.
[116] *Id.* at 1072.

test to the leases, the Court determined the following: the City had a public interest in encouraging non-profit organizations to develop cultural, educational, and recreational programs and facilities for public use;[117] the Boy Scouts furthered the City's public interest and received only an incidental benefit;[118] the City's leases were available to both sectarian and secular institutions on an equal basis;[119] the City expended no funds on the Boy Scouts or the properties leased to them;[120] and the leases imposed no financial burden on the City, but instead the City received the benefit of expensive improvement and management of the properties.[121] Based on the foregoing, the Court concluded that the leases did not violate the California Constitution's No Aid clause.

THE EQUAL ACCESS ACT

Congress enacted the Equal Access Act in 1984 to clarify the First Amendment rights of public school students in the areas of speech, association, and religion.[122] The Act provides that it is "unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access ... or discriminate against any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical or other content of the speech at such meetings."[123]

A public secondary school has a limited open forum whenever it grants the opportunity for one or more non-curriculum-related student groups to meet on school premises during non-instructional time.[124]

As used in the Act, the term "equal access" means that religiously oriented student activities must be allowed under the same terms and conditions as other extracurricular activities, once a secondary school has established a limited open forum.[125]

In *Ceniceros v. Board of Trustees of the San Diego Unified School District*,[126] the Ninth Circuit ruled that a school district violated a student's rights under the Equal Access Act[127] when it denied the student's request to hold a religious club meeting on school campus during lunch breaks. Several other student groups held meetings in empty classrooms during lunch breaks, including the African American club, the Hackey Sac club, and the Surf club. Although no classes were held during the school's lunch break, the school district denied the religious club's request because it claimed that the lunch period did not fall within the Act's definition of non-instructional time.

The Ninth Circuit disagreed and ruled that the plain meaning of noninstructional time includes the high school's lunch period because no instruction takes place during that time. Citing the U.S. Supreme Court's decision in *Board of Education v. Mergens*,[128] the Ninth Circuit stated that the language of the Act must be given a broad interpretation consistent with Congress' intent to provide a low threshold for triggering the Act's requirements. The Ninth Circuit emphasized that the Act is about *equal* access, stating that "[i]f a school district wanted to prohibit religious groups from meeting during lunch, the school need only make its prohibition neutral, so that all non-curriculum-related groups are barred from meeting at lunch."[129]

Cross on Land of Veterans' Memorial Violated the Establishment Clause.

After years of controversy over a 43-foot cross and veteran's memorial atop Mount Soledad in La Jolla, California, the Ninth Circuit decided the issue of whether there was a violation of the Establishment Clause.

[117] *Id.* at 1081.
[118] *Id.*
[119] *Id.* at p. 1080.
[120] *Id.*
[121] *Id.* at pp. 1080-81.
[122] Equal Access Act, 20 U.S.C. §§ 4071 et seq.
[123] *Id.* at § 4071(a).
[124] *Id.* at § 4071(b).

[125] *Widmar, supra*, 454 U.S. 263; see also *Van Schoick v. Saddleback Valley Unified School Dist*. (2001) 87 Cal.App.4th 522, 104 Cal.Rptr.2d 562, rehg. den. (2001) review den. (2001); *Prince v. Jacoby* (9th Cir. 2002) 303 F.3d 1074, cert. den. (2003) 124 S.Ct. 62.
[126] (9th Cir. 1997) 106 F.3d 878.
[127] Equal Access Act, *supra*.
[128] (1990) 496 U.S. 226, 110 S.Ct. 2356.
[129] *Ibid.*

In *Trunk v. City of San Diego,* plaintiffs filed suit against the city and federal government alleging that a veterans' memorial dominated by the 43-foot cross violated the Establishment Clause. A federal trial court denied plaintiffs' motion for summary judgment and granted the government's motion for summary judgment. The plaintiffs appealed.

In January 2011, the Ninth Circuit ruled that the placement of the cross was unconstitutional. The Court stated that the entirety of the memorial, when understood against the background of its particular history and setting, projected government endorsement of Christianity. The fact that the memorial also commemorated the war dead and served as a site for secular ceremonies honoring veterans could not overcome the effect of its decades-long religious history. The Court further stated that the use of such a distinctively Christian symbol to honor all veterans sent a strong message of endorsement and exclusion.[130]

THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

Background

Congress enacted the RLUIPA in 2000 for the legislative purpose of heightening the free exercise guarantees secured by the First Amendment relative to regulations regarding land use and institutionalized persons. The RLUIPA is the most recent Congressional action taken in response to courts' treatment and interpretation of the rights and contours of the First Amendment's guarantees of religious freedom. Congress' first such attempt came by way of the RFRA enacted in 1993. The RFRA prohibits the government from imposing a "substantial burden" on a person's free exercise of religion, even if the burden results from a rule of general applicability, unless the governmental imposition is the least restrictive means available to further a compelling government interest.[131]

The Supreme Court invalidated the RFRA as applied to states in a 1997 decision as an unconstitutional exercise of congressional power.[132] However, it still applies to the federal government. Thus, the U.S. Supreme Court affirmed a preliminary injunction blocking a ban on a religious sect's use of hallucinogenic tea, stating the government had not met its burden under the RFRA of showing that the prohibition was the least restrictive means of advancing a compelling interest.[133] Congress took care in drafting the RLUIPA to avoid the constitutional flaws identified by the high court's decision invalidating the RFRA. In this regard, Congress drafted the RLUIPA as remedial legislation that explicitly applies only to regulations regarding land use and prison conditions.[134] Congress thereby avoided the overbreadth that rendered the RFRA Constitutionally infirm.

Land Use

Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA") in 2000 in an effort to define the scope of the Free Exercise Clause. The RLUIPA has two distinct provisions regulating land use. The first prohibits governments from implementing land use regulations that impose "a substantial burden" on religious exercise unless the government demonstrates that it chose the "least restrictive means" to further a "compelling governmental interest."[135] The RLUIPA puts the burden on the applicant to prove the denial of its application imposed a substantial burden.[136] This first land use aspect of the RLUIPA is commonly referred to as the "substantial burden" provision.

The second land use provision of the RLUIPA prohibits government from imposing a land use restriction on a religious assembly "on less than equal terms" with a non-religious assembly.[137] This is known as the "equal terms" provision of the RLUIPA. The equal terms provision includes more than the name would suggest. Included within the "equal terms" provision is the prohibition

[130] *Trunk v. City of San Diego* (9th Cir. 2011) 629 F.3d 1099.
[131] 42 U.S.C. § 2000bb-1.
[132] *City of Boerne*, *supra*, 521 U.S. at p. 533.
[133] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegeta*l, 546 U.S. 418.
[134] *Cutter v. Wilkinson* (2005) 544 U.S. 709, 125 S.Ct. 2113, 2118.
[135] 42 U.S.C. § 2000cc(a).
[136] 42 U.S.C. § 2000cc-2(b).
[137] 42 U.S.C. § 2000cc(b).

against discrimination by the government by imposition of a land use provision that discriminates on the basis of religion.[138] Equal terms also subsumes the blanket prohibition against land use regulations that either "totally excludes religious assemblies from a jurisdiction, or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[139]

The language of the RLUIPA renders it inapplicable to land use regulations that are written in general and neutral terms; however, when even generally and neutrally written land use laws are applied to grant or deny a certain use to a particular parcel of land, the RLUIPA becomes applicable by way of the *implementation* of a land use regulation under section 2000cc(2)(C) of title 42 of the *United States Code*.[140] In other words, the RLUIPA becomes applicable anytime a religious assembly seeks a conditional use permit ("CUP") because the grant or denial of a CUP is an "implementation of a land use regulation" within the meaning of the RLUIPA. Once the RLUIPA becomes implicated, courts then will consider the plaintiff's RLUIPA substantial burden or equal access claim(s).

In considering RLUIPA substantial burden claims, courts look to the body of First Amendment free exercise jurisprudence unrelated to the RLUIPA.[141] This jurisprudence instructs "that a 'substantial burden' must place more than an inconvenience on religious exercise."[142] The Ninth Circuit further distilled these separately developed rules holding that for a land use regulation to impose a substantial burden, "it must be oppressive to a significantly great extent;" specifically, a substantial burden on religious exercise "must impose significantly great restriction or onus upon such exercise."[143] A religious group need not establish that there is no other parcel of land in the jurisdiction to show a substantial burden under the RLUIPA.

In *Guru Nanak Sikh Society of Yuba v. County of Sutter*, the Ninth Circuit affirmed the trial court's ruling that the county created a substantial burden on the local Guru Nanak Sikh Society's ("Society") religious exercise under the RLUIPA in denying the Society a CUP.[144] The Society applied for a CUP in connection with two different parcels of land because the county denied the Society's first application to construct a temple on the land initially chosen by the Society. The first parcel of land was zoned "residential," and the second property was zoned "agricultural" within a general agricultural district. The Ninth Circuit based its ruling that the denial of the CUP was a substantial burden on two considerations. First, that the county cited broad reasons for denying the Society's CUP applications, which could "apply" equally easily to any future applications for a CUP by the Society. Second, the Court pointed to the insufficient level of cooperation on the part of the county. The Court noted that the Society agreed to every mitigation measure recommended by the planning division, yet the county stood by its denial without providing any explanation.[145] This case underscores the importance of (1) articulating the governmental interests that

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[138] *Ibid.*

[139] *Ibid.*

[140] See *Kaahumanu v. County of Maui* (9th Cir. 2003) 315 F.3d. 1215, 1220-23 (holding that permit process resulted in an administrative, and not legislative, action because it "was based on the circumstances of the particular case and did not effectuate a policy"); *c.f. Freedom Baptist Church of Del. County v. Township of Middletown* (E.D. Pa. 2002) 204 F.Supp.2d 857, 868-69 ("No one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activities against extant land use regulations.").

[141] See, e.g., *Sherbert v. Verner* (1963) 374 U.S. 398, 406, 83 S.Ct. 1790 (ruling that strict scrutiny test applies and substantial governmental burden on free exercise exists where unemployment compensation regulations that withheld benefits based on adherents adhering to tenets of their religious faith.); *Thomas v. Review Bd., Ind. Employment Security Div.* (1981) 450 U.S. 707, 717-18, 101 S.Ct. 1425 (The choice between unemployment benefits or religious duties imposed impermissible burden because it exerted "substantial pressure on an adherent to modify his behavior and to violate his beliefs."); see also *Lyng v. N.W. Indian Cemetery Protective Assn.* (1988) 485 U.S. 439, 450-51, 108 S.Ct. 1319 (instructing that to trigger strict scrutiny under the First Amendment, a governmental burden must "tend[] to coerce individuals into acting contrary to their religious beliefs.").

[142] *Midrash Sephardi, Inc. v. Town of Surfside, Cal*. (11th Cir. 2004) 366 F.3d 1214, 1227 rehg. den. by *Midrash Sephardi, Inc. v. Town of Surfside* (11th Cir. 2004) 116 Fed.Appx. 254 (unpublished table decision, No. 03-13858-CC) cert. den. by *Town of Surfside, Fla. v. Midrash Sephardi, Inc.* (2005) 543 U.S. 1146.

[143] See *San Jose Christian College v. City of Morgan Hill* (9th Cir. 2004) 360 F.3d 1024, 1034.

[144] (9th Cir. 2006) 456 F.3d 978, 981.

[145] *Id.* at p. 989.

are implicated by an application for a CUP; (2) explaining how these interests are furthered by denying the CUP; and (3) addressing why each alternative or mitigating measure is insufficient to protect the impacted interests of the government.

In *Cottonwood Christian Center v. Cypress Redevelopment Agency*,[146] the Court relied on this law when it granted a preliminary injunction against the City of Cypress' condemnation proceedings because the city had illegally prevented the Cottonwood Christian Center from building a church on the land the city sought to condemn.

The Court found significant circumstantial evidence of a discriminatory intent because the city expressed no concerns about the vacant land creating a blight until Cottonwood purchased the property. Cottonwood also demonstrated a strong likelihood of success on its RLUIPA claim because the city's zoning and condemnation actions substantially burdened Cottonwood's exercise of religion and the city failed to establish a compelling state interest for its actions. The Court found that "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion. Churches are central to the religious exercise of most religions. If Cottonwood could not build a church, it could not exist."[147] The city's asserted interest in eliminating blight was not compelling.

The Court noted that the blight created by the vacant land could be eliminated if the city allowed Cottonwood to build its church. A modern church facility would not be considered a blight on the community, and the value of the property would increase as a result of Cottonwood's development. "The city could not take the land, based in large part on the absence of a church facility, if its own illegal actions prevented the church from being built."[148]

Emerging Themes - Land Use

Certain helpful themes emerge from review of land use RLUIPA case law. Courts are focusing on the availability of sites to determine whether a city's ordinance poses a substantial burden on religion. The analysis for claims brought under the equal terms provision of the RLUIPA is emerging and provides less definitive guidance to stakeholders. As such, counties and cities should set up and articulate their best argument during the planning on ordinance adoption stage. In terms of permissible regulation, courts generally do not find a substantial burden on religious exercise to require an applicant to follow and complete land use permit procedures; require a conditional use permit; or to impose reasonable conditions on the use of land.

All individualized assessment processes must apply clear standards and avoid vague, discretionary, or subjective criteria or standards. With regard to standards for land usage, cities and counties must avoid using criteria such as "character of the neighborhood," "inconsistent with the Master Plan," or undefined "aesthetic interests." Counties and cities must not adopt new, targeted regulations, as this demonstrates arbitrary treatment if prior entities were not subject to new criteria because such facts support substantial burden claims while also giving rise to an inference of discrimination. "Complete" denials will support substantial burden claims where religious entity is willing to mitigating measures to address negative impacts of their proposed use. Public entities employ caution properly when contracting with private citizens or groups, as discriminatory intent may be imputed to government actors, and third-party communications are discoverable in litigation.

Institutionalized Persons

The RLUIPA prohibits the government from imposing a "substantial burden on the religious exercise of an inmate, even if the burden derives from a rule of general applicability, unless the government shows that the burden is the least restrictive means to achieve a compelling governmental interest.[149] The RLUIPA thus congressionally sets a standard that is more difficult for the government to meet than would otherwise

[146] (C.D.Cal. 2002) 218 F.Supp.2d 1203.
[147] *Ibid.*
[148] *Ibid.*
[149] 42 U.S.C. § 2000cc-1(a)(1)-(2); and see *Shakur v. Schriro* (9th Cir. 2008) 514 F.3d 878.

be required under First Amendment analysis. The RLUIPA specifically "bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion."[150] The second stage of the test is whether the government's conduct substantially burdens the inmate's religious exercise. Once the inmate has demonstrated that the government action-policy substantially burdens his religious exercise, the government must then establish that its action was taken in furtherance of a compelling government interest that could be achieved by no less-restrictive means.[151]

Prison security is a compelling governmental interest; however, the government must show this with particularity.[152] Further, the challenge for the government is demonstrating that its action/policy is the least restrictive means to achieve this interest.[153] In *Holts v. Hobbs*,[154] the U.S. Supreme Court ruled that the Arkansas Department of Correction's grooming policy, which prohibited an inmate from having a ½-inch beard, violates RLUIPA. In finding the policy to be unconstitutional, the Court rejected Arkansas' argument that it needed to ban beards in order to maintain safety in its prisons. The Court stated that although the Department has a compelling interest in regulating contraband, its argument that this interest is compromised by allowing an inmate to grow a ½-inch beard is unavailing, especially given the difficulty of hiding contraband in such a short beard and the lack of a corresponding policy regulating the length of hair on the head.[155] The Court further noted that less restrictive means were likely possible, given that the vast majority of states and the federal government allow inmates to grow ½-inch beards, either for any reason or based on religious exemptions.[156]

In the case of *In re Garcia*,[157] the court concluded that incarcerated persons may assert a RLUIPA claim in a habeas corpus writ.[158] An inmate in the Oregon Department of Corrections ("ODOC") sued numerous ODOC officials in their official capacities alleging that they were substantially burdening the inmate's practice of his Native American religion.[159] The trial court granted summary judgment in favor of the defendants and the plaintiff appealed. The Ninth Circuit remanded the plaintiff's RLUIPA claims for further consideration under the RLUIPA.[160] On remand, the trial court again entered summary judgment in favor of the ODOC ruling that money damages are unavailable under the RLUIPA against state officials sued in their official capacity, and that the plaintiff's requests for injunctive and declaratory relief under the RLUIPA were moot secondary to the plaintiff's release from the ODOC during the pendency of the litigation. The plaintiff again appealed. The Ninth Circuit affirmed the trial court's finding that money damages are unavailable against the state because of Eleventh Amendment sovereign immunity.[161]

County Courthouse Holding Facility Is an "Institution" for Purposes of Religious Land Use and Institutionalized Persons Act.

In *Khatib v. County of Orange County*,[162] a practicing Muslim, Souhair Khatib, wore a headscarf in accordance with her religious beliefs. When Khatib's probation was revoked, she was taken to a county courthouse holding facility and ordered to remove her headscarf. The trial court dismissed her RLUIPA claims on the ground that the facility was not a covered institution under RLUIPA. The appellate court determined that it was in fact a facility under RLUIPA because the facility fit within the

[150] 42 U.S.C. § 2000cc-5(7)(A); and see *Cutter v. Wilkinson* (2005) 544 U.S. 709, 725 n. 13, 125 S.Ct. 2113.
[151] *Greene v. Solano County Jail* (9th Cir. 2008) 513 F.3d 982, 986.
[152] See *Cutter*, *supra*, 544 U.S. at p. 725, fn. 13.
[153] See, e.g., *Greene v. Solano County Jail* (9th Cir. 2008) 513 F.3d 982, 989; and see *Warsoldier v. Woodford* (9th Cir. 2005) 418 F.3d 989, 996 (holding that inmate's "choice" between cutting his hair pursuant to prison regulation and contrary to his religious beliefs or to remain confined in his cell was a "false choice").
[154] 135 S.Ct. 853 (2015).
[155] *Id.* at 863.
[156] *Id.* at 866.
[157] (2012) 202 Cal.App.4th 892, 136 Cal.Rptr.3d 298.
[158] *Id.* at p. 902.
[159] See *Alvarez v. Hill* (9th Cir. 2012) 667 F.3d 1061, 1063.
[160] *Id.* at pp. 1154-55.
[161] See *Id.* at pp. 1063-64; see also *Sossamon v. Texas* (2011) 131 S.Ct. 1651, 1654 (ruling that damages not available against state defendants under the RLUIPA).
[162] (9th Cir. 2011) 639 F.3d 898.

definition of a "pretrial detention facility," as it was a secure detention facility located within a court building used for the confinement of persons, and its main purpose was to temporarily hold individuals awaiting court proceedings. Furthermore, it fell within the definition of a "jail," since it was a secure detention facility for the confinement of persons solely for the purpose of a court appearance. Therefore, the appellate court reversed and remanded the case.

Money Damages Awarded to Church that Successfully Challenged CUP Under the RLUIPA's "Equal Terms" Provision.

In *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*,[163] the plaintiff church sued for declaratory judgment, injunction, and damages as a result of the city's denial of a CUP that the church needed in order to conduct church services in the building it purchased for worship services. Both the district and circuit court characterized the case as presenting the type of "reverse urban blight" case that, instead of a nightclub or bar being treated as blighting the community, the city treated the church "as blighting the bar and nightclub scene." This resulted from the city's attempt to revitalize its "old town" area as a tourist district that would "help to ensure a lively pedestrian-oriented district."[164] The church bought the building in question with knowledge that it would require a city issued permit to hold church services, but purchased the building before obtaining the required permit.

In denying the permit, the city cited a significant concern that a church would prevent issuance of liquor licenses pursuant to a state law that prohibited new bars, nightclubs, or liquor stores within 300 feet of a church. The community planning staff for the city recommended denying the permit, and the City Planning and Zoning Commission followed this recommendation. In denying the permit, the Commission noted as "pivotal" that issuance would be inconsistent with the "24/7 downtown neighborhood" it sought to revitalize. Had the church been a secular organization rather than a church, it would not be legally obligated to obtain a CUP; the city's code uniquely required *religious organizations*, and no other type of organization, to obtain a CUP to operate in the city's old town district.[165] The church asked the court to invalidate this city code provision, and sought consequential money damages to compensate the church for the costs resulting from the denial of the CUP.

The trial court found that the city did not violate the RLUIPA notwithstanding the city's differential treatment. Subsequently and during the pendency of the church's appeal to the Ninth Circuit, the church lost the property to foreclosure and Arizona changed the law that formerly required businesses with liquor licenses to be 300 feet from any church. As such, the Ninth Circuit did not consider the claims for declaratory judgment as moot. The Ninth Circuit concluded that money damages are available under the RLUIPA against a municipality in violation thereof because Eleventh Amendment immunity applies only to states, and does not apply to municipalities.[166]

Under these facts, the *substantial burden* test is not implicated. Rather, the Ninth Circuit analysis applied the RLUIPA's "equal terms" provision, and the Court construed the requirements of the equal terms provision as a matter of first impression in this circuit. Principally before the Court was the RLUIPA's requirement that the imposition to religious institutions be on "less than equal terms with a non-religious assembly or institution." The Court determined that the analytical focus under this provision of the RLUIPA is on what "equal" means in the context presented by each case. The Court noted that, for land use purposes, a church of several hundred members is not *equal* to a ten-member book club. The test announced by the Ninth Circuit in this case instructs that the government violates the equal terms provision when a church is treated on a less than equal basis with a secular comparator, similarly-situated with respect to an accepted zoning criteria. In dicta, the Ninth Circuit noted that cities may be able to justify differential treatment if the

[163] (9th Cir. 2011) 651 F.3d 1163.
[164] *Id.* at p. 1165.
[165] *Id.* at pp. 1166-67.
[166] *Id.* at pp. 1168-69.

less-than-equal terms flow from a legitimate regulatory purpose.[167] The Ninth Circuit found that the RLUIPA's equal terms provision was violated because the city requires religious institutions to obtain a CUP, and doesn't require similarly-situated secular membership assemblies to do the same.

THE RELIGIOUS FREEDOM RESTORATION ACT

Background

The Religious Freedom Restoration Act ("RFRA")[168] now governs the extent to which all levels of government can regulate religious practice.[169] The RFRA permits federal, state, and local governments to impose a substantial burden upon an individual's religious exercise. The RFRA reestablished the standard commonly referred to as the "strict scrutiny test," which is the toughest, least deferential standard for evaluating government impingement upon individual constitutional rights. The strict scrutiny test is the most difficult standard for the government to meet. The RFRA replaced the reasonableness standard with strict scrutiny.[170] The RFRA's restrictions applies to every agency and official of federal, state, and local governments,[171] and the RFRA applies to all federal and state law, whether adopted before or after the enactment of the RFRA,[172] which substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.[173]

Regulations Requiring Employers of Closely-Held Corporations to Provide Female Employees with No-cost Access to Contraception Violates the Religious Freedom Restoration Act.

Regulations issued under the Affordable Care Act require employers to provide their female employees with health insurance that includes no-cost access to twenty different kinds of contraceptives. In *Burwell v. Hobby Lobby Stores*,[174] and a related case,[175] the owners of three closely-held for-profit corporations have sincere Christian beliefs that life begins at conception, and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. The business owners sued the Department of Health and Human Services ("HHS") and other federal officials and agencies under the RFRA and the Free Exercise Clause, seeking to enjoin application of the contraceptive mandate insofar as it requires them to provide health coverage for the four contraceptives that they find objectionable.

The U.S. Supreme Court ruled that, as applied to closely-held corporations, the HHS regulations imposing the contraceptive mandate violate the RFRA. First, the Court decided that the RFRA applies to regulations that govern the activities of closely held for-profit corporations. The Court noted that Congress included corporations within the RFRA's definition of "persons," and that the RFRA's text shows that Congress designed the statute to provide very broad protection for religious liberty.[176] Although HHS argued that Congress could not have wanted the RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere "beliefs" of a large corporation, such as IBM or General Electric, these cases do not involve publicly traded corporations.[177] Instead, the Court noted that the companies in these cases are owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.

Next, the Court ruled that HHS's contraceptive mandate substantially burdens the exercise of religion because companies that refuse to provide contraceptive coverage face severe economic

[167] *Id.* at pp. 1172-73.
[168] 42 U.S.C. §§ 2000bb to 2000bb-4.
[169] *City of Boerne v. P.F. Flores* (1997) 521 U.S. 507, 535-36.
[170] *Freeman v. Arpaio* (9th Cir. 1997) 125 F.3d 732, 736.
[171] 42 U.S.C. § 2000bb-2(1).
[172] 42 U.S.C. § 2000bb-3(a).
[173] 42 U.S.C. § 2000bb-1.
[174] (2014) 134 S.Ct. 2751.
[175] No. 13-356, *Conestoga Wood Specialties Corp. v. Burwell*, Secretary of Health and Human Services, on certiorari to the United States Court of Appeals for the Third Circuit.
[176] *Burwell*, 134 S.Ct. at 2755.
[177] *Id.* at 2766 (stating that HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring).

consequences.[178] While the Court assumed, without deciding, that guaranteeing cost-free access to the four challenged contraceptive methods is a compelling governmental interest, the Court found that the government failed to show that the contraceptive mandate is the least restrictive means of furthering that interest.[179] For example, the government could assume the cost of providing the four contraceptives to women unable to obtain coverage due to their employers' religious objections. Or it could extend the accommodation that HHS has already established for religious nonprofit organizations to non-profit employers with religious objections to the contraceptive mandate.[180]

It is important to note that the RFRA applies only to federal law. In *Stormans, Inc. v. Wiesman*,[181] the owner of a pharmacy and two individual pharmacists who had religious objections to delivering emergency contraceptives challenged the State of Washington's regulations requiring the timely delivery of all prescription medications. The trial court decided that the rules violate the Free Exercise and Equal Protection Clauses.[182] However, the Ninth Circuit reversed the trial court, deciding that the rules are neutral because the delivery requirement for pharmacies applies to all objections, whether the objections are religious, moral, ethical, or based on personal distaste for the patient.[183] Additionally, the delivery requirement applies to all prescription products, not just emergency contraceptives.[184] The Ninth Circuit also found that the rules promoted the State's interest in patient safety.[185]

Further, the Ninth Circuit noted that the rules specifically protect religiously motivated conduct by providing an accommodation to individual pharmacists who have religious, moral, philosophical, or personal objections to the delivery of particular prescription drugs.[186] Because the *Stormans* case concerned a state regulation, it could not have been litigated under the RFRA.

Religious Freedom Restoration Act Is Preempted by Title VII.

The RFRA provides a claim or defense in a judicial proceeding to a person whose religious exercise has been burdened by the government, and governs the extent to which the federal government can regulate religious practices. The RFRA prohibits all levels of government from imposing a *substantial burden* on the religious exercise of religion, even if it does so by way of a rule of general applicability, *unless* the government shows that the *burden is the least restrictive means* or that the burden furthers a compelling governmental interest.[187] The reach of the RFRA was limited by the U.S. Supreme Court, and has not been applicable to state or local governments since 1997.[188]

Initially, one must show that the regulation substantially burdens the exercise of religion.[189] Once the plaintiff demonstrates a substantial burden, the federal defendant is permitted to defend its regulation and avoid liability under the RLUIPA if its action was taken in furtherance of a compelling government interest and is the least restrictive means to achieve these interests.[190]

The RFRA does not alter the exclusive nature of Title VII with regard to an employee's claims of religion-based employment discrimination.[191] Consequently, a former federal employee who was terminated from

[178] *Id.* at 2757 (the business owners argued that they would face severe economic consequences if they refused to provide contraceptive coverage: about $475 million per year for Hobby Lobby, $33 million per year for Conestoga, and $15 million per year for Mardel. And if they drop coverage altogether, they could face penalties of roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel.).
[179] *Id.* at 2759.
[180] *Id.* at 2758 (noting HHS has effectively exempted certain religious nonprofit organizations from provisions of the Affordable Care Act under 45 CFR §147.131(b); 78 Fed. Reg. 39874 (2013)).
[181] 794 F.3d 1064 (9th Cir. 2015), cert. denied, 136 S. Ct. 2433 (2016).
[182] *Id.* at 1074.
[183] *Id.* at 1076-77.
[184] *Id.* at 1077.
[185] *Id.* at 1079.
[186] *Id.* at 1076.
[187] 42 U.S.C. § 2000bb-1(a).
[188] *City of Boerne v. Flores*, *supra*, 521 U.S. at pp. 508-09.
[189] 42 U.S.C. § 2000bb1-(b)(1) and (2).
[190] *Greene v. Solano County Jail, supra*, 513 F.3d 982.
[191] 42 U.S.C. § 2000bb et seq.; see *Brown v. General Services Admin.* (1976) 425 U.S. 820, 832-33; see also (1993) H.R.Rep. No. 103-88, at 9; and see (1993) S.Rep. No. 103-111, at 13 ("[N]othing in this act shall be construed as affecting religious accommodations under Title VII of the Civil Rights Act of 1964.").

his position as a Transportation Security Administration ("TSA") security screener because he wore his hair in dreadlocks in violation of the TSA's grooming policy was precluded from pursuing his claim for religious discrimination under the RFRA.[192] He claimed that he was terminated because his religious practice of wearing dreadlocks was inconsistent with TSA's grooming policy, and sued because the policy failed to accommodate his religious-based conduct. His claims were dismissed because he brought them under the wrong act (RFRA, instead of Title VII). In reaching this conclusion, the Third Circuit noted that the RFRA's legislative history demonstrates that Congress' did not intend for the act to create a vehicle for allowing religious accommodation claims in the context of federal employment, reasoning that an end-run around the legislative scheme of Title VII would otherwise result.[193]

A Plaintiff Who Exhausts Her Administrative Remedies Required by Title VII Is Barred from Also Seeking Relief Under the RFRA.

A member of the Seventh-day Adventist Church and former employee of the United States Postal Service ("USPS") brought suit against the Postmaster General alleging violations of Title VII of the Civil Rights Act of 1964 for religious discrimination and a violation of the RFRA after being fired.[194] In November 2006, the plaintiff made a written request to his USPS supervisor seeking a religious accommodation in observance of his religious belief to not work between sundown on Friday to sundown on Saturday.[195] The USPS office at which the plaintiff worked required letter carriers to work on a rotating schedule that obliged each to work one of every six Saturdays. The schedule and related issues such as leave were expressly controlled by the collective bargaining agreement.[196] The USPS responded to the request for religious accommodation by convening a meeting with various USPS supervisors and the carrier, and offered to give the carrier leave for a part of the day every Saturday to attend to church religious observations. The carrier rejected the accommodation insisting he receive every Saturday off. The USPS next asked each of the other full-time letter carriers if they would be willing to give up any non-scheduled Saturday shifts to accommodate another letter carrier; all declined.[197]

The plaintiff contended that because he fully exhausted the administrative remedies required by Title VII, he may properly assert a claim for relief under the RFRA. The Eighth Circuit disagreed finding that that a plaintiff's exclusive remedy for claims of discrimination in federal employment is the Civil Rights Act of 1964 notwithstanding actual exhaustion of administrative remedies required by Title VII claims.[198]

Ninth Circuit Ruled that the RFRA Has No Exhaustion Requirement and Does Not Waive Sovereign Immunity for Money Damages.

In *Oklevueha v. Holder*,[199] the Ninth Circuit considered an RFRA challenge of church to federal drug laws asserting that their right to use marijuana is a religious practice protected by the RFRA. Plaintiffs Oklevueha Native American Church of Hawaii and Raging Bear sought declaratory and injunctive relief barring the government from enforcing the Controlled Substances Act against them and for the return or compensation for one pound of marijuana seized by the government. Plaintiffs alleged that they consume marijuana as a "sacrament/eucharist" in their religious ceremonies, and that such use is protected by the RFRA.

The Ninth Circuit declined to read an exhaustion requirement into the RFRA because the statute itself set no such precondition to the pursuit of RFRA claims in court.[200] The Ninth Circuit also noted that the destruction of the seized marijuana prevented its return to plaintiffs putting the availability of compensatory money damages

[192] *Francis v. Mineta* (3d Cir. 2007) 505 F.3d 266, 271-72.
[193] *Id.* at p. 271.
[194] See *Harrell v. Donahue* (8th Cir. 2011) 638 F.3d 975, 977.
[195] See *Id.* at p. 978.
[196] See *Id.* at pp. 977-78.
[197] See *Id.* at p. 978.
[198] See *Id.* at p. 983 discussing *Brown v. General Services Admin*. (1976) 425 U.S. 820, 835.
[199] (9th Cir. 2012) 676 F.3d 829.
[200] *Id.* at p. 838.

for the value of the drugs taken from plaintiffs. The Ninth Circuit may have ordered the return of the drugs had the Government not destroyed them; however, the Court ruled that the RFRA does not waive the federal government's sovereign immunity from damages.[201] Thus, money damages are not permitted and may not be awarded under the RFRA. The Ninth Circuit reversed the federal trial court's dismissal of plaintiffs' claims for declaratory and injunctive relief under the RFRA. The Ninth Circuit remanded these claims to the trial court because the trial court dismissed both claims on ripeness grounds and didn't reach the merits of either claim. The federal trial court in Hawaii, on remand, most recently allowed the plaintiffs to move forward with their claim which could result in the invalidation of the federal Controlled Substance Act, as applied to plaintiffs, by another federal law, the RFRA.[202]

INTERACTION BETWEEN THE EEOC AND RELIGION

U.S. Supreme Court for the First Time Recognized a "Ministerial Exception" to Employment Discrimination Laws, Which Allows Churches and Religious Groups to Freely Choose and Dismiss Their Leaders.

In what is likely the most significant religious liberty decision in two decades, the U.S. Supreme Court recognized in 2012 for the first time a "ministerial exception" to employment religious discrimination laws in *Hosanna-Tabor Evangelical Lutheran Church and School vs. EEOC*,[203] which permits churches and other religious groups to freely choose and dismiss their leaders free of governmental interference. In this case, a teacher of primarily secular subject matter at Hosanna-Tabor Lutheran School became ill and took a medical leave in July 2004. When she recovered and wanted to return to teaching at the school, the school expressed concerns about her disability and asked that she resign. The teacher told the school that if they did not find an amicable solution, she would file a disability discrimination suit, and thereafter she was fired.

The Equal Employment Opportunity Commission ("EEOC") filed charges against Hosanna-Tabor Lutheran School for illegally retaliating against the teacher, and firing her for discriminatory reasons. Hosanna-Tabor claimed that they had theological reasons for terminating the teacher and that they were protected by the First Amendment's religion clauses. The school cited the "ministerial exception" to the Americans with Disabilities Act, whereby a religious institution is immune from discrimination suits if a fired employee had primarily religious duties.

The trial court granted summary judgment for Hosanna-Tabor finding a "ministerial exception," but the Court of Appeals for the Sixth Circuit disagreed, stating that parochial school teachers who teach primary secular subject matter do not classify as ministerial employees; the U.S. Supreme Court reversed recognizing the ministerial exception.[204]

Chief Justice John G. Roberts Jr. wrote the decision for the Supreme Court, which was both surprising in sweep and unanimity. Justice Roberts' opinion noted that while "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important," "[s]o too is the interest of religious groups in choosing who will preach their beliefs, teach their faith and carry out their mission."[205] Notwithstanding, the high court's decision provides only limited guidance to lower courts that must now decide who counts as a minister, as the court "was reluctant to adopt a rigid formula."[206] Contrasting proposals were offered by two concurring opinions.

Whatever the precise scope of the holding, the ruling will have real and immediate implications for many religious group employers of employees that perform

[201] *Id.* at pp. 840-41.
[202] *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 2012 WL 6738532 (D. Hawai'i Dec 31, 2012).
[203] (2012) 132 S.Ct. 694.
[204] *E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church and School* (2008) 582 F.Supp.2d 881 order vacated by *E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church and School* (6th Cir. 2010) 597 F.3d. 769 cert. granted by *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* (2011) 131 S.Ct. 1783 rev'd by *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* (2012) 132 S.Ct. 694.
[205] *Hosanna-Tabor Evangelical Lutheran Church and School, supra*, 132 S.Ct. at p. 710.
[206] *Id.* at p. 707.

religious work. In addition to ministers, priests, rabbis, and other religious leaders, the newly recognized ministerial exception appears to encompass at least those teachers in religious schools with formal religious training who are charged with instructing students about religious matters.[207] The teacher in this case was charged with religious duties that consumed only 45 minutes every school day, but such a determination "is not one that can be resolved with a stopwatch."[208]

U.S. Supreme Court rejects Ninth Circuit's "Rigid Formula" on the Application of "Ministerial Exception"

Prior to the U.S. Supreme Court's consolidated decision in *Morrissey-Berru v. Our Lady of Guadalupe*, it had provided little guidance as to the qualifications for the ministerial exception.[209]

In *Biel v. St. James School* and *Morrissey-Berru v. Our Lady of Guadalupe School*, the Ninth Circuit addressed the application of the ministerial exception in cases where teachers at Catholic schools within the Archdiocese of Los Angeles respectively brought claims under the Americans with Disability Act ("ADA") and the Age Discrimination in Employment Act ("ADEA") following their termination. [210]

In *Biel*, the teacher was required to teach a standard religion curriculum on the Catholic faith. In addition, she was required to join her students in twice-daily prayers but was not required to lead them. She also attended a school-wide monthly Mass where her sole responsibility was to keep her class quiet and orderly. Despite receiving a positive performance evaluation, she was terminated after informing the school that she needed to miss work for surgery and chemotherapy following a breast cancer diagnosis.[211] She filed a lawsuit alleging that the school's decision to terminate her employment violated the ADA. Citing to the ministerial exception, the trial court granted summary judgment against her.[212] The Ninth Circuit reversed, finding that the ministerial exception did not bar the plaintiff's claims because the ministerial exception "does not provide carte blanche to disregard anti-discrimination laws when it comes to other employees who do not serve a leadership role in the faith."[213]

In *Morrissey-Berru*, the plaintiff was also a school teacher without religious credentials, training, or a ministerial background and did not hold herself out to the public as a religious leader or minister.[214] However, the plaintiff had significant religious responsibilities as a teacher, including leading students in daily prayer, and Plaintiff's performance was reviewed under religious standards.[215] After the trial court dismissed the lawsuit based upon the ministerial exception, the Ninth Circuit reversed that ruling, reasoning that the exception did not apply because Plaintiff did not have the formal title of "minister," had limited formal religious training, and "did not hold herself out to the public as a religious leader or minister."[216]

In reversing both decisions, and ruling that the ministerial exception did apply, the U.S. Supreme Court emphasized that "[w]hat matters, at bottom, is what an employee does at bottom, is what an employee does." [217] Rather than "rigidly" focusing on religious titles or education, the Supreme Court found ample evidence that the plaintiffs in these cases "performed vital religious duties" by "educating their students in the Catholic faith and guiding their students to live their lives in accordance with that faith."[218]

Following the *Morrissey-Berru* decision, the ministerial exception will be tested in a more functional way by considering the totality of the circumstances and focusing on whether the employee's duties are important to the spiritual and pastoral mission of the organization. This all-encompassing approach could allow more employees, such as teachers, counselors, and social workers,

[207] *Id.* at p. 708.
[208] *Id.* at p. 709.
[209] (2020) 140 S.Ct. 2049, 2064 [207 L.Ed.2d 870].
[210] (9th Cir. 2018) 911 F.3d 603; (9th Cir. 2019) 769 Fed.Appx. 460.
[211] *Biel* 911 F.3d at 605.
[212] *Id.* at 606.
[213] *Id.* at 608-609.
[214] *Morrissey-Berru*, *supra*, 769 Fed.Appx. at 461.
[215] *Id.* at 461.
[216] *Id.* at 461.
[217] *Morrissey-Berru*, *supra*, 140 S.Ct. at 2064.
[218] *Morrissey-Berru*, *supra*, 140 S.Ct. at 2066.

to qualify as ministers, even if their positions are predominantly secular.

California Court of Appeal Imposes Limitation on Application of "Ministerial Exception" to Breach of Contract Claims.

State courts also had to analyze when this new ministerial exception applied. In *Sumner v. Simpson University*, a former dean filed a state lawsuit against Simpson University alleging breach of employment contract, defamation, invasion of privacy, and intentional infliction of emotional distress after her employment was terminated for "insubordination."[219] The trial court ruled that the plaintiff qualified as a minister, and the university a religious employer, and, therefore, the plaintiff's employment claims were barred by the ministerial exception.[220] The California Court of Appeal reversed, in part, ruling that a minister could sue a religious employer for breach of employment contract. However, it rejected plaintiff's tort claims finding to allow tort claims based on termination of employment would "render the ministerial exception meaningless."[221]

EEOC Compliance Guidance Section on Religious Discrimination Claims Under Title VII.

The Equal Employment Opportunity Commission has a Compliance Manual section on religious discrimination under Title VII of the 1964 Civil Rights Act. The Compliance Manual is a consolidation of Title VII case law and EEOC's views on religious discrimination issues. The Compliance Manual covers topics such as: the statutory definitions of religion and religious organization; case law developed "ministerial exception" to Title VII coverage; religious bias claims; religious accommodation issues; and, undue hardship standards for an employer when rejecting a proposed accommodation under Title VII. Religious bias claims often implicate constitutional questions. (See Chapter 18 for a more comprehensive discussion of religious discrimination.)

[219] (2018) 27 Cal.App.5th 577.
[220] *Id.* at 585.
[221] *Id.* at 592-595.

New Developments 2021

COURT CASES

U.S. Supreme Court's Narrow Ruling in *Fulton v. City of Philadelphia* Bolsters Religious Liberty But Stops Short of Overruling Landmark *Smith* Decision.

In *Fulton v. Philadelphia*, the U.S. Supreme Court addressed whether Catholic Social Services ("CSS"), a social services agency affiliated with the Philadelphia Catholic Archdiocese, had a Free Exercise right to refuse referrals to certify same-sex couples as foster parents under a contract with the City of Philadelphia. [222]

The City stopped referring all foster parent certification cases to CSS after it learned that the agency was not certifying same-sex couples for placement as foster parents because same-sex marriage was incompatible with Catholic beliefs about marriage.[223] The City also refused to renew its contract with CSS unless the agency agreed to work with same-sex couples.[224] The City defended its actions based upon the non-discrimination provision in CSS's contract with the City and the non-discrimination provisions of the citywide Fair Practices Ordinance.[225]

Because the trial court and the Court of Appeals found that the City's actions were generally applicable, CSS asked the Supreme Court to overrule the central holding from *Smith*, which provided that generally applicable and neutral laws (*i.e.*, not targeting specific religious practices) do not violate the Free Exercise Clause of the First Amendment.[226] If a government action meets this standard, its constitutionality has generally been tested under the deferential rational basis test.

However, the Court side-stepped the more difficult question of whether the principles established in the *Smith* decision should be reconsidered and concluded that the City's contract with CSS and the Fair Practices Ordinance were not generally applicable and,

[222] *Fulton v. City of Philadelphia* (2021) 141 S.Ct. 1868.
[223] *Id.* at 1875.
[224] *Ibid.*
[225] *Id.* at 1874.
[226] *Id.* at 1876.

therefore, should be reviewed under the strict scrutiny standard.[227]

The Court observed that the contract between the City and the CSS grants the Commissioner of the City's Human Services Department discretion to allow CSS to refuse a referral to perform a foster parent certification.[228] The City, however, stated that it had not granted, and was not intending on granting, such an exemption to CSS based upon religious hardship.[229] The Court was persuaded that because exemptions were allowed for secular but not religious reasons, the City's actions were not generally applicable: "Where such a system of individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason."[230]

Having determined that the strict scrutiny standard applied, the Court stated that the City was required to show that denying CSS an exemption from serving same-sex couples for religious reasons was necessary to meet a compelling governmental interest, and was narrowly tailored to achieve those interests.[231] Accordingly, because the City failed to justify its refusal to exempt CSS, the City's actions were found to violate CSS's Free Exercise rights.[232]

Although the ruling in *Fulton* appears to be narrow, the decision could have far-reaching consequences. A whole host of laws and government contracts contain secular or non-religious exceptions, but not religious ones. Following the *Fulton* decision, they may no longer be found to be generally applicable and, therefore, subject to challenge as under strict scrutiny analysis.

U.S. Supreme Court Carves Out Exceptions from COVID-19 Public Health Orders for Religious Observance.

Although the *Fulton* decision did not explicitly upend the landmark *Smith* decision, two other cases dealing with COVID-19 restrictions suggest that a majority of the U.S. Supreme Court is prepared to make significant changes to religious liberty jurisprudence.

In *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Tandon v. Newsom*, the Supreme Court granted emergency applications for an injunction in favor of places of worship that respectively sought exemptions from New York's and California's public health orders intended to mitigate the spread of COVID-19.[233]

In *Roman Catholic Diocese of Brooklyn*, the Court evaluated New York's public health orders, which limited attendance in religious services in areas with coronavirus outbreaks and areas where New York was concerned that a severe outbreak could occur.[234] The Court ruled that New York could not enforce those restrictions because the order "cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."[235]

In *Tandon*, the Court analyzed whether California's COVID-19-related public health orders that restricted in-home gatherings, secular and religious ones alike, to three families infringed upon the Free Expression rights of the plaintiffs.[236] Unlike the public health order in *Roman Catholic Diocese of Brooklyn*, California's public health order did not single out religious gatherings for additional restrictions.[237] A majority of the Supreme Court still decided that religious activities must be treated as favorably as secular activities in order to qualify for deferential review under *Smith*: laws "are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[238] Previously, under the

[227] See, *supra*, at pp. 9-1 and 9-2
[228] *Id.* at 1878.
[229] *Ibid.*
[230] *Id.* at 1871.
[231] *Id.* at 1881.
[232] *Id.* at 1882.

[233] *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S.Ct. 63 (per curiam); *Tandon v. Newsom* (2021) 141 S.Ct. 1294, 1296 (per curiam).
[234] *Roman Catholic Diocese of Brooklyn, supra*, 141 S.Ct. at 63–66.
[235] *Id.* at 66.
[236] *Tandon, supra*, 141 S.Ct. at 1296.
[237] *Ibid.*
[238] *Ibid.*

Smith decision, laws only needed to be generally applicable and neutral to avoid strict scrutiny.

In evaluating whether secular and religious activities are comparable, the Court said that the analysis should be based upon "the risk various activities pose, not the reasons why people gather."[239]

Should the government treat religious activities less favorably than comparable secular activities based upon the risk to public health, the Court explained that the governmental entity will need to show that the public health order is the least restrictive means of reducing the spread of the virus or that "religious exercise at issue is more dangerous than those activities even when the same precautions are applied."[240]

In granting the emergency injunction exempting religious observance from California's public health order, the Court was persuaded that secular activities, such as retail stores, movie theatres, and attending sporting events in private suites, that allowed more than three households at a time were comparable and that California had failed to offer any proof that the restricted religious activities in private settings posed a greater risk.[241]

Tandon not only shows that a majority of the U.S. Supreme Court is willing to create exceptions to public health orders for religious activities, but also that the Court is prepared to dramatically depart from the ruling in *Smith* by requiring that religious activities be treated as favorably as comparable secular activities.

KEY ISSUES

- Public schools may develop plans to allow transgender students to utilize school facilities corresponding to their gender identify without violating the First Amendment.
- The Pledge of Allegiance recitation in public schools does not violate the Establishment Clause.
- Club meetings held for Bible lessons and memorizing scriptures after school hours, which are not sponsored by the school, and open to only those students who obtained parental permission, do not violate the Establishment Clause.
- Public schools can refuse recognition to student religious associations if they do not abide by non-discrimination policies.
- Religious symbols representing one religion that are placed on city, county, or state land must meet a higher standard under the California Constitution's No Preference Clause than religious symbols placed on federal land.
- A public school teacher can express critical religious comments without violating the Establishment Clause, but the control that public schools have to regulate teacher speech increases when the teacher speaks as a school district employee and not as a private citizen.
- A holding facility at a county courthouse is an "institution" for purposes of RLUIPA.
- The U.S. Supreme Court recognizes a "ministerial exception" to employment religious discrimination laws permitting churches and other religious groups to freely choose and dismiss their leaders consistent with their religion and mission. This exemption is not limited to religious leaders such as priests, rabbis, or preachers. What matters is whether the employee is teaching and conveying the tenets of the faith.
- The U.S. Supreme Court has ruled that local legislative prayer or invocations that contain sectarian references are not per se violations of the establishment clause. The Ninth Circuit has extended this ruling to encompass School Board meetings.

[239] *Ibid.*
[240] *Id.* at 1296-1297.
[241] *Id.* at 1297-1298.

- If a hospital refuses treatment to a patient on religious grounds, that hospital must couple the refusal with a referral to a nearby hospital within the same medical system.
- Recent cases suggest that the U.S. Supreme Court intends on expanding religious liberty by requiring that religious activities be treated as favorably as comparable secular activities.

Public Safety Officers and Firefighters Procedural Bill of Rights Act

SUMMARY OF THE LAW

The Public Safety Officers Procedural Bill of Rights Act ("POBRA")[1] and the Firefighters Procedural Bill of Rights Act ("FPBRA")[2] articulate procedural protections that "public safety officers" and "firefighters" must receive when their employers investigate or discipline them. Among other things, POBRA and FPBRA (the "Acts") specify the rights that must be accorded an officer or firefighter when an interrogation may lead to disciplinary action — dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer where that transfer is for purposes of punishment.

Legislation creating the Firefighters Procedural Bill of Rights Act ("FPBRA") went into effect on January 1, 2008.[3] The new FPBRA largely mirrors the protections for peace officers under the POBRA. Accordingly, case law interpreting POBRA will be instructive in interpreting and applying FPBRA. However, there are a few important distinctions between the two Acts which will be identified later in the Chapter.

COVERED EMPLOYEES

POBRA applies to all employees classified by the Penal Code as "peace officers."[4] Peace officers include all local police officers, deputy sheriffs, state police officers, peace officers employed by the California State University and University of California, members of the California Highway Patrol, welfare investigators, and police chiefs.

"Firefighter," for purposes of FPBRA, includes any firefighter who is a paramedic or emergency medical technician, irrespective of rank.

However, "firefighter" does not include an inmate of a state or local correctional agency who performs firefighting or related duties, or any employee who has not successfully completed the probationary period established by his or her employer as a condition of employment.[5]

The courts clarified the meaning of "fire chief" for purposes of the chief's removal FPBRA section 3254(c) in *Corley v. San Bernardino County Fire Protection District*.[6] The court concluded that the term "fire chief" refers only to a jurisdiction's lead chief and not to division chiefs or other chiefs serving under the lead chief. The court noted that FPBR was modeled after POBRA, whose similar provisions apply solely to the jurisdiction's chief of police.

POBRA does not apply to the termination of a Career Executive Assignment ("CEA") position. In *Manavian v. Department of Justice*, the Court considered the issue of whether a peace officer holding a career executive assignment position is entitled to POBRA rights with respect to the termination of that

[1] POBRA appears in Gov. Code, §§ 3300-3311.
[2] FPBRA appears in Gov. Code, §§ 3250-3262.
[3] Gov. Code, §§ 3250 et seq.
[4] See Pen. Code, §§ 830.1-830.33 (except subdivision [e]), 830.34, 830.35 (except subdivision [c]), 830.36-830.38, 830.4, 830.5, and 832.25.
[5] Gov. Code, § 3251(a).
[6] (2018) 21 Cal.App.5th 390, 392.

position.[7] A CEA position is "an appointment to a high administrative and policy influencing position within the state civil service in which the incumbent's primary responsibility is the managing of a major function or rendering of management advice to top-level administrative authority."[8]

In this case, Edward Manavian held a CEA position as chief of the Criminal Intelligence Bureau ("Bureau"), a branch of the Department of Justice ("DOJ"). As a chief designated as a peace officer by the Attorney General, Mr. Manavian was also entitled to the protections of POBRA. However, due to dissatisfaction with the way that he was managing the Bureau, Mr. Manavian was terminated from the CEA position and was reassigned. After appealing the termination decision to the State Personnel Board, Mr. Manavian filed a lawsuit against the DOJ asserting, *inter alia*, a claim for violation of his rights under POBRA. The trial court granted the defendant's summary judgment and Mr. Manavian appealed.

On appeal, Mr. Manavian argued that the termination of his CEA position was a punitive action protected by POBRA. The Court rejected this argument, noting the clear statutory language providing that "termination of a career assignment ... is not a punitive action." The Court ruled: "POBRA gives officers certain rights when an employer is taking a punitive action, but in accordance with [Government Code] section 19889.2, termination of a CEA is not a punitive action, thus POBRA rights do not apply."

NOTICE OF VIOLATION CHARGED

Both POBRA and FPBRA require that an officer or firefighter who is the subject of an investigation be informed of the nature of the investigation before any interrogation begins. This requirement has been interpreted to require notification "reasonably prior" to any interrogation "with enough time for the officer to meaningfully consult with any representative he elects to have present."[9] The time required for this consultation depends on whether the officer is already represented, and the nature, complexity, and number of the allegations. If an employing department has reason to believe that providing the information would risk the safety of interested parties or the integrity of evidence in the officer's control, the department may delay notice until the time scheduled for the interrogation as long as thereafter it grants sufficient time for consultation.[10] If an employer specifies a particular regulation that an officer or firefighter has violated, without a description of the wrongful conduct, the employer cannot later impose discipline based on a different regulation.[11]

COVERED INTERROGATIONS

POBRA and FPBRA both protect an officer or firefighter during an investigation that could lead to the officer's or firefighter's discipline. Neither Act covers interrogations that occur in the normal course of duty, counseling, instruction, or informal verbal admonishment by or during other routine or unplanned contact with a supervisor or any other public safety officer[12] or firefighter.[13] POBRA covers interrogation by a commanding officer or by any other member of the employing public safety department. FPBRA covers interrogation by a commanding officer, or any other member designated by the employing department or licensing or certifying agency.

POBRA does not protect an officer who is interrogated by a member of another police agency on a criminal matter. POBRA also does not protect officers who are the subject of criminal investigations conducted by their employers.[14] But, POBRA permits the employing agency to rely on statements made by an officer in a different proceeding if the officer was not under investigation at the time of the statement, and where the officer was represented by counsel and the statement was under oath, even though the officer was not advised that he/she was under investigation. Under this exception,

[7] (2018) 28 Cal.App.5th 1127.
[8] Gov. Code, § 18547.
[9] *Ellins v. City of Sierra Madre* (2016) 214 Cal.App.4th 445.
[10] *Id.*
[11] *Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921, 23 Cal.Rptr.3d 186.
[12] Gov. Code, § 3303(i).
[13] Gov. Code, § 3253(i).
[14] *Van Winkle v. County of Ventura* (2007) 158 Cal.App.4th 492, 69 Cal.Rptr.3d 809.

the examiner in the different proceeding must not be an agent of the officer's employer.[15]

Routine conversation between a commander and subordinate does not invoke the POBRA's procedural protections. In *Steinert v. City of Covina*,[16] Stephanie Steinert, a police officer for the City of Covina, was terminated after an internal affairs investigation. Ms. Steinert challenged her termination by arguing that she was not afforded POBRA's procedural protections[17] when her supervisor questioned her, and her answers to the questions ultimately led to her dismissal. The Court of Appeal rejected Ms. Steinert's claims because she was not "under investigation and subjected to interrogation by her commanding officer," but instead was engaged in a routine conversation with her supervisor. Under section 3303(i) of POBRA, interrogations of officers "in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor" do not trigger POBRA's protections.

Ms. Steinert's supervisor believed that Ms. Steinert had properly accessed a criminal record as part of a legitimate investigation, but had mislabeled her computer query using a training designation rather than the case number. The supervisor questioned Ms. Steinert about the matter in order to remind her of the proper procedures for labeling criminal record queries. Because the supervisor expected only to provide routine corrective information to Ms. Steinert, and not to discipline her about the matter, he did not give any advisements required by POBRA for disciplinary interrogations. The supervisor asked Ms. Steinert if she had disclosed the criminal record information to anyone, and Ms. Steinert said she had not. During a subsequent routine audit, the supervisor discovered that Ms. Steinert had improperly disclosed the confidential criminal record information. The discovery that Ms. Steinert's dissemination of confidential information, despite her denial that she had done so, led to the internal affairs investigation and ultimately to her termination.

In contrast, in the case of *City of Los Angeles v. Superior Court*, the Court ruled that a supervisor's questioning of an officer that occurred outside a formal internal affairs investigation fell within the protection of POBRA. Thus, the termination of the officer based upon the statements made to the supervisor was overturned because the supervisor did not advise the officer of his rights under POBRA. The deciding factor in this case hinged on the supervisor's awareness that the questioning of the officer may have led to punitive action and as such, the court stated this was an investigation rather than mere supervisory contact.[18]

Similarly, a "sick check" may be justified if it is a routine supervisory contact pursuant to department procedures. But, in the case of *Paterson v. City of Los Angeles*, the court ruled that the sick check was an interrogation because the supervisor suspected wrongdoing when the officer was asked if he was at home sick.[19]

Interrogation pursuant to both POBRA and FPBRA preferably should be scheduled at a time when the officer is on duty, or during the normal waking hours for the officer, unless the seriousness of the investigation requires otherwise.[20] Officers and firefighters must be compensated for time spent at interrogations during off-duty time under regular departmental pay rules. However, this provision of POBRA "does not require that the interrogation be conducted at the convenience of the officer or the officer's chosen representative," and off-duty investigations at unreasonable times are permissible where the investigation is of a serious nature, such as a criminal investigation following the arrest of off-duty officers.[21]

[15] *Shafer v. County of Los Angeles Sheriff's Dept.* (2003) 106 Cal.App.4th 1388, 131 Cal.Rptr.2d 670, review den. (2003) 2003 Cal.LEXIS 4561.
[16] (2006) 146 Cal.App.4th 458, 53 Cal.Rptr.3d 1.
[17] Gov. Code, § 3303.
[18] *City of Los Angeles v. Superior Ct. (Labio)* (1997) 57 Cal.App.4th 1506, 67 Cal.Rptr.2d 775.
[19] (2009) 174 Cal.App.4th 1393, 95 Cal.Rptr.3d 333.
[20] Gov. Code, §§ 3253(a) and 3303(a).
[21] *Quezada v. City of Los Angeles* (2014) 222 Cal.App.4th 993, 166 Cal.Rptr.3d 479.

REPRESENTATION AT INVESTIGATIONS AND INTERROGATIONS

Officers have a right to counsel under POBRA.[22] Officers who are subject to interrogations that POBRA covers may choose a representative. Similarly, firefighters who are subject to interrogations that FPBRA covers have the right to be represented by a person of his or her choice. An officer's choice of representative, however, must meet a reasonableness standard which likely applies to firefighters as well. Officers subject to interrogation may not postpone their interrogation indefinitely by choosing a representative who is not available for a reasonably scheduled interrogation.[23] The representative, who may be present at all times during the investigation, observes and assists in ascertaining facts favorable to the officer's position. Where the investigation focuses on non-criminal matters, the representative is not required to disclose any information, and cannot be subjected to punitive action for refusing to disclose any information.[24] But in criminal matters, the representative may be required to disclose information obtained from the officer under investigation, and could be subject to punitive action for failing to disclose the information. The representative is not immune from discipline, even though he or she is acting as an officer's representative, if the officer is under investigation for a criminal matter.[25] In other words, POBRA does not supplant an officer's official duties of preventing the commission of crime and disclosing all information that may lead to the punishment of the perpetrator.

Under POBRA, the Court of Appeal in the case of *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*,[26] a police agency may impose reasonable limits on the police officer's statutory right to consult with counsel of his or her choosing during an investigation regarding an officer-involved shooting. The Court ruled that the police agency did not act unreasonably as a matter of law in deciding to prohibit "huddling" between multiple deputies and a single lawyer before the internal affairs investigative interviews involving an officer involved shooting. The rationale of the Court of Appeals' ruling was that the policy expressly provided that a deputy may consult individually with counsel before being interrogated by an investigator. The Court also emphasized that the "anti-huddling" policy only precludes an officer from getting together in a group with other officers and a lawyer before the interview and the police agency had a legitimate objective of obtaining "accurate witness accounts before the recollection of witnesses can be influenced by the observation of the other witnesses."

POBRA: SELF-INCRIMINATION AND THE "LYBARGER WARNING"

Under POBRA, when an employer interrogates an officer and (a) it appears that the officer may be charged with a criminal offense as a result of misconduct, or (b) the officer refuses to answer questions on the ground that the answers may be self-incriminating, the questions must be preceded by a "*Lybarger* warning." Under either of these circumstances, the officer must be told that:

- although the officer has the right to remain silent,[27] the officer's silence will be deemed insubordination, and lead to administrative discipline; and
- any statement that the officer makes to investigators under these circumstances will not and cannot be used against the officer in any subsequent criminal proceeding.[28]

If the officer continues to stand on a Fifth Amendment right to remain silent in the face of the *Lybarger* admonition, the officer risks disciplinary action for refusing to answer. If the officer agrees to answer questions after

[22] *California Correctional Peace Officers Assn. v. State of Cal.* (2000) 82 Cal.App.4th 294, 98 Cal.Rptr.2d 302.
[23] *Quezada, supra*; *Upland Police Officers' Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 4 Cal.Rptr.3d 629, review den. (2003) 2003 Cal.LEXIS 9888; *NLRB v. J. Weingarten Inc.* (1975) 420 U.S. 251, 95 S.Ct. 959.
[24] Gov. Code, §§ 3253(i) and 3303(i).
[25] *Alhambra Police Officers Assn. v. City of Alhambra Police Dept.* (2003) 113 Cal.App.4th 1413, 7 Cal.Rptr.3d 432, review den. (2004) 2004 Cal.LEXIS 2852.
[26] (2008) 166 Cal.App.4th 1625.
[27] Gov. Code, § 3303(h).
[28] *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 829, 221 Cal.Rptr. 529, 533.

the *Lybarger* admonition, the employer can use the officer's answers for administrative purposes, but not for criminal prosecution. Public employers' use of the *Lybarger* warning to compel employees to answer questions was confirmed by the California Supreme Court. See *Spielbauer v. County of Santa Clara*[29] in Chapter 11, where the Court ruled that an employer was not further required to seek, obtain, and confer a formal guarantee of immunity before requiring its employee to answer questions related to an administrative investigation.

POBRA also bars using coerced statements in "any subsequent civil proceeding" except when: (1) the employing department seeks civil sanctions against any public safety officer; (2) the officer introduces the statement in a civil action arising out of a disciplinary action; (3) the statement is used to impeach the officer's testimony; or (4) the officer is deceased.[30]

FPBRA: SELF INCRIMINATION AND FORMAL GRANT OF IMMUNITY

Under FPBRA, the employer shall provide to, and obtain from, an employee a formal grant of immunity from criminal prosecution, in writing, before the employee may be compelled to respond to incriminating questions in an interrogation.[31] This is a significant departure from POBRA. Once the grant of immunity has been provided, the employer may advise a firefighter refusing to respond to questions or submit to interrogations that the failure to answer questions directly related to the investigation or interrogation may result in punitive action.

Similar to POBRA, FPBRA prohibits the use of a statement made during interrogation by a firefighter under duress, coercion, or threat of punitive action in any "subsequent judicial proceeding" except (1) when the employing fire department is seeking civil service sanctions against any firefighter; or (2) in any civil action, including administrative actions brought by the firefighter or his exclusive representative, arising out of a disciplinary action.

DOCUMENTS TO BE PROVIDED

An officer or firefighter is entitled to a transcribed copy of any notes that a stenographer makes or to any reports or complaints investigators or other persons make, except documents that the investigating agency deems confidential.[32] This includes any raw notes and tape-recordings that an investigator retains, whether or not agency rules require such retention.[33] An employer, though, need not disclose the documents before interrogating an officer.[34]

An employer may tape-record an officer's or firefighter's interrogation. If a tape-recording is made, the officer or firefighter must have access to the tape if any further proceedings are contemplated, or before any further interrogation at a subsequent time.[35]

At the interrogation stage of disciplinary proceedings, peace officers are not entitled under POBRA to the full panoply of discovery rights that would apply in criminal proceedings. Rather, POBRA provides minimal disclosure rights to prevent grossly abusive interrogation tactics and to protect the officer's personnel file.[36] All that is required is material sufficient to provide the officer with an opportunity to meaningfully respond at the pre-termination stage.[37]

Under POBRA, following an interrogation, if a recording is made of the interrogation, peace officers are entitled to the recording, any transcribed copies of the stenographers notes, and any reports or complaints made by the investigators, except those deemed confidential.[38] On April 26, 2021, the First District Court of Appeal published its decision in *Oakland Police Officers Association v. City of Oakland* deciding that mandating complaints and reports be disclosed prior to a subsequent interrogation

[29] (2009) 45 Cal.4th 704.
[30] Gov. Code, § 3303(f)(1-4).
[31] Gov. Code, § 3253(e)(1).
[32] Gov. Code, §§ 3253(g) and 3303(g).
[33] *San Diego Police Officers Assn. v. City of San Diego* (2002) 98 Cal.App.4th 779, 784-785, 120 Cal.Rptr.2d 609, 612, review den. (2002) 2002 Cal.LEXIS 6247.
[34] *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d. 564, 273 Cal.Rptr. 584.
[35] Gov. Code, §§ 3253(g) and 3303(g).
[36] *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 31 Cal.Rptr.3d 297.
[37] *Id.* at pp. 1280–1281.
[38] Gov. Code § 3303(g).

is "inconsistent with the plain language of the statute and undermines a core objective under POBRA—maintaining the public's confidence in the effectiveness and integrity of law enforcement agencies by ensuring that internal investigations into officer misconduct are conducted promptly, thoroughly, and fairly."[39] The First District explicitly disagreed with the Fourth District's decision in *Santa Ana Police Officers Association v. City of Santa Ana*,[40] where a peace officer underwent two interrogations. Prior to the second interrogation, the peace officer requested the recording from the first round of interrogations as well as any reports or complaints made by the investigators. The City did not provide these. The Court found in *Santa Ana Police Officers Association*, that the City was required to provide these materials to the officer prior to the second interview under the plain language of the statute.[41] This decision establishes a clear split in authority between California's First and Fourth Appellate Districts, potentially making the issue ripe for the California Supreme Court to decide.

In a Court of Appeal decision, the Court upheld the management rights of the County Sheriff to implement a policy prohibiting deputies' access to the Department's Internal Affairs investigative file (including memoranda, witness statements, interview transcripts, and physical evidence such as video footage) before being interviewed by an Internal Affairs investigator.[42] Because this practice "interfered with the internal affairs bureau's ability to conduct prompt, thorough, and fair investigations into police officer misconduct," the Court determined that the Sheriff's order was within her legal authority and not subject to the Meyers-Milias-Brown Act meet-and-confer requirements.[43]

ASSIGNMENT DURING INVESTIGATION

POBRA prohibits loaning or temporarily reassigning an officer to a location or duty assignment if a sworn member of the officer's department would not normally be sent to that duty assignment under similar circumstances.[44] The same rule applies to firefighters.[45] Accordingly, assigning an officer to a desk during a shooting investigation, without providing the officer with an opportunity to work the field on an overtime basis, will not violate POBRA unless the officer can demonstrate that the treatment was "abnormal" for officers in similar circumstances.[46]

LIE DETECTOR EXAMINATIONS

POBRA gives an officer the absolute right to decline to take a lie detector examination, defined as "a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device, whether mechanical or electrical, that is used, or the results of which are used for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual."[47] No comment shall be entered anywhere in an investigator's notes or anywhere else that the officer did not take, or refused to take, a lie detector test. Firefighters receive the same protections under FPBRA.[48]

Courts will not consider admissions made as the result of a threatened lie detector examination in any challenge to an officer's discipline.[49] Even a voluntary polygraph examination's results may not be admitted in a subsequent administrative hearing.[50] Requiring officers to pass polygraph exams before transferring to specialized divisions does not violate POBRA if the officers are not compelled to take a polygraph, but do so

[39] *Oakland Police Officers Assn. v. City of Oakland* (2021) 63 Cal.App.5th 503.
[40] *Santa Ana Police Officers Assn. v. City of Santa Ana* (2017) 13 Cal.App.5th 317.
[41] *Id.* at p. 6.
[42] *Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29.
[43] *Id.* at p. 33.
[44] Gov. Code, § 3303(j).
[45] Gov. Code, § 3253(j).
[46] *Crupi v. City of Los Angeles* (1990) 219 Cal.App.3d 1111, 268 Cal.Rptr. 875, rehg. den. and op. mod. (1990) 220 Cal.App.3d 741A.
[47] Gov. Code, § 3307.
[48] Gov. Code, § 3257.
[49] *Estes v. City of Grover City* (1978) 82 Cal.App.3d 509, 147 Cal.Rptr. 131.
[50] *Aengst v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 167 Cal.Rptr. 796.

voluntarily to apply for a position, and with advance notice of the exam requirement.[51]

FINANCIAL RECORDS

Officers and firefighters have a qualified right to maintain the privacy of "property, income, assets, source of income, debts, or personal or domestic expenditures, including those of any member of his or her family or household."[52] Under POBRA, that privilege does not apply to information "obtained or required under state law or proper legal procedure which tends to indicate a conflict of interest with respect to the performance of [the officer's] official duties, or [which] is necessary for the employing agency to ascertain the desirability of assigning the public safety officer to a specialized unit." Similarly, under FPBRA, the privilege does not apply to information that "is otherwise required to be furnished under state law or obtained pursuant to court order."

MEDIA ATTENTION

Both POBRA and FPBRA prevent an employer from subjecting an officer or firefighter under interrogation to press or news media visits without the officer's or firefighter's express consent. Nor shall the employer give the officer's or firefighter's home address or photograph to the press or news media without the officer's express consent.[53]

SEARCHES

An employer may search any space under the employer's control, such as a locker or other personal storage space, if the officer is notified or if the officer is present or gives consent. If the employer wishes to avoid these conditions, it must obtain a search warrant.[54]

PLACEMENT ON A *BRADY* LIST CANNOT BE THE BASIS OF DISCIPLINARY ACTION OR DENIAL OF PROMOTION.

POBRA provides that a law enforcement agency *may not* take punitive action, or deny a peace officer a promotion, on grounds other than merit, solely because the officer's name was placed on a *Brady* list, or because the officer's name may otherwise be subject to disclosure pursuant to *Brady v. Maryland*.[55] A "*Brady* list" contains the names of peace officers whose personnel files contain evidence of bias or dishonesty that may need to be disclosed to a criminal defendant in a case involving the officer. However, POBRA does not prohibit a public agency from taking punitive action against a peace officer based on the underlying conduct that resulted in the officer's name being placed on the *Brady* list. Evidence of such placement may be introduced during a hearing to determine the type or level of discipline to be imposed if the hearing officer finds that the underlying conduct is proven.[56]

PERSONNEL FILE ENTRIES

Under POBRA, an employer must provide notice to both actively employed officers and former officers about adverse comments entered into their personnel files, and give them 30 days to make a written response to the comments.[57] The same protections are afforded to firefighters under FPBRA.[58] "Adverse comments" include negative comments about an officer's performance contained in a complaint lodged by a fellow officer or in an internal affairs file, after an investigation is concluded.[59]

Likewise, citizen complaints investigated by a public entity's affirmative action or equal employment opportunity office are subject to POBRA.[60] POBRA is satisfied when an officer requests and obtains copies of citizen complaints against him, even when he is denied tape recorded interviews and

[51] *Los Angeles Police Protective League v. City of Los Angeles* (1995) 35 Cal.App.4th 1535, 42 Cal.Rptr.2d 23.
[52] Gov. Code, §§ 3258 and 3308.
[53] Gov. Code, §§ 3253(e)(2) and 3303(e).
[54] Gov. Code, §§ 3259 and 3309.
[55] (1963) 373 U.S. 83; Gov. Code, § 3305.5.
[56] *Id.*
[57] Gov. Code, §§ 3305 and 3306.
[58] Gov. Code, §§ 3255 and 3256.
[59] *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 124 Cal.Rptr.2d 666.
[60] *Seligsohn v. Day* (2004) 121 Cal.App.4th 518, 16 Cal.Rptr.3d 909, opn. mod. and rehg. den. (2004) 2004 Cal.App.LEXIS 1457.

transcripts of the internal affairs investigations generated from the citizen complaints. The Court of Appeals reasoned that the officer's review of the written complaints fulfilled the purposes of POBRA because he was provided the opportunity to review and respond to alleged wrongdoing against him.[61]

Under both Acts, an officer or firefighter must be given the opportunity to sign a document indicating that he or she is aware of the adverse comment. If the officer or firefighter refuses to sign, that fact is noted on the document and the officer or firefighter signs or initials the document.[62] An employer need not comply with these provisions if local rules provide officers with "greater protections," such as an administrative appeal hearing.[63]

The Penal Code offers additional procedural protections by prohibiting an employer from maintaining citizen complaints deemed "frivolous" in a police officer's "general personnel file."[64] The question of whether Penal Code section 148.6, which makes filing a knowingly false complaint against a peace officer a misdemeanor, is constitutional has been debated by the courts. The California Supreme Court confirmed the constitutionality of Penal Code section 148.6 despite the fact that the statute applies only to peace officers.[65] The Ninth Circuit, however, found that the statute violated the First Amendment because it failed to make all parties to an investigation of peace officer misconduct subject to sanction for knowingly making false statements.[66] .

Nevertheless, the Penal Code expressly permits employers to retain complaints, and any reports or findings related to complaints, in other files.[67]

Review of Personnel Files

Employers of public safety officers must permit the officers to inspect their personnel files during regular business hours with no loss of compensation. This review must take place within a reasonable period of time after an officer's written request. If, after examination, an officer believes any part of the information in the file is unlawful or erroneous, he or she may make a written request that it be deleted. The employer must either grant or deny this request within 30 days. If the employer denies the request it must provide a written list of reasons for the denial. All of these communications become part of the officer's personnel file.[68] FPBRA calls for the same procedures and protections for firefighters.[69]

The right to review records, however, applies only to "currently employed" peace officers in order to maintain the employer-employee relationship. But once that relationship no longer exists (e.g., after the effective date of termination), POBRA does not apply and a former peace officer is not entitled to review his or her personnel records.[70]

Whether adverse comments entered into a "daily log" for purposes of performance evaluations constitute an "adverse comment" in a personnel file remains an open question under the FPBRA. In *Poole v. Orange County Fire Authority*, the California Supreme Court ruled that the FPBRA did not apply to a "daily log" kept by a fire captain because it was not a "personnel file" or a file "used for any personnel purposes by [an] employer."[71] In *Poole*, at issue was a "daily log" file maintained by a fire captain with the Orange County Fire Authority ("OCFA") regarding each employee that the captain supervised, which included any factual occurrences that would aid the captain in writing a thorough and fair annual review for each employee. Steve Poole, a firefighter with the OCFA, was one of

[61] *McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324, 92 Cal.Rptr.3d 68.
[62] Gov. Code, §§ 3255 and 3306.
[63] *Crupi, supra,* 219 Cal.App.3d at p. 1121, 286 Cal.Rptr. at p. 883.
[64] Pen. Code, § 832.5; see also Pen. Code, §§ 832.7 and 832.8.
[65] *People v. Stanistreet* (2002) 29 Cal.4th 497, 127 Cal.Rptr.2d 633, *cert. den. sub nom. Stanistreet v. California* (2003) 123 S.Ct. 1944.
[66] *Chaker v. Crogan* (9th Cir. 2005) 428 F. 3d 1215, 1227-1228, *cert. den. sub nom. Crogan v. Chaker* (2006) 547 U.S. 1128.
[67] Pen. Code, § 832.8
[68] Gov. Code, § 3306.5.
[69] Gov. Code, § 3256.5.
[70] *Barber v. California Dept. of Corrections and Rehabilitation* (2010) 203 Cal.App.4th 638, 640, 137 Cal.Rptr.3d 727.
[71] (2015) 61 Cal.4th 1378.

the employees included in the captain's log. The captain included descriptions of Mr. Poole's activities on the job, including both positive and negative aspects of Mr. Poole's behavior, and assessments under a performance improvement plan. Although the captain discussed concerns with Mr. Poole's performance with others, including the captain's own supervisors, human resources personnel, and attorneys for the OCFA, he did not share the log with them or permit other employees to review the log.

After receiving a substandard evaluation, Mr. Poole requested to review all of his performance evaluations. Mr. Poole then requested a copy of his "station file" from the fire captain, which was provided, and then Mr. Poole requested that the OCFA remove all adverse comments in his "personnel file" located in the station house. The OCFA denied this request on the grounds that the captain's log was not a personnel file. The trial court agreed with the OCFA, but the Court of Appeal reversed and granted Mr. Poole the requested relief. The California Supreme Court then granted reviewed and reversed the Court of Appeal's decision.

Turning to POBRA and provisions in the Education Code on the right to inspect personnel records for guidance, the Court found that a supervisor's log used solely to help its creator remember past events does not fall within the scope of the definition of "personnel file." Noting its decision in *Miller v. Chico Unified School District,*[72] the Court reiterated that prior decisions found documents containing adverse comments to fall within the scope, even if not formally entered in the personnel file, if the document was either (1) maintained in such a manner that it would be available to those making personnel decisions in the future, or (2) was actually used by the employer in making a personnel decision, or both.[73] In this case, the captain was not Mr. Poole's employer and did not have the authority to take adverse disciplinary actions against Mr. Poole; his comments could adversely affect Mr. Poole only if and when they were placed in a personnel file or in some other form to which the employer had access. Further, there was no evidence that the captain's log would be available to anyone making personnel decisions in the future as the captain did not permit anyone to review it other than himself.

Disclosure of Peace Officer Personnel Files to Outsiders

The Penal and Evidence Codes provide procedures for determining when peace officer personnel files may be disclosed to third parties.[74] Penal Code section 832.7 "imposes confidentiality upon peace officer personnel records and records of investigations of citizens' complaints [and provides] strict procedures for appropriate disclosure in civil and criminal cases ... ."[75] Among other things, this statute requires agencies to keep officer records confidential unless a court or appropriate administrative body approves the disclosure.[76]

The Supreme Court, in *Commission on Peace Officer Standards and Training v. Superior Court*,[77] interpreted Penal Code sections 832.7 and 832.8 narrowly, stressing the importance of the public's right to know about the conduct of the police force, and noting that the identities of peace officers and the basic facts of their employment are not confidential information and are subject to disclosure under the California Public Records Act when they are not sought in conjunction with any of the personal or sensitive information that the statute seeks to protect.[78] Accordingly, Penal Code sections 832.7 and 832.8 do not prevent the disclosure of peace officers' names, employing departments, and hiring and termination dates, and the Public Records Act compels the disclosure of this basic

[72] (1979) 24 Cal.3d 703.
[73] *Poole*, *supra*, 61 Cal.4th at 1387.
[74] Pen. Code, §§ 832.5, 832.7, 832.8; Evid. Code, §§ 1043-1047.
[75] *City of Richmond v. Superior Ct.* (1995) 32 Cal.App.4th 1430, 1440, 38 Cal.Rptr.2d 632, 638, rehg. den. (1995) 1995 Cal.App.LEXIS 313, review den. (1995) 1995 Cal.LEXIS 4046.
[76] *Copley Press v. Superior Ct.* (2006) 39 Cal.4th 1272, 48 Cal.Rptr.3d 183; *San Diego Police Officers' Assn. v. City of San Diego Civil Service Com.* (2002) 104 Cal.App.4th 275, 128 Cal.Rptr.2d 248, opn. mod. on den. of rehg. (2003) 2003 Cal.App.LEXIS 31.
[77] (2007) 42 Cal.4th 278, 64 Cal.Rptr.3d 661.
[78] *Ibid.*

personnel information to a requesting newspaper.

Notwithstanding this ruling, an accused officer's personnel records cannot be disclosed even at otherwise public disciplinary appeal hearings. An agency may not make these records public over the objections of the officer involved.[79] Similarly, the courts have determined that section 832.7 protections extend to reports issued by local citizens' review boards as "personnel files," even if a review board does not maintain files under a particular officer's name or place a copy in the officer's personnel file.[80]

Further, information contained in police personnel files, or other department files containing information related to complaints, is not discoverable under generally applicable discovery rules in the California Code of Civil Procedure or through a Public Records Act request.

In response to this broad restriction on public access to police personnel records, the California Legislature passed, and then-Governor Brown enacted, SB 1421, which amended and limited section 832.7 restrictions by generally requiring the disclosure of certain peace officer personnel records under the California Public Records Act, information previously only available through the *Pitchess* procedure described below. Such records include any records relating to: (i) an officer's discharge of a firearm at a person; (ii) an officer striking a person's head or neck with a weapon or projectile; and (iii) an incident in which an officer's use of force resulted in death or serious bodily injury. In addition, it requires other records to be available for public inspection, such as a sustained finding of sexual assault by an officer involving a member of the public, and certain sustained findings of dishonesty by an officer. Although these records will now be available to the public, the law also provides that certain personal identifying information be redacted as necessary for the public interest.

POBRA also allows a judge to review records sought in connection with a civil or criminal court action and to release those records that are material to the litigation's subject matter. This procedure, which codifies the rule established by the California Supreme Court in *Pitchess v. Superior Court*,[81] provides the exclusive means for obtaining discovery of peace officer personnel records. For a criminal defendant to meet the requirements for an in-chambers *Pitchess* review of a peace officer's personnel file by a judge in a criminal proceeding, the defendant need only demonstrate that the alleged officer misconduct could or might have occurred.[82] Similarly, prosecutors, as well as defendants, must comply with the *Pitchess* procedures if they seek information from confidential personnel records.[83]

The *Pitchess* process, however, is not required for obtaining peace officer personnel records in a federal lawsuit.[84] In *Pierce v. County of Sierra*, a federal court ruled that the California *Pitchess* process did not supplant federal rules of procedure.[85] Instead, the Court applied Federal Rule of Civil Procedure Rule 26(b) to determine whether there was good cause for production of the records requested.[86]

Finally, police personnel files retain their confidentiality even after the officer retires.[87] But a peace officer whose files are improperly released may not sue the employing public agency for damages resulting from that disclosure.[88]

TIMELINES FOR COMPLETING INVESTIGATIONS AND ISSUING DISCIPLINE

Timeline to Complete Investigation and Issue Notice of Proposed Discipline

A public agency must complete its investigation into an officer's or firefighter's

[79] *San Diego Police Officer's Assn., supra.*
[80] *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 131 Cal.Rptr.2d 266.
[81] (1974) 11 Cal.3d 531, 113 Cal.Rptr. 897.
[82] *Warrick v. Superior Ct.* (2005) 35 Cal.4th 1011, 29 Cal.Rptr.3d 2.
[83] *People v. Superior Ct. (Johnson)* (2015) 61 Cal.4th 696.
[84] (E.D.Cal. 2013) 2013 WL 2421710.
[85] *Id.* at p. 3.
[86] *Id.* at p. 4.
[87] See *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 400, 29 Cal.Rptr.2d 232, 235, review den. (1994) 1994 Cal.LEXIS 3211.
[88] *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 428, 98 Cal.Rptr.2d 144, 150.

alleged acts of misconduct and notify the officer of the proposed disciplinary action within one year of discovering the misconduct. Under POBRA, misconduct is "discovered" when an individual with authority to investigate realizes (or should realize) that misconduct has occurred.[89] Under FPBRA, however, the one-year statute of limitations is triggered by the "discovery by the employing fire department or licensing or certifying agency."[90] The one-year statute of limitations is strictly construed, and local agencies may not establish a longer statute of limitations.[91]

In *Mays v. City of Los Angeles*,[92] the California Supreme Court ruled that the notice contemplated by section 3304(d) is notice that the public agency, having completed its investigation into the alleged misconduct within the statutory period, has decided that it may take disciplinary action against the officer for specified misconduct. The notice does not need to provide the specific level of discipline to be sufficient under the Act.

The California Supreme Court concluded, among other things, that:

- In enacting section 3304(d), it is clear that the Legislature was focused upon preventing a perceived lack of fairness caused by a drawn-out investigatory process — and not with requiring the officers to receive notice of specific intended discipline at the early stage of the process.
- If the Legislature intended section 3304(d) to require public agencies to propose precise disciplinary consequences or punishment for alleged misconduct, the Legislature would have made this intention clear in the language of the provision, or at least such an intent would appear in the legislative reports. The court found no such indication in the legislative history.
- The language of section 3304(d) provides that an agency "may" take discipline. The use of the conditional word "may" demonstrates the preliminary nature of the proceedings at the time the notice is required under subdivision (d). The court pointed out that it would be anomalous to require the public agency to reach a conclusion regarding potential discipline prior to any pre-disciplinary proceedings or responses on the part of the officer."

The statutory scheme requires that the employer notify the officer of the proposed disciplinary action within the one-year deadline, but the formal notice of adverse action is not subject to the deadline.[93]

The one-year statute of limitations applies even if the officer's dishonesty during the investigation of the underlying charges gives rise to disciplinary proceedings for dishonesty.[94] An officer's dishonesty during an investigation into misconduct does not start a new limitations period.

Under both Acts, if the agency fails to complete its investigation and notify the officer or firefighter of its proposed disciplinary action within one year, then it cannot take punitive action or deny the officer or firefighter a promotion on grounds other than merit unless:

- the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution — the time during which the criminal investigation or criminal prosecution is pending tolls the one-year time period;
- the officer or firefighter waives the one-year time period in writing — the time

[89] *Haney v. City of Los Angeles* (2003) 109 Cal.App.4th 1, 134 Cal.Rptr.2d 411.
[90] Gov. Code, § 3254(d).
[91] *Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 4 Cal.Rptr.3d 325, review den. (2003) 2003 Cal.LEXIS 9300.
[92] (2008) 43 Cal.4th 313, 74 Cal.Rptr.3d 981.
[93] *Sulier v. State Personnel Bd. (Dept. of Corrections)* (2005) 125 Cal.App.4th 21, 22 Cal.Rptr.3d 615, review den. (2005) 2005 Cal.LEXIS 2856; Gov. Code § 3304(d)(1); *Squire v County of Los Angeles* (2018) 22 Cal.App.5th 16, 25-27 (Court concluded that modified reprimand outside the one-year statutory period did not violate POBRA as the agency was required to notify the officer only of the proposed discipline. The Court further concluded that the modified reprimand was not untimely even though it was initiated outside the one-year period because: (1) it did not constitute new discipline under POBRA, but rather, it concerned the same underlying conduct; and (2) the modified reprimand did not change the level of discipline.).
[94] *Almeida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 15 Cal.Rptr.3d 383.

period is tolled for the period of time specified in the written waiver;
- the investigation is a multi-jurisdictional investigation that requires a reasonable extension for coordinating the involved agencies;
- the investigation involves more than one employee and requires a reasonable extension (under POBRA only);
- the investigation involves an employee who is incapacitated or otherwise unavailable;
- the investigation involves a matter in civil litigation where the officer or firefighter is named as a party defendant — the one-year time period is tolled while that civil action is pending;
- the investigation involves a matter in criminal litigation where the complainant is a criminal defendant — the one-year time period is tolled during the period of that defendant's criminal investigation and prosecution; or
- the investigation involves an allegation of workers' compensation fraud on the officer's or firefighter's part.

In addition to the above, a pending criminal prosecution tolls the one-year statute of limitations, even for officers not named in the criminal matter. In *Parra v. City and County of San Francisco*,[95] several San Francisco police officers involved in the notorious "Fajitagate" scandal were criminally charged for their improper investigation in the matter. The criminal charges were dropped against most officers, and after a complex and lengthy investigation, the police department initiated discipline against the officers, including at least one officer who was not criminally charged. The officers challenged the police department's proposed discipline on the basis that the disciplinary charges were not filed against them for almost two years after the incident occurred. The Court of Appeal concluded that the criminal prosecutions tolled POBRA's one-year statute of limitations because the acts at issue in the disciplinary action were the subject of a criminal investigation and prosecution,[96] even though not all of the disciplined officers had been charged in the criminal case. The court coupled the criminal prosecution tolling statute with POBRA's provisions allowing reasonable extensions to the one-year statute of limitations for investigations involving multiple officers[97] to extend the limitations period and allow the charges to be filed against the officers 20 months after the incident occurred.

In *Bacilio v. City of Los Angeles*, Edgar Bacilio, a Los Angeles Police Department ("LAPD") officer, was the subject of an administrative and criminal investigation conducted by LAPD's Internal Affairs based on alleged misconduct that could constitute aiding and abetting sexual battery.[98] The lead internal affairs investigator, who sought prosecution of Mr. Bacilio's officer partner for sexual battery, presented the results of the investigation to the District Attorney's Office. A deputy district attorney then interviewed the victim while the lead internal affairs investigator translated. Immediately thereafter, the deputy district attorney told the lead investigator that the lead investigator could proceed with conducting an administrative interview of Mr. Bacilio since the victim was not going to file charges against him. Subsequently, the District Attorney's Office officially declined to file criminal charges.

However, Mr. Bacilio was noticed he would receive a formal reprimand based on the underlying incident. After a hearing sustained the administrative charge, Mr. Bacilio filed a petition for writ of administrative mandamus against the City of Los Angeles (" City"). The trial court found for the City, and Mr. Bacilio appealed. Mr. Bacilio argued on appeal that the LAPD did not notify him of the potential discipline within POBRA's one-year limitations period. Specifically, he asserted that the tolling period ended when the prosecutor orally told the internal affairs investigator that the victim would not be filing charges rather than when the District Attorney's Office formally rejected prosecution, which occurred a few months later. The Court ruled that a criminal

[95] *Parra v. City and County of San Francisco* (2006) 144 Cal.App.4th 977, 50 Cal.Rptr.3d 822, mod. and rehg. den. by (2006) 2006 Cal.App.LEXIS 1901.

[96] Gov. Code, § 3304(d)(1).
[97] Gov. Code, § 3304(d)(4).
[98] *Bacilio v. City of Los Angeles* (2018) 28 Cal.App.5th 717.

investigation is no longer pending when a final determination not to prosecute and to close the criminal investigation is made. Additionally, the Court explained that in assessing whether a prosecuting entity's or public agency's determination is final, courts look to the totality of circumstances along the entire timeline of the decision maker's involvement. In this case, the Court ruled that substantial evidence supported the finding that the District Attorney's Office did not make a final determination regarding prosecution until it issued its official rejection of criminal charges.

Daugherty v. City & County of San Francisco[99] is another tolling case that arises out of a criminal corruption investigation of officers in the San Francisco Police Department ("SFPD") by the United States Attorney's Office ("USAO") and the criminal unit of SFPD's Internal Affairs Division ("IAD-Crim") wherein the text messages that were discovered during the course of the investigation was the subject of a separate criminal investigation. After a verdict was rendered in the criminal case, the text messages were released by the USAO to the administrative unit of SFPD's Internal Affairs Division ("IAD-Admin"), a separate division from IAD-Crim. After IAD-Admin completed its investigation of the text messages, the chief of police issued disciplinary charges against several SFPD police officers who were involved in the same text message communications. The officers filed a petition for Writ of Mandate and complaint for extraordinary relief to rescind the disciplinary charges on the grounds that they were untimely, exceeding the one-year statute of limitations by over two years.

The Court ruled that the one-year statute of limitations did not begin to run until the text messages, which were part of the criminal case, were released from the USAO to IAD-Admin because before then, the alleged misconduct was not and could not be discovered by the "person[s] authorized to initiate an investigation" for purposes of section 3304(d)(1). In this regard, section 3304(d)(1) triggers the statute of limitations not by just any employee's discovery, but upon discovery by a person who is authorized to initiate investigations into the misconduct. Courts should generally apply the agency's designation of who is authorized to initiate an investigation. The Court also concluded that the one-year statute of limitations was tolled until the verdict was rendered in the criminal corruption case because the text messages were a key investigative tool to aid in the corruption scheme. Moreover, the text messages belonged to the federal investigation and were subject to the federal protective order, which restricted their disclosure and use well before the text messages were ever discovered. After the verdict was issued, the officers were notified of the disciplinary charges well within one year of the close of the criminal trial. The SFPD cooperated with federal authorities by adhering to the USAO's confidentiality restriction and a federal protective order during the pendency of the wide-ranging criminal investigation. Waiting until the completion of the criminal trial was in alignment with POBRA.

Further, a criminal investigation tolls the one-year statute of limitations period *until* the district attorney reaches a decision to decline charges.[100] In *Richardson v. City and County of San Francisco*, a fraud investigator was terminated for a number of violations including check fraud and resisting arrest. After the internal criminal investigation was closed and the internal affairs investigation was sustained, the employee filed a lawsuit claiming that she was not disciplined within the one-year statute of limitations period under POBRA. The Court ruled that the limitations period when the officer is under criminal investigation does not require that the investigation be "active and actual," and that any such requirement would be "unworkable."[101] Instead, the Court decided that tolling continues between the date the investigating agency advises prosecutors of its findings and the date of the prosecutor's decision not to prosecute.[102]

[99] *Daugherty v. City & County of San Francisco* (2018) 24 Cal. App. 5th 928.
[100] *Richardson v. City and County of San Francisco* (2013) 214 Cal.App.4th 671.
[101] *Id.* at p. 697.
[102] *Id.* at p. 698.

The statute of limitations also may be tolled for a pending civil action. A pending civil action tolls the one-year statute of limitations even when civil litigation did not impede the disciplinary action. In *Bettencourt v. City and County of San Francisco*,[103] five San Francisco police officers were notified of proposed discipline related to an incident in which the officers allegedly improperly detained, handcuffed, and searched four African American juveniles, and one of the officers made racially-charged remarks. After receiving numerous complaints regarding the incident, the Office of Citizen Complaints ("OCC") recommended disciplinary action to the police chief. Perhaps because the department was so busy with the Fajitagate matter discussed above, this disciplinary matter "fell through the cracks," and the police department did not file charges against the officers until after POBRA's one-year statute of limitations. The department also failed to file the charges within 60 days of receiving the OCC complaint, as required by local city rules.

The Court of Appeal allowed the disciplinary action to proceed despite the delay in filing the charges. All of the officers were named defendants in a civil action related to the same incidents, and the Court of Appeal concluded that the filing of the civil action tolled the one-year statute of limitations under POBRA.[104] The court rejected the officers' argument that the civil action must have some bearing on the disciplinary action in order for the exception to the one-year statute of limitations to apply. POBRA's exception requires only that the civil action and disciplinary proceedings involve the same incident. Nothing in the statute requires the police department to show that the civil litigation impeded the disciplinary action. The court also found that the failure to meet the local 60-day filing rule did not require dismissal of the disciplinary action because the local rule was merely directory and provided no forfeiture sanction for failing to meet the deadline.

A pending civil action tolls the statute of limitations only for officers named in the civil litigation. Extensions to statute of limitations are limited. In *Breslin v. City and County of San Francisco*,[105] four San Francisco police officers pursuing a known fugitive fired their weapons at the fugitive's car and killed a 17-year-old passenger. After a criminal investigation, criminal charges, and civil litigation were resolved, the city initiated disciplinary procedures against the officers. The charges were not filed against the officers until over four years after the incident. The officers moved to dismiss the disciplinary action because it was not filed within the one-year statute of limitations established by POBRA. The Court of Appeal carefully analyzed the applicable exceptions to the one-year statute of limitations and concluded that the exceptions did not apply and the disciplinary action against the four officers had to be dismissed. The Court of Appeal concluded that:

- The criminal investigation tolled the statute of limitations for all officers until the time that the criminal investigation formally ended.[106]
- The civil litigation involved the same matter and tolled the statute of limitations even though the civil action had no effect on the OCC's disciplinary investigation.[107]
- The civil litigation tolled the statute of limitations only for the officer named as a defendant in the civil action, and not for other officers involved in the same matter.[108] (Note that the criminal investigation tolling statute applies to all officers involved in the same incident; see discussion of *Parra* case above.)
- The one-year statute of limitations could not be extended based on the multijurisdictional extension,[109] because one entity had reasonable control over the investigations of both investigatory entities. The San Francisco Police Commission had reasonable control over both the OCC and the police department, and should have coordinated the investigations.

[103] *Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090; 53 Cal.Rptr.3d 402.
[104] Gov. Code, § 3304(d)(6).
[105] *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 55 Cal.Rptr.3d 14.
[106] Gov. Code, § 3304(d)(1).
[107] Gov. Code, § 3304(d)(6).
[108] Gov. Code, § 3304(d)(6).
[109] Gov. Code, § 3304(d)(3).

- The multiple-employee extension[110] to the one-year statute of limitations did not apply because there was no connection between the involvement of multiple employees and any need for an extension. Further, the exception allows only a reasonable extension, and the extension sought in this case was not reasonable under the circumstances.

Finally, the statute of limitations on disciplinary actions does not apply to investigations of worker's compensation fraud regardless whether the investigation is conducted internally or externally. As such, an allegation of workers' compensation fraud on the part of the public safety officer that was subject to either an *internal investigation* or an investigation conducted by an outside agency or third party may toll the statute.[111]

An officer forfeits the issue of the statute of limitations if he or she does not raise it in the administrative proceedings.[112]

Timeline to Issue Notice of Final Discipline

Although the public agency is not required to impose the proposed discipline within the one-year time period in which it must conclude the investigation, under section 3304(f), the public agency *must notify the public safety officer in writing of its final decision to impose discipline within 30-days of its decision.*[113] Significantly, the 30-day timeline is *not* triggered by the initial notice of proposed discipline required by section 3304(d).[114] Rather, the 30-day notification requirement begins to run only *after* the agency completes the pre-disciplinary process and decides the specific level of discipline that will be imposed.[115] Thus, once the agency follows its relevant procedural mechanism and decides the level of discipline it intends to impose, it *then* has 30 days to so notify the officer.[116]

DISCIPLINARY SANCTIONS

POBRA does not intend to interfere with a charter city's right to regulate officers' employment qualifications or the causes for their removal.[117] These matters are generally provided for by charter, ordinance, local rule, collective bargaining agreement, statute, or case law. The California Supreme Court has ruled that in assessing the propriety of a particular disciplinary sanction, a reviewing court should consider the extent that the employee's misconduct resulted in "harm to the public service," the circumstances surrounding the misconduct, and the likelihood of its recurrence.[118] At-will employees are not necessarily entitled to full evidentiary hearings before they are terminated.[119]

OPPORTUNITY FOR ADMINISTRATIVE APPEAL

Administrative Appeal Rights Triggered by Punitive Action

POBRA provides that an officer who has successfully completed the probationary period required by the employing agency must receive an "opportunity for administrative appeal" whenever there is a "punitive action, [or] denial of promotion on grounds other than merit."[120] There is no distinction between newly hired public safety officers and public safety officers who are subject to a period of probation upon promotion.[121] When an employee is denied a promotion based on merit, the fact that the employee also loses any pay increase that went along with the provisional promotion does not transform the denial of promotion

[110] Gov. Code, § 3304(d)(4).
[111] *California Dept. of Corrections and Rehabilitation v. State of Personnel Bd. (Moya)* (2013) 215 Cal.App.4th 1101.
[112] *Moore v. City of Los Angeles* (2007) 156 Cal.App.4th 373, 67 Cal.Rptr.3d 218.
[113] Gov. Code, § 3304(f).
[114] *Neves v. California Dept. of Corrections and Rehabilitation* (2012) 203 Cal.App.4th 61, 136 Cal.Rptr.3d 617.
[115] *Id.* at p. 65.
[116] *Neves, supra,* 203 Cal.App.4th 61, 69 citing *Sulier, supra,* 125 Cal.App.4th at pp. 29-30 [a formal notice of adverse action containing a statement of the nature of such action is required when the public agency decides to impose discipline and serves a formal notice pursuant to § 3304,(f)].
[117] Applies to misconduct allegedly committed after January 1, 1998.
[118] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215, 124 Cal.Rptr. 14, 30-31.
[119] *Holmes v. Hallinan* (1998) 68 Cal.App.4th 1523, 81 Cal.Rptr.2d 174.
[120] Gov. Code, § 3304(b).
[121] *Guinn v. County of San Bernardino* (2010) 184 Cal.App.4th 941; 109 Cal.Rptr.3d 667.

into either a demotion or a punitive act within the meaning of section 3304(b).[122]

Similarly, FPBRA provides that "[p]unitive action or denial of promotion on grounds other than merit shall not be undertaken by any employing department or licensing or certifying agency against any firefighter who has successfully completed the probationary period without providing the firefighter with an opportunity for administrative appeal."[123] Punitive action is any personnel action that "may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."[124] The following cases discuss "punitive action" in the context of POBRA, but they may also be instructive for interpreting the FPBRA.

In *Benach v. County of Los Angeles*,[125] Los Angeles County Deputy Sheriff Francisco Benach was fired from his helicopter pilot position after he allegedly assaulted another deputy. He challenged his termination, and settled that litigation with an agreement that allowed him to continue working for the county. After Mr. Benach was reinstated and assigned to a helicopter pilot position at the Aero Bureau, the county received over 30 complaints from other personnel alleging that Mr. Benach created an unsafe and hostile work environment, including reckless flying, threats against fellow deputies, and actual physical violence. After investigating the complaints, the county transferred Mr. Benach to a new work location in order to address the "less-than-harmonious working environment" at his original workplace. The division chief who ordered the transfer stressed that the transfer was not disciplinary or punitive.

Mr. Benach claimed that his reassignment from a Bonus II helicopter pilot position to a position routinely held by a Bonus I detective was a punitive demotion that violated POBRA's prohibition on imposing punitive action without completing an investigation and notifying the officer of the proposed action within one year of the misconduct.[126] The California Court of Appeal rejected Mr. Benach's claim.[127] Mr. Benach retained the same rank and rate of pay in his new position, so the transfer was not a demotion, and the reassignment was not imposed for a punitive purpose.

In order for an involuntary transfer to constitute "punitive action" for purposes of section 3304, the employee must show "some evidence" suggesting their transfer was punitive. [128] This issue was addressed in *Los Angeles Police Protective League v. City of Los Angeles.* In its analysis, the Court noted that a "transfer for purposes of punishment," is "the only personnel action listed in section 3303 which is not intrinsically disadvantageous to an officer."[129] The Court offered some guidance on what will and will not indicate that an involuntary transfer was effected as a punishment. The Court stated that loss of overtime pay, as a consequence of a transfer, cannot be punitive where there is no showing that employees are entitled to such overtime pay. Similarly, loss of a take-home vehicle is not punitive where the employee cannot show any entitlement thereto. Loss of promotional opportunities does not indicate punishment, at least when speculative and not supported by independent evidence. Additionally, nothing can be probative of punishment where there is no meaningful causal relationship, despite appearing on a laundry list of grievances.

Further, the Court placed great weight on declarations from relevant decision-makers outlining the managerial reasons for transferring each officer (one, because she was having difficulty as a supervisor, another because the division's discovery of sexual harassment allegations had damaged his relationships with other officers). Further, the Court seemed persuaded by a statement that "the Chief of Police may and often does transfer officers to assignments other than

[122] *Id.*
[123] Gov. Code, § 3254(b).
[124] Gov. Code, §§ 3251(c) and 3303; *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 85 Cal.Rptr.2d 660, review den. (1999) 1999 Cal.LEXIS 6368; *Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 91 Cal.Rptr.2d 171, review den. (2000) 2000 Cal.LEXIS 2030.
[125] *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 57 Cal.Rptr.3d 363.
[126] Gov. Code, § 3304(d)(4).
[127] *Benach v. County of Los Angeles*, *supra*.
[128] *Los Angeles Police Protective League v. City of Los Angeles* (2014) 232 Cal.App.4th 136.
[129] Quoting *White v. County of Sacramento* (1982) 31 Cal.3d 676, 681-82.

those they may prefer based on his belief that the transfer serves the best interest of the Department."[130] Personnel actions are judged by their content and effect, not their labels. A "summary of conference" memorandum will give rise to an officer's administrative appeal rights when it includes adverse comments that might lead to discipline, but not when the memorandum's tone and the conference conversation itself suggest that the memorandum is only an "educational reminder, without criticism."[131]

Punitive action sufficient to trigger POBRA's protections is not limited to the conduct that POBRA specifically lists. Limiting an officer's authority to carry weapons and make arrests and documenting the reasons behind those limitations in the officer's personnel file are severe restrictions that an officer may appeal under POBRA.[132] And officers may appeal the decision of an advisory citizens' law enforcement review board.[133]

Further, POBRA's protections may be triggered where an employee is terminated for non-disciplinary reasons. In *Riverside Sheriffs' Association v. County of Riverside*,[134] plaintiff Beatrice Sanchez, a probation corrections officer, was placed on "unpaid status" and ultimately terminated for a medical condition that prevented her from resuming her full duties with the probation department. Less than a month later, the County "rescinded" the termination and submitted a disability retirement application to CalPERS on her behalf, retroactive to the date she was first placed on "unpaid status" with the County. Sanchez filed a petition for writ of mandate seeking an order directing the County to process her request for an appeal of her termination pursuant to her MOU with the union, and POBRA. The County claimed that because Ms. Sanchez was not terminated for disciplinary reasons under the MOU, she was not entitled to an MOU or POBRA appeal of her rescinded termination. The appellate court found that Ms. Sanchez was denied wages and other benefits of employment which she would not have been denied had the County treated her as a non-terminated employee eligible for disability retirement at all times after she was placed on unpaid status. The County's actions in depriving Ms. Sanchez of her wages and benefits constituted "disciplinary action" within the meaning in the MOU and "punitive action" within the meaning in the POBRA. Therefore, Ms. Sanchez was entitled to an appeal, not of her termination which had been rescinded, but of the County's adverse "disciplinary" or "punitive" actions in denying her wages and other employment benefits.

In *Perez v. City of Westminster*, a police officer argued that removal from a special assignment, and his department's refusal to assign him trainees, was punitive action. The Court of Appeal determined that a police officer's removal from a special assignment that resulted in loss of prestige and the loss of the ability to overtime pay was insufficient to establish a punitive action.[135]

Administrative Appeal Procedures

POBRA provides that an officer wishing to appeal a punitive action must use existing local administrative avenues and the hearing must be conducted according to rules and procedures adopted by the local agency.[136] If an agency fails to designate a body to hear appeals, the court will order the agency to appoint one.[137] Although POBRA does not specifically set forth hearing procedures, it implies that the hearing must comport with fair play and due process standards appropriate to the seriousness of the charges. This right may not be bargained away or waived by an officer's union representatives.[138] The appeal may either precede or follow disciplinary action. If the appeal consists of a de novo proceeding, it may result in a harsher discipline than the

[130] *Los Angeles Police Protective League v. City of Los Angeles, supra*, at 143.
[131] *Otto v. Los Angeles Unified School Dist.* (2001) 89 Cal.App.4th 985, 107 Cal.Rptr.2d 664, op. mod. (2001).
[132] *Gordon v. Horsley* (2001) 86 Cal.App.4th 336, 102 Cal.Rptr.2d 910, rehg. den. (2001) 2001 Cal.App.LEXIS 112.
[133] *Caloca*, *supra*.
[134] (2011) 193 Cal.App.4th 20, 122 Cal.Rptr.3d 197.
[135] *Perez v. City of Westminster* (2016) 5 Cal.App.5th 358.
[136] Gov. Code, § 3304.5.
[137] *Hunter v. Los Angeles County Civil Service Com.* (2002) 102 Cal.App.4th 191, 124 Cal.Rptr.2d 924.
[138] *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 125 Cal.Rptr.2d 474, review den. (2003) 2003 Cal.LEXIS 234.

one initially appealed, even if the employee attempts to abandon the appeal.[139]

Complying with statutory timelines is important. Civil service probationary employees are entitled to have the statutory dismissal procedure strictly followed. If an employer fails to notify the civil service commission of its decision to discharge an employee before the employee's probationary period ends, the employee will achieve tenured status and a full pre-termination hearing will be required.[140]

Case law has addressed the types of meetings that satisfy POBRA's requirement of "an opportunity for administrative appeal." Individuals who were embroiled in the controversy may not conduct the appeal hearing.[141] A meeting with a city manager as required by a Memorandum of Understanding does not constitute an administrative appeal under POBRA.[142] But a "liberty" hearing may satisfy an officer's right to an administrative appeal under POBRA,[143] and providing officers the opportunity to present their version of events may be sufficient if punitive action has not resulted from adverse comments.[144] When an allegation of misconduct can stigmatize an officer's reputation and make it difficult to obtain other law enforcement jobs, a protected "liberty" interest is implicated, requiring that the officer be afforded the name-clearing appeal provided by section 3304(b) before the officer's termination becomes effective.[145]

The appeal need not provide the "full panoply of judicial procedures." Due process requires that appeal procedures be sufficient to meet the seriousness of the charges or action challenged. If the challenged action has not yet resulted in any punitive action, it is enough that the agency provides the officer with an opportunity to present his or her side of the issue. If the challenged action is subsequently used as a basis for adverse action, the officer will then have an opportunity to, for example, cross examine witnesses.[146]

FPBRA provides that an administrative appeal instituted by a firefighter shall be conducted in conformance with rules and procedures adopted by the employing department or licensing or certifying agency that are in accordance with the Administrative Procedure Act ("APA").[147] The APA[148] sets out a variety of hearing requirements, including:

- notice and an opportunity to be heard, including the opportunity to present and rebut evidence;
- written hearing procedures;
- hearings open to the public unless necessary to protect confidential or privileged information or to insure a fair hearing;
- separate investigative, prosecutorial, adjudicative, and advocacy functions;
- a presiding officer or arbitrator who is subject to disqualification for bias, prejudice, or interest; [149]
- a written decision that is based on the record and includes the factual and legal basis for the decision;
- restrictions on ex parte communications; and
- language assistance.[150]

The APA provides that informal hearing procedures may be appropriate for disciplinary action that "does not involve

[139] *Holcomb v. City of Los Angeles* (1989) 210 Cal.App.3d 1560, 259 Cal.Rptr. 1; *Jackson v. City of Los Angeles* (1999) 69 Cal.App.4th 769, 81 Cal.Rptr.2d 814.
[140] *Zeron v. City of Los Angeles* (1998) 67 Cal.App.4th 639, 79 Cal.Rptr.2d 130.
[141] *Stanton v. City of West Sacramento* (1991) 226 Cal.App.3d 1438, 277 Cal.Rptr. 478.
[142] *Runyan v. Ellis* (1996) 40 Cal.App.4th 961, 47 Cal.Rptr.2d 356, rehg. den. (Dec. 28, 1995), review den. (1996) 1996 Cal.LEXIS 1144.
[143] *Riveros v. City of Los Angeles* (1996) 41 Cal.App.4th 1342, 49 Cal.Rptr.2d 238, mod. on den. of rehg. (1996) 42 Cal.App.4th 1193D.
[144] *James v. City of Coronado* (2003) 106 Cal.App.4th 905, 131 Cal.Rptr.2d 85, rehg. den. (2003) 2003 Cal.App.LEXIS 503, review den. (2003) 2003 Cal.LEXIS 3387.
[145] *Riveros, supra*, at 1359.
[146] *Ibid.*
[147] Gov. Code, § 3254.5.
[148] Gov. Code, §§ 11400 et seq.
[149] Gov. Code, §3254.5(b) ["Notwithstanding subdivision (a), if the employing department is subject to a memorandum of understanding that provides for binding arbitration of administrative appeals, the arbitrator or arbitration panel shall serve as the hearing officer in accordance with Chapter 5 (commencing with § 11500) of Part 1 of Division 3 of Title 2 and notwithstanding any other provision that hearing officer's decision shall be binding."].
[150] Gov. Code, § 11425.10.

discharge from employment, demotion, or suspension for more than 5 days."[151] In informal proceedings, the presiding officer may limit the use of witnesses, testimony, evidence, and argument, and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal.[152] Decisions made through the informal process are not subject to judicial review.[153] Otherwise, formal hearing procedures are followed, as set forth in the APA.[154]

Finally, FPBRA's procedures for administrative appeals apply to chartered cities and do not violate the Home Rule Provisions of the California Constitution, article XI, section 5.[155] The effect of section 3254.5 is "not to deprive local government (chartered city or otherwise) of the right to manage and control its fire departments but to create uniform fair labor practices throughout the state."[156] Thus, a chartered city is required to implement the FPBRA's procedures for administrative appeals even if they conflict with existing procedures. In conforming new FPBRA procedures for administrative appeals with existing procedures, the agency must meet and confer with the firefighter union prior to implementation of the new procedures.[157]

A Denial of Promotion During the Probationary Period Does Not Trigger an Officer's Administrative Appeal Rights.

In *Thomas L. Conger v. County of Los Angeles*, the Los Angeles County Sheriff's Department rescinded the appellant's probationary promotion from sergeant to lieutenant based on investigatory findings that he had failed to report a use of force incident several months before he was promoted to his probationary position as lieutenant. The Court of Appeals ruled that the Department's decision to rescind his probationary promotion and return him to his previous rank of sergeant constituted a "denial of promotion and not a demotion." Under POBRA, specifically Government Code section 3304(b), as long as the denial was based on merit, which was the case here, an employer may deny a promotion without triggering the administrative appeal process. Nothing in section 3304(b) suggests that the term "merit" should be limited to the merits of an officer's performance during the probationary period. An officer's ability to perform successfully in his former position is clearly relevant in assessing his ability to perform successful at a higher position. His past job performance speaks to his merit as much as his performance during probation.

Moreover, Conger did not have a vested property interest since he was still on probation, which was extended indefinitely due to the pending investigation into the alleged use of force incident. Conger's release from his probationary period before he achieved permanent status as a lieutenant was a denial of promotion rather than a demotion. Since the grounds for denying the promotion were merit-based factors substantially related to the successful performance of the duties of the position, the Department was justified in denying the promotion without triggering his administrative appeal rights.

Limited Waiver of Administrative Appeal Rights Permitted to Settle Pending Disciplinary Action

The California Court of Appeal examined under what circumstances a peace officer may waive his or her rights under POBRA. In *Jaramillo v. County of Orange*, the Court analyzed the enforceability of two pre-hire waivers signed by a former Assistant Sheriff of Orange County as a condition of employment.[158] The first waiver acknowledged George Jaramillo was an at-will employee and could be released from employment at any time and without notice. The second waiver affirmed Jaramillo served at the pleasure and discretion of the Sheriff and acknowledged he could be terminated

[151] Gov. Code, § 11445.20(b)(3).
[152] Gov. Code, § 11445.40.
[153] Gov. Code, § 11445.50(c).
[154] Gov. Code, §§ 11500 et seq.
[155] *International Assn. of Firefighters Local Union 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 125 Cal.Rptr.3d 832; Cal. Const., art. XI, § 5, subd. (a) [the home rule doctrine gives chartered cities the power to "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to [the] restrictions and limitations provided in their several charters..."].
[156] *International Assn. of Firefighters, supra*, at 1204; citing, *Professional Fire Fighters, supra.*
[157] See *International Assn. of Firefighters, supra.*
[158] (2011) 200 Cal.App.4th 811, 133 Cal.Rptr.3d 751.

"at any time without notice, cause or rights of appeal."[159] Neither waiver referenced POBRA directly. The Court ruled that the waivers were ineffective and did not waive his rights under POBRA. In reaching its conclusion, the Court examined the 2002 California Supreme Court decision in *County of Riverside v. Superior Court*,[160] which upheld a "limited waiver" of rights under POBRA as long as the waiver was narrow and served the public purpose of POBRA, rather than "undermine it."[161] Unlike the waiver upheld in *County of Riverside*, the waivers at issue in *Jaramillo* were not limited and differed in three respects: 1) Jaramillo's waivers of his POBRA rights were "blanket waivers" – waiving important notice and administrative hearing requirements; 2) the waivers were entirely prospective and Jaramillo did not have "full knowledge" at the time that he signed the waiver that he was already in his boss's ill graces; and 3) the waivers would undermine the purpose of POBRA and not serve it because if enforced, the protections afforded to high-ranking peace officers by POBRA could easily be circumvented."[162]

Despite the Court of Appeal's decision in *Jaramillo*, police officers may still execute limited waivers of their rights under POBRA in the context of a settlement of a pending disciplinary action. In *Lanigan v. City of Los Angeles*,[163] plaintiff Officer Robert Lanigan entered into a settlement agreement with the City of Los Angeles to settle pending disciplinary charges by the City against him pursuant to which he agreed to resign if similar misconduct charges were upheld in the future. In reaching this agreement, Mr. Lanigan also gave up his right to pursue an administrative appeal and discharged the City from all claims.[164] A year later, Mr. Lanigan was charged with similar misconduct and he was "forced to resign" after the charges were sustained. Soon thereafter, Mr. Lanigan challenged the enforceability of the settlement agreement. Specifically, he argued that his right to an administrative appeal under POBRA was established for a public purpose and is thus not subject to a blanket waiver. He also argued that the agreement was unconscionable because he was forced to either sign the agreement or risk termination.[165] The trial court granted Mr. Lanigan's petition and ruled that the agreement was unenforceable because the settlement of pending disciplinary charges by the City of Los Angeles against Mr. Lanigan was an impermissible waiver of his rights under POBRA.

The Court of Appeal disagreed, ruling that when faced with disciplinary proceedings, peace officers may waive their POBRA rights "provided that any settlement is a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences."[166] In contrast to the waivers in *Jaramillo*, Mr. Lanigan's waiver was not a pre-employment, blanket waiver of his POBRA rights. Instead, Mr. Lanigan's waiver was knowingly made *postemployment*, and he was well aware of the relevant circumstances and likely consequences of entering into such an agreement. Mr. Lanigan deliberately waived his right to an administrative appeal in exchange for avoiding an administrative hearing which could result in his termination.[167] This decision allowed Mr. Lanigan to enjoy the benefits of continued employment subject only to a future event that he was able to control.[168] Further, the agreement was not unconscionable because Mr. Lanigan could not demonstrate any procedural unfairness or surprise. Mr. Lanigan was not presented a "take it or leave it offer;" he had time to consider and revoke the agreement; he had alternatives to settling; and he had the opportunity to negotiate the terms of the agreement and his attorney did so.

In *Hughes v. County of San Bernardino*, Robert Hughes, a Sheriff Deputy, sought an administrative appeal of a suspension resulting from alleged misconduct. While the appeal was pending in September 2011, Hughes suffered a heart attack and was unable to attend the hearing due to being in

[159] *Id.* at p. 822.
[160] (2002) 27 Cal.4th 793.
[161] *Id.* at pp. 805-806.
[162] *Jaramillo, supra,* 200 Cal.App.4th at p. 824.
[163] *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 132 Cal.Rptr.3d 156.
[164] *Id.* at. p. 1025-26.
[165] *Id.* at p. 1027.
[166] *Id.* at p. 1033 citing *County of Riverside, supra,* 27 Cal.4th at p. 806.
[167] *Id.* at p. 1034.
[168] *Id.* at p. 1033.

the hospital. Mr. Hughes' counsel entered into a tentative oral settlement with the County without authorization from Mr. Hughes. The agreement was placed on the record at the administrative appeal hearing with directions to the County to prepare a written settlement agreement. The agreement was never put in writing.

In March 2012, Mr. Hughes obtained new legal counsel and requested to continue with his administrative appeal. The County objected that the matter had been settled pursuant to the tentative agreement. While this issue was pending before the Civil Service Commission, Mr. Hughes retired from the County due to a medical condition. The Civil Service Commission then denied Mr. Hughes's request to continue with the administrative appeal and Mr. Hughes filed a writ petition under POBRA. The County demurred to the writ petition and the trial court sustained the demurrer.

On appeal, the County relied completely on the tentative settlement agreement for its assertion that Mr. Hughes was given the opportunity for an administrative hearing. The Court of Appeal found that regardless of whether the attorney had no authority to settle the matter, or whether the County never reduced the agreement to writing, Mr. Hughes did not agree to and did not receive consideration for giving up his undisputed right to an administrative hearing. For this reason, the court found that Mr. Hughes was deprived of an opportunity for a hearing.[169]

COURT CLAIMS

Superior courts have initial jurisdiction over any proceeding alleging violations of POBRA or FPBRA.[170] This permits aggrieved officers or firefighters to file court claims without first exhausting administrative remedies.[171] Superior court jurisdiction is initial, but not exclusive, and an officer may pursue rights under available administrative mechanisms or as a defense to disciplinary action.[172] An officer who is successful in his administrative appeal is not precluded from then suing the city employer for violations of POBRA; nothing in POBRA requires that adverse employment consequences must occur in order to pursue a civil claim.[173] But, an officer who chooses to arbitrate his termination may not, after losing the arbitration, assert a right to judicial review.[174] POBRA and FPBRA also provide that the reviewing court shall render appropriate injunctive or other extraordinary relief to remedy the violation.[175]

A peace officer who wishes to file a court claim against an employer to remedy violations under POBRA must file a Code of Civil Procedure section 1094.5 mandamus petition if the employer already has rendered a final administrative decision.[176] The officer may, however, file a court claim under POBRA section 3309.5 before the employer renders its final administrative decision.[177] Section 3309.5 permits a police officer to seek a legal remedy of monetary damages (actual damages, civil penalties, and attorneys' fees) in cases of malicious violation of an officer's rights with intent to injure.[178] FPBRA, section 3260(d), also provides for recovery of monetary damages under such circumstances.

To seek money damages against the employer, the peace officer must comply with the Torts Claims Act. In *Lozada v. City and County of San Francisco*,[179] San Francisco police officer Mr. Lozada fired his weapon at an oncoming vehicle, allegedly in self-defense. Although he was not terminated, Mr. Lozada argued that the department violated his procedural rights under POBRA in at least thirteen instances related to the incident. Mr. Lozada filed a lawsuit in superior court seeking monetary damages, attorneys' fees, and a $25,000 civil penalty for every violation of POBRA. The Court of

[169] *Hughes v. County of San Bernardino* (2016) 244 Cal.App.4th 542.
[170] Gov. Code, §§ 3260(b) and 3309.5(b).
[171] *Mounger v. Gates* (1987) 193 Cal.App.3d 1248, 239 Cal.Rptr. 18.
[172] *Id.* at pp. 1256-1257; *Almeida, supra,* 120 Cal.App.4th at p. 54.
[173] *Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 95 Cal.Rptr.3d 333.
[174] *Zazueta v. County of San Benito* (1995) 38 Cal.App.4th 106, 44 Cal.Rptr.2d 678, op. mod. (September 8, 1995), review den. (1995) 1995 Cal.LEXIS 6995.
[175] Gov. Code, §§ 3260(c) and 3309.5(c).
[176] *Gales v. Superior Ct.* (1996) 47 Cal.App.4th 1596, 55 Cal.Rptr.2d 460.
[177] *Ibid.*
[178] Gov. Code, § 3309.5(3).
[179] (2006) 145 Cal.App.4th 1139, 52 Cal.Rptr.3d 209.

Appeal dismissed Mr. Lozada's case because he failed to file a claim with the city under the Tort Claims Act.

The Court of Appeal concluded that no exception to the Tort Claims Act applied in Mr. Lozada's case. Mr. Lozada's claim was primarily an action for "money or damages" as contemplated by the Tort Claims Act.[180] Although the POBRA grants initial jurisdiction over POBRA claims to the superior court,[181] eliminating the requirement to exhaust administrative remedies,[182] POBRA does not excuse claims for money and damages from Tort Claims Act requirements. Claims for attorneys' fees do not require compliance with the Tort Claims Act, but claims for monetary damages and civil penalties require the filing of a tort claim when the monetary claims are the primary relief sought. In cases where reinstatement or similar injunctive relief is the primary relief sought, and money damages are merely incidental to those claims, compliance with the Tort Claims Act may be excused.

Both Acts allow public safety officers or firefighters who prevail in litigation to collect attorneys' fees when the employing department "maliciously violates" the Acts.[183] In *Riverside Sheriffs' Association v. County of Riverside*,[184] the Court of Appeal concluded that fees are also available under more general provisions of law that allow the award of attorneys' fees when the litigation enforces an important public right affecting the public interest. The sheriff's association in this case enforced an important public right when it prevailed in litigation holding that public safety officers had the right to union representation in criminal investigations and not just internal disciplinary investigations.

Video and Audio Recordings

Effective July 1, 2019, Government Code section 6254(f) was amended to require public agencies to disclose video or audio recordings of "critical incidents" involving a peace officer or custodial officer pursuant to a California Public Records Act ("CPRA") request. A "critical incident" is an incident that involves a peace officer's or a custodial officer's discharge of a firearm at a person or an incident involving the use of force by a peace officer or custodial officer against a person resulting in death or great bodily injury. As with SB 1421, this information previously was disclosable only through a *Pitchess* procedure.

Under the law, an audio or video recording of a critical incident acquired by law enforcement or a prosecutor must generally be disclosed in response to the CPRA request within 45 days of the critical incident or of the date the agency reasonably should have known it occurred,

However, the agency may delay disclosure up to one year after the incident if disclosure would substantially interfere with an active criminal or administrative investigation. After one year, the agency may refrain from producing the recording only upon a showing by "clear and convincing evidence" that disclosure of the recording would continue to substantially interfere with an ongoing investigation. Moreover, the agency is required to reconsider every 30 days whether production of the recordings would continue to substantially interfere with the active investigation and notify the CPRA requester of this determination,

Additionally, the agency is required to use redaction technology to redact recordings in instances where the agency shows production of the recording would violate the reasonable expectation of privacy of individuals in the recording and the public's interest in the recording does not outweigh that right. Should an agency demonstrate that redaction cannot adequately protect those privacy rights, the recording can be withheld. That said, if a person whose privacy rights the nondisclosure is designed to protect requests the recording, a redacted or unredacted version must be promptly made available to them.

[180] Gov. Code, §§ 905 and 945.4.
[181] Gov. Code, § 3309.5.
[182] *Bozaich v. State of Cal.* (1973) 32 Cal.App.3d 688, 697-698, 108 Cal.Rptr. 392.
[183] Gov. Code, §§ 3260(d) and 3309.5(e).
[184] *Riverside Sheriffs' Assn. v. County of Riverside* (2007) 152 Cal.App.4th 414, 61 Cal.Rptr.3d 295.

New Developments 2021

NEW CASE LAW

On April 26, 2021, the Court of Appeal, First Appellate District in *Oakland Police Officers' Assn. v. City of Oakland*[185] concluded that Government Code section 3303, subdivision (g), does not require automatic disclosure of reports and complaints prior to any further interrogation of an officer under investigation. Instead, an investigating agency's disclosure obligations to a peace officer should be guided by whether the agency designates otherwise discoverable materials as confidential. This decision is contrary to the Fourth Appellate District's decision in *Santa Ana Police Officers' Association v. City of Santa Ana.*[186]

In *Oakland Police Officers' Assn. v. City of Oakland*, a citizen filed a complaint against officers from the Oakland Police Department, alleging that officers violated his rights while conducting a mental health welfare check. The police department conducted an investigation and the officers were separately interrogated by the Department in April and May of 2018. These officers were cleared of any wrongdoing by the Department in June 2018.

Subsequent to the Department's investigation, the Oakland Community Police Review Agency (CPRA), a civilian oversight agency with independent authority to investigate claims of police misconduct, conducted its own investigation. Before the CPRA's second interrogation of the officers, counsel for the officers demanded copies of all "reports and complaints" prepared or compiled by investigators pursuant to section 3303, subdivision (g). Although the CPRA agreed to provide recordings and transcribed notes from the prior interrogations conducted by the Department, it refused to produce any other materials and insisted that the Doe officers either sit for further interrogations or face possible punitive action. The officers and their police union filed a petition for writ of mandate alleging that the City of Oakland violated their procedural rights by refusing to disclose reports and complaints prior to holding the supplemental interrogations.

The *Oakland* trial court granted the writ petition, reasoning as follows: "The Court is bound by *Santa Ana*, which plainly holds that 'reports and complaints also must be produced' "prior to any further interrogation." [Citation.] This holding is not inconsistent with the Supreme Court's holding in *Pasadena Police Officers' Association v. City of Pasadena.*[187]

The City of Oakland appealed the trial court's granting of the writ of mandate to the First District. The First District's decision that the agency was not required to automatically provide additional materials, disagreed with an earlier Fourth District decision in *Santa Ana Police Officers' Association v. City of Santa Ana*, 17, where the Fourth Appellate District held that, "[b]ecause discovery rights to reports and complaints are coextensive with discovery rights to tape recordings of interrogations, and tapes recordings must be produced 'prior to any further interrogation,' then it follows that reports and complaints also must be produced 'prior to any further interrogation.'"[188]

The First Appellate District concluded that a plain reading of the statute did not support the Fourth District's interpretation, and that the Fourth District's view ignored the Supreme Court's own analysis of the omitted phrase 'prior to' in that part of subdivision (g) discussing the disclosure of "reports and complaints." In short, the First District concluded that based on statutory construction, broad latitude must be given to an investigating agency to declare otherwise discoverable materials confidential so as to ensure the efficacy and integrity of police misconduct investigations.[189]

KEY ISSUES

- POBRA and FPBRA specify the rights that must be accorded to an officer or firefighter when an interrogation

[185] (2021) 63 Cal.App.5th 503, 503, 277 Cal.Rptr.3d 750.
[186] (2017) 13 Cal.App.5th 317, 328, 219 Cal. Rptr. 3d 919.
[187] *Id.* at p. 328.
[188] (1990) 51 Cal.3d 564, 273 Cal.Rptr. 584.
[189] *Id.* at p. 573.

may lead to disciplinary action which include dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer where that transfer is for purposes of punishment.

- Neither POBRA nor FPBRA covers interrogations that occur in the normal course of duty, counseling, instruction, or informal verbal admonishment by or during other routine or unplanned contact with a supervisor or any other public safety officer or firefighter.
- A public agency must complete its investigation into an officer's or firefighter's alleged acts of misconduct, and notify the officer of the proposed disciplinary action, within one year of discovering the misconduct. Under POBRA, misconduct is "discovered" when an individual with authority to investigate realizes (or should realize) that misconduct has occurred. Under FPBRA, however, the one-year statute of limitations is triggered by the "discovery by the employing fire department or licensing or certifying agency."
- Under both Acts, if the agency fails to complete its investigation and notify the officer or firefighter of its proposed disciplinary action within one year, then it cannot take punitive action or deny the officer or firefighter a promotion on grounds other than merit unless one of the specific exceptions is triggered.
- Peace officer personnel records are to be maintained as confidential pursuant to Penal Code section 832.7 unless a court or appropriate administrative body approves the disclosure. POBRA allows a judge to review records sought in connection with a civil or criminal court action and to release those records that are material to the litigation's subject matter. However, Penal Code sections 832.7 and 832.8 do not prevent the disclosure of peace officers' names, employing departments, and hiring and termination dates.
- Both Acts provide that that an officer or firefighter who has successfully completed the probationary period required by the employing agency, employing department, or licensing or certifying agency must receive an opportunity for administrative appeal whenever there is a punitive action, or denial of promotion on grounds other than merit. An officer may waive his or her appeal rights under POBRA when settling a disciplinary matter.
- Superior courts have initial, but not exclusive, jurisdiction over any proceeding alleging violations of POBRA or FPBRA. This permits aggrieved officers or firefighters to file court claims without first exhausting administrative remedies.
- Superior courts have initial, but not exclusive, jurisdiction over any proceeding under Government Code section 3305.5, stating that a law enforcement agency *may not* take punitive action, or deny a peace officer a promotion on grounds other than merit, solely because the officer's name was placed on a Brady list, or because the officer's name may otherwise be subject to disclosure pursuant to *Brady v. Maryland*.

Chapter 11
Individual Rights

Public Employees' Basic Due Process Rights

Summary of the Law

Skelly Rights

This chapter discusses public employees' basic due process rights but does not discuss the particular statutory rights that apply to certain employees, such as public school teachers, state employees, or public safety officers. Collective bargaining agreements, local civil service rules, and local policies also impose additional requirements.

How Were *Skelly* Rights Created, and Who Is Entitled to Them?

In California, the term "*Skelly* rights" refers to employees' due process rights. In the 1975 case of *Skelly v. State Personnel Board*, the California Supreme Court ruled that the California Constitution entitles public employees who have a property interest in continued employment to pre-disciplinary due process rights.[1]

Skelly rights are based on the due process clauses of the U.S. Constitution and the California Constitution, which provide that a person may not be deprived of a property interest without due process of law. A public employee has a property interest in their job whenever a statute, ordinance, personnel rule, or employment agreement provides that the employee may be discharged only "for cause."[2] The employee then has a reasonable expectation of continued employment and may not be disciplined or terminated without due process.

Employers can terminate employees without cause if they are not vested with a property interest in their employment and have no pre-discipline or pre-removal due process rights. This is often, but not always, the case for probationary or temporary employees. Although the timing of when public employment is considered a vested property interest generally depends on the length of time that the parties agree on, the calculation of the first day of the probationary period must commence on at least the same day of employment.[3] In some cases, probationary periods are based on statute or collective bargaining agreements.

What Is Just Cause?

An employee with a property interest in their job may not be suspended, demoted, or discharged without "just cause." Employers must consider the nature of the employee's position and the circumstances of each case in determining whether there is just cause for the disciplinary action. Generally speaking, just cause requires that:

- the rule violated reasonably relates to the employer's operations;
- the employee has adequate notice of the rule and consequences for violation;
- the employer undertakes a fair and sufficient investigation of the alleged wrongdoing;

[1] (1975) 15 Cal.3d 194, 124 Cal.Rptr. 14.
[2] *Board of Regents v. Roth* (1972) 408 U.S. 564, 92 S.Ct. 2701.
[3] *California Dept. of Corrections and Rehabilitation v. California State Personnel Bd.* (2015) 238 Cal.App.4th 710, 189 Cal.Rptr.3d 619.

- the employer has adequate proof of the misconduct or performance problems;
- the employer provides reasonably equal treatment to employees in similar circumstances; and
- the discipline is reasonable in light of the employee's overall performance and the seriousness of the problem.

What are the Basic *Skelly* Rights?

Before discharging or imposing significant discipline upon a public employee who has a property interest in continued employment, an employer must provide the employee with: (1) notice of the proposed disciplinary action; (2) the reasons for the adverse action (including any rules or regulations violated); (3) a copy of the charges and materials upon which the action is based; and (4) the right to respond orally or in writing.

What Discipline Qualifies for *Skelly* Rights?

Employees are entitled to a *Skelly* meeting before a disciplinary termination and any other significant deprivation of a property right in employment, such as a demotion[4] or unpaid suspension.[5] Note, however, that case law suggests that suspensions of five or fewer days do not trigger *Skelly* rights unless a past practice, memorandum of understanding ("MOU"), or rule provides otherwise.[6] An employee whom an employer places on involuntary retirement also has a right to a pre-deprivation hearing.[7]

Employees terminated according to a rule calling for automatic resignation for absences without leave are entitled to pre-resignation notice and the opportunity to be heard. However, these employees are not entitled to a post-resignation evidentiary hearing.

Public employees also have property interests in not being placed on involuntary sick leave.[8] Employees who are placed on *paid* involuntary leave while the employer investigates misconduct charges may, under some circumstances, have due process rights that entitle them to a *Skelly* meeting.[9] However, except for deprivations short of termination, demotion, or unpaid suspension, the full due process protections are not necessarily required; instead, the procedural due process requirements are determined based on a balancing test.[10]

Employees are not entitled to a *Skelly* meeting before a layoff,[11] lateral transfer,[12] or reassignment.[13] Other than peace officers and firefighters who are entitled to appeals, public employees have no *Skelly* rights in connection with receiving a reprimand or a negative performance evaluation.[14] Similarly, employees who voluntarily retire from employment have no *Skelly* rights.[15]

Under certain circumstances, an employer may substantially limit an employee's *Skelly* rights. For example, an employee who occupies a high-profile position and has been charged with a felony can have their rights to a pre-deprivation hearing limited by the employer, so long as they receive adequate post-deprivation hearings.[16] However, the employee's waiver of due process rights through a "last chance" agreement is generally prohibited. The

[4] *Ng. v. Cal. State Personnel Bd.* (1977) 68 Cal.App.3d 600, 137 Cal.Rptr. 387.
[5] *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d. 552, 150 Cal.Rptr. 129.
[6] *Civil Service Assoc., Local 400 v. City and County of San Francisco* (1978) 22 Cal.3d 552, 562-65.
[7] *Barberic v. City of Hawthorne* (C.D.Cal. 1987) 669 F.Supp. 985; *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (9th Cir. 2011) 648 F.3d 986 (retired employees are also entitled to pre-deprivation due process procedures).
[8] *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 73 Cal.Rptr.2d 523 (employee on an unpaid involuntary *unpaid* leave of absence is entitled to a *Skelly* meeting).
[9] See *Bostean*; *cf Jadwin v. County of Kern* (E.D. Cal. 2009) 610 F.Supp.2d 1129.
[10] *Matthews v. Eldridge* (1976) 424 U.S. 319, 335, 96 S.Ct. 893.
[11] *Duncan v. Dept. of Personnel Admin.* (2000) 77 Cal.App.4th 1166, 92 Cal.Rptr.2d 257; but see *Levine v. City of Alameda* (2008) 525 F.3d 903, which provides a right to a pre-deprivation hearing for layoff. The cases can be differentiated on the facts that the plaintiff in *Duncan* was demoted in lieu of being laid off, and that City was facing budgetary challenges, while in *Levine*, the plaintiff was not given the option of demotion in lieu of lay off, and that City was not facing budgetary challenges.
[12] *Berumen v. Los Angeles County Dept. of Health Services* (2007) 152 Cal.App.4th 372, 60 Cal.Rptr.3d 890; *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 43 Cal.Rptr.2d 774.
[13] *Ibid*.
[14] See *Turturici v. City of Redwood City* (1987) 190 Cal.App.3d 1447, 236 Cal.Rptr. 53 (public safety officer not entitled to appeal negative comments in performance evaluation because they were not punitive).
[15] *Id*. at p. 1120.
[16] *Association for L.A. Deputy Sheriffs v. County of L.A.* (9th Cir. 2011) 648 F.3d 986.

employer must still provide the employee a *Skelly* meeting and other post-deprivation rights.[17]

Is This a "Hearing," a "Conference," or a "Meeting" regarding *Skelly* Rights?

Although a *Skelly* meeting is sometimes referred to as a *Skelly* "hearing," it is only an *informal* meeting. Employees are not entitled to a full evidentiary hearing before an employer imposes discipline as a matter of law. The purpose of the *Skelly* meeting is merely to provide an employee with the opportunity to respond informally to an individual (the *Skelly* "officer") who has the authority to impose or recommend discipline but who was not involved in making the initial decision to discipline the employee. The *Skelly* meeting serves as an initial check against mistaken decisions.[18]

After listening to and considering the employee's response, the *Skelly* officer must determine whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The *Skelly* officer must then make recommendations to the governing board or other entity with the final authority to hire and fire.

THE *SKELLY* NOTICE AND *SKELLY* MEETING

When Does the Employer Provide the *Skelly* Notice, and What Information Should It Contain?

As above, before an employer discharges or otherwise deprives a public employee of a property right in employment, it must provide the employee with notice of the proposed disciplinary action, the reasons for it, a copy of the charges and materials on which the action is based, and the right to respond orally or in writing to the authority imposing the discipline.[19] The notice and copy of the charges and materials on which the action is based are commonly referred to as the "*Skelly* notice."

At a minimum, the *Skelly* notice should be in writing and should inform the employee of the following:

- the reasons for the proposed action;
- the specific facts and violations upon which the proposed action is taken;
- the effective dates of the proposed action;
- the employee's right to a pre-disciplinary meeting (*Skelly* meeting) before a *Skelly* officer;
- the employee's right to representation;
- the employee's right to respond orally or in writing within a certain number of days of the date of the written notification;
- the fact that failure to respond to the notice shall constitute a waiver of the due process appeal; and
- the employee's right to receive copies of written materials, reports, statements, and any other materials upon which the action is based.

The employer must provide the notice in a time and manner reasonably calculated to notify the employee of the charges and the opportunity to respond.[20]

What Documents Should the Employer Provide to the Employee?

An employee's *Skelly* rights are not synonymous with general discovery rights.[21] The "materials" referred to under *Skelly* do not include every document that an employer considers when determining whether to recommend disciplinary action. Before a *Skelly* meeting, an employee has a right to the following documents: (1) written notice of the proposed action; (2) a statement of the charges, including a description of each incident of misconduct and reference to each rule or regulation violated; and (3) materials providing the employee with "notice of the substance of the relevant supporting evidence."[22] An employer will have complied with *Skelly*

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[17] *Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486; but see *Walls v. Central Contra Costa Transit Authority* (N.D.Cal. 2010) 2010 U.S. Dist LEXIS 40596, in which the trial court found a "last chance" agreement constituted a knowing and voluntary waiver of the plaintiff's pre- and post-deprivation rights.

[18] *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 31 Cal.Rptr.3d 297.

[19] *Skelly, supra.*

[20] *California School Employees Assn. v. Livingston Union School Dist.* (2007) 149 Cal.App.4th 391, 56 Cal.Rptr.3d 923 (notice to school bus driver during summer with only five days to respond did not give employee a meaningful opportunity to refute charges).

[21] *Gilbert, supra*, 130 Cal.App.4th at p. 1280.

[22] *Ibid.*

requirements if it provides copies of all documents cited in the *Skelly* notice.

An employer should attach to the *Skelly* notice copies of memos of correction, letters of reprimand, copies of e-mail messages or other written communication documenting warnings and the employee's response, and any performance evaluations documenting the employee's deficiencies or misconduct. Unless a statute or rule requires it, an employer is not required to provide investigation reports, raw notes, or tape-recordings, or transcripts of witness interviews. The documents or materials attached to the *Skelly* notice statement of charges should support the charges and provide the employee with notice of the substance of the evidence on which the employer is relying.

What are the Qualifications of a *Skelly* Officer?

The employee has a right to respond to the charges "before a reasonable, impartial, uninvolved reviewer."[23] The *Skelly* officer is an individual who is authorized to recommend discipline effectively. Ideally, the *Skelly* officer should not be the person who made the initial recommendation for discipline or the employee's immediate supervisor because those individuals are likely not neutral concerning the issue of discipline. But this is not an absolute rule.[24]

What is the Usual Order of Events in the *Skelly* Meeting?

A *Skelly* meeting is an employee's opportunity to respond to charges before discipline. The *Skelly* officer should:

- start the meeting by stating that the conference is an informal meeting to hear the employee's response to the charges described in the *Skelly* notice;
- introduce the people present at the meeting to each other;
- limit the participation of any employee representative (representatives may observe and privately advise the employee; representatives do not ask questions or provide facts);
- explain the reason for the proposed action and the facts upon which the action is based (usually this will be a brief discussion regarding the charges in the *Skelly* notice);
- ask the employee to respond to each allegation;
- ask open-ended follow-up questions;
- take notes of the employee's response to the charges (if the officer tape-records the meeting, the employee likely will be entitled to a copy of the tapes);
- conclude the meeting by informing the employee of the timetable for the remainder of the process; and
- identify any documents provided by the employee.

Does the Employer Present at the *Skelly* Meeting All the Evidence that It Would Present in the Disciplinary Hearing?

The purpose of the *Skelly* meeting is to provide the employee with notice of the charges and an opportunity to respond informally to them.[25] As discussed above, an employer need not produce all the documents at the *Skelly* meeting that it might produce at a full evidentiary hearing. The employer need not produce the witnesses who support the charges at the Skelly meeting, and the employee is not entitled to cross-examine any witnesses.[26]

Does the Employee Present Evidence?

The employee does not present "evidence" within the meaning of the full evidentiary hearing, which comes after the discipline. Instead, the employee can provide an explanation for the actions at issue and may present additional documents that support their version of events. The *Skelly* officer may limit the introduction of evidence to evidence that is sufficiently material to affect the case's outcome.[27] The employee is not entitled to present witnesses.

[23] *Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 737, 50 Cal.Rptr. 475.
[24] See *Flippin v. Los Angeles City Bd. of Civil Service Comrs.* (2007) 148 Cal.App.4th 272, 55 Cal.Rptr.3d 458 (no rule prevents the person who initiated the disciplinary action from serving as the *Skelly* officer).
[25] *Gilbert* (2005), *supra.*
[26] See *Holmes v. Hallinan* (1998) 68 Cal.App.4th 1523, 81 Cal.Rptr.2d 174 (in context of at-will employee and the "liberty interest" hearing).
[27] *Gilbert v. Superior Ct.* (1987) 193 Cal.App.3d 161, 175, 238 Cal.Rptr. 220, 228.

What if the *Skelly* Officer Discovers an Additional Cause for Discipline During the Meeting?

Often during a *Skelly* meeting, new causes for discipline will become evident. For example, it may become apparent during a *Skelly* meeting that an employee is lying. If the employer wishes to include dishonesty as a reason for discipline and dishonesty was not included in the *Skelly* notice, the employee is entitled to a new notice and an opportunity to respond to the new charge.

May an Employee Refuse to Answer a Question Because the Answer Might Incriminate the Employee?

No. In *Spielbauer v. County of Santa Clara*, the California Supreme Court reaffirmed the right of public employers to require an employee truthfully to answer any question so long as the employer first gives the employee a "*Lybarger*" warning.[28] The employer is not required to offer formal immunity from criminal prosecution, except for firefighters, as discussed below.

A *Lybarger* warning informs the employee that:

- although the employee has the right to remain silent, the employee's silence will be deemed insubordinate and lead to administrative discipline; and
- any statement made to investigators under these circumstances will not and cannot be used against the employee in any subsequent criminal proceeding.[29]

If an employee continues to stand on a Fifth Amendment right to remain silent in the face of a *Lybarger* admonition, the employee risks disciplinary action for refusing to answer. If the employee agrees to answer questions after the *Lybarger* admonition, the employer can use the employee's answers for administrative purposes but not for criminal prosecution.

For firefighters covered by the Firefighters Procedural Bill of Rights Act, the coerced statements in "any subsequent civil proceeding" are barred except when: (1) the employing department seeks civil sanctions against any public safety officer; (2) the officer introduces the statement in a civil action arising out of disciplinary action; (3) the statement is used to impeach the officer's testimony; or (4) the officer is deceased.[30]

RIGHT TO REPRESENTATION DURING A *SKELLY* MEETING

Who has the Right to be Present at the *Skelly* Meeting other than the Employee?

Represented employees have a right to have an exclusive bargaining unit representative at a *Skelly* meeting. An employee organization's right to represent employees extends beyond the negotiations table to meetings between the employer and employee that could lead to discipline.[31] Accordingly, the right to representation attaches to investigative interviews and other meetings where the results might lead to disciplinary action.[32]

The right to representation is not dependent on the supervisor's intent for the meeting, but rather, it is the *employee's* reasonable belief on whether the meeting is disciplinary or investigatory in nature.[33] Should the employee reasonably believe that the meeting is for disciplinary purposes, the burden is on the employee to request representation, and the employer does not have to offer it.[34] However, once an employee affirmatively requests representation, the supervisor must stop the meeting or proceed at the risk that the meeting may be unlawful and that the product of the meeting could be expunged from the employment records.[35]

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[28] (2009) 45 Cal.4th 704, 725; *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 221 Cal.Rptr. 529; see also *TRW, Inc. v. Superior Ct.* (1994) 25 Cal.App.4th 1834, 31 Cal.Rptr.2d 460 (*Lybarger* principles apply to all California employees, not just police officers).

[29] *Lybarger, supra*, 40 Cal.3d at p. 829.

[30] Gov. Code, §§ 3303(f)(1)-(4).

[31] *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 113 Cal.Rptr. 461.

[32] *Capistrano Unified School District v. California School Employees and Its Capistrano Chapter 224* (2015) PERB Dec. No. 2440, 40 PERC ¶ 24.

[33] *Ibid.*

[34] *California Dept. of Forestry* (1988) PERB Dec. No. 690-S, 12 PERC ¶ 19122.

[35] *Capistrano Unified School Dist., supra.* PERB Dec. No. 2440. at 23.

An employee who requests representation is entitled to have an organization representative attend the meeting, but not necessarily a specific representative. An employee is not entitled to insist on a particular individual when that insistence would impair the employer's ability to proceed with the investigation.[36]

May an Attorney Be at the *Skelly* Meeting?

Yes. The representative at the meeting may be an attorney.

May a Union Representative Be at the *Skelly* Meeting?

The law specifically contemplates that the representative at the meeting will be a union representative if the employee wishes for a union representative to be present.[37] But a union does not have an independent right or duty to attend a *Skelly* meeting if an employee does not want union representation. The union's duty of fair representation does not extend to forums outside the collective bargaining agreement, such as non-contractual pre-termination hearings.

May the Employee Insist on more Than One Person Being Present?

No. An employee may not insist on having more than one representative present at the *Skelly* meeting.

May the Representative Answer for the Employee and Actively Participate in the Meeting?

No. The representative should not present any factual information but should serve as a witness to the meeting and an advisor to the employee. The *Skelly* officer should control the meeting and limit the representative's participation.

AFTER THE *SKELLY* MEETING

What is the Employee's Status while Awaiting the Results of the *Skelly* Process?

The employee's employment status does not change while awaiting the results of the *Skelly* process—the individual remains employed. But the individual may be placed on paid administrative leave or reassigned (without loss of pay) pending the completion of the *Skelly* process if it is determined to be in the employer's best interest to do so.

What is the *Skelly* Officer Required to do After the Completion of the Meeting?

The *Skelly* officer must notify the governing board, or entity with final hiring and firing authority, of their recommendations, orally or in writing.

Does the *Skelly* Officer Write a Summary of the Meeting Events?

Written recommendations are not required following a *Skelly* meeting. If the *Skelly* officer opts to make written recommendations, the writing should include the information described below.

How Detailed should a *Skelly* Officer's Written Recommendation be?

Suppose the *Skelly* officer chooses to write a written recommendation to the appointing authority. In that case, the officer should specify if they concur with the appointing authority's recommended discipline or if they believe the discipline should be modified or rescinded. The *Skelly* officer should also include the facts supporting their recommendations.

Does the Employee Receive a Copy of the *Skelly* Report?

If the *Skelly* officer elects to make written recommendations, the employee is not entitled to a copy. But if the employee appeals the discipline, the employee might be entitled to a copy of any written *Skelly* report.

[36] *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 4 Cal.Rptr.3d 629.
[37] See *Robinson v. State Personnel Bd.* (1979) 97 Cal.App.3d 994, 159 Cal.Rptr. 222.

If Additional Facts are Presented or Requests for Additional Investigations Made, Must There be a Continuance of the Meeting or a New *Skelly* Notice?

If an employer discovers during a *Skelly* meeting new grounds for discipline, such as dishonesty, the employee has a right to respond to those new charges. Consequently, the employer must prepare an amended *Skelly* notice and give the employee additional time to respond to the new charges.

However, suppose an employee presents additional facts relative to the existing charges in the original *Skelly* notice. If those facts are related to the same subject matter to which the employee previously responded, the employee is not entitled to a new *Skelly* notice or conference.[38]

RIGHTS OF AT-WILL EMPLOYEES

Are "At-Will" Employees Entitled to Any Hearing or Meeting Before the Imposition of Discipline?

At-will employees do not have a property interest in their position.

At-will employees do, however, have a "liberty interest." All public employees—including temporary, probationary, and permanent—have liberty interests in their employment.[39] This interest ensures that a public employee has the freedom to work without an unjustified label of infamy.

Right to Liberty Interest ("*Lubey*") Hearing

Public employees who have no pre-discipline or pre-removal due process rights because they may be terminated without cause are still entitled to a "liberty interest" or "name-clearing" hearing if their liberty interest in their reputation is involved.[40] For this right to apply, three elements must exist: (1) there must be a stigmatizing charge; (2) the employee must deny the charge; and (3) there must be public disclosure of the charge.[41]

Traditionally, courts have narrowly interpreted the meaning of a "stigmatizing charge." A liberty interest is found only when an employer makes a charge that might seriously damage an employee's standing in the community.[42] The right to a so-called *Lubey* Hearing may be based on a stigmatizing event.

In *Braswell v. Shoreline Fire Department*,[43] for example, the Ninth Circuit found a triable issue of fact existed concerning if the plaintiff had suffered a deprivation of his liberty interest when he was dismissed from his position and no longer allowed to practice "paramedicine." The plaintiff was a paramedic who operated under a physician's medical license, but when his employer terminated him for misbehavior, he lost his right to practice the specialty of paramedicine. He did, however, not lose his paramedic license, only his right to the special practice of paramedicine.

The Ninth Circuit in *Braswell* ultimately decided that the employee was entitled to a *Lubey* hearing, and in so doing, expanded on the requirement of a negative or "stigmatizing" charge needed to warrant a liberty hearing. The revocation of the paramedic's permission to practice the specialty of paramedicine amounted to a stigmatizing event that could warrant a *Lubey* hearing.

The type of hearing required depends on the circumstances of the case. The due process could be satisfied with an informal hearing before an employee's supervisors or other management representatives.[44] In one case, a court ruled that an employee had no right to an attorney or to cross-examine witnesses.[45] The employer must hold the hearing before termination.

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[38] *Caveness v. State Personnel Bd.* (1980) 113 Cal.App.3d 617, 170 Cal.Rptr. 54.
[39] *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340, 159 Cal.Rptr. 440.
[40] *Ibid*.
[41] *Ibid*.
[42] *Stretten v. Wadsworth Veterans Hospital* (9th Cir. 1976) 537 F.2d 361.
[43] (9th Cir. 2010) 622 F.3d 1099.
[44] *Murden v. County of Sacramento* (1984) 160 Cal.App.3d 302, 206 Cal.Rptr. 699.
[45] *Ibid*.

POST-DISCIPLINE APPEAL RIGHTS

What Appeal Rights do Public Employees have Following Notification of Discipline?

Most public employers establish appeal rights for employees with a property interest in their positions through collective bargaining agreements, policies, or civil service rules. In addition, statutes establish specific appeal procedures for state employees,[46] school district[47] and community college employees,[48] and public safety officers.[49] Due process concerns require employers to include good-cause requirements in administrative procedures for terminated employees if a fundamental vested right to continued employment exists.[50]

May an Employee Appeal Discipline Less Than a Termination?

Due process requires an appeal process to reduce pay, suspend without pay for more than five days, or demote an employee, but not for lesser forms of discipline where no property interest is at stake. A public entity's collective bargaining agreement or rules can allow employees to appeal to lesser forms of discipline. Most employers permit an employee to appeal a reduction in pay, suspension, or demotion, but not a letter of reprimand, evaluation, or lesser discipline.

What Documents Must a Public Employer Provide to an Employee in Connection with a Post-Discipline Appeal? Must the Employer Provide Written *Skelly* Reports or Investigation Reports?

An employee's discovery rights before arbitration are limited. In the absence of specific contractual provisions providing for discovery, employees who are appealing disciplinary action through arbitration under a collective bargaining agreement's grievance procedure must rely upon the disclosure requirements contained in the California Public Records Act ("CPRA"), the Meyers-Milias-Brown Act ("MMBA"), other collective bargaining statutes, or the employer's appeal procedures.[51] Employees, such as public school teachers or state employees, who appeal discipline according to statutory procedures may have specific discovery rights.[52] Similarly, local civil service rules may establish specific pre-hearing discovery rights.

POBRA Entitles Police Officer to Complete Memorandum Prepared by Investigator.

In *Davis v. County of Fresno*,[53] the County of Fresno dismissed a correctional officer based on findings of insubordination, discourteous treatment of a subordinate, and other misconduct. The Fresno Civil Service Commission upheld the officer's termination.

The officer then contended that the County had violated his due process rights by failing to provide him with a copy of all materials that it based the disciplinary action on before his *Skelly* hearing and before the commission's hearing. Specifically, the officer alleged that the County failed to provide the attachments to a memorandum that a special probation officer had prepared regarding the investigation into allegations of retaliation. The officer also contended that the County's failure to produce complete copies of the materials violated the Public Safety Officers Procedural Bill of Rights Act ("POBRA").

The court, however, found the memorandum constituted a "report made by an investigator" that the officer had a right to under POBRA. The court, in turn, concluded that the County had violated POBRA. The court did not reach the constitutional questions regarding due process, except to conclude that compliance with POBRA's procedural protections relating to document disclosure satisfies the procedural due

[46] Gov. Code, §§ 19570 et seq. (non-managerial) and 19590 et seq. (managerial).
[47] Ed. Code, §§ 44932 et seq. (certificated employees); Ed. Code, §§ 45113 et seq. (classified employees); Ed. Code, §§ 45304 et seq. (merit system district classified employees).
[48] Ed. Code, §§ 87660 et seq. (faculty); Ed. Code, § 88013 (classified).
[49] Gov. Code, §§ 3300 et seq.; Gov. Code, §§ 3250 et seq.
[50] *Hall-Villareal v. City of Fresno* (2011) 196 Cal.App.4th 24, 125 Cal.Rptr.3d 376 (good-cause exception for late-filed appeals challenging termination must be included in employers' administrative procedures).
[51] See Code Civ. Proc., § 12831.
[52] See, e.g., Ed. Code, § 44944 and Gov. Code, § 19574.1.
[53] (2018) 22 Cal.App.5th 1122.

process requirements that applied before the commission's hearing. Thus, the County should have provided the memorandum to the officer before the Commission appeal.

Discovery Rights under the CPRA

Any individual or organization may utilize the CPRA to obtain records from a public agency. Employees are entitled to review their personnel files but sometimes seek to obtain the personnel files of other employees or other agency records by filing a CPRA request.[54] The CPRA provides that public agencies must disclose public records unless the record is statutorily exempt from disclosure or the public interest in non-disclosure outweighs the public interest in disclosure.[55] The CPRA defines a "public record" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency."[56]

Government Code section 6254(c) exempts from disclosure several types of public records, including "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."[57] Although investigative reports and tape-recordings of witness interviews are not typically placed in an employee's personnel file, courts have applied the personnel file exemption more broadly to protect employee privacy even if the requested documents are not part of an employee's personnel file.[58] For example, to obtain tape-recordings of witness interviews obtained in an internal investigation, the requesting party would have to show that the need to have this information outweighed the privacy rights of the employee witnesses. In each case, the requesting party must provide legal justification for the release of any information that identifies individual employees.

[54] Gov. Code, §§ 6250 et seq.
[55] Gov. Code, § 6255.
[56] Gov. Code, § 6252(e).
[57] Gov. Code, § 6254(c).
[58] See *Department of the Air Force v. Rose* (1976) 425 U.S. 352, 96 S.Ct. 1592 (analyzing similar language of the federal Freedom of Information Act).

Discovery Rights under the MMBA's Duty to Bargain

Under the MMBA, public employers must provide information to the exclusive representative for purposes of representing the bargaining unit.[59] An employer's refusal to provide such information violates the duty to bargain in good faith unless the employer can show adequate reasons for its failure to provide the requested information.[60] Information requests pertaining to non-bargaining unit employees are not presumed relevant.[61] And if an employer questions the relevance of the information requested, the exclusive representative must give the employer an explanation.[62] There is no violation of the MMBA where an employer responds, and the union does not reassert or clarify its information request.[63]

Even if the requested information is relevant, an employer may refuse to provide information if the employer has legitimate countervailing interests. An employer need not provide information if a request is unduly burdensome[64] or seeks confidential information. And an employer need not provide information in a form more organized than its records.[65]

Whether an employer must provide the union with investigation reports and related materials about employee misconduct depends on the circumstances of the investigation. For example, in one case, the

[59] Gov. Code, § 3505 states, in relevant part: "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions and proposals, and endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year."
[60] *Stockton Unified School Dist.* (1980) PERB Dec. No. 143, 4 PERB ¶ 11189.
[61] *State of Cal. (Dept. of Consumer Affairs)* (2004) PERB Dec. No. 1711-S, 29 PERC 15.
[62] *San Bernardino City Unified School Dist.* (1998) PERB Dec. No. 1270, 22 PERC ¶ 29113.
[63] *Oakland Unified School Dist.* (1983) PERB Dec. No. 367, 8 PERC ¶ 15008.
[64] *State of Cal. (Dept. of Consumer Affairs), supra; Chula Vista City School Dist.* (1990) PERB Dec. No. 834, 14 PERC ¶ 21162.
[65] *State of Cal. (Depts. of Personnel Admin. and Transportation)* (1997) PERB Dec. No. 1227-S, 22 PERC ¶ 29007.

Public Employment Relations Board ("PERB") found that an employer was required to give a union an investigation report concerning allegations of a hostile work environment created by a supervisor. PERB concluded that the report was necessary and relevant to workplace safety and freedom from a hostile work environment, both of which were subjects within the scope of representation.[66]

In another case, PERB found that an employer was not required to provide an investigation report to a union because the report pertained to a supervisor outside the bargaining unit.[67] In the same proceeding, PERB found that another investigation report was also not discoverable. The employer conducted an investigation of alleged threats against an employee from an employee applicant. The union sought all information about the employer's investigation of the applicant's threats on behalf of the threatened employee and other bargaining unit members. The union claimed it wished to examine if the investigation was "thorough" and if the applicant represented a continuing threat to unit members. PERB balanced the applicant's right to privacy against the union's need for the information and found that the balancing weighed against disclosure of the investigative information.

Agencies Cannot Use Attorneys from the Same Law Firm as Advocate and Advisor in a Contested Administrative Matter.

Many agencies followed the practice of using two attorneys from the same law firm to serve as advocates and advisors, respectively, in an advisory arbitration. One attorney would advocate by presenting the employer's case to the trier of fact, and the other attorney would advise the final decision-maker regarding the agency's response to the arbitrator's award. Relying on the case of *Howitt v. Superior Court*,[68] agencies and their law firms understood that this practice was permissible so long as the law firm maintained an ethical wall between the two attorneys to bar communication about the matter and prevent access to each other's files and documents.

In *Sabey v. City of Pomona*,[69] the California Court of Appeal ruled that this practice violates the principles of due process when the two attorneys are in the same law firm. The City had terminated a police officer after an independent investigation found that he had engaged in misconduct. The officer appealed the termination and appeared at a disciplinary appeal hearing before an advisory arbitrator. The arbitrator determined that termination was not the appropriate remedy and recommended reinstatement. An attorney from a private law firm served as the City's advocate at the hearing. Because the arbitrator's decision was advisory, it was presented to the City Council, which had the authority to accept, reject, or modify the decision. Another attorney from the same law firm that represented the City at the hearing advised the City Council. The City Council rejected the arbitrator's decision and sustained the termination.

The police officer then challenged the City Council's decision by seeking a writ of mandate. The police officer argued that the use of attorneys from the same law firm as both advocate and advisor violated his due process rights. Although the trial court upheld the City Council's decision, the Court of Appeal reversed, noting that law firm attorneys have a fiduciary duty to each other as well as a duty to their clients. Even though the court did not find evidence of actual bias in the case at hand, the court ruled that serving "two masters" creates an unavoidable appearance of bias and unfairness.[70] As a result, agencies cannot use attorneys from the same private law firm to act as advisors and advocates in a contested matter.

[66] *State of Cal. (Dept. of Veterans Affairs)* (2004) PERB Dec. No. 1686-S, 28 PERC 250.
[67] *State of Cal. (Dept. of Consumer Affairs)* (2004) PERB Dec. No. SA-CE-1385-S, 28 PERC 98.
[68] (1992) 3 Cal.App.4th 1575.
[69] (2013) 215 Cal.App.4th 489.
[70] *Id.* at 457.

Agency Does Not Violate Due Process by Amending Charges Against a Terminated Employee During an Administrative Hearing or by Introducing Facts that May Be Time-Barred to Assess Appropriate Level of Discipline, Credibility, or Bias.

During the course of an administrative disciplinary proceeding, an agency may discover additional facts to support the pending disciplinary charges, or, after the issuance of the final notice of discipline, the employee may engage in further misconduct. In either instance, the agency may seek to amend the charges against the employee. Additionally, where an employee has a lengthy disciplinary history, to support the level of proposed discipline, the agency may seek to introduce evidence of prior misconduct, even though the misconduct occurred outside the applicable statute of limitations.

In *Thornbrough v. Western Placer Unified School District*,[71] the court ruled that these common practices do not violate an employee's due process rights. In *Thornbrough*, the District terminated an assistant director of maintenance, Michael Thornbrough, for multiple instances of misconduct, including insubordination, humiliating a female employee after being ordered to stay away from her, retaliation, and misuse of a school computer. Thornbrough administratively appealed the termination.

During the administrative appeal, the school district amended the charges against Thornbrough on three separate occasions. At the conclusion of the hearing, the hearing officer found in favor of the District and sustained the termination. Thornbrough filed a petition for writ of mandate seeking to overturn the termination. The trial court denied Thornbrough's petition, and Thornbrough again appealed.

On appeal, Thornbrough argued that the District's repeated amendments to the dismissal charges violated his rights to statutory notice under the education code and due process of law. The court affirmed the trial court's decision. It ruled that section 45113(c) of the Education Code does not prohibit amendments to the charges but simply provides the minimum time (five days) that an employer must give an employee to request a hearing. The court also ruled that the District's amendments to the disciplinary charges did not violate Thornbrough's due process rights because each time the District amended the charges, the parties stipulated to continue the hearing to allow Thornbrough to prepare for and respond to each amended charge.

Thornbrough also objected to the District's introduction of evidence relating to incidents outside the relevant statute of limitations in support of termination as the appropriate level of discipline. The court rejected Thornbrough's claim and ruled that once the District establishes a valid basis for disciplinary action, all relevant facts are admissible to assess the appropriate level of punishment. The court also noted that facts arising from time-barred incidents might also be relevant to assess credibility or bias.

Thornbrough further claimed that the hearing officer was biased because he had worked for school districts in the past and for a firm that represented school districts. However, Thornbrough did not raise the issue until the twelfth day of the hearing, even though the hearing officer's identity and professional background were available before the hearing commenced. The court affirmed the finding that there was nothing in the record to rebut the presumption that the hearing officer was reasonably impartial as required by due process. Furthermore, the court ruled that the mere prospect of future employment as a hearing officer in cases involving the District did not establish bias.

No Public Disclosure of Stigmatizing Charge Existed When City Placed Termination Letter Discussing Sexual Orientation Harassment in Employee's Personnel File Because California Public Records Act Generally Exempts Personnel Files From Disclosure.

In *Flanagan v. City of Richmond*,[72] the City terminated a police records specialist,

[71] (2013) 223 Cal.App.4th 169, 167 Cal.Rptr.3d 24.

[72] (N.D. Cal. 2015) WL 5964881, aff'd 692 F. App'x 490 (9th Cir. 2017).

Loudesia Flanagan, for: (1) discourteous and disrespectful treatment of a volunteer intern; (2) inappropriate comments and conduct regarding homosexuality; and (3) dishonesty during the administrative interview.

Flanagan received her *Skelly* notice informing her of the City's proposal to terminate her employment. The *Skelly* notice also notified Flanagan of her right to respond either orally or in writing and how to schedule a *Skelly* hearing, which she did. At the conclusion of the hearing, the hearing officer found in favor of the City and sustained the termination. The City terminated Flanagan's employment shortly after that and placed a copy of the termination letter in her personnel file. Neither Flanagan nor the City requested a "liberty interest" or "name-clearing" hearing regarding the basis for Flanagan's termination.

Flanagan filed a lawsuit against the City, alleging, among other things, that the City failed to provide her with a liberty interest hearing after accusing her of sexual orientation harassment. The crux of her argument was that publication existed because the City placed stigmatizing information (i.e., that the City terminated Flanagan for sexual orientation harassment) in her personnel file, which is subject to review when she applies for positions at other law agencies.

The City moved for summary judgment. It argued that no public disclosure of stigmatizing charges existed when it placed Flanagan's termination letter discussing sexual orientation harassment in her personnel file because the CaCPRA generally exempts personnel files from public disclosure. Thus, as the court ruled, there was no constitutionally protected liberty interest.

A *Skelly* Hearing is a "Flexible Concept."

In *Moody v. County of Santa Clara*,[73] the Santa Clara County terminated Don Moody from the position of public guardian for an alleged violation of the County's merit system rules.

In the notice of termination, the County informed Moody of his right to a *Skelly* hearing. The County advised him that the hearing was not a formal hearing allowing for an examination of witnesses, nor did he have a right to a court reporter or transcript of the proceedings. The County also advised that if Moody was not satisfied with the final action of the *Skelly* officer, he could appeal the decision to the Santa Clara County Personnel Board and have a public hearing in front of the Board.

Moody alleged that the County denied him adequate due process with the *Skelly* hearing because it was neither public nor evidentiary in nature. The court disagreed, finding that due process is a "flexible concept," and merely because the *Skelly* hearing was private and informal does not mean it provided an inadequate process. The court further noted that to the extent that sufficient process requires a public, evidentiary hearing, Moody had such a right to appeal the *Skelly* officer's decision to the Personnel Board.

New Developments 2021

COURT CASES

Disclosing Police Officer Records of Dishonesty was Protected Speech Subject to Anti-SLAPP Motion and Not Confidential

In *Collondrez v. City of Rio Vista*,[74] the Court of Appeal found that the City's disclosure of a former police officer's records of dishonesty in response to media outlets' requests under the CPRA was lawful.

In reaching its conclusion, the court used the definition of "sustained" as outlined in Penal Code section 832.8. It found that, where the officer appealed the police chief's notice of intent to discipline, had a *Skelly* hearing before a *Skelly* officer, and appealed that decision to arbitration but forewent arbitration to resign in place of termination, the *Skelly* officer's decision was a "sustained finding." Finally, in ruling on the City's anti-SLAPP motion, the court found that it should be granted because the disclosures constituted protected speech and the Penal

[73] (N.D. Cal.) 2018 WL 646686.

[74] (2021) 61 Cal.App.5th 1039.

Code required disclosing the information in his personnel file.

MOU Provision Allowing Purge of Negative Personnel Records After One Year Violated Public Policy.

In *Department of Human Resources v. International Union of Operating Engineers*,[75] the California Department of Human Resources had a MOU with the International Union of Operating Engineers regarding the terms and conditions of employment for certain state employees classified as "Bargaining Unit 12." The MOU provided that "materials of a negative nature" placed in an employee's personnel file could be purged after one year at an employee's request. An exception to this provision stated that it did not apply to "formal adverse actions" as defined in the Government Code or to material of a negative nature for which actions have occurred during the intervening one-year period.

In any event, an employee in Bargaining Unit 12 requested that the department purge negative material retained in his personnel file for more than one year. Some months later, the California Department of Water Resources ("DWR"), where the employee was employed, took formal disciplinary action against the employee referred to as a notice of adverse action ("NOAA"). The discipline imposed in the NOAA consisted of a one-year salary reduction. The NOAA was based on, and attached, copies of, counseling and corrective memoranda of a negative nature from several years past relating to the employee's job performance history at DWR.

After the employee appealed his discipline, the parties reached an agreement to settle the disciplinary action. However, during the settlement discussions, the union filed a grievance alleging the DWR violated the MOU by relying on documents that the department should have purged after one year. An arbitrator agreed, and the State appealed.

The Court of Appeal found that the arbitrator's interpretation that the MOU meant that the DWR could not use such documents to support the employee's adverse action was contrary to public policy. Specifically, public policy embodied in the constitutional merit principle applicable to all civil service employment. As the court explained, purging relevant records and information and preventing any subsequent use or consideration of them to support disciplinary action would undermine the State's constitutional duty to make a fair and fact-based evaluation of the employee's performance and decide on disciplinary action based on merit.

Probationary Employee on Administrative Duty During Investigation is Entitled to *Skelly* Rights.

In Trejo v. County of Los Angeles,[76] the Court of Appeal found that Los Angeles County Sheriff's Department could not unilaterally extend a sheriff's deputy's probation by reassigning him to administrative duties during a lengthy investigation into a use-of-force incident.

The court reasoned that the time the deputy spent on administrative duty fell under the definition of "actual service." It was the time the deputy spent in his administrative job that was not "time away," and he was not "absent from duty" because this job was still "a position." This meant that the deputy's transfer into a desk job did not "extend" his probation; it was just more time in another position that counted toward completion of his 12-month probation, which he did. As a result, the deputy became a permanent employee after his probation ended and was entitled to *Skelly* rights.

State Employer Can't Impose Harsher Penalties After Discipline Becomes Final.

In Chaplin v. State Personnel Board,[77] three firefighters arguing they were being demoted twice for the same conduct of cheating to get job promotions appealed a San Francisco Superior Court's order denying their petition for a writ of mandate. The State Personnel Board found the disciplinary actions issued by their employer, the California Department of Forestry and Fire Protection ("Cal Fire"),

[75] (2020) 58 Cal.App.5th 861.

[76] (2020) 50 Cal.App.5th 129.

[77] (2020) 54 Cal.App.5th 1104.

were warranted and denied the firefighters' motions to dismiss.

The Court of Appeal agreed with the firefighters that an employer could not withdraw final disciplinary action against employees and initiate new adverse actions. The court reasoned that the plain language of Government Code section 19575 could not be more precise: an appointing power's discipline is final where the employee does not appeal it within 30 calendar days. Therefore, the discipline against two of the firefighters became final after they did not appeal. As a result, their discipline was final; Cal Fire could not withdraw adverse action notices and serve them new and different notices.

However, the court's analysis differed for the third firefighter, who appealed the first notice of adverse action to the Board. His discipline was not final under section 19575 when Cal Fire served him with the new adverse action notice.

KEY ISSUES

- Employees may be entitled to a pre-deprivation hearing when employment is terminated due to lay off.
- Last chance agreements may be effective and allow employees to knowingly waive their rights to pre- and post-termination hearings outside of the education law context.
- Employers may limit an employee's pre-deprivation rights, but only when the post-deprivation process is adequate.
- An employee may be entitled to a name-clearing, liberty interest hearing ("*Lubey* hearing") in the event of a stigmatizing event, as opposed to only a stigmatizing charge.
- Good-cause exceptions must be read into administrative procedures where the fundamental vested right to continued employment is at issue.
- Employers may not use attorneys from the law firm to act as advisors and advocates in contested administrative matters.
- At-will employees are not entitled to due process or *Skelly* rights.
- Employers may amend disciplinary charges during an administrative hearing provided that they give the employee a reasonable opportunity to review and respond to the amended charges.
- During the course of an administrative hearing, once an employer has established a basis for disciplinary action, the employer may introduce facts that otherwise may be barred by the applicable statute of limitations to support an assessment of the appropriate level of discipline, credibility, and bias.
- No public disclosure of stigmatizing charges existed when a city placed a termination letter discussing sexual orientation harassment in an employee's official personnel file because California Public Records Act generally exempts personnel files from public disclosure.
- A *Skelly* hearing is a flexible concept, and a private and informal hearing does not violate an employee's due process rights.
- Employers cannot unilaterally extend probationary periods.
- Employer policies or MOU provisions that purge prior discipline for Civil Service employees should be reviewed to ensure they don't violate the merit principle in the California constitution.

Independent Contractors

SUMMARY OF THE LAW

Public employers should ensure that individual workers whom the law considers to be "employees" are not erroneously designated as "independent contractors." Misclassifying an employee as an independent contractor can create disputes and potential liability not only with the misclassified worker, but also with the Internal Revenue Service ("IRS"), the California Employment Development Department, the California Department of Labor Standard Enforcement, the California Public Employees' Retirement System, workers' compensation carriers, and the unions. In distinguishing between employees and independent contractors, California and most other states have traditionally followed one or more variants of the multi-factor "common law" test. Although this is still the rule for *some* aspects of employment law, in California this has been largely replaced with the so-called "ABC" test, under which anyone "providing labor or services for remuneration"[1] is presumed to be an employee unless the hirer demonstrates that all three very specific (and difficult to achieve) criteria are satisfied.[2] Under the ABC Test, a worker is *presumed* to be an employee unless the hiring entity can establish that:

(A) The person is free from the control and direction of the hiring entity in connection with the work, both under the contract for the performance of the work and in fact;

(B) The person performs work that is outside the usual course of the hiring entity's business; and

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[3]

While part "A" largely resembles the prior common law test, parts "B" and "C" constitute a major shift in the independent contractor analysis.

Liability for worker misclassification can include, among other things, minimum wage and overtime liability, state and federal employment taxes, penalties, and interest. In addition, failure to properly classify a worker as an employee can lead to liability with the California Public Employees' Retirement System ("CalPERS" or "PERS"), including unpaid contributions and administrative penalties.[4] Accordingly, misclassification can be costly for public agencies.

As of this writing, the complete consequences of the 2018 *Dynamex* case and subsequent legislation remain in flux. It appears, though, that the consequences continue to be greater in the private sector (particularly in California's growing gig economy) than in the public sector. However, all employers should remain alert for continued legislative, regulatory, and case law developments in this area.

APPLICABLE TESTS TO DETERMINE INDEPENDENT CONTRACTOR STATUS

The U.S. Supreme Court,[5] the IRS, and CalPERS still generally follow the common law rule for determining whether a worker is an employee or an independent contractor.[6]

[1] Lab. Code, § 2775(b)(1); an earlier formulation, part of the "employ" definition from the IWC Wage Orders, is "suffer or permit to work." E.g., Wage Order 4, Sec. 2(E).
[2] *Dynamex Operations West, Inc. v. Superior Ct.* (2018) 4 Cal.5th 903; AB 5 and AB 2257 (see "California's Legislative Response to *Dynamex*," below).
[3] Lab. Code, § 2775(b)(1)(A)-(C).
[4] Gov. Code, § 20283.
[5] *Nationwide Mutual Ins. Co. v. Darden ("Darden")* (1992) 503 U.S. 318, 323-324, 112 S.Ct. 1344, 1348.
[6] *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d. 341, 258 Cal.Rptr. 543.

Application of the common law rule can be complicated and depends heavily upon the unique facts of each case.

The IRS Tests

In 1987, the IRS issued what became known as the "20 factor test."[7] Subsequently, the IRS organized the common law factors into three main categories:[8]

1. Behavioral Control — whether the entity has the right to control the behavior of the worker;
2. Financial Control — whether the entity has financial control over the worker; and
3. Relationship of the Parties — how the entity and the worker see their relationship and how they present it to others.

All the facts and circumstances must be considered in deciding whether a worker is an independent contractor or an employee. No single factor is dispositive.[9] However, the primary consideration is whether the service recipient (*i.e.*, the public entity employer) has the right to direct and control the worker as to the manner and means of the worker's job performance. In other words, an employee can be directed not just as to *what* needs to be done, but *how* to do it. Treasury Regulations state that: "Generally [an employer-employee] relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so."[10]

Note that whether the service recipient actually exercises the right to control is generally irrelevant—what matters is that it has the right to do so.

Additional IRS Guidance

IRS Publication 15-A, Employer's Supplemental Tax Guide (2020) ("Pub. 15-A")[11]

[7] Rev. Rul. 87-41, 1987-1 C.B. 296. The 20 factors were:
1. Instructions. Is the worker required to comply with employer's instructions about when, where, and how to work?
2. Training. Is training required? Does the worker receive training from or at the direction of the employer, includes attending meetings and working with experienced employees?
3. Integration. Are the worker's services integrated with activities of the company? Does the success of the employer's business significantly depend upon the performance of services that the worker provides?
4. Services rendered personally. Is the worker required to perform the work personally?
5. Authority to hire, supervise and pay assistants. Does the worker have the ability to hire, supervise and pay assistants for the employer?
6. Continuing relationship. Does the worker have a continuing relationship with the employer?
7. Set hours of work. Is the worker required to follow set hours of work?
8. Full-time work required. Does the worker work full-time for the employer?
9. Place of work. Does the worker perform work on the employer's premises and use the company's office equipment?
10. Sequence of work. Does the worker perform work in a sequence set by the employer? Does the worker follow a set schedule?
11. Reporting obligations. Does the worker submit regular written or oral reports to the employer?
12. Method of payment. How does the worker receive payments? Are there payments of regular amounts at set intervals?
13. Payment of business and travel expenses. Does the worker receive payment for business and travel expenses?
14. Furnishing of tools and materials. Does the worker rely on the employer for tools and materials?
15. Investment. Has the worker made an investment in the facilities or equipment used to perform services?
16. Risk of loss. Is the payment made to the worker on a fixed basis regardless of profitability or loss?
17. Working for more than one company at a time. Does the worker only work for one employer at a time?
18. Availability of services to the general public. Are the services offered to the employer unavailable to the general public?
19. Right to discharge. Can the worker be fired by the employer?
20. Right to quit. Can the worker quit work at any time without liability?

[8] IRS Publication 15-A, Employer's Supplemental Tax Guide (April 3, 2009); IRS Publication 963, Federal-State Reference Guide (rev. November 2008).

[9] E.g., "Independent Contractor (Self-Employed) or Employee?" https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee (as of August 6, 2018) ("There is no 'magic' or set number of factors that 'makes' the worker an employee or an independent contractor, and no one factor stands alone in making this determination.")

[10] 26 C.F.R. § 31.3121(d)-1(c)(2).

[11] (Feb 17, 2021), https://www.irs.gov/pub/irs-pdf/p15a.pdf.

offers guidance to be used by the IRS in characterizing workers as independent contractors or employees. According to Pub. 15-A, the 20-factor test remains valid, and the general rule remains that an individual is an independent contractor if the hiring entity has the right to control or direct only the result of the work and not the means and methods of accomplishing the result. A worker will be deemed an employee if the hiring entity has the right to control what will be done, and how it will be done. According to the IRS, what matters is whether the hiring entity has the right to control the details of how the services are performed. Pub. 15-A also reminds employers it does not matter how the relationship is labeled. The substance of the relationship, not the label, governs the worker's status, and it does not matter whether the individual is employed full or part time.

In evaluating the employer-worker relationship, all information that provides evidence of the degree of control and the degree of independent must be considered. With respect to behavioral control, the IRS will focus on things such as the instructions that the hiring entity gives to the worker, like when and where to do the work, whose tools or equipment is used, whether specific duties are assigned to a specific worker, and training provided to the worker. The IRS notes that the amount of instruction may vary depending on the job. Even if no instruction is given, sufficient behavioral control may still exist if the employer has the right to control how the work results are achieved. The key consideration is whether the hiring entity has retained the right to control details of a worker's performance or instead has given up that right.

With respect to financial control, facts that show whether a hiring entity has a right to control the business aspects of the worker's job include the extent to which the worker has unreimbursed business expenses, the extent of the worker's investment, the extent to which the worker makes his or her services available to the relevant market, how the hiring entity pays the worker, and the extent to which the worker can realize a profit or loss.

With respect to the type of relationship, Pub. 15-A explains that facts demonstrating the type of relationship may include written contracts, whether the worker is provided with employee-type benefits, the permanency of the relationship, and the extent to which services performed by the worker are a key aspect of the regular business of the hiring entity.

California's Pre-*Dynamex* Common Law Test Focused on the "Right to Control"

The California "common law" test was established in the case of *S.G. Borello & Sons, Inc. v. Department of Industrial Relations.*[12] Although the *Dynamex* case and subsequent statutes have significantly reduced *Borello*'s importance, the case remains important as it establishes the independent contractor standards in many situations that the Legislature exempted from the ABC Test.[13]

In *Borello*, the California Supreme Court noted that "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired" and adopted its own multi-factored test. The "*Borello* factors" include: (1) whether the person performing work is engaged in an occupation or business that is distinct from that of the company; (2) whether the work is part of the company's regular business; (3) whether the company or the worker supplies the equipment, tools, and the place for the person doing the work; (4) the worker's financial investment in the equipment or materials required to perform the work; (5) the skill required in the particular occupation; (6) the kind of occupation, with reference to whether, in the locality, the work is usually done under the company's direction or by a specialist without supervision; (7) the worker's opportunity for profit or loss depending on his or her own managerial skill (a potential for profit does

[12] (1989) 48 Cal.3d 341 at 350 *(citations omitted)* and 353-355.

[13] E.g., for the relationships between various services providers and referral agencies (Lab. Code, § 2777(a)), with respect to various "professional services" providers (Lab. Code, § 2778(a)), with respect to various non-musician music industry personnel (Lab. Code, § 2780(a)(1), etc.).

not include bonuses); (8) how long the services are to be performed; (9) the degree of permanence of the working relationship; (10) the payment method, whether by time or by the job; and (11) whether the parties believe they are creating an employer/employee relationship.

However, in applying the test, the most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed.

A common theme of many post-*Borello* cases is the focus on the employer's right to control the worker. For example, in *Narayan v. EGL, Inc.*,[14] the Ninth Circuit reversed the trial court's decision to grant the company's motion for summary judgment and instead remanded the case for trial. In analyzing the independent contractor classification question, the Ninth Circuit created a shifting burden test similar to the test applied in discrimination cases. Once a plaintiff establishes a *prima facie* case that he or she is an employee, the burden shifts to the employer to prove that the person was an independent contractor. In this case, the Ninth Circuit concluded that an independent contractor agreement acknowledging independent contractor status was but one element in the equation and that there were sufficient indicia of employment in this case to defeat summary judgment. The Ninth Circuit further opined that summary judgment would rarely be appropriate in cases where employers claim that the plaintiffs were independent contractors, based on the numerous factors that must be considered in making the determination.

In *Narayan,* the Ninth Circuit also emphasized the considerable control that the employer exercised over its contracted drivers, even though the signed agreements provided that the "intention of the parties is to ... create a vendor/vendee relationship between the Contractor and EGL," and acknowledged that "neither Contractor nor any of its employees or agents shall be considered employees of EGL." The agreements also provided that the contracted drivers "shall exercise independent discretion and judgment to determine the method, manner and means of performance of its contractual obligations," although EGL retained the right to "issue reasonable and lawful instructions regarding the results to be accomplished." Among other things, the Court stated that the employer told drivers what deliveries to make, and when to arrive each day for work, and exercised control over their vacations as well as any passengers who might ride along with them. Further, the drivers did not appear to work for multiple clients, but rather worked exclusively for EGL. Moreover, EGL's own manuals informed the drivers that they had "the key role in the shipping process" and were EGL's "largest sales force"— representations that underscored their essential role in the regular business of EGL. And although the drivers owned their vehicles, they were required to attach EGL logos to them and to wear EGL uniforms.

In contrast, in *Murray v. Principal Financial Group,*[15] the Ninth Circuit ruled that a "career agent" who sold financial products and sued for sex discrimination under Title VII was an independent contractor, not an employee, in large part due to the company's lack of control over the worker. The Ninth Circuit adopted the common law agency test, applied by the U.S. Supreme Court in *Nationwide Mutual Insurance Co. v. Darden.*[16] The *Darden* test focuses on the hiring party's right to control the manner and means by which the product is accomplished. The relevant factors to this inquiry are: (1) the skill required; (2) the source of the individual's tools and instruments; (3) the location of the work; (4) the duration of the relationship between the hiring and hired parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party's discretion over when and how long to work; (7) the method of payment; (8) the hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the

[14] (9th Cir. 2010) 616 F.3d 895.
[15] (9th Cir. 2010) 613 F.3d 943.
[16] *Darden, supra.*

hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party.

Applying these factors, the Ninth Circuit found that Patricia Murray was an independent contractor for purposes of Title VII. She was free to operate her business as she saw fit, without day-to-day intrusions. Murray decided when and where to work, and in fact, maintained her own office, where she paid rent. She scheduled her own time off, and was not entitled to vacation or sick days. Also, she was paid on commission only, reported herself as self-employed to the IRS, and sold products other than those offered by Principal. The few factors which supported employee status – such as the provision of some benefits, a long term relationship with Principal, having an at-will contract, and being subject to certain minimum standards imposed by Principal – did not overcome the indications that Murray was an independent contractor.

It is important to remember that many facts about the parties' relationship are relevant to determining independent contractor status, and that no one factor is dispositive. In *Varisco v. Gateway Science and Engineering, Inc.*, an at-will employment provision in a written agreement did not mean a contract worker was a common law employee when all the other factors were considered and weighed.[17] Public agencies should ensure that their written agreements with contract workers help demonstrate the parties' mutual intent to create and preserve an independent contractor relationship and such agreements should always be reviewed by employment law counsel.

In 2014, a federal trial court issued its opinion in *Hennighan v. Insphere Insurance Solutions*[18] which demonstrates the fact-intensiveness of the common law independent contractor test. Thomas Hennighan was an insurance salesperson who signed an independent contractor agreement with Insphere and later sued for employment-related claims, including Labor Code violations, unlawful discharge, discrimination, and retaliation. In analyzing whether Hennighan was an employee or an independent contractor, the Court painstakingly evaluated numerous factors. Among those favoring his status as an independent contractor were that he signed a very clear and precise independent contractor agreement, was paid only commissions, developed and kept his own clients, set his own hours and schedule, kept his own office, paid his own taxes and expenses, provided his own equipment and supplies, earned no benefits, conducted business outside of his relationship with Insphere, paid for his own training, and reported only business income and deductions on his tax returns. Factors suggesting Hennighan was an employee included that he was required to attend weekly and annual meetings (under threat of termination of his contract), pressure to come to the Insphere office, that Insphere set production goals and conducted performance evaluations, and that Insphere expected Hennighan not to work for competitors at the same time.[19]

Applying the California common law factors, the Court focused primarily on Insphere's lack of control over Hennighan. In assessing the level of control, the Court noted that Insphere did not set his schedule and did not tell him when, where, or how often to work. Although he was required to attend meetings and report on his production levels, such was not sufficient evidence to establish an employment relationship.[20] Ultimately, the Court granted Insphere's motion for summary judgment and concluded, "Any control Insphere exercised over Hennighan was generally unrelated to the manner and means by which Hennighan accomplished his work and was directed more towards the results. An analysis of the amount of control exerted by Insphere and of the *Borello* factors showed that all the factors were either in Insphere's favor or neutral. Even if one or two of the individual factors might suggest an employment relationship, summary judgment is nevertheless proper when, as here, all the factors weighed and considered as a whole establish that [Hennighan] was an independent contractor

[17] (2009) 166 Cal.App.4th 1099, 83 Cal.Rptr.3d 393.
[18] (N.D.Cal. 2014) 38 F.Supp.3d 1083.
[19] *Id.* at 1090-1093.
[20] *Id.* at 1100-1102.

and not an employee."[21] Hennighan appealed the federal trial court's decision to the Ninth Circuit Court of Appeal, which affirmed the lower court's decision.[22]

The Ninth Circuit reached a different conclusion in *Ruiz v. Affinity Logistics Corporation*.[23] There, a class action was filed on behalf of drivers who alleged that they were improperly classified as independent contractors and were not paid sick leave, vacation, holiday, or severance wages. Although the drivers signed an independent contractor agreement, they were treated like employees. They were given a Procedures Manual that outlined procedures drivers were required to follow regarding loading trucks, delivering goods, installing goods, interacting with customers, reporting to Affinity after deliveries, and addressing returns and refused merchandise, damaged goods, and checking in with Affinity after deliveries. The Procedures Manual included mandatory language such as "must," "will report," "must contact," "required," "not acceptable," "100 percent adherence," and "exactly as specified."[24] Drivers regularly worked about five to seven days per week. An Affinity employee would call the drivers each day to tell them whether or not they were working the following day. Drivers had a fairly regular rate of pay since they worked five to seven shifts per week, and every route had approximately eight deliveries. Drivers had to request time off three to four weeks in advance, and Affinity had discretion to deny those requests. In fact, Affinity denied requests for time off when it decided the delivery schedule was too busy.[25]

Affinity also required drivers to stock their trucks with certain supplies, to use a certain type of mobile phone which it supplied to the drivers, and to have a second driver in the truck with them at all times. Drivers were required to report at a certain time, attend a daily meeting, given a manifest and route, told how many deliveries they were required to make, required to wear uniforms provided by Affinity, and required to check in after every delivery and provide regular updates throughout the day.[26] Focusing on the "right to control" element, the Ninth Circuit easily found that Affinity had the right to control the details of the drivers' work, including their rates, schedules, routes, equipment, and appearance, and also closely supervised and monitored the drivers.[27] Accordingly, the drivers were ruled to be employees, not independent contractors.

In 2014, the California Supreme Court issued its ruling in *Ayala v. Antelope Valley Newspapers, Inc.*[28] There, newspaper home delivery carriers brought a class action alleging that they were improperly classified as independent contractors and denied a host of protections set forth in the Labor Code. The Superior Court and Court of Appeal denied the motion for class certification. The question before the California Supreme Court was whether the delivery persons had sufficiently demonstrated that common questions predominated in order to proceed as a class action. The delivery persons contended that the employment relationship between the newspaper and delivery persons could be established through common proof, but the newspaper argued that there were individual variations in how the carriers performed their work.[29]

Noting that an employer-employee relationship turns foremost on the degree of a hirer's right to control how the end result is achieved, and that the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, the Supreme Court concluded that, at the certification stage, the relevant inquiry is not what degree of control Antelope Valley retained over the manner and means of its papers' delivery. It is, instead, a question one step further removed: Is Antelope Valley's right of control over its carriers, whether great or small, sufficiently uniform to permit class wide assessment? As to that question, the Court remanded the case to the trial court with instructions to consider

[21] *Id.* at 1098.
[22] (9th Cir. 2016) 650 Fed.Appx.500.
[23] (9th Cir. 2014) 754 F.3d 1093.
[24] *Id.* at 1097.
[25] *Id.*
[26] *Id.* at 1097-1099.
[27] *Id.* at 1101.
[28] (2014) 59 Cal.4th 522, 173 Cal.Rptr.3d 332.
[29] *Id.* at 529.

whether the individual variations were material, and if so, whether they could be managed through the class action procedure.[30]

The *Dynamex* Decision Established the ABC Test

In the 2018 *Dynamex Operations West, Inc. v. Superior Court* decision,[31] the California Supreme Court established a new test for determining whether a worker should be classified as an employee or independent contractor under California's wage orders. The wage orders regulate issues such as minimum wage, overtime compensation, and meal and rest periods. The Court rejected the multifactor *Borello* common law test that had been used to resolve worker classification issues in contexts such as pension, workers' compensation, unemployment insurance, and other employment rights for decades.[32] Instead, the Court adopted a strict three-part "ABC Test" that places the burden on the employer to establish a worker is properly classified as an independent contractor and not entitled to the protections of the wage orders. Notably, under the ABC Test, a worker who performs services that are part of the employer's "usual course of business" is protected under the wage orders as an employee.

The 2018 *Dynamex* Case

Dynamex is a nationwide package and document delivery company. After Dynamex restructured its operations and reclassified all of its drivers as independent contractors to generate cost savings, two of its drivers filed a class action lawsuit. They alleged that the company misclassified its drivers as independent contractors instead of employees under the wage order governing the transportation industry and the California Labor Code.[33]

California wage orders protect employees, not independent contractors. To address plaintiffs' claims, the Court had to determine the applicable standard and test for evaluating their status as employees or independent contractors. Dynamex argued for the application of the *Borello* common law standard. As previously noted, that test is a flexible, multifactor approach that focuses primarily on whether the hiring entity has a "right to control" the manner and means by which the worker performs the contracted service.[34] The *Borello* test has been used to make independent contractor determinations in a wide variety of contexts for over thirty years.[35] The plaintiffs argued that in addition to using the *Borello* test, the Court should apply two additional tests, including the standard known as "to suffer or permit to work." The "suffer or permit to work" standard is much broader and is intended to protect relationships beyond the reach of the common law.

The *Dynamex* Court adopted the "suffer or permit" standard.[36] Under that standard, if an employer requires or allows employees to work, they are employed and the time spent is probably hours worked. The Court adopted this standard to provide workers with the broadest possible protections so that "workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare."[37] The Court also sought to remove employers' economic incentives to misclassify workers in order to avoid costs associated with paying payroll taxes, etc. for employees.[38]

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[30] *Id.* at 540.
[31] (2018) 4 Cal.5th 903.
[32] *Borello,* 48 Cal.3d at 350.
[33] Industrial Welfare Com. Wage Order 9, Cal. Code Regs., Tit. 8, §§ 11090 et. seq.
[34] To assist in the determination, the *Borello* test also sets out a series of "secondary factors" to consider which include: whether the worker is engaged in a distinct occupation or business; whether the work is usually done under supervision; the skill required in the particular occupation; who supplies the instrumentalities, tools and location of work; the duration of the services; the method of payment; whether or not the work is part of the regular business of the hiring entity; and, the intent of the parties. *Borello,* 48 Cal.3d at 351.
[35] *Messenger Courier Assn. v. California Unempl. Ins. Appeals Bd.* (2009) 175 Cal.App.4th 1074, 1092 (unemployment insurance benefits); *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 512 (unemployment insurance); *McFarland v. Voorheis-Trindle* (1959) 52 Cal.2d 698 (workers' compensation); *Metropolitan Water Dist. v. Superior Ct.* (Cargill) (2004) 32 Cal.4th 491 (CalPERS benefits).
[36] *Dynamex, supra,* 4 Cal. 5th at 916, 943 (emphasis added).
[37] *Id.* at 952.
[38] *Ibid*.

The ABC Test

After adopting the "suffer or permit to work" standard, the Court next had to establish a workable test to govern the determination.[39] The Court adopted the ABC Test as enacted by the State of Massachusetts, after concluding it is the most structured, provides the broadest coverage, and removes the possibility for manipulation to which the more flexible tests such as the *Borello* common law are susceptible.[40]

Under the ABC Test, the hiring entity — not the worker — must establish that a worker is an independent contractor under the wage order. To properly classify the worker as an independent contractor, the hiring entity must prove *each* of the following three conditions:

1. that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and,
2. that the worker performs work that is outside the usual course of the hiring entity's business; and,
3. that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[41]

Applying the ABC Test

Part A "free from the control and direction"

Part A requires the hiring entity to establish that the worker is free from the direction and control of the hirer in performance of the work, both under contract and in fact. This requirement appears to closely mirror the *Borello* test, with the focus on whether the hiring entity retained or exercised the "right to control" the manner and means by which the workers perform the services.

Part B "work that is outside the usual course of...business"

Part B has raised the most concerns for employers. Courts must consider the usual course of business for which the worker has been retained and assess the worker's role in the overall operation. If the worker performs a function that is directly tied to the heart of the operation, the service will be deemed to constitute a regular and integrated portion of the employer's business. This part would thus weigh in favor of a finding of employee status.

To explain this part of the ABC Test, the *Dynamex* Court provided examples of fairly straightforward transactions. For example, the Court explained that when a retail store hires a plumber to a repair a leak, the services are not within the retail store's usual operation. Conversely, when a bakery hires cake decorators to work on custom designed cakes on a regular basis the workers are part of the bakery's usual operations.[42]

The use of independent contractors to perform any service that is part of the employer's usual course of business carries a high degree of risk of misclassification. In order to pass muster under this general guidance, an employer must clearly establish the contract for service is one that is unrelated to the employer's usual course of business. The employer can do so by identifying the specialized nature of the service, its purpose and anticipated duration. If the service is ongoing and relates to a core function, a literal application of the ABC Test may result in the classification of the worker as an employee.

Part C "independently established trade, occupation, or business"

This inquiry focuses on the usual or customary trade, occupation, profession, or business of the person retained to perform services for the employer. The employer must show that the worker is engaged in an enterprise that exists and can continue to exist upon termination of the relationship. In other words, the worker must be well-established in a business for his or herself, as evidenced by incorporation, licensure, advertisements, own office, business card, and offers to provide services to many potential customers.

[39] *Id.* at 946.
[40] *Id.* at 954-955, 957, fn. 23.
[41] *Id.* at 956, 964.
[42] *Id.* at 959-960.

CALIFORNIA'S LEGISLATIVE RESPONSE TO *DYNAMEX*

AB 5, AB 2257, and New Labor Code Sections 2775 through 2787

On September 18, 2019, Governor Newsom signed into law AB 5, which generally took effect on January 1, 2020.[43] AB 5 confirmed—in some cases expanding and in other cases narrowing—significant changes to California's employee vs. independent contractor law. As of this writing, AB 5 has already been extensively revised, with the principal provisions "recast" by AB 2257 which was signed by Governor Newsom on September 4, 2020 as urgency legislation to become effective immediately.[44]

Legislation proposed in December 2020 (AB 25) seeks to repeal new Labor Code sections 2775 *et seq.* and restore the common law *Borello* test. AB 25 has been referred to the Assembly Committee on Labor and Employment, where it remains under review.[45]

Further changes remain possible, and multiple legal challenges to AB 5 and related subsequent legislation remain underway. Readers are therefore cautioned to not rely on any summary as final and to always seek the most current information available.

As it stands currently, Labor Code sections 2775 *et seq.* (which codified AB 5 and AB 2257)[46] accomplished several things:

First, Labor Code sections 2775 *et seq.* specifically adopted the *Dynamex* "ABC" test[47] for employee classification under the Labor Code—which includes both "regular" employer-employee matters (such as wage and hour laws, paycheck requirements, workers compensation insurance requirements, etc.)—and the Unemployment Insurance Code (unless some other statutory exemption or definition of employee applies)[48] as well as the Wage Orders. Therefore, as a basic principle, AB 5 and its amendments are broader than the *Dynamex* case.

Second, Labor Code sections 2775 *et seq.* created a class of exceptions for which the determination of employment status will continue to be determined under the California common law *Borello* standards. In this sense, the new statutes are narrower than *Dynamex* (and potentially some Wage Orders). The exceptions list is extremely detailed, and has already been amended twice.[49] Future amendments or repeal efforts, or at least attempted amendments or repeal efforts, continue.

Third, the California Attorney General, and the City Attorneys or District Attorneys in certain large cities with populations greater than 750,000 and certain others (*e.g.,* Los Angeles, San Diego, San Jose, and San Francisco), were specifically authorized to file lawsuits to prevent continued misclassification of employees as independent contractors.[50] For example, the Attorney General (joined by the Los Angeles, San Diego, San Jose, and San Francisco City

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[43] AB 5 was initially codified at Labor Code § 2750.3.

[44] Stats 2020 (Ch. 38) (AB 2257); see Sec. 8 for urgency status. Certain items were also amended by Stats 2020 (Ch. 341) (AB 323). AB2775 and AB 323 are codified at Labor Code §§ 2775-2787.

[45] leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB25.

[46] Unless otherwise indicated, all statutory references are to the Labor Code as amended during the 2019-2020 regular session, including AB 2257 and AB 323. See fn 44, *infra*.

[47] "For purposes of this code and the Unemployment Insurance Code, and for the purposes of the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied: [¶] (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. [¶] (B) The person performs work that is outside the usual course of the hiring entity's business. [¶] (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." Lab. Code, § 2775(b)(1).

[48] Lab. Code, § 2785(b).

[49] See fn 44, *infra*.

[50] Lab. Code, § 2786.

Attorneys) sued Uber and Lyft,[51] and San Diego sued Instacart.[52]

Fourth, they sought to definitively answer the retroactivity issue (see "Does *Dynamex* Have Retroactive Application?" below) by stating that the basic ABC Test "does not constitute a change in, but is declaratory of, existing law."[53] The full implications of this language have not yet been determined.

In sum, employers should continue to be alert for changes as legal, political, and legislative assaults on AB 5 and its progeny continue.

The Current Exemption List

As of this writing,[54] the legislatively-established exceptions to the ABC Test—i.e., the relationships where the employee vs. independent contractor will be determined under the *Borello standard*—are:

1. Bona fide business-to-business contracting relationships (see below).[55]
2. The relationship between a referral agency and certain service providers (see below),[56] but excluding high hazard industries and janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, and construction services other than minor home repair.[57]
3. The following so-called "professional services" providers:[58]
   (a) Certain marketing professionals,[59] human resources administrators[60] and travel agents;[61]
   (b) Graphic designers,[62] grant writers and fine artists;[63]
   (c) Enrolled IRS agents[64] and payment processing agents;[65]
   (d) Certain still photographers, photojournalists, and photo editors to digital content aggregators (but ***not*** individuals working on motion pictures, including without limitation theatrical and commercial productions, broadcast news television, and music videos);[66]
   (e) Certain freelance writers, translators, editors, copy editors, illustrators, and newspaper cartoonists;[67]

[51] As of this writing: (i) on August 10, 2020, a San Francisco Superior Court Judge ruled there was an "overwhelming likelihood" that Uber and Lyft had misclassified drivers as independent contractors, and ordered them to reclassify them within 10 days; (ii) Uber and Lyft publically threatened to withdraw from California if the order remained in effect; (iii) the California Court of Appeal temporarily stayed the Superior Court order, (iv) the Court of Appeal then affirmed the Superior Court's Order (*People v. Uber Technologies, Inc*. (2020) 56 Cal.App.5 266), (vi) Proposition 22 to establish new rules for what the Proposition referred to as "app. based drivers" was adopted by the California voters on November 3 2020 ballot, (vii) the California Supreme Court denied review on February 10, 2021. As for the status of Proposition 22, see "California Voters Approved Pro-Independent Contractor Initiative Changes Advocated By App-Based Transportation And Delivery Companies; Long-Term Future Of The Adopted Initiative Is Uncertain," below.

[52] "The city of San Diego obtained a preliminary injunction Tuesday against grocery delivery company Instacart, in the wake of a judge's ruling that the company misclassified its employees as independent contractors." "*San Diego City Attorney Candidate Cory Briggs on InstaCart injunction and AB 5* (posted February 26, 2020) https://www.kusi.com/san-diego-city-attorney-candidate-cory-briggs-on-instacart-injunction-and-ab-5/ (downloaded March 16, 2020). Primarily in light of the intervening passage of Proposition 22, the injunction was reversed in an unpublished opinion, *People v. Maplebear, Inc.* (Ct. App. February 17, 2021 D077380) 2021 WL 612567. The current status of the case is not known.

[53] At least "with regard to wage orders of the Industrial Welfare Commission and violations of [the Labor Code] relating to wage orders." Lab. Code, § 2785(c).

[54] See fn 44, *infra*.

[55] Lab. Code, § 2776.

[56] Lab. Code, § 2777. The statute includes a long, *non*-exclusive list of potentially applicable service providers: "graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, minor home repair, moving, errands, furniture assembly, animal services, dog walking, dog grooming, picture hanging, pool cleaning, yard cleanup, and interpreting services." Lab. Code, § 2777(b)(2)(B). The statute also contains specific definitions of tutor, youth sports coaching, interpreting services, consulting and animal services. *Id.* at § 2777(b)(5-9).

[57] Lab. Code, § 2777(b)(2)(C);6.

[58] Lab. Code, § 2778.

[59] Lab. Code, § 2778(b)(2)(A).

[60] Lab. Code, § 2778(b)(2)(B).

[61] Lab. Code, § 2778(b)(2)(C).

[62] Lab. Code, § 2778(b)(2)(D).

[63] Lab. Code, § 2778(b)(2)(F) ("'fine artist' means an individual who creates works of art to be appreciated primarily or solely for their imaginative, aesthetic, or intellectual content, including drawings, paintings, sculptures, mosaics, works of calligraphy, works of graphic art, crafts, or mixed media").

[64] Lab. Code, § 2778(b)(2)(G).

[65] Lab. Code, § 2778(b)(2)(H).

[66] Lab. Code, § 2778(b)(2)(I). Among other things, AB 2257 eliminated AB 5's 35 submissions per year limitation in this category. *Id.*

[67] Lab. Code, § 2778(b)(2)(J). Among other things, AB 2257 eliminated AB 5's 35 submissions per year limitation applicable to some of the workers in this category. *Id.*

(f) Certain individual content contributors, advisors, producers, narrators, and cartographers for a journal, book, periodical, evaluation, other publication or educational, academic, or instructional work in any format or media;[68]
(g) Certain licensed estheticians, electrologists, manicurists (but only until January 1, 2022), barbers and cosmetologists;[69]
(h) Specialized performers hired by a performing arts company or organization to teach certain "master classes" no longer than one week;[70]
(i) Real estate appraisers licensed under the Business & Professions Code;[71]
(j) Registered professional foresters; and[72]
(k) Certain real estate licensees,[73] home inspectors[74] and repossession agencies.[75]

4. Certain relationships between two individuals (including individuals acting as a separate business entity) pursuant to a contract for purposes of providing services at the location of a single-engagement event, excluding high hazard industries and janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, and construction services other than minor home repair.[76]
5. The following so-called "occupations:"
   (a) Licensed insurance agents and persons providing or a person who provides underwriting inspections, premium audits, risk management, or loss control work for the insurance and financial service industries;[77]
   (b) Physicians and surgeons, dentists, podiatrists, psychologists, and veterinarians performing professional or medical services provided to or by a health care entity;[78]
   (c) Licensed lawyers, architects, landscape architects, engineers, private investigators and accountants;[79]
   (d) Registered securities broker-dealers, investment advisers, and direct sales salespersons;[80]
   (e) Manufactured housing salespeople licensed under the Health & Safety Code;[81]
   (f) Certain commercial fishers working on American vessels;[82]
   (g) Certain newspaper distributors and carriers (but only until January 1, 2022 unless otherwise extended by the legislature);[83]
   (h) Certain individuals engaged by US Department of State-designated international and cultural exchange programs;[84] and
   (i) Certain competition judges, including amateur umpires and referees.[85]
6. Certain individuals performing motor club services.[86]
7. Individuals ***other than*** musicians engaged to render creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions,[87] and specifically excluding film and television unit

[68] Lab. Code, § 2778(b)(2)(K).
[69] Lab. Code, § 2778(b)(2)(L).
[70] Lab. Code, § 2778(b)(2)(M).
[71] Lab. Code, § 2778(b)(2)(N).
[72] Lab. Code, § 2778(b)(2)(O).
[73] Lab. Code, § 2778(c)(1). *[Statute erroneously refers to (b)]*
[74] Lab. Code, § 2778(c)(2). *[Statute erroneously refers to "b"]*.
[75] Lab. Code, § 2778(c)(3). *[Statute erroneously refers to "b"]*.
[76] Lab. Code, § 2779.
[77] Lab. Code, § 2783(a).
[78] Lab. Code, § 2783(b).
[79] Lab. Code, § 2783(c).
[80] Lab. Code, §§ 2783(d) and (e).
[81] Lab. Code, § 2783(f)
[82] Lab. Code, § 2783(g).
[83] Lab. Code, § 2783(h).
[84] Lab. Code, § 2783(i).
[85] Lab. Code, § 2783(j).
[86] Lab. Code, § 2784.
[87] The persons specifically identified in the statute include: (A) certain recording artists; (B) songwriters, lyricists, composers, and proofers; (C) managers of recording artists; (D) record producers and directors; (E) musical engineers and mixers engaged in the creation of sound recordings; (F) certain musicians engaged in the creation of sound recordings; (G) certain vocalists; (H) photographers working on recording photo shoots, album covers, and other press and publicity purposes; and (I) independent radio promoters. Lab. Code, § 2780(a)(1)(A)-(I).

production crews[88] and publicists who are not independent music publicists.[89] If any present or future collective bargaining agreement applies, it will control.[90]

8. Musicians and musical groups for the purpose of a single-engagement live performance event, but excluding (i) theme parks and amusement parks, (ii) performance in a musical theater production, (iii) if the musical group is an event headliner for a performance in a venue location with more than 1,500 attendees, and (iv) if performances at a festival that sells more than 18,000 tickets per day.[91]
9. Certain individual performance artists performing original creative material.[92]
10. Certain construction subcontractors licensed under the Business & Professions Code, and certain construction truckers.[93]
11. Data aggregators and individuals providing feedback to data aggregators.[94]

Several pending pieces of legislation seek to further amend and revise these statutes, so the full scope of impacted professions is not fully settled.

Specific Requirements

Many of the above categories and subcategories have significant additional restrictions, the failure of which to follow will result in the ABC Test applying. For example:

- "Professional services" providers must: (i) maintain a business location (may be a residence) separate from the hiring entity; (ii) in addition to any required professional license, must have a business license or business tax registration if required by the applicable jurisdiction; (iii) have the ability to set or negotiate their own rates; (iv) outside of project completion dates and reasonable business hours, have the ability to set their own hours; (v) be customarily engaged in the same type of work or hold themselves out to other potential customers as available to perform the same type of work; and (vi) customarily and regularly exercise discretion and independent judgment.[95]
- Estheticians, electrologists, manicurist, barbers, and licensed cosmetologists must: (i) set their own rates, process their own payments, and are paid directly by clients; (ii) set their own hours of work and have sole discretion to decide the number of clients and which clients for whom they will provide services; (iii) have their own book of business and schedules their own appointments; (iv) maintain their own business license for the services offered to clients; and (v) if the individual is performing services at the location of the hiring entity, then the individual issues a Form 1099 to the salon or business owner from which they rent their business space.[96]
- To satisfy the business-to-business contracting relationships exemption—where a "business service provider" (either an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation)[97] provides services to another such business or to a public agency or quasi-public corporation ("contracting business")[98]—the contracting business must demonstrate that: (i) the business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (ii) the business service provider is providing services directly to the contracting business rather than to customers of the contracting business (unless the business service provider's employees are solely performing the

[88] Lab. Code, § 2780(a)(2)(A).
[89] Lab. Code, § 2780(a)(2)(B).
[90] Lab. Code, § 2780(a)(3).
[91] Lab. Code, § 2780(b).
[92] Lab. Code, § 2780(c). The statute indicates that this category includes, but is not limited to, performing comedy, improvisation, stage magic, illusion, mime, spoken word, storytelling, and puppetry; excludes theatrical production, and musicians and musical groups; and is subject to any current or future collective bargaining agreement. *Id.*
[93] Lab. Code, § 2781.
[94] Lab. Code, § 2782.
[95] Lab. Code, §§ 2778(a)(1)-(6).
[96] Lab. Code, §§ 2778(b)(2)(L)(i) – (vi).
[97] Lab. Code, § 2776(a).
[98] Lab. Code, § 2776(a).

services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses); (iii) the contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services; (iv) the business service provider must have a business license or business tax registration if required by the applicable jurisdiction; (v) the business service provider must maintain a business location (may be a residence) separate from the contracting business's business or work location; (v) the business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed; (vii) the business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity; (viii) the business service provider advertises and holds itself out to the public as available to provide the same or similar services; (ix) consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any necessary proprietary materials; (x) the business service provider can negotiate its own rates; (xi) consistent with the nature of the work, the business service provider can set its own hours and location of work; and (xii) the business service provider is not performing the type of work for which a California contractor's license is required.[99]

- To satisfy the referral agency to service provider exemption, the service provider must: (i) be free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact; (ii) certify to the referral agency that it maintains a business license or business tax registration if required by the applicable jurisdiction (and the referral agency must keep the certification for at least three years); (iii) have the required state contractor's license if otherwise required by the work; (iv) certify to the referral agency that it has the required state-administered or recognized professional license, permit, certification if otherwise required by the work (and the referral agency must keep the certification for at least three years); (v) deliver services to the client under the service provider's name, without being required to deliver them under the referral agency's name; (vi) provide its own tools and supplies to perform the services; (vii) be customarily engaged, or be previously engaged, in an independently established business or trade of the same nature as, or related to, the work performed; (viii) the referral agency does not restrict the service provider from maintaining a clientele and the service provider is free to seek work elsewhere, including through a competing referral agency; (ix) set their own hours and terms of work or negotiate their hours and terms of work directly with the client; (x) without deduction by the referral agency, set their own rates, negotiate their rates with the client through the referral agency, negotiate rates directly with the client, or be free to accept or reject rates set by the client; and (xi) be free to accept or reject clients and contracts, without being penalized in any form by the referral agency (other than following failure to fulfill any contractual obligations).

Specific Business-to-Business Contracting Relationships Applicable to Public Entities

From the public entity perspective, the AB 2257 business-to-business contracting relationships exemption encompasses at least two significant changes from the comparable AB 5 provision:

First, the definition of an eligible "contracting business" which can hire business service providers specifically ***includes*** governments.[100] It is therefore clear that governments can obtain whatever benefits this exemption provides.

[99] Lab. Code, §§ 2776(a)(1)-(12).

[100] Lab. Code, § 2776(a).

Second, in some cases, the business service provider may provide services directly to ***customers*** of the contracting business, rather than just to the contracting business itself. The requirements are strict (only when the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses),[101] and it is not yet known whether this exemption will be workable. Nevertheless, if it does work, it could provide, for example, a way for a City to obtain part-time parks and recreation department instructors, summer camp coaches, etc.—who perform services to members of the public rather than to the City itself—without making them City employees.

Potential Public Agency Use of "Special Services" Rules

Public agencies have the express authority to contract for specialized services, regardless of whether they relate to a core function. Government Code section 53060 provides that, "[t]he legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained, experienced and competent to perform the special services required."[102] While some of these special services matters are covered in the new legislation, others are not. Whether the special services statutes will give public agencies greater flexibility than privatecompanies in this area remains unknown, as no cases have been decided under section 53060 since the passage of AB 5 and related legislation.

The ABC Test Applies Beyond the Wage Orders

While the *Dynamex* court expressly limited its application of the ABC Test to the analysis of the "suffer or permit to work test" under the wage orders,[103] AB 5 and AB 2257 expanded the ABC Test to apply to provisions of the Labor Code and Unemployment Insurance Code, as well as the wage orders.[104]

Additionally, the Labor Commissioner's legal counsel issued an opinion on May 3, 2019 indicating that determinations of employee status for "waiting time" penalties under Labor Code section 203 should be governed by the ABC Test, as should claims for expense reimbursements covered in the Wage Orders under Labor Code section 2802.[105]

Dynamex Has Retroactive Application

The *Dynamex* court did not expressly address the issue of whether the decision applied retroactively. In the wake of the *Dynamex* decision, some employers have maintained that the ABC Test was a new mandatory test that should not be applied retroactively, as it would violate due process. Further, they argued, courts and administrative agencies followed the *Borello* multifactor test for more than three decades, and private businesses and public agencies have relied on the *Borello* common law standard in structuring their business and service models. On the other hand, employee advocates asserted that the decision merely clarified existing law and therefore should apply retroactively.

On June 20, 2018, the California Supreme Court denied a petition for rehearing solely on the issue of whether the Court's adoption of the ABC Test should apply retroactively.[106] One trial court presented with the issue of retroactivity explicitly ruled in favor of the employee,[107] and at least one Court of Appeal

[101] Lab. Code, § 2776(a)(1-12).
[102] See also Gov. Code, § 37103 which authorizes general law cities to "contract with any specially trained and experienced person, firm, or corporation for special services and advice in" the same categories.
[103] *Dynamex, supra,* 3 Cal.5th at 916.
[104] Lab. Code, § 2775(a).
[105] Opinion Letter dated May 3, 2019 "Application of the 'ABC' test to Claims Under the Wage Orders," Chung, Christina, Special Counsel to California Labor Commissioner, to Dana Hall, Directing Attorney, Employment Rights Project, Bet Tzedek Legal Services.
[106] Tulis, B., *The California Supreme Court to Decide Dynamex Retroactivity,* The National Law Review (December 3, 2019) https://www.natlawreview.com/article/california-supreme-court-to-decide-dynamex-retroactivity (retrieved September 23, 2020).
[107] In ruling on the issue of retroactivity, the trial court reasoned that (i) the case did not specifically say it should be applied only prospectively, (ii) the Supreme Court's denial of a specific request to modify *Dynamex* to say it would be applied only prospectively, and (iii) "the general rule that judicial decisions are given retroactive effect." *Johnson v. VCG-IS, LLC* (Orange County Superior Ct. July

concluded that *Dynamex* should be retroactively applied to pending litigation.[108]

Likewise, the Ninth Circuit ruled that under standard California legal principles, *Dynamex* should be applied retroactively, but subsequently withdrew its previously-published opinion, and then certified the retroactivity question to the California Supreme Court.[109]

AB 5 and AB 2257 sought to answer this question, with the new statutes expressly stating that application was intended to be retroactive as to existing claims and actions and that it "does not constitute a change in, but is declaratory of, existing law."[110]

This question was definiitely answered in *Vazquez v. Jan-Pro Franchising International*,[111] where the California Supreme Court decided that that Dynamex should be applied retroactively, because it "addressed an area of first impression" and "did not change a settled rule I which the parties ... had relied."

CHANGES TO INDEPENDENT CONTRACTOR TEST SPURRED LITIGATION THROUGHOUT CALIFORNIA

After AB 5 took effect on January 1, 2020, the new legislation fueled litigation across the State, with mixed results. As of this writing, these efforts have had mixed results.

For example, one case was a challenge brought by the trucking industry, which for decades relied on an owner-operator model to move goods through interstate commerce, resulted in a published decision.[112]

On April 16, 2020 a class action complaint was filed against Uber on behalf of drivers seeking damages for various labor code violations, such as paid sick leave, failure to provide itemized wage statements, and business expense reimbursements.[113] On July 28, 2020, the federal Northern District of California certified a class of medical and pharmaceutical sales associates claiming misclassification as independent contractors, noting that the predominance of common issues related to a single ABC factor would support class certification.[114]

In one case against the County of Los Angeles, Dr. Torang Sepah, a board certified psychiatrist working as an independent contractor at a detention center sued the County, alleging that it terminated its working arrangement with her due to certain whistleblowing activities. At trial, the County argued that, as an independent contractor, Dr. Sepah could be summarily dismissed. Before submitting the case to the jury, both parties submitted proposed instructions related to her employment status. Dr. Sepah's proposed instruction drew upon the definitions used in California's wage order for professional, technical, clerical, mechanical, and similar occupations. The County based its instruction on FEHA-related case law addressing the difference between employees and independent contractors, and argued an instruction in its preferred form was consistent with *Borello*. Over Sepah's objection, the trial court instructed the jury with the County's proposed instruction.

The jury ruled against Dr. Sepah without reaching the substantive merits of her claims. The first question on the special verdict form asked: "Was the County of Los Angeles Torang Sepah's employer?" The jury answered "No."

On appeal, Dr. Sepah challenged whether the jury had been properly instructed on the definition of "employer" and "employee." Dr. Sepah argued that the jury should have been instructed to determine employee status using the ABC Test, as had been recently

18, 2018), Case No. 30-2015-00802813-CU-CR-CXC Ruling on Motion in Limine (quoting *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978).

[108] *Gonzales v. San Gabriel Transit, Inc.* (2019) 50 Cal.App.5th 1131 (rev. granted Jan. 15, 2020).

[109] *Vazquez v. Jan-Pro Franchising Internat., Inc.* (9th Cir. 2019) 923 F.3d 575, *op. withdr.* July 22, 2019, WL 3271969; (9th Cir 2019) 939 F.3d 1045 (certifying retroactivity question to California Supreme Court).

[110] At least "with regard to wage orders of the Industrial Welfare Commission and violations of this code relating to wage orders." Lab. Code, § 2785(a).

[111] (2020) 10 Cal.5th 944, 948.

[112] *See California Trucking Assn. v. Becerra* (S.D. Cal. 2020) 438 F.Supp.3d 1139 (granting preliminary injunctive relief from enforcement of Labor Code § 2750.3 against any motor carrier operating in California for duration of the litigation), *reversed* by *California Trucking Assn. v. Bonta* (Ninth Cir. Cal. 2021) 996 F.3d 644.

[113] *Colopy v. Uber Technologies, Inc.,* N.D. Cal., Case No. 3:19-CV-06462.

[114] *Karl v. Zimmer Biomet Holdings, Inc.* (N.D. Cal. 2020) 2020 WL 4340172.

adopted in *Dynamex*. In an unpublished opinion, the Court of Appeal disagreed, noting that *Dynamex* does not hold, or even suggest, that the ABC Test is applicable to non-wage order-related claims like her Labor Code whistleblower retaliation claim. The Court also indicated in a footnote that a similar argument about applying the ABC Test under Labor Code section 2750.3 would have likewise been meritless.[115]

LAWSUITS ATTEMPTED TO HALT ENFORCEMENT OF THE NEW INDEPENDENT CONTRACTOR LAWS

On December 30, 2019, Uber and Postmates filed suit against the State of California in federal court seeking a preliminary injunction to enjoin enforcement of AB 5 to their businesses. More than 300,000 drivers make deliveries through the Postmates app, and more than 395,000 drivers provide ride-sharing services through the Uber rides app. Uber and Postmates asserted multiple constitutional challenges to the new law, each of which was rejected by the court. The federal trial court ultimately denied the request for a preliminary injunction against application of AB 5.[116] In the spring of 2020, Uber and Postmates appealed the denial of their injunction request to the Ninth Circuit.[117] Oral arguments were held in November 2020, just after the passage of Proposition 22. As of this writing, the Ninth Circuit has not issued a decision.

In another case filed on May 5, 2020 in San Francisco County Superior Court by the California Attorney General against Uber and Lyft, the State sought to enforce AB 5 against the ride-sharing companies.[118] On June 25, 2020, the State moved for a preliminary injunction enjoining defendants from classifying their drivers as independent contractors. In response, Uber and Lyft filed motions to compel arbitration, dismiss and strike the complaint, and to stay the litigation until the Ninth Circuit rules on pending constitutional challenges to AB 5 in the *Olson* case, and/or after Proposition 22 was decided by voters on November 3, 2020. However, on August 10, 2020, the trial court squarely rejected each of Uber's and Lyft's requests and ordered the companies to reclassify the drivers as employees within ten days.[119]

Uber and Lyft appealed the trial court decision. In that published decision in October 2020, the California Court of Appeal concluded that the trial court did not commit legal error in issuing the State's requested injunctive relief, confirming that the companies were in fact a "hiring entity" subject to the ABC Test.[120]

OPEN ISSUES FOLLOWING *DYNAMEX* AND RELATED LEGISLATION

Competing Definitions Under Different Statutory Schemes

The *Dynamex* decision and subsequent legislation do not change the definition of independent contractor under federal law, which governs who is an employee for purposes of Social Security and payroll taxes. Indeed, the *Dynamex* court specifically recognized that a worker may qualify as an employee under one statute but not another.[121] Thus, workers may still be subject to other common law tests or other statutory definitions of "employee" for other purposes, such as CalPERS regulations and the Public Employees Retirement Law ("PERL").

Does the ABC Test Apply To Joint Employment Relationships?

Joint employer relationships arise when an employer uses staffing agencies, management companies, and consulting firms to supply workers to perform specific services. The worker is subject to the control of both the outside firm and the employer: the outside firm is responsible for all of the administrative functions, including payment of salary, benefits, and payroll taxes, and both entities are responsible for ensuring that the worker receives proper employment

[115] *Sepah v. County of Los Angeles*, 2020 WL 1038078.
[116] *Olson v. State of Cal.* (C.D. Cal. 2020) 2020 WL 905572.
[117] *Olson v. State of Cal.*, U.S. Court of Appeals for the Ninth Circuit, Case No. 20-55267.
[118] *People v. Uber Technologies, Inc. and Lyft, Inc.*, San Francisco County Superior Court Case No. CGC-584402.
[119] *Id.*, Order on People's Motion for Preliminary Injunction and Related Motions, dated August 10, 2020.
[120] *People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5 266. The Supreme Court declined to grant a rehearing in February 10, 2021.
[121] *Dynamex, supra,* 4 Cal.5th at 948.

protections.[122] Such relationships are common in the public sector.

An entity may be considered a joint employer under the Labor Code if it (i) exercises control over the hours, wages, or working conditions; (ii) it "suffers" or "permits" the work"; or (iii) it "engages" with the worker, thereby creating a common law employment relationship.[123]

The *Dynamex* court and subsequent legislation do not address whether the ABC Test applies within the context of a joint employment relationship. Such relationships are common in the public sector.

However, just a few days before the *Dynamex* decision was issued in 2018, in *Curry v. Equilon Enterprises*, an appellate court found that the ABC Test does not apply in the joint employment context because "taxes are being paid and the worker has employment protections."[124] Another appellate court had a similar ruling in 2019 in *Henderson v. Equilon Enterprises*.[125] The *Henderson* court considered both the policy reasons underpinning *Dynamex* and the "absurd and unintended result" from a literal application of parts B and C of the ABC Test, neither of which supported extending *Dynamex* to joint employment cases. The *Henderson* court concluded that the standard from *Martinez* still governs, and that the burden of establishing an employment relationship remains with the employee.

Similarly, the Ninth Circuit agreed that *Dynamex* was inapposite to employees seeking to impose joint employer liability on a franchisor.[126] According to the Ninth Circuit, *Dynamex* had no bearing "because no party argues that Plaintiffs are independent contractors. Plaintiffs are Hayne's employees; the relevant question is whether they are also McDonald's' employees."[127]

Following these cases, employers may be able to contract out functions that are part of their core business, so long as they do so with a third party entity that serves as the primary employer, rather than contracting directly with the individuals.[128] Such contractual arrangements ensure that the worker receives the protections of California's labor and employment laws and that the appropriate payroll taxes are paid. By clearly articulating the primary employer's responsibilities towards the workers in the contracts, employers may be able to reduce the risk of misclassification under the "usual course of business" part of the ABC Test. However, as joint employers, both entities remain responsible for ensuring that the worker receives proper employment protections (such as a safe workplace and a workplace free from harassment or discrimination).[129] And the joint employment defense does *not* seem to apply to claims by workers who are deemed common law employees of public agencies for CalPERS pension benefits. (See *"Special Issues With CalPERS Benefits"* below.)

How Do California Wage Orders Apply to California Public Agencies?

Although the *Dynamex* decision was perceived as a direct blow to the "gig economy" and a direct attack on new business models that are based on independent contractor relationship that have driven the growth of companies such as *Uber, Lyft,* and *GrubHub,* the direct impact on California public agencies was initially thought to be more limited. That is because not all of the wage order provisions apply to public agencies,[130] and generally, provisions of the Labor Code do not apply to public

[122] *In-Home Supportive Services v. Workers' Compensation App. Bd.* (1984) 152 Cal.App.3d 720, 732. See also *Cargill, supra*, 32 Cal.4th at 506.
[123] *Martinez v. Combs* (2010) 49 Cal.4th 35, 64.
[124] 23 Cal.App.5th 289, 313-314 (*Curry*).
[125] (2019) 40 Cal.App.5th 1111.
[126] *Salazar v. McDonalds Corp.* (9th Cir. 2019) 944 F.3d 1024.
[127] *Salazar, supra,* at 1032.
[128] Note, however, that employees of third parties must be enrolled in CalPERS if they qualify as the City's employees under the common law control test. *Cargill and Cambria Community Services Dist., supra.*
[129] Whether a business is a joint employer of a particular worker is evaluated individually, and not in relation to the worker's connection to another employer. See *Jiminez v. U.S. Continental Marketing, Inc.* (2019) 41 Cal.App.5th 189 (finding a direct employee of staffing agency to also be an employee of contracting employer for claims arising under the FEHA).
[130] See, e.g., Clear As Mud: California Wage and Hour Laws in the Public Sector, The Authority, CalJPIA, Issue 50, April 2016.

employees unless they specifically say they do.[131]

For example, Wage Order 4 is most applicable to public sector employees.[132] It addresses wages, hours, and working conditions in "Professional Technical, Clerical, Mechanical and Similar Occupations." While the minimum wage provisions of Wage Order 4 do apply to public entities,[133] Wage Order 4 specifies that the following provisions do *not* apply to public agencies: daily overtime and double pay; meal and rest periods; reporting time pay; and, uniforms and equipment, among others. Daily overtime, meal and rest breaks, and failure to comply with reporting time pay provisions are among the most common claims in wage and hour litigation,[134] and were not directly affected by *Dynamex*.

However, to the extent that at least some requirements of the wage orders do apply to public entities, public employers could face misclassification challenges and application of the ABC Test to those requirements. In such a case, Part A (the worker is free from the control and direction of the hiring entity) is likely already familiar to public employers who have previously applied the control test from *Borello*. More problematic is Part B (the worker performs work that it outside the usual course of the hiring entity's business). Commonly, public employers hire consultants or temporary workers to perform the work of an absent direct employee or work that otherwise falls squarely within their own operations. The *Dynamex* court offered some examples: a retail store hiring a plumber to repair a leak is outside the usual course of business but a bakery hiring cake decorators is not outside the usual course.[135] Thus, under the ABC Test, a Planning Department utilizing a consultant or contractor to perform overflow planning work similar to that of its own employees is likely to run afoul of this element. With respect to Part C (the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed), the hiring entity would be required to show that the worker is engaged in some enterprise that exists and would continue to exist upon termination of the relationship with the hiring entity.

In sum, it will continue to be important for public sector employers to monitor legal and legislative updates to the changing landscape as new issues arise and are addressed.

Responding to *Dynamex* and Subsequent Legislation

California employers should anticipate a continued general focus on worker misclassification issues. To minimize the risk of employee misclassification under the wage orders and other employment laws, employers would be wise to review of all of its contingent worker relationships in order to (1) proactively identify potential compliance issues; (2) modify contracting practices to minimize potential risks; (3) implement effective control and monitoring mechanisms; and, (4) establish a record of good faith compliance efforts. And particularly when hiring public agency retirees, public employers should consider consulting with CalPERS in advance.

[131] *Stoetzl v. Department of Human Resources* (2019 7 Cal.5th 718, 752; *Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729 (Labor Code §§ 510 and 512 governing overtime and meal breaks do not apply to public employees because such employees not specifically mentioned in statute) cf. Lab. Code, § 220(b) – expressly excluding employees of any county, incorporated city, or town or other municipal corporation from protections of Labor Code §§ 200-211.

[132] 8 Cal. Code Regs., § 11040(1)(B).

[133] *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289 (minimum wage provisions of Wage Order 4-2001 apply to public employers because wage order explicitly provides so); *Marquez v. City of Long Beach* (2019) 32 Cal.App.5th 552 (extending application to charter cities).

[134] However, the Wage Order also specifies that provisions relating to determining whether an employee is exempt or non-exempt, minimum wage, and various definitions that impact rate of pay **do** apply to public agencies. Those provisions include: the test for exempt/non-exempt status; definitions for key terms, including "hours worked" and "primarily" which are key in evaluating an employee's entitlement to payment at an overtime rate under California law; minimum wage; meals and lodging; and, penalties.

[135] *Dynamex, supra,* at 959-960.

ONGOING TRENDS AND ISSUES REGARDING INDEPENDENT CONTRACTORS

Federal Government Input on the Employee vs. Independent Contractor Debate

Although their practical effect in California was limited, two Trump administration opinions took a different approach in analyzing the employee vs. independent contractor issue.

First, the NLRB's Office of the General Counsel issued an Advice Memorandum determining that UberX and UberBLACK drivers were independent contractors rather than employees, resulting in the dismissal of several NLRB Regional charges against Uber for alleged unlawful driver terminations, and unlawful assistance to or unlawful domination of a labor organization representing certain Uber drivers.[136] The opinion focused on the drivers' purported "entrepreneurial opportunity" and concluded:

> "Drivers' virtually complete control of their cars, work schedules, and log-in locations, together with their freedom to work for competitors of Uber, provided them with significant entrepreneurial opportunity. On any given day, at any free moment, UberX drivers could decide how best to serve their economic objectives: by fulfilling ride requests through the App, working for a competing ride-share service, or pursuing a different venture altogether. The surge pricing and other financial incentives Uber utilized to meet rider demand not only reflect Uber's "hands off" approach, they also constituted a further entrepreneurial opportunity for drivers."[137]

Second, the U.S. Department of Labor's Wage and Hour Division issued an opinion letter[138] determining that workers for an unidentified company—which seemed something like TaskRabbit—were independent contractors for FLSA purposes.

In this highly political area, perhaps the only certainty is that these decisions are not likely to be the federal government's final positions. With legal misclassification disputes emerging across the country, and a presidential election looming, employers should anticipate further developments at the federal level.

With the transition to the Biden administration in 2021, things have changed again at the federal level. The Department of Labor ("DOL") has now reverted to the multi-factor "economic realities" test. See New Developments – 2021, below.

Independent Contractors Have Increasing Rights Under Civil Rights Laws That Protect Employees.

Historically, independent contractors were unable to sue under many civil rights statutes that protect employees. For example, in *Barnhart v. New York Life Insurance Co.*,[139] Thomas Barnhart, an insurance agent who operated as an independent contractor, could not pursue either a wrongful discharge claim under the Age Discrimination in Employment Act ("ADEA") or an Employee Retirement Income Security Act ("ERISA") claim. The Ninth Circuit reflected that under the ADEA and ERISA, a claimant must establish that he or she is an "employee." Both the ADEA and ERISA define an "employee" as "any individual employed as an employee." To determine whether Mr. Barnhart was an employee, the Court relied on the multifactor, common law test expressed in *Nationwide Mutual Insurance Co. v. Darden.*[140] The *Darden* factors are similar to the common law factors listed above. Because only some of the *Darden* factors applied to Mr. Barnhart, the Ninth Circuit concluded that he was an independent contractor and prohibited his claims. Similarly, in *Lopez v. Johnson*,[141]

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[136] *Subject: Uber Technologies, Inc. Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483*, dated April 16, 2019, but not released until approximately May 14, 2019. For release date, see Wiessner, Daniel, of Reuters "Uber drivers are contractors, not employees, U.S. labor agency says" May 14, 2019 and available at https://www.reuters.com/article/us-uber-contractors/uber-drivers-are-contractors-not-employees-us-labor-agency-says-idUSKCN1SK2FY.

[137] *Id.*

[138] *FLSA 2019-6*, April 29, 2019.

[139] (9th Cir. 1998) 141 F.3d 1310.

[140] *Darden, supra*.

[141] (9th Cir. 2003) 333 F.3d 959.

Bernard Lopez, who worked on federal government property providing computer services to a government agency, asked the government to accommodate his mobility disability under section 501 of the Rehabilitation Act[142] by providing transportation from the main gate to his work location. Mr. Lopez worked for a private firm that contracted with the government to provide the services. The Ninth Circuit determined that Mr. Lopez should not be considered a government employee for the purpose of providing reasonable accommodation because the government did not retain control over the terms and conditions under which Mr. Lopez accomplished his work. Instead, Mr. Lopez's private employer hired, trained, and paid Mr. Lopez and supervised his work.

The plaintiff in *Sistare-Meyer v. Young Men's Christian Association*[143] faced a similar hurdle. In that case, an independent contractor could not sue her employer for wrongful termination in violation of the public policy against race discrimination. A dance instructor hired as an independent contractor at a Los Angeles YMCA alleged that the YMCA terminated her because she is Caucasian. She claimed that this violated the public policy in the California Constitution, article I, section 8, which states that "a person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color or national or ethnic origin."

An appeals court considered this claim and framed the question before it as whether the plaintiff could state a claim for wrongful discharge in violation of public policy under *Tameny v. Atlantic Richfield Co.*[144] In *Tameny*, the California Supreme Court established that employees may bring a tort claim when their discharge contravenes a fundamental public policy. That policy must, however, be clearly delineated in either constitutional or statutory provisions.

The Court in *Sistare-Meyer* opined that, "Neither section 8 nor the body of law concerning independent contractors clearly favor the public interest in curbing discrimination over the existing social benefits attached to the independent contractor-hiring party relationship." The Court determined that the uncertainties concerning the balance of competing public interests barred it from finding that the policy asserted by section 8 supports a *Tameny* claim. The Court said that the Legislature is better suited to decide the issue, and that California's Constitution permits an action for wrongful termination in violation of public policy claim only where an employer-employee relationship exists. Contrasting with these court decisions are the state statutory prohibitions on harassing independent contractors and a 1997 Equal Employment Opportunity Commission ("EEOC") Guidance.

Although state law does not prohibit *discrimination* against independent contractors, the California Fair Employment and Housing Act ("FEHA") specifically prohibits *harassment* of "person[s] providing services pursuant to a contract," on any of the numerous bases described in the Act.[145] For purposes of this law, "a person providing services pursuant to a contract" means a person who:

- has the right to control the performance of the contract for services and discretion as to the manner of performance; and
- is customarily engaged in an independently established business; and
- has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.[146]

Further, a comprehensive new set of FEHA regulations went effect on April 1, 2016. With respect to harassment under the FEHA, the regulations confirm: "For all purposes related to the Act's protections of individuals from unlawful harassment, the term "employee" shall include unpaid interns, volunteers, and

[142] 29 U.S.C. § 791.
[143] (1997) 58 Cal.App.4th 10, 67 Cal.Rptr.2d 840.
[144] (1980) 27 Cal.3d 167, 164 Cal.Rptr. 839.
[145] Gov. Code, § 12940(j)(1); see, also, *Bradley v. California Dept. of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1612, 71 Cal.Rptr.3d 222.
[146] Gov. Code, § 12940(j)(5).

persons providing services pursuant to a contract."[147]

The California Court of Appeal also has reminded employers that they can be held liable for harassment claims brought by independent contractors. In *Hirst v. City of Oceanside*,[148] the plaintiff was an employee of American Forensic Nurses, Inc., which provided on-call services to the City's Police Department pursuant to a contract with the City. While performing work pursuant to this contract, the plaintiff, Kimberli Hirst, was sexually harassed by a City employee. She eventually sued the City under the FEHA which offers protections not just for regular employees and applicants, but also for "a person providing services pursuant to a contract." A "person providing services pursuant to a contract" often has been interpreted as meaning an independent contractor. The Court of Appeal concluded that the plaintiff had standing to bring her FEHA claims against the City.

Reflective of the ever-expanding definition of "employee," effective January 1, 2016, Labor Code section 2754 mandates that California-based professional minor and major league sports teams using cheerleaders during its exhibitions, events, or games must classify such cheerleaders as "employees" rather than "independent contractors," even if the cheerleader is provided through a labor contractor.

The EEOC's Guidance addresses applying Title VII, the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), and the Equal Pay Act ("EPA") to individuals placed in job assignments by temporary agencies and other staffing firms.[149] The EEOC calls these individuals "contingent workers." This term includes workers who are outside an employer's "core" work force, such as those whose jobs are structured to last only a limited period of time, are sporadic, or differ in any way from full-time long-term employment. The EEOC's guidance uses the phrase "staffing firm" to describe the temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with clients.

The EEOC's Guidance clarifies that anti-discrimination statutes generally cover contingent workers because the workers typically qualify as "employees" of the staffing firms, the clients to whom they are assigned, or both. Staffing firms and the clients to whom they assign workers may not discriminate against the workers on the basis of race, color, religion, sex, national origin, age, or disability. In many cases, both the staffing firm and the contracting client will be considered a temporary worker's "employers." If both the staffing firm and its client have the right to control the worker, and each has the statutory minimum number of employees, they are covered as "joint employers."

The Guidance also requires a staffing firm to hire and make job assignments in a nondiscriminatory manner. The client must treat the contingent worker assigned to it in a nondiscriminatory manner, and the staffing firm must take immediate and appropriate corrective action if it learns that the client has discriminated against one of the contingent workers. The Guidance also explains that staffing firms and their clients are responsible for ensuring that workers are paid wages on a nondiscriminatory basis.

Finally, the Guidance describes how remedies are allocated between a staffing firm and its client when the EEOC finds that both have engaged in unlawful discrimination. In assessing remedies against the staffing firm or the client, the EEOC advises that back pay, front pay, and compensatory and punitive damages can be obtained. Punitive damages under Title VII and the ADA and liquidated damages under the ADEA are individually assessed against both the staffing firm and its client according to each party's degree of maliciousness or reckless misconduct.

Independent Contractors and the "Gig Economy"

Well before *Dynamex*, several cases in California and elsewhere—involving

[147] Cal. Code Regs., tit. 2, § 11019(b)(1).
[148] (2015) 236 Cal.App.4th 774, 187 Cal.Rptr.3d 119.
[149] *EEOC Policy Guidance on Application of Civil Rights EEO Laws to Contingent Workers* (12/3/97), EEOC Notice Number 915.002.

companies such as Uber, Lyft, and GrubHub[150]—raised significant questions regarding whether workers in what has been called the "on-demand" or "gig" economy[151] are employees or independent contractors. Although some states enacted specific legislation or regulations to define some gig workers as independent contractors,[152] California left the issue to the courts, which ultimately resulted in the *Dynamex* decision, and later AB 5 and AB 2257, and which ultimately has led to the massive fight between Uber, Lyft, and other on-demand ride-share and delivery services and those seeking classification of their drivers as independent contractors, or as something other than employees.

Although California gig economy companies had some success in their fight for independent contractor classification prior to *Dynamex*, much of their success came from utilizing procedural hurdles, such as requiring disputes to be handled individually through private arbitration, rather than as class actions in courts. For example, two pre-*Dynamex* administrative decisions – from the California Labor Commissioner in 2015[153] and the California Unemployment Insurance Appeals Board in 2016[154]- determined that the Uber drivers at issue were employees, not independent contractors. In June 2015, the California Labor Commissioner relied on the *Borello* factors[155] to determine that a driver for Uber is an employee, not an independent contractor. The Commissioner concluded that Uber is "involved in every aspect of the operation," despite the arguments by Uber touting driver autonomy. The Commissioner also noted that Uber controls the tools the drivers use, monitors their approval ratings, maintains quality control procedures, conducts background and DMV checks, pays drivers a non-negotiable service fee, and terminates drivers' access to the system if their customer ratings fall below a certain threshold.[156]

On the other hand, at least one private arbitrator, also applying the *Borello* factors, determined that the subject worker was an

[150] For GrubHub, see A. Alahi, *"Grubhub delivery drivers sue over contractor status"* Chicago Tribune June 29, 2016 (http://www.chicagotribune.com/bluesky /originals/ct-grubhub-lawsuit-worker-misclassification-bsi-20160629-story.html).

[151] As of this writing, there is no universally accepted definition of the "gig economy" or even a "gig." Examples include "a gig describes a single project or task for which a worker is hired, often through a digital marketplace, to work on demand." E. Torpey and A. Hogan, *"Working in a gig economy" U.S. Dept. of Labor, Bureau of Labor Statistics, Career Outlook May 2016."* (http://www.bls.gov/ careeroutlook/2016/article/what-is-the-gig-economy.htm); "[a] gig economy is an environment in which temporary positions are common and organizations contract with independent workers for short-term engagements." Whatsit.com (http://whatis.techtarget.com/definition/gig-economy).

[152] For example, one report claims that in 2015-2016 23 states adopted laws creating special rules for so-called "transportation network companies" such as Uber. See *"The On-Demand Economy & State Labor Protections"* issued by the National Employment Law Project, January 2017, available at https://www.nelp.org/wp-content/uploads/On-Demand-Economy-State-Labor-Protections.pdf.

[153] *Berwick v. Uber Technologies, Inc.* (2015) DLSE Case No. 11-46739 EK, Order Decision, or Award of the Labor Commissioner, 2015 WL 4153765 (CA. Dept. Lab.).

[154] Decision of the Cal. Unemployment Ins. App. Bd., Inglewood Office of Appeals, Case. No. 5371509, dated 4/06/2014, Decision mailed 06/01/2016.

[155] The Commissioner summarized the *Borello* factors as follows: "[w]hether the person performing services is engaged in an occupation or business distinct from that of the principal; [¶][w]hether or not the work is a part of the regular business of the principal or alleged employer; [¶][w]hether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work; the alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers; [¶][w]hether the service rendered requires a special skill; [¶][t]he kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; [¶][t]he alleged employee's opportunity for profit or loss depending on his or her managerial skill; [¶][t]he length of time for which the services are to be performed; [¶][t]he degree of permanence of the working relationship; [¶][t]he method of payment, whether by time or by the job; and [¶][w]hether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests."

[156] *Berwick, supra*; see also *Advisory Opinion of the Commissioner of the Bureau of Labor and Industries of the State of Oregon Regarding the Employment Status of Uber Drivers*, October 14, 2015. The Commissioner applied Oregon's "economic realities test" which it said "considers the degree to which a worker is economically dependent upon the employer" and was "comprised of the following factors:" [¶] 1. The degree of control exercised by the alleged employer; [¶] 2. The extent of the relative investments of the worker and the alleged employer; [¶] 3. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer; [¶] 4. The skill and initiative required in performing the job; [¶] 5. The permanency of the relationship; and, [¶] 6. The extent to which the work performed by the worker is an integral part of the alleged employer's business." *Id.* at p. 2.

independent contractor.[157] As summarized in one article:[158]

> In his 48-page decision, Arbitrator Marcus applied the so-called *Borello* factors to determine worker classification, noting that "Uber does not guarantee its drivers the number of rides they shall be given, does not require a minimum amount of time a driver must be online, allows its drivers to drive for competitors … and does not tell drivers where to drive while they are on the app."
>
> He also noted that Uber drivers are not required to wear uniforms or any clothing bearing the company's logo. "These factors, individually, or in the aggregate, establish that Uber did and does not have the right to control [redacted] or any comparable driver," he added.

Likewise, there were several trial court denials of summary judgment motions for the proposition that certain Uber and Lyft drivers were independent contractors as a matter of law.[159]

Most other significant pre-*Dynamex* misclassification cases either settled, in a manner which provided money and certain rights to the workers, while maintaining the independent contractor classification sought by the companies[160] or, pursuant to the underlying agreement,[161] were transferred to private binding arbitration.[162]

To the extent that these misclassification issues continue to exist in the post-*Dynamex* world, and as companies like Uber, Lyft, and Postmates continue to push back on the application of the ABC Test to their businesses, the arbitration setting may continue to be a primary forum in which such disputes are resolved.

There are two other potential exceptions to the non-judicial resolution of these cases. First, because California law invalidates mandatory arbitration clauses with respect to claims under the Private Attorney General Act ("PAGA"),[163] and successful plaintiffs in PAGA suits receive 25% of the civil penalties awarded (the other 75% goes to the State), gig economy workers may continue to use

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[157] Decision by Hon. Michael D. Marcus (Ret.), Arbitrator of ADR Services Inc., *YE v. Uber Technologies, Inc., et al.* (November 23, 2016), *from http://assets.documentcloud.org/documents/3280327/Uber-Petition.txt , printed 1/12/2017.*

[158] Hancock, Ben, *"Uber Driver is Independent Contractor, Arbitrator Rules"* (The Recorder, January 11, 2017).

[159] *O'Connor v. Uber Technologies* (2015) 82 F.Supp.3d 1133 (N.D.Cal.); *Doe 1 v. Uber Technologies, Inc.* (N.D. Cal. 2016) 184 F.Supp.3d 774; *Cotter v. Lyft, Inc.* (2015) 60 F.Supp.3d 1067 (N.D.Cal.).

[160] For example, a federal trial court approved a Lyft case settlement ($27 million in monetary relief) on June 23, 2016. *Cotter v. Lyft, Inc.* (N.D. Cal. 2016) 193 F.Supp.3d 1030. However, the proposed $100 million ($84 million fixed, $16 million contingent) settlement of the much larger Uber case was rejected by the Court as being "not fair, adequate, and reasonable." The Court did so even while noting the plaintiff drivers "face a considerable risk that they will not proceed as a class action in any court, or at least be limited to a class action greatly reduced in size," which would occur if the Ninth Circuit were to uphold various Uber driver agreements requiring arbitration of claims against Uber. *O'Connor v. Uber Technologies, Inc.* (N.D.Cal. 2016) 201 F.Supp.3d 1110. Subsequently, the Ninth Circuit did uphold the applicable arbitration agreements. *Mohamed v. Uber Technologies, Inc.* (2016), 848 F.3d 1201 (9th Cir.). Per news reports, the *O'Connor* case settled for $20 million. Dickey, Megan Rose, *Uber agrees to pay drivers $20 million to settle independent contractor lawsuit*, (March 12, 2019) https://techcrunch.com/2019/03/12/uber-agrees-to-pay-drivers-20-million-to-settle-independent-contractor-lawsuit (downloaded September 23, 2020).

[161] See *"Disputes Over Classifications May Be Subject to Arbitration Agreements"* below. As for the class action waiver, in May 2018, the U.S. Supreme Court upheld employee agreements waiving the right to file class actions as a condition of employment (concluding they such agreements were not an unfair labor practice under the NLRA). *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612. For a negative analysis of this result, see California Lawyers Association Business Law Section Business Litigation Committee, *Litigation E-Bulletin: US Supreme Court upholds Employment Agreements Requiring Workers to Waive their Rights to Pursue Class Action Claims*, email sent Thursday, May 24, 2018 9:46 AM ("As one commentator noted, "This opinion paves the way for employers to require employees to waive their rights to class or collective actions in employment agreements. However, this opinion does not nullify defenses that apply to any contract (i.e., fraud, duress or unconscionability) and, at least in California, employees may still object to procedural and substantive unconscionable provisions in an arbitration agreement following guidelines set forth in in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000)."). Class action waivers have also been enforced under California law. *Sanchez v. Valencia Holding Co.* (2015) 61 Cal.4th 899.

[162] On the other hand, for a later situation where workers were able to turn the tables on the alleged employer and use arbitration to their advantage, see "*Arbitration Agreements Used As A Tool To Address Misclassification Issues*" below.

[163] *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348.

PAGA to bring large claims for labor law violations.[164]

And second, in June 2017 at least one group of Uber employees sued former Uber CEO Travis Kalanick, and Uber Chairman of the Board Garrett Camp, individually, for "knowingly" advising Uber to misclassify Uber workers as independent contractors, thereby resulting in joint and several liability under Labor Code section 2753.[165] This case appears to have settled as part of the *O'Connor* case,[166]

Under the ABC Test, which workers and the State of California are now actively attempting to apply to gig workers (see *"Efforts to Halt Enforcement of AB 5 to Some Businesses Remain Underway"* below), the most significant part will likely be the "B" part—whether the worker performs work that is outside the usual course of the hiring entity's business. For example, although Uber and Lyft both say that they are technology companies (with drivers being outside that), other have claimed that they are transportation companies. This issue was highlighted in a 2018 pre-*Dynamex* California federal trial court opinion (by a magistrate judge, not a jury) which—while applying the *Borello* factors (i) determined that the specific GrubHub worker at issue was an independent contractor, not an employee,[167] but also (ii) determined that food delivery—the specific work performed by the worker—was "a regular part of [GrubHub's] business" in the worker's locality.[168] That seems very close to the "B" part under the ABC Test which automatically makes any worker in the "usual course of the hiring entity's business" an employee.

Classification Disputes May Be Subject to Arbitration Agreements.

The California Court of Appeal also enforced an arbitration agreement requiring independent contractors to submit all disputes to binding arbitration. In *Galen v. Redfin Corporation*,[169] a California-based field agent for Redfin, a Washington State real estate company, alleged that the firm had misclassified him and other similarly-situated workers, and brought a class action to adjudicate claims for unpaid overtime, missed meal and rest breaks, and unreimbursed expenses. The plaintiff had signed a Field Agent Independent Contractor Agreement that contained an arbitration clause covering all disputes arising under the Agreement and requiring arbitration in Washington State. Although the plaintiffs argued that a number of the claims were pleaded under California statutes and therefore did not arise under the Agreement, the appellate court rejected that argument, finding instead that because the "Agreement is the instrument that classified him as [an independent contractor] *and* that governed his relationship with defendant, including the services he was to provide and the method by which those services would be compensated," the claims therefore "arose out of" the Agreement and were subject to arbitration.[170]

SPECIAL ISSUES WITH CALPERS BENEFITS

General CalPERS Eligibility Rules

Many public agencies contract with CalPERS for employment pension benefits. As a general rule, regular, full-time employees of contracting entities are entitled to CalPERS membership upon employment.[171]

[164] See, e.g. *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667 (a representative PAGA claim for civil penalties for a violation of Labor Code § 226(a) does not require proof of injury or a knowing and intentional violation; and *Huff v. Securitas Security Services USA, Inc.* (2018) (PAGA allows one person affected by at least one Labor Code violation committed by an employer ("aggrieved employee") to pursue penalties for all the Labor Code violations committed by that employer).

[165] *James and Beatleston v. Kalanick, et al.*, Los Angeles Superior Court, Case No. BC666055 (filed June 22, 2017).

[166] See fn. 160, *infra.*

[167] The primary factors for that part of the decision included: GrubHub did not control the type of transportation the worker used, the worker's appearance when making the deliveries, or who could accompany the worker while completing orders; and the worker had control over whether and when he worked, and for how long. *Lawson v. GrubHub* (N.D. Cal. February 8, 2018) Case 3:15-cv-05128-JSC.

[168] *Id.* at pp. 28-29.

[169] (2014) 227 Cal.App.4th, 1525, 174 Cal.Rptr.3d 847. In November 2014, the California Supreme Court granted a petition for review, and ultimately dismissed and remanded the case to the Court of Appeal. *Galen v. Redfin Corp.* (2020) 464 P.3d 594.

[170] *Id.*, 174 Cal.Rptr.3d at 854.

[171] Gov. Code, § 20281.

Temporary or part-time employees also may be entitled to membership upon employment if their positions require them to work full-time in excess of six months or an average of twenty hours per week for at least one year. Temporary or part-time employees who do not meet this standard must be monitored and enrolled into membership upon the seventh month of full-time employment or following 1,000 hours of work during a fiscal year.

CalPERS Uses the Common Law Test to Determine Independent Contractor Status.

In the June 2021 update to the "Public Agency & Schools Reference Guide"[172] (issued after both the *Dynamex* decision and the Legislature's enactment of AB 5), CalPERS confirmed that independent contractors are not "employees" and are excluded from membership in CalPERS by Government Code section 20300(b). Pursuant to the Guide, an independent contractor is someone who contracts to provide a service or complete a task according to his or her own methods and is not subject to the contracting entity's control as to the end product, final result of work, or manner and means by which the work is performed. CalPERS uses the "Common Law Control Test" as a guide to determining independent contractor status. The common law control test factors are enunciated in the case of *Albert B. Tieberg v. Unemployment Insurance Board*.[173] Under the common law test utilized by CalPERS, "the right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship."[174]

Public employers should note that a position, title, or characterization of the services performed is not the determining factor of employee or independent contractor status. Just because a worker is retained for a position that is called an "independent contractor," "consultant," or "third-party employer position," does not necessarily mean employment in that position is truly on an independent contractor basis. It is important for public employers utilizing contracted workers to thoroughly assess the Common Law Control Test to the position or services in question.

Many "contracts" or "employment agreements" entered into by contracted workers and employers that purport to give the retiree the status of an "independent contractor" are, upon review by CalPERS, found not to qualify the retiree as an independent contractor. Thus, public entities seeking to utilize independent contractors should seek CalPERS review of the agreement and approval in advance.

CalPERS commonly corresponds with member agencies (by sending a questionnaire to be completed by both the worker and the contracting entity) to determine whether a worker is an employee or an independent contractor. It is important that such questions be answered authoritatively by an appropriate certifying officer at the agency, since the employer may be liable for arrears costs (if membership is determined to be applied retroactively), or for service credit purchased by the employer, if the worker is found to be an employee of the agency.[175] Questions about employee versus independent contractor status should be directed to the CalPERS Customer Contact Center at 888-CalPERS.

Public employers also should remain mindful that even when using bona fide independent contractors, they may still face liability for other workplace claims, such as discrimination, harassment, and whistleblower retaliation, among others.

CalPERS Guidance on Hiring Retired Annuitants

Public employers must be especially careful when retaining individuals who are already collecting CalPERS retirement as temporary workers or independent contractors. CalPERS regulations and the PERL place numerous restrictions on retirees who return to work with another member agency

[172] https://www.calpers.ca.gov/docs/forms-publications/pas-ref-guide.pdf.
[173] (1970) 2 Cal.3d 943, 949; see *also CalPERS Precedential Decision No. 05-01, In The Matter of Lee Deidengard v. Tri-Counties Assn. for the Developmentally Disabled* (April 22, 2005).
[174] *Id.*
[175] https://www.calpers.ca.gov/docs/forms-publications/pas-ref-guide.pdf at p. 50.

following retirement. The restrictions are intended to prevent the "double-dipping" of a retiree receiving a monthly CalPERS retirement benefit while also receiving a salary from permanent or regular employment with a CalPERS employer.

In January 2021, CalPERS issued Publication 33 – "A Guide to CalPERS Employment After Retirement," which sets forth rules regarding post-retirement work by CalPERS annuitants.[176] Among other things, CalPERS retired annuitants may not work more than 960 hours per year.[177] Likewise, appointment to any permanent or regular staff position requires reinstatement from retirement. This applies to all CalPERS member classifications (miscellaneous, safety, fire, police, etc.).

There are two types of retired annuitant employment: "extra help" and interim (or acting) "vacant position" employment. For "extra help" positions, among other things, the arrangement must be for limited duration work; hourly pay cannot be less than the minimum or exceed the maximum paid to other employees performing comparable duties; the annuitant cannot receive any other employment benefits, incentives, or compensation other than the hourly pay rate; and the annuitant may not work more than 960 hours in a fiscal year.[178]

For vacant positions, a retired annuitant may be appointed to an interim position by the governing body of an employer, as authorized in Government Code sections 7522.56 and 21221(h). The employment must meet all of the requirements for extra help positions, plus before the annuitant is hired, the employer must have in place an active recruitment for a permanent replacement for the vacant position; the work must be only for the duration of recruitment period, and the employment may not be permanent or indefinite; and the annuitant may be appointed only once to the vacant position.[179]

Generally, retirees engaged as true independent contractors or consultants, or retained through third-party employers, whose employment does not meet the California common law employment test, are not subject to the retirement law requirements. If, however, the employment constitutes a California common law employment (employer-employee) relationship, the agency may be liable for arrears and administrative fees, and the retired annuitant may be subject to mandatory reinstatement, termination of monthly retirement allowance, repayment of benefits already received, and other penalties.[180]

Therefore, to ensure compliance with retirement law, any contract or employment agreement involving a retired annuitant should be reviewed by CalPERS before the retiree accepts the employment, and CalPERS approval should be sought in advance.

With respect to retired annuitants working as independent contractors, consultants, or employees of a third party employer, the CalPERS website indicates "We recommend you contact us to request an independent contractor determination before you sign any such agreement and/or begin this type of work."[181]

CalPERS Suspended 960-Hour Rule for Retired Annuitants Working During Covid-19 Pandemic.

On March 4, 2020, Governor Newsom signed Executive Order N-25-20, which, among other things, suspended work hour restrictions for retired annuitants in order to ensure adequate staffing and to expedite emergency response and recovery.[182] Then, on March 18, 2020, CalPERS issued Circular Letter 200-015-20, which explained that the 960-hour rule for retired annuitants would be suspended for the duration of the public health emergency. The 18-day break in service

[176] https://www.calpers.ca.gov/docs/forms-publications/employment-after-retirement.pdf.
[177] Gov. Code, §§ 21221 and 21224. The 960-hour restriction has been lifted during the Covid-19 pandemic. See "Calpers Suspends 960-Hour Rule For Retired Annuitants Working During Covid-19 Pandemic," *supra.*
[178] Gov. Code, §§ 7522.56, 21224, 21227, and 21229; https://www.calpers.ca.gov/docs/forms-publications/employment-after-retirement.pdf.
[179] *Id.*
[180] *Id.*
[181] https://www.calpers.ca.gov/page/retirees/working-after-retirement/retired-annuitant.
[182] https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf.

requirement under Government Code section 7522.56(f) was also suspended for the duration of the public health emergency.[183]

Joint Employment Is Not a Defense to Claims for CalPERS Benefits

In 2004's *Metropolitan Water District of Southern California v. Superior Court*,[184] the Metropolitan Water District ("MWD") argued that it could exclude from enrollment in CalPERS workers who are paid through private labor suppliers, even if they would be employees under the common law test. Rejecting MWD's argument, the California Supreme Court ruled that the PERL requires contracting public agencies to enroll all common law employees in CalPERS except those excluded under a specific statutory or contractual provision. The Court pointed out that PERL contains no broad exclusion for long-term, full-time workers hired through private labor suppliers. Although PERL permits contracting agencies to seek agreement from CalPERS for exclusion of selected categories of employees, MWD had not negotiated such an exception to its CalPERS contract for its long-term project workers. The Court stressed that the decision resolved only the limited question of CalPERS eligibility for leased employees who meet the common law definition of employee. The Court did not decide whether the contract workers are entitled to civil service protections and other benefits provided to MWD employees.

CalPERS issued a Circular Letter stating that as a result of this California Supreme Court decision, "CalPERS has concluded that a common law employee of a contracting agency not otherwise excluded from CalPERS enrollment by law or contract must be enrolled into membership *retroactive* to the original date of qualification" (emphasis added). In addition, Government Code section 20283, which requires an employer to pay arrears costs for member contributions, "will be applied to contracting agencies on a case-by-case basis, depending on the individual circumstances relevant to each contracting agency." Finally, CalPERS stated that "[r]equests for exclusions of leased or co-employed employees will be reviewed for compliance with the standards for contract exclusions that were approved in 1997 by the CalPERS Board of Administration."[185]

In contrast to the *Metropolitan Water District* case is *Holmgren v. County of Los Angeles*.[186] There, engineers employed by a contractor to perform work for the County were not eligible for benefits under the County Employees Retirement Law of 1937 ("CERL") since they did not meet the definition of "employee," which was expressly defined under CERL. The concept of "common law employee" discussed in *Metropolitan Water District* was thus irrelevant.[187] The *Holmgren* plaintiffs argued that although they were "payrolled" through a contractor and "misdesignated" as contract employees, they were actually screened, interviewed, and effectively hired by the County; they worked solely on County business; their salaries were fixed by the County; they were subject to direct control and supervision of the County; they used County facilities, equipment, and supplies to perform County business; the work that they performed was the same or similar to work performed by "recognized" County employees with whom they worked side by side; and they were nevertheless paid lower wages and did not receive the benefits received by the County's "recognized" workers (including retirement pensions, paid vacation and sick leave, grievance procedures, and salary step increases). To avoid the conclusion that their employer was the contractor, not the County, the plaintiffs mistakenly argued that they were common law employees. The Court of Appeal rejected the argument, ruling that where the term "employee" is defined by the statute, the Legislature's definition controls and the doctrine of common law employment is irrelevant. Under these circumstances, the factors that the plaintiffs relied on "had nothing to do with the price of tomatoes."[188] In addition, the Court summarily rejected the plaintiffs' contentions that they had substantially complied with the civil service

[183] https://www.calpers.ca.gov/docs/circular-letters/2020/200-015-20.pdf.
[184] (2004) 32 Cal.4th 491, 9 Cal.Rptr.3d 857 ("*Cargill*").
[185] CalPERS Circular Letter No. 200-154-04 (May 3, 2004).
[186] (2008) 159 Cal.App.4th 593, 71 Cal.Rptr.3d 611, review den. (2008) 2008 Cal.LEXIS 4847.
[187] *Id.* at 606.
[188] *Id.* at 605-606.

system's requirements and have become civil service employees "by operation of law."[189]

In 2018, in a case involving the Cambria Community Services District,[190] the CalPERS Board declared that an employee of a third-party contractor for the District was a common law employee, and therefore, the District was required to make contributions to CalPERS for the workers' retirement benefits. The case involved an interim Finance Manager who worked for eight months under a contract between the District and Regional Government Services ("RGS"), a consortium of local governments providing temporary workers, such as retired annuitants.[191]

The prior Finance Manager retired just as the District was starting an emergency water project that required the immediate assistance of a skilled financial manager. The District did not believe that it could adequately recruit for a permanent replacement within the 30-day notice period of the former manager's retirement, so it contacted RGS for assistance finding an interim replacement. RGS found a candidate, Tracy Fuller, a retired CalPERS annuitant who had not worked for either RGS or the District before. After interviewing Fuller, the District contracted with RGS for the placement.

The "Agreement for Management and Administrative Services" required the District to pay RGS an invoiced hourly rate between March and July, after which the agreement would continue month-to-month until one or the other party ended it. Under section 1 of the Agreement, RGS was required to reassign a different worker if the District so requested. The Agreement also stated that, "It is understood that the relationship of RGS to the Agency is that of an independent contractor and all persons working for or under the direction of RGS are its agents or employees, and not agents or employees of the Agency.... The Agency shall have the right to control RGS only insofar as the results of RGS's services rendered pursuant to this agreement and assignment of personnel under section 1." The Agreement also provided that "Agency shall not have the ability to direct how services are to be performed, specify the location where services are to be performed, or establish set hours or days for performance of services." Nor did the District have the right to discharge any employee of RGS from employment. RGS remained responsible for all benefits, such as workers' compensation, disability insurance, vacation pay, sick pay, retirement benefits, licenses and permits, and employment taxes.

Fuller also signed an "Employment Agreement" with RGS under which she agreed to "act as Regional Government Services Advisor assigned to multiple clients." Under that agreement, Fuller agreed to serve as an at-will employee of RGS. The District was not a signatory to the Employment Agreement or other RGS employment forms. RGS provided Fuller with a phone extension, email address, and business cards, but not an office.

Fuller reported to work at the District, where she was treated as an employee of RGS and not offered membership in CalPERS or any other retirement or health benefits. She used the title of "Interim Finance Manager" and performed the day-to-day operations of Finance Manager for the District and made decisions on what work should be done by the District's Finance Department. District employees assisted her with projects, but Fuller was not involved with reviewing or disciplining District employees. She attended District board meetings and presented to the board on financial issues. Fuller prepared an annual budget and salary chart, and worked on a rate study and a Proposition 218 study for the emergency water project, and secured a loan for the District for that project. The District's General Manager assigned and reviewed Fuller's work. Fuller did not sign documents on behalf of the District or have access rights to all District computer systems, unlike the Finance Manager who preceded her. Fuller set her own work schedule and was not subject to the hours of other employees, though she was expected to work full time.

[189] *Id.* at 607.

[190] *Fuller adv. Cambria Community Services Dist.*, OAH Decision No. 2017050780; CalPERS Board of Administration Case No. 2016-1277.

[191] According to the Decision, RGS provides workers to approximately 100 public agencies and has served about 225 public agencies since it began operating in 2002.

She often worked from District offices, but also worked from other locations. The District did not create a personnel file for Fuller.

While Fuller was working for the District, the District recruited for a permanent Finance Director. Fuller did not apply for the position. In the fall of 2014, the District selected a permanent Finance Director, and gave notice of its intent to terminate the Agreement for Management and Administrative Services.

After Fuller's departure from the District, CalPERS conducted a routine membership and payroll audit, during which it reviewed the Agreement for Management and Administrative Services, the Finance Manager job description, and an "Employment Relationship Questionnaire" CalPERS had the District complete related to Fuller. In the Questionnaire, the District asserted that Fuller was tasked with providing finance manager services, but she alone determined what those services were, produced work based on her own knowledge or abilities, and was not supervised or evaluated. The audit concluded that Fuller should have been enrolled in CalPERS as an eligible employee under the *MWD* "common law test of employment," and that the District was liable for arrears costs for member contributions and administrative costs.

The decision noted there was no contractual exclusion between the District and CalPERS for the interim Finance Manager position. It then applied the multi-factor common law test for employment set forth in *MWD* and *Tieberg v. Unemployment Insurance Appeals Board*.[192] Notably, the CalPERS Board expressly declined to adopt the ABC Test, stating: "These factors remain applicable after *Dynamex*, in which the California Supreme Court adopted a different test with respect to the employee or independent contractor question under state wage orders. No wage orders are at issue here."

Applying the common law factors, the evidence established that the District had the right to control the manner and means by which Fuller accomplished the result desired, and the balance of other factors led to the conclusion that Fuller was an employee of the District. Further, according to the decision, the District reasonably should have known about the CalPERS enrollment requirement because it was filling a longtime employee position, albeit on an interim basis. The decision also noted, RGS's role in supplying Fuller to the District does not compel a different result. No provision of the PERL "suggests that workers hired through labor suppliers are ... deemed employees of only the labor supplier. Nor, of course, has the Legislature provided in the PERL for any co-employment exception to a contracting agency's duty to enroll employees in CalPERS. The only relevant legislative choice to date has been to require enrollment of all persons in the 'employ' of the contracting agency."

Although the CalPERS Board ultimately opted not to make the decision precedential, the case still demonstrates the significant implications for public agencies using temporary workers and independent contractors in interim assignments, project-based work, or long-term operations that require skilled expertise.

Final Advice and Procedures For Public Agencies

As a result of these decisions and publications, public agencies must continue to determine whether any workers who are presently excluded from CalPERS qualify as true independent contractors, or whether they can be excluded from CalPERS coverage on any other CalPERS statutory or contractual basis. If the workers cannot be excluded, the agency may be responsible for retroactive membership contributions and other costs and fees. In order to avoid liability with CalPERS, public agencies should work closely with CalPERS and third party labor suppliers in advance of retaining consultants, contractors, or retired annuitants.

THE "INDEPENDENT CONTRACTOR" AND THE BARGAINING UNIT

Another key distinction between employees and independent contractors is that independent contractors are not included in

[192] *Tieberg, supra*.

bargaining units. They lack union representation, and the union receives no agency fee for those individuals. Unions generally prefer that employers designate workers as employees rather than as independent contractors. Thus, a union representing a bargaining unit may oppose an employer's designation of a worker as an independent contractor.

Whether independent contractors may be eligible for public employment benefits other than PERS depends on common law principals of employment as well as how "employee" is defined by the public agency's charter, laws, and other rules that govern those benefits.[193]

CONTRACTING OUT TO INDEPENDENT CONTRACTORS

State Agencies May Not Ordinarily Contract Work Out to Independent Contractors.

The California Constitution and statutes favor use of civil service personnel to perform public services. But state agencies may hire independent contractors under some circumstances.

State agencies may hire firms, not individuals, as independent contractors on personal service contracts when the use of outside contractors will result in cost savings to the state. The agency wishing to use the contractor also must be able to show that going outside the civil service will not displace employees or jeopardize affirmative action efforts and will provide qualified personnel. The outside contract must result from publicized, competitive bidding.[194]

Agencies also may hire outsiders to perform state functions that are:

- Exempt from civil service under the California Constitution, Article VII, section 4;
- New functions that the Legislature has specifically authorized independent contractors to perform;
- Highly specialized or of a technical nature, or the required knowledge or skill is not otherwise available within the civil service system;
- Service agreements incidental to the purchase of equipment;
- Required to protect against conflicts of interest, for example, independent investigators or counsel or expert witnesses;
- Required in emergencies under Government Code sections 19888 et seq.;
- Necessary in locations where the contractor, but not the state, can feasibly provide required equipment, materials, facilities, or support;
- Training courses not requiring permanent instructor positions;
- Urgent, temporary, or occasional to the degree that the delay inherent in following civil service procedures would frustrate the purpose of the appointment.[195]

A state agency may hire outside counsel only with the advance, written permission of the Attorney General, who is presumed to know the staff's abilities and availability.[196] But in the case of a county board of education, the Attorney General has opined that the board may appoint outside counsel, when in-house counsel is available, only when in-house counsel has a conflict of interest, in-house counsel has failed to render requested advice in a timely manner, the board desires "services" in addition to those in-house counsel normally provides, or the board desires a second opinion on a legal matter. The board may consider the qualifications of in-house counsel and hire outside counsel when particular expertise is not available in-house.[197]

State agencies also may be able to hire independent contractors when the services to be hired out cannot be "adequately rendered by an existing state agency and do not duplicate an existing agency's functions."[198] Under this rule, the Department of Health Care Services was

[193] *Id; Tieberg, supra.*
[194] Gov. Code, § 19130(a)(1)-(11); see also Ed. Code, §§ 45103.1 and 88003.1.
[195] Gov. Code, § 19130(b)(1)-(10).
[196] Gov. Code, §§ 11040 and 19130(b)(7); *People ex re. Dept. of Fish & Game v. Attransco, Inc*. (1996) 50 Cal.App.4th 1926, 1932-1937, 58 Cal.Rptr.2d 661, 664-668.
[197] 86 Ops.Cal.Atty.Gen. 57 (2003).
[198] *California State Employees' Assn. v. Williams* (1970) 7 Cal.App.3d 390, 396, 86 Cal.Rptr. 305, 310, rehg. den. (1970) 7 Cal.App.3d 390, 400.

permitted to hire an independent contractor to perform administrative services for the Medi-Cal program. Because this was a new program, no current state employee performed this work. The Court ruled that the state may hire independent contractors when the alternative is to hire additional employees to perform new duties. The state's constitutional policy protecting its civil service system applies only to existing personnel, not when the state will be supplying new services (but note that current state statutory law, cited above, requires a legislative finding that the new services may be performed by outside contractors).

State agencies have been afforded far greater flexibility to contract out engineering and architectural services. In 2000, California voters passed Proposition 35 which amended the state constitution to permit state agencies to privately contract for architectural and engineering services without violating the civil service system. The California Supreme Court eventually decided that the enactment of Proposition 35 also meant that the "cost savings" exception for when state agencies may use outside contractors no longer applied when dealing with these types of services.[199] Proposition 35 even prevents state agencies from self-imposing contracting-out restrictions for architectural or engineering services within MOUs.[200]

Whether Local Public Agencies May Contract Work Out to Independent Contractors Frequently Depends on Local Law, and May Result in Challenges From Unions.

Local public employers must consult state law, as well as their own charters and local rules, to determine the circumstances under which they may hire independent contractors. Public agencies can be compelled to make findings their charters require before they may legally contract out work.[201] In addition, there may be conflict of interest issues to consider if a public agency employee would be acting as independent contractor for another public entity,[202] or if a former agency employee seeks work from the agency as an independent contractor.[203]

OTHER EMPLOYER VS. INDEPENDENT CONTRACTOR ISSUES

Employment Taxes

The Internal Revenue Code requires employers to pay Federal Insurance Contribution Act ("FICA") taxes and Federal Unemployment Tax Act ("FUTA") taxes with respect to wages paid to their employees.[204] Collectively, these two taxes are referred to as "employment taxes." Employers also must withhold FICA and federal income taxes from employees' wages and remit the amounts withheld to the IRS.[205] Employers need not pay FICA or FUTA taxes or withhold those taxes from moneys paid to an independent contractor. Instead, independent contractors must pay Self-Employment Contributions Act ("SECA") taxes on their earnings.[206]

If an employer misclassifies a worker as an independent contractor rather than as an employee, the IRS may seek to recover FICA taxes, FUTA taxes, interest, and civil penalties from the employer. The IRS may sue the employer to collect back employment taxes within three years from the date of the alleged violation.[207] To avoid paying back taxes, interest, and penalties, the employer must prove the worker's independent contractor status.[208]

Safe Harbor

The "safe harbor" of section 530 of the 1978 Revenue Act prohibits assessing employment taxes if a public employer has consistently treated individuals as independent contractors for federal tax-reporting purposes, and the employer has a reasonable basis for treating the individuals as independent contractors. Employers must

[199] *Professional Engineers in Cal. Gov. v. Kempton* (2007) 40 Cal.4th 1016, 56 Cal.Rptr.3d 814.
[200] See *Consulting Engineers and Land Surveyors of Cal., Inc. v. Professional Engineers in Cal. Gov.* (2007) 42 Cal.4th 578, 67 Cal.Rptr.3d 485.
[201] *Giles v. Horn* (2002) 100 Cal.App.4th 206, 123 Cal.Rptr.2d 735.
[202] See 88 Ops.Cal.Atty.Gen. 56 (2005).
[203] See FPPC Advice Letter No. I-05-225, 2005 Cal.Fair-Pract. LEXIS 187.
[204] 26 U.S.C. §§ 3101 and 3301.
[205] 26 U.S.C. §§ 3101 and 3401 et seq.
[206] 26 U.S.C. §§ 1401 et seq.
[207] 26 U.S.C. § 6501.
[208] *Marvel v. United States* (10th Cir. 1983) 719 F.2d 1507.

meet all three of these subtests to qualify for tax relief:

1. The employer treated all workers in the affected positions as independent contractors and filed all appropriate tax documents for those workers as if they were independent contractors for the entire time period that the workers performed the services at issue for the taxpayer employer (the "reporting consistency test"); and
2. The employer did not treat any worker holding a substantially similar position as an employee for any period after December 31, 1978 (the "substantive consistency test"); and
3. The employer had a reasonable basis to treat the workers as independent contractors. This "reasonable basis" requirement is construed liberally in favor of the taxpayer employer, but the other two requirements are strictly applied, and after December 31, 1978, all applicable federal tax returns, including information on returns that the employer/taxpayer files, must be consistent with the worker's status as an independent contractor (for example, by filing Form 1099 rather than Form W-2).

"Reasonable basis" may be established by one or more of three bases or "safe harbors:"

- judicial precedent, published rulings, technical advice, or a letter ruling to the taxpayer;
- a past favorable IRS audit on the same issue; or
- treatment of the particular workers as independent contractors as the long-standing, recognized practice of a significant segment of the industry in which the individual is engaged.[209]

As these federal "safe harbors" have never applied to California payroll taxes, at best they have provided only partial assistance to California public entities. Whether in the future they will apply for federal payroll purposes when the worker is an employee under California law (such as if the stricter ABC Test applies) is not yet known.

IRS Voluntary Worker Classification Settlement Program

Since 2011, the IRS has sponsored a voluntary worker classification settlement program. The program is available for employers who want to voluntarily change the prospective classification of their workers. The program applies to employers who are currently treating their workers (or a class or group of workers) as independent contractors or other nonemployees and who want to prospectively treat the workers as employees.

In order to participate, an employer must have consistently treated the workers as independent contractors or other nonemployees, and must have filed all required Forms 1099 for the workers to be reclassified under the program for the previous three years. Additionally, the employer cannot be currently under employment tax audit by the IRS and the employer cannot be currently under audit concerning the classification of the workers by the Department of Labor or by a state government agency. If the IRS or the Department of Labor previously has audited an employer concerning the classification of workers, the employer will be eligible only if the employer has complied with the results of that audit and is not currently contesting the classification in court. Exempt organizations and government entities may participate in the program if they meet all of the eligibility requirements.

An employer participating in the program will agree to prospectively treat the class or classes of workers as employees for future tax periods. In exchange, the employer will:

- Pay 10% of the employment tax liability that would have been due on compensation paid to the workers for the most recent tax year, determined under the reduced rates of section 3509(a) of the Internal Revenue Code;
- Not be liable for any interest and penalties on the amount; and

[209] Pub. L. 95-600 (1978), §§ 530(a)(2)(A), (B), and (C), 92 Stat. 2763.

- Not be subject to an employment tax audit with respect to the classification of the workers being reclassified under the program for prior years.

Misclassification Initiative With the Department of Labor

Since 2011, the U.S. Department of Labor has maintained a "Misclassification Initiative" with different states, including California, to coordinate enforcement efforts and to share information between state and federal agencies about non-compliant employers.[210] In recent years, the Department of Labor has actively pursued employers who misclassify workers as independent contractors, collecting many millions of dollars in back wages, primarily for minimum wage and overtime violations.

Effective January 1, 2016, Labor Code section 2750.8 establishes the "Motor Carrier Employer Amnesty Program," by which a motor carrier performing drayage services may be relieved of statutory and civil penalties associated with misclassification of commercial drivers as "independent contractors" if the motor carrier entered into a settlement agreement with the California Labor Commissioner, with the consent of the California Employment Development Department before January 1, 2017. To take advantage of the program, the motor carrier must agree to convert all of its commercial drivers to "employees" and the settlement agreement must provide, among other things, that the motor carrier pay all wages, benefits and taxes owed, if any. This law allows the Labor Commissioner and Employment Development Department to recover reasonable, actual costs for their review, approval, compliance, and monitoring of the settlement agreement. In order to be eligible for the amnesty program, the motor carrier must not: (1) have any civil lawsuit, filed on or before December 31, 2015, pending against it in a state or federal court that alleges or involves a misclassification of a commercial driver, or (2) have had a final imposition of certain penalties against it.

Federal Department of Labor Withdraws 2015-2016 Guidance on Misclassification and Joint Employment

On June 7, 2017, the U.S. Department of Labor withdrew the Department's guidance issued under the Obama administration on joint employers and independent contractors.[211] Although stating that employers were still responsible for complying with the Fair Labor Standards Act ("FLSA") and that the Department would continue to fully enforce the FLSA, the move suggested a possible shift in the Department's enforcement priorities.

The January 2016 guidance took the position that the concept of joint employment should be viewed broadly, and the July 2015 guidance essentially created a presumption of employment for workers, stating "most workers are employees under the FLSA's broad definitions."

Then, on March 16, 2020, the Department announced a final rule providing guidance for determining joint employer status. In the final rule, the Department:

- specified that when an employee performs work for the employer that simultaneously benefits another person, that person will be considered a joint employer when that person is acting directly or indirectly in the interest of the employer in relation to the employee;
- provided a four-factor balancing test to determine when a person is acting directly or indirectly in the interest of an employer in relation to the employee;
- clarified that an employee's "economic dependence" on a potential joint employer does not determine whether it is a joint employer under the FLSA;
- specified that an employer's franchisor, brand and supply, or similar business model and certain contractual agreements or business practices do not make joint employer status under the FLSA more or less likely; and
- provided several examples applying the Department's guidance for determining

[210] http://www.dol.gov/whd/workers/misclassification/.

[211] https://www.dol.gov/newsroom/releases/opa/opa20170607.

FLSA joint employer status in a variety of different factual situations.[212]

The four-factor test noted in the final rule, adopted from the Ninth Circuit's ruling in *Bonnette v. California Health & Welfare Agency*,[213] assesses whether the other person: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. No single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances. However, satisfaction of the maintenance of employment records factor alone does not demonstrate joint employer status.[214]

Then, on July 29, 2021, things changed again when the DOL rescinded the Joint Employer Rule. In doing so, the DOL noted that "that the Joint Employer Rule "unlawfully limits the factors the Department will consider in the joint employer inquiry" by focusing on a control-based test to the exclusion of economic dependence and certain other considerations, as the Rule's approach is not consistent with the totality-of-the-circumstances economic realities standard that has generally been used by the courts."[215] The DOL will continue to consider legal and policy issues relating to FLSA joint employment before deciding what alternative regulatory guidance is appropriate.

In the interim, 29 C.F.R. section 791.2, which provides as follows, remains in effect:

There are two joint employer scenarios under the FLSA.

(a)(1) In the first joint employer scenario, the employee has an employer who suffers, permits, or otherwise employs the employee to work, see 29 U.S.C. 203(e)(1), (g), but another person simultaneously benefits from that work. The other person is the employee's joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee. See 29 U.S.C. 203(d). In this situation, the following four factors are relevant to the determination. Those four factors are whether the other person:

(i) Hires or fires the employee;

(ii) Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;

(iii) Determines the employee's rate and method of payment; and

(iv) Maintains the employee's employment records.

Regardless of the position that the current federal administration may take on these issues, misclassification litigation in California is not likely to decrease as a result, given California's expansive protections for workers under state law.

National Labor Relations Board ("NLRB") Decides That Misclassifying Workers as Independent Contractors Does Not Violate the National Labor Relations Act ("NLRA").

In December 2017, the NLRB formally withdrew an advice memorandum issued during the Obama administration which found that misclassification, even without any other underlying unfair labor practice, is unlawful. This development set in motion a possible limitation on the NLRB's authority to go after misclassification as a stand-alone violation.[216]

However, on August 29, 2019, the NLRB issued its final decision in *Velox Express, Inc.*,[217] and concluded that employers do not violate the NLRA solely by misclassifying employees as independent contractors. There, an administrative law judge initially determined that by misclassifying drivers as independent contractors, Velox restrained and interfered with their ability to engage in protected

[212] https://www.dol.gov/agencies/whd/flsa/2020-joint-employment.
[213] *Bonnette v. California Health & Welfare Agency* (9th Cir. 1983) 704 F.2d 1465.
[214] https://www.federalregister.gov/documents/2020/01/16/2019-28343/joint-employer-status-under-the-fair-labor-standards-act.
[215] https://www.dol.gov/agencies/whd/flsa/2020-joint-employment.
[216] *Pac. 9 Transp., Inc.*, NLRB Div. of Advice, No. 21-CA-150875, 12/18/15 [released 8/26/16; now withdrawn].
[217] NLRB Case No. 15-CA-184006, Decision and Order [8/29/19].

activity under the NLRA. According to the ALJ's decision, Velox's "take it or leave it" independent contractor agreements drivers were required to sign without negotiation, which misclassified them as independent contractors, essentially told the drivers "that they are not protected by section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection."[218]

In February 2018, the NLRB invited amicus briefs asking, under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of the NLRA. Numerous amicus briefs were submitted, including from several unions and drivers' associations, chambers of commerce, human resource organizations, employee advocacy groups, and several states' Attorney Generals, among others.

The NLRB ultimately applied the common law factors, noting, among other things, that the Velox drivers did not have the discretion to determine when or how long they worked, to set their routes, or to decide what customers they serviced. Accordingly, the NLRB determined that the drivers were improperly classified as independent contractors. However, the NLRB also concluded that an employer's misclassification of workers as independent contractors does not violate the NLRA. The NLRB disagreed that misclassification was, by itself, coercive, and did not prohibit the workers from engaging in protected activity or threaten them with adverse consequences for doing so. The NLRB also noted that when an employer decides to classify workers as independent contractors, it forms a legal opinion regarding the status of those workers, and its communication of that opinion to the workers is privileged under section 8(c) of the Act, which states: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice ..., if such expression contains no threat of reprisal or force or promise of benefit."

The NLRB also found important legal and policy concerns weighed against finding a stand-alone misclassification violation. When applying the multi-factor common law test, "reasonable minds can, and often do, disagree about independent contractor status when presented with the same factual circumstances ... . Independent-contractor determinations are difficult and complicated enough when only considering the Act, but the Act is not the only relevant law. An employer must consider numerous Federal, State, and local laws and regulations that apply a number of different standards for determining independent-contractor status. Unsurprisingly, employers struggle to navigate this legal maze. Further, in classifying its workers as independent contractors, an employer may be correct under certain other laws but wrong under the Act—which is all the more reason why it would be unfair to hold that merely communicating that classification is unlawful."[219]

In light of these considerations, the NLRB felt that it would "significantly chill" the creation of independent contractor relationships if it held that misclassification alone violated the NLRA.[220]

Although public employees in California are not governed by the NLRA, the California Public Employment Relations Board ("PERB") frequently looks to the NLRB for guidance. Accordingly, the outcome of the *Velox* case could impact the way that PERB decides similar issues.

Other NLRB Actions

On January 25, 2019, the NLRB, applying what it claimed to be the NLRB's standard common law agency test,[221] determined that franchisees who operated shared-ride vans for SuperShuttle Dallas-Fort Worth were independent contractors, not employees

[218] NLRB Case No. 15-CA-184006, ALJ Decision [9-25-17] at p. 14.
[219] NLRB Case No. 15-CA-184006, Decision and Order [8/29/19] at p. 8.
[220] *Id.* at pp 8-9.
[221] *NLRB v. United Insurance Co. of America* (1968) 390 U.S. 254, 256.

covered under the NLRA.[222] In doing so, the Board expressly overrode a 2014 NLRB decision[223] in which—in a case deciding that certain FedEx drivers were employees under the NLRA—the Board determined the key factor to be whether the putative independent contractor "is, in fact, rendering services as part of an independent business."[224] The most important differences between the 2014 and 2019 decisions appear to be the makeup of the NLRB: while in 2014 there were three Democratic Party members and one Republican Party member, in 2019, there were three Republican Party members and one Democratic Party member. This is yet another example of the significant political nature of decisions in this area.

Employees of Independent Contractors May Not Sue the Hiring Party for Damages Resulting from Most Work-Related Injuries.

In a series of decisions, the California Supreme Court has clarified the circumstances under which the hirer of an independent contractor may be held liable to the contractor's employees for on-the-job injuries. Employees of independent contractors generally may not sue where the hiring party's only connection to the injury is the passive one of hiring the employee's employer. "Central to this rule of nonliability [is] the recognition that a person who hire[s] an independent contractor ha[s] no right of control as to the mode of doing the work contracted for."[225]

Where the contractor is hired to perform inherently dangerous work, the contractor's employees may not sue the party that hired the contractor for injuries resulting from the contractor's failure to take special precautions to ameliorate the danger, whether or not the hiring party required in the contract that the contractor take such precautions. The California Supreme Court reasoned that it would be unfair to impose liability on the hiring entity when the liability of the contractor, who is primarily responsible for its employees' on-the-job injuries, is limited to providing workers' compensation coverage.[226]

The California Supreme Court also has ruled that an independent contractor's employee may not bring a negligent hiring action against the entity that hired the contractor.

Two policy considerations support the Court's conclusion. First, the rule of workers' compensation exclusivity should apply to the entity hiring the contractor because the hirer has indirectly paid the cost of coverage insofar as it was presumably factored into the contract price. Second, permitting the recovery of tort damages would give employees of independent contractors an "unwarranted windfall" that is denied other workers who are limited to receiving workers' compensation benefits for industrial injuries caused by their employer's failure to provide a safe working environment.

Similarly, a hiring party owes no duty of care to a contractor's employees to prevent or correct unsafe procedures or practices to which the hiring party did not contribute by direction, induced reliance, or other affirmative conduct.[227] Simply failing to exercise a power to compel the contractor to adopt safer procedures is not in itself a violation of any duty a hiring party owes a contractor's employees.

But a hiring party may be liable to a contractor's employees where: (1) the contractor is unlicensed and a contractor's license was required for the work performed;[228] or (2) the hiring party both retains control of aspects of the work and actually exercises that control, by act or omission, so as to affirmatively contribute to

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[222] *Supershuttle DFW, Inc. and Amalgamated Transit Union Local 1338*, Case 16 RC 010963, 367 NLRB No. 75 (N.L.R.B.) (January 25, 2019).
[223] *FedEx Home Delivery*, 361 NLRB 610 (2014) (FedEx), enf. denied 849 F.3d 1123 (D.C. Cir. 2017) (FedEx II).
[224] *Id.*, 361 NLRB at 610, *quoted* in *Supershuttle DFW, Inc.* (italics in original omitted).
[225] *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 213, 115 Cal.Rptr.2d 853, 864, rehg. den. (2002) 2002 Cal.LEXIS 2014, quoting *Green v. Soule* (1904) 145 Cal. 96, 99, 78 P. 337, internal quotation marks omitted.
[226] *Privette v. Superior Ct.* (1993) 5 Cal.4th 689, 697-700, 21 Cal.Rptr.2d 72, 77-79, mod. and rehg. den. (1993); *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 267, 74 Cal.Rptr.2d 878, 887.
[227] *Kinney v. CSB Construction, Inc*. (2001) 87 Cal.App.4th 28, 103, Cal.Rptr.2d 594, rehg. den. (2001) 2001 Cal.LEXIS 119.
[228] *Fernandez v. Lawson* (2003) 31 Cal.4th 31, 1 Cal.Rptr.3d 422.

the employees' injuries.[229] Employees also may sue the hiring party where the hirer provides unsafe equipment that affirmatively contributes to the employees' injuries.[230] In addition, a landowner who hires an independent contractor may be liable to the contractor's employees for on-the-job injuries resulting from hidden hazardous conditions where: (1) the landowner knew, or should have known, of a latent or concealed pre-existing hazardous condition on its property; (2) the contractor did not know and could not have reasonably discovered this hazardous condition; and (3) the landowner failed to warn the contractor about this condition.[231]

The Hirer of an Independent Contractor May Not Be Held Liable for Work-Related Injuries.

In 2010, the California Supreme Court issued its opinion in *Tverberg v. Fillner Construction, Inc.*[232] Since 1993, the rule laid down by the California Supreme Court was that the hirer of a contractor is generally not liable to the contractor's employees for work-related injuries.[233] In *Tverberg*, the Supreme Court ruled that an independent contractor could not hold a general contractor vicariously liable for workplace injury under the peculiar risk doctrine. The Court explained that "...the reason underlying our holding is this: Unlike a mere employee, an independent contractor, by virtue of the contract, has authority to determine the manner in which inherently dangerous construction work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions. Having assumed responsibility for workplace safety, an independent contractor may not hold a hiring party vicariously liable for injuries resulting from the contractor's own failure to effectively guard against risks inherent in the contracted work."[234]

Following remand from the Supreme Court, the Court of Appeal was left to resolve the issue of whether the contractor could be held directly liable on a theory that it retained control over safety conditions at the job site.[235] According to the Court of Appeal, the hirer is not liable to a contractor's employee merely because it retains control over safety conditions. The imposition of tort liability turns on whether the hirer exercised that retained control in a manner that *affirmatively contributed* to the injury. An affirmative contribution may take the form of actively directing a contractor or an employee about the manner or performance of the contracted work. When the employer directs that the work be done by use of particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. By contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the *failure* to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a *negligent exercise* of control. In order for a worker to recover on a retained control theory, the hirer must engage in some active participation. Ultimately, the Court of Appeal determined that there was sufficient evidence of affirmative contribution to overcome summary judgment.[236]

In 2011, the California Supreme Court once again granted review of the *Tverberg* case. Further action in that matter was deferred pending consideration and disposition of a related issue raised in *Seabright Insurance Company v. U.S. Airways, Inc.*, which the California Supreme Court decided.[237] After the *Seabright* decision was issued, the California Supreme Court transferred the

[229] *Hooker, supra.*
[230] *McKown v. Wal-Mart Stores* (2002) 27 Cal.4th 219, 115 Cal.Rptr.2d 868.
[231] *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, op. mod. without change and rehg. den. at (2006) 2006 Cal.LEXIS 4301.
[232] (2008) 168 Cal.App.4th 1278, 86 Cal.Rptr.3d 265; (2010) 49 Cal.4th 518, 110 Cal.Rptr.3d 665.
[233] *Privette, supra.*
[234] *Tverberg, supra.*
[235] *Id.*
[236] *Id.* at 1126-1129.
[237] (2011) 52 Cal.4th 590, 129 Cal.Rptr.3d 601.

case back to the Court of Appeal with directions to vacate its decision and reconsider the issue in light of the *Seabright* decision.

Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work. In *Seabright*, the California Supreme Court considered whether that rule applies when the party that hired the contractor fails to comply with workplace safety requirements concerning the precise subject matter of the contract, and the injury is alleged to have occurred as a consequence of that failure. The Court concluded that, by hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract. That implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements. Such delegation does not include the tort law duty the hirer owes to its own employees to comply with the same safety requirements, but under the definition of "employer" that applies to California's workplace safety laws, the employees of an independent contractor are not considered to be the hirer's own employees.[238]

Following the *Seabright* decision and remand back to the Court of Appeal, in 2012, the Court of Appeal issued its final decision in the *Tverberg* case, ruling that a general contractor could delegate its obligation to comply with government safety regulations to a sub-contractor's independent contractor. However, summary judgment was precluded because there were disputed material facts about whether the general contractor retained control over the jobsite in such a manner that it affirmatively contributed to the injuries.[239]

Notably, in 2015, at least one Court of Appeal refused to interpret *Tverberg* and *Seabright* so broadly as to conclude that a hirer can *never* be vicariously liable to an individual employed by an independent contractor. In *Vargas v. FMI, Inc.*, an independent contractor hired to drive a tractor-trailer owned by FMI, Inc. was injured in a roll-over accident while the vehicle was being driven by an FMI, Inc. employee.[240] The Court of Appeal concluded that although a motor carrier may act through an independent contractor driving a leased vehicle, the motor carrier retains the ultimate responsibility for the vehicle's safe operation, and in the event of an accident, for satisfying a judgment for injury resulting from the negligent operation, maintenance, or use.[241]

Joint and Third Party Liability for Misclassification of Workers

One of the most potentially troubling aspects of California law is that individuals, in addition to business entities, can be subject to fines. Indeed, section 226.8(h) provides that an employer's third-party advisors, such as financial, accounting, and human resources professionals, can be jointly and severally liable along with the employer for fines and penalties.

And, Labor Code section 2753 broadens the scope even further, extending "joint and several liability" to any person who, for money or other valuable consideration, "knowingly advises an employer to misclassify an individual as an independent contractor to avoid employee status."

If an employer is found to have violated the law, the employer must post a notice informing all employees and the general public that it has committed a violation by misclassifying an employee. The notice must be posted for one year, must be signed by an officer of the company, and must inform employees and the general public that the employer has changed its practices. California's Labor Commissioner can enforce these laws, and Private Attorney General Act lawsuits are also permitted.[242] This legislation sends a clear message to employers about the focus and attention being placed on the classification of California's workforce.

[238] *Id.*
[239] (2012) 202 Cal.App.4th 1439, 136 Cal.Rptr.3d 521.
[240] (2015) 233 Cal.App.4th 638.
[241] *Id.* at 664.
[242] Lab. Code, §§ 2698-2699.5.

In *Noe v. Superior Court*,[243] vendors hired from a labor contractor, Levy Premium Foods, to provide food and beverage services at venues owned by entertainment giant AEG sued Levy Premium Foods and AEG alleging that they were willfully misclassified as independent contractors and were not paid minimum wage.

One key issue of first impression in the case related to the question of whether Labor Code section 226.8 is limited to employers who make the decision to misclassify workers, or whether liability may extend to employers who know that a co-joint employer has widely misclassified their joint employees and failed to remedy the misclassification. The Court of Appeal concluded that section 226.8 liability extends to a joint employer who has knowledge that its employees have been misclassified by a co-joint employer.[244] Notably, the Court also ruled that section 226.8 does not include a private right of action; rather, the statute is to be enforced, and any penalties are to be collected solely by the Labor Commissioner.[245]

California Unemployment Insurance Statutes and Workers' Compensation Statutes Make Many Employee Misclassifications Criminal Offenses.

For many years,[246] California employers who misclassified employees as independent contractors have been at risk for criminal sanctions for the resulting failures to provide the employees with customary required unemployment insurance and workers' compensation. These risks could be even higher in a post-*Dynamex* and ABC-test world.

The "standard" penalties for Unemployment Insurance Code violations are up to one year of imprisonment in either county jail or state prison, a fine of up to $20,000, or both,[247] plus potentially investigation costs.[248] These penalties apply, for example, to the following violations:

- Unemployment Insurance Code section 2101.5 ("to willfully make a false statement or representation or knowingly fail to disclose a material fact for the purpose of lowering or avoiding any contribution required of the maker or other person, or to avoid becoming or remaining subject to this division");
- Unemployment Insurance Code section 2102(a) ("to willfully make a false statement or representation or knowingly fail to disclose a material fact to obtain or increase benefits or payments under the provisions of the unemployment insurance law of any other state");
- Unemployment Insurance Code section 2120 ("[a]ny individual required to supply information to his or her employer ... who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld"); and
- Unemployment Insurance Code section 2121 (any person who "willfully aids or assists in ... advises, or coerces anyone" in preparing or presenting any "return, report ... or other document" that is "fraudulent or false as to any material matter ... whether or not the falsity or fraud is with the knowledge or consent of the person authorized or required to present the return, report ... or other document").

As for workers' compensation insurance:

- Insurance Code section 11760 (any person who "make[s] or cause[s] to be made any knowingly false or fraudulent statement of any fact material to the determination of the premium, rate, or cost of any policy of workers' compensation insurance, for the purpose of reducing the premium, rate, or cost of the insurance" is subject to imprisonment in county jail for one, two, three or five years, a fine up to $50,000, or both, with subsequent violations reviving "a two-year enhancement for each prior conviction... .").

[243] (2015) 237 Cal.App.4th 316, 187 Cal.Rptr.3d 836.
[244] *Id.* at 327-330.
[245] *Id.* at 337-341.
[246] With respect to the statutes discussed below, the original Unemployment Insurance Code chapter was enacted in 1953. *General Notes* from West's Ann. Cal. Unemp. Ins. Code D. 1, Pt. 1, Ch. 10, Refs & Annos.
[247] Unemp. Ins. Code, § 2122.
[248] Unemp. Ins. Code, § 2126.

There Is Liability For Failure to Pay Prevailing or Minimum Wages of Independent Contractors.

Labor Code section 2810 allows construction, farm labor, garment, janitorial, security guard and warehouse workers to sue a person or entity that contracts with its direct employer for labor or services, "where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state and federal laws and regulations governing the labor or services to be provided."[249] Essentially, this statute permits a worker to sue the entity that contracted with the worker's employer if the employer does not pay legally required wages. The statute does not apply to a person or entity who executes a collective bargaining agreement covering the workers employed under the contract or agreement.[250]

Labor Code section 2810 creates a rebuttable presumption affecting the burden of proof that there has been no violation where the contract or agreement satisfies ten different criteria, including several detailed items such as the vehicle identification number of any vehicle that is owned by the contractor, workers' compensation insurance policy number and the name, address, and telephone number of the insurance carrier.[251]

In a wage and hour lawsuit by employees of two different framing subcontractors against a large-scale residential developer, in which employees sought to hold the developer liable for Labor Code violations by the subcontractors, the Court concluded that section 2810 requires compliance with the legal minimum wage, not the workers' regular rate of pay.[252]

Although the Court did not discuss the minimum wage on a prevailing wage project, because existing case law establishes prevailing wage as the legal minimum wage on a public project, there is a potential argument that on a public works project, a public entity could be held liable if the contract does not include sufficient funds to pay the prevailing wage.[253]

Private Employers and Staffing Agencies Are Jointly Liable for Violations of Wage, Safety, and Workers' Compensation Laws.

California's Temp Worker Protection Law, set forth in Labor Code section 2810.3, makes private employers and staffing agencies jointly liable for wage and safety violations and the procurement of workers' compensation coverage. Employers covered by the statute are those with 25 or more employees that obtain or are provided at least six workers to perform labor within the usual course of business from one or more labor contractors.

Under this law, if a private employer receives temporary workers through a staffing agency, and the staffing agency fails to properly pay the work or maintain valid workers' compensation coverage, then the employer can be responsible for any unpaid wages or workers' compensation claims. For example, if the staffing agency deems workers to be independent contractors, but a government agency subsequently deems them to be employees, the staffing agency and the employer will be jointly responsible.

And, under this law, covered employers have non-delegable responsibilities for worksite occupational health and safety. However, employers can contract for defense and indemnification from the staffing agency for the staffing agency's failure to pay wages or secure workers' compensation. Even so, the worker retains the ability to sue the employer directly, which places the burden on the employer to seek to enforce the defense and indemnity provisions in court.

There is no "opportunity to cure" provision in the law, but a worker, or his or her representative, must notify the employer of violations at least 30 days prior to filing a civil action against the employer. But workers are not required to provide 30 days' notice before pursing an administrative claim. Neither the employer nor the staffing

[249] Lab. Code, § 2810(a).
[250] Lab. Code, § 2810(c).
[251] Lab. Code, § 2810(d)(1)-(10).
[252] *Castillo v. Toll Bros., Inc.* (2011) 197 Cal.App.4th 1172.
[253] *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 125 Cal.Rptr.2d 804.

agency may retaliate against a worker who provides notice of a violation or who files an administrative claim or civil action.

To prevail in an administrative or civil action against the employer for the staffing agency's alleged violations, the worker will need to prove:

- That he/she was not properly compensated or provided with workers' compensation coverage;
- That these violations occurred while the worker was working pursuant to a contract for labor between the employer and staffing agency; and
- The contract was for work within the "usual course of business" of the employer, meaning the work was regular and customary for the employer and performed within or upon the premises of the worksite of the employer.

Private employers who use contracted workers should carefully review vendor agreements to ensure compliance with these provisions and act vigilantly to ensure workers supplied by staffing agencies are paid properly and are appropriately covered by the staffing agency's workers' compensation plan. Additionally, such agreements should include a provision allowing the employer to audit the staffing agency's records regarding compliance with-wage-and hour laws and workers' compensation insurance coverage. Such agreements also should include strong indemnification language indicating that the staffing agency will hold the employer harmless if it fails to properly compensate workers or provide workers' compensation coverage.

ARBITRATION AGREEMENTS USED AS A TOOL TO ADDRESS MISCLASSIFICATION ISSUES

One federal judge recently ordered restaurant delivery service DoorDash to individually arbitrate employment misclassification claims brought by more than 5,000 food couriers. In order to make deliveries for DoorDash, the drivers "clicked through" a mutual arbitration provision mandating arbitration of any misclassification claim. In August and September 2019, the drivers' attorneys filed individual arbitration demands on behalf of the drivers, for which they paid over $1.2 million in fees. DoorDash refused to pay its nearly $12 million share of the fees, resulting in a federal action by the drivers seeking to compel their arbitrations. In the decision, the judge noted: "For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the U.S. Supreme Court to sustain such provision. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, DoorDash ironically now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This apparent hypocrisy will not be blessed, at least by this order."[254]

INTERSTATE TRANSPORTATION WORKERS

In January 2020, a federal trial court issued a preliminary injunction in favor of the California Trucking Association preventing the State from enforcing AB 5 against the trucking industry, ruling that this application of AB 5 was preempted by the Federal Aviation and Administration Authorization Act of 1994 ("FAAAA").[255] This injunction was

[254] *Abernathy v. DoorDash, Inc.* (N.D. Cal. 2020) 438 F.Supp.3d 1062, 1067-1068.

[255] *California Trucking Assn. v. Becerral*, Case No.: 3:18-cv-02458-BEN-BLM (S.D. Cal. January 16, 2020, Benitez, R.); Said, C., *Federal judge gives truckers reprieve from AB 5* (Jan. 16, 2020 Updated: Feb. 6, 2020 5:39 p.m.) https://www.sfchronicle.com/business/article/Federal-judge-give-truckers-reprieve-from-AB 5-14981564.php# (Downloaded March 16, 2020).

overturned by the Ninth Circuit in 2021.[256] The final disposition of this dispute is not known.

In *New Prime Inc. v. Oliveira*,[257] the U.S. Supreme Court ruled that the Federal Arbitration Act's exclusion of "contracts of employment of ... workers engaged in foreign or interstate commerce"[258] In doing so, the Court specifically concluded that the exclusion in the 1925 FAA referred to "not only agreements between employers and employees but also agreements that require independent contractors to perform work."[259]

And state law—whatever it may be—continues to be significant in employment law aspects of at least some interstate commerce. For example, in late 2018, the Ninth Circuit ruled that the Federal Aviation Administration Authorization Act ("FAAAA")[260] did not preempt the California Labor Commissioner from using the *Borello* standard "to determine whether a motor carrier has properly classified its drivers as independent contractors."[261]

New Developments 2021

CALIFORNIA VOTERS APPROVED PRO-INDEPENDENT CONTRACTOR INITIATIVE CHANGES ADVOCATED BY APP-BASED TRANSPORTATION AND DELIVERY COMPANIES; LONG-TERM FUTURE OF THE ADOPTED INITIATIVE IS UNCERTAIN.

A coalition of businesses and drivers fought back against the new independent contractor legislation with a ballot initiative in November 2020 in Proposition 22, known as the "Protect App-Based Drivers & Services Act." Uber, Lyft, and DoorDash each placed $30 million into campaign accounts to fund the measure. Initially, Proposition 22 was approved by 59% of the voters at the November 3, 2020 election.[262] However, as of this writing, at least one court has determined that Proposition 22 is unconstitutional, and its future is therefore uncertain.

As enacted, Proposition 22[263] considered app-based drivers to be independent contractors and not employees or agents. The ballot initiative enacted new Business & Professions Code section, which defined "app-based drivers" as workers who (a) provide delivery services on an on-demand basis through a business's online-enabled application or platform, or who (b) use a personal vehicle to provide prearranged transportation services for compensation via a business's online-enabled application or platform. The ballot measure did not affect how the new legislation is applied to other types of workers.

Proposition 22 also enacted labor and wage policies that are specific to app-based drivers and companies, including:

- payments for the difference between a worker's net earnings, excluding tips, and a net earnings floor based on 120% of the minimum wage applied to a driver's engaged time and 30 cents, adjusted for inflation after 2021, per engaged mile;
- limiting app-based drivers from working more than 12 hours during a 24-hour period, unless the driver has been logged off for an uninterrupted 6 hours;
- for drivers who average at least 25 hours per week of engaged time during a calendar quarter, require companies to provide healthcare subsidies equal to 82% the average California Covered ("CC") premium for each month;
- for drivers who average between 15 and 25 hours per week of engaged time during a calendar quarter, require companies to provide healthcare subsidies equal to 41% the average CC premium for each month;
- require companies to provide or make available occupational accident insurance to cover at least $1 million in medical expenses and lost income resulting from injuries suffered while a driver was online (defined as when the driver is using the

[256] *California Trucking Assn. v. Bonta* (9th Cir. 2021) 996 F.3d 644.
[257] (2019) 139 S.Ct. 532.
[258] 9 U.S.C. § 1.
[259] *Id.* at 539.
[260] 49 U.S.C. § 14501.
[261] *California Trucking Assn. v. Su* (2018) 903 F.3d 953.
[262] https://en.wikipedia.org/wiki/2020_California_Proposition_22 (as of August 24, 2021, 8:49 pm PT).
[263] Bus. & Prof. Code, §§ 7448 et seq.

app and can receive service requests) but not engaged in personal activities;
- require the occupational accident insurance to provide disability payments of 66 percent of a driver's average weekly earnings during the previous four weeks before the injuries suffered (while the driver was online but not engaged in personal activities) for upwards of 104 weeks (about two years);
- require companies to provide or make available accidental death insurance for the benefit of a driver's spouse, children, or other dependents when the driver dies while using the app.

Proposition 22 defined a driver's engaged time as the time between accepting a service request and completing the request.[264]

COURT CHALLENGES TO PROPOSITION 22

On August 20, 2021, an Alameda County Superior Court determined that Business & Professions Code section 7451, the principal portion of Proposition 22, was unconstitutional[265] for two somewhat technical reasons. First, the court ruled that provisions which limited the power of future legislators to define app-based drivers as workers subject to workers' compensation violated the California Constitutional provisions giving the legislature "unlimited" power to create worker's compensation laws.[266] Second, the court determined that the provision prohibiting future legislators from adopting amendments allowing app-based drivers some collective bargaining rights violated the single-subject rule[267], as collective bargaining was not "germane to Proposition 22's stated theme, purpose or subject."[268]

FEDERAL DEPARTMENT OF LABOR RULES FOR CLASSIFYING INDEPENDENT CONTRACTORS AND EMPLOYEES

On January 6, 2021, the U.S. Department of Labor ("DOL") announced a rule addressing the distinction between employees and independent contractors under the Fair Labor Standards Act ("FLSA"), which was initially scheduled to take effect on March 8, 2021. Following transition of the new Biden administration, on February 5, 2021, the DOL delayed adoption of the new rule. After reviewing thousands of comments over the next few months, the DOL ultimately did not adopt the proposed rule, and confirmed it's prior 2008 guidance on the distinction between employees and independent contractors.[269]

Pursuant to that guidance, under the FLSA, the DOL will continue to apply the "economic realities" test, under which an employee "as a matter of economic reality" follows the usual path of an employee and is dependent on the business which he or she serves."[270] According to the DOL, "The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls."[271] Among the factors which the Court has considered significant are:

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the alleged contractor's investment in facilities and equipment.
- The nature and degree of control by the principal.
- The alleged contractor's opportunities for profit and loss.

[264] https://ballotpedia.org/California_Proposition_22,_App- Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020).
[265] *Castellanos v State of Cal.*, Order Granting Petition fo Writ of Mandate (Alameda County Superior Court Case No. RG21088725, Roesch, F., August 20, 2021).
[266] *Id.* at p. 11.
[267] Initiative statutes must be limited to a single "subject." Cal. Const. art. II, § 8(d).
[268] *Castellanos, supra*, at p. 12 (internal quotations om.).
[269] https://www.dol.gov/agencies/whd/flsa/2021-independent-contractor.
[270] https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship.
[271] *Id.*

- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- The degree of independent business organization and operation.

According to the DOL, there are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.[272]

LITIGATION EFFORTS BY LOCAL GOVERNMENT AGENCIES TO ENFORCE MISCLASSIFICATION LAWS CONTINUE

In March, 2021, the District Attorneys for Los Angeles and San Francisco sued New York-based online housekeeping and repair company, Handy Technologies, Inc. for allegedly misclassifying its workers as independent contractors.

KEY ISSUES

- Litigation in California related to worker misclassification continues to hit employers hard. The 2018 *Dynamex* case, AB 5 and AB 2257, and subsequent Labor Code revisions will continue this trend. The gig economy is a particularly active source of misclassification litigation. When an employer has questions about the proper classification for its worker, it should work closely with employment law counsel to mitigate the risk of future litigation.
- California law establishes civil penalties of up to $15,000 where willful misclassification can be established, and up to $25,000 where a pattern or practice of willful misclassification can be established.
- California law also establishes criminal penalties for various misclassifications under the Labor Code, Unemployment Insurance Code and Insurance Code (regarding workers' compensation insurance), with penalties including jail time and significant fines.
- An employer's third party advisors, such as financial, accounting, and human resource professionals can be jointly and severally liable with the employer for fines and penalties under the Labor Code for willful misclassification of workers.
- Employers should review classification of their workers to avoid liability potential for misclassification.
- In addition to all other aspects of the independent contractor issue, public employers must carefully evaluate whether workers it has classified as independent contractors may actually be covered by CalPERS and whether a retiree can properly be rehired as an independent contractor.
- Employers should identify exposure items related to the potential misclassification of workers from other perspectives, including benefits eligibility, state income tax withholding, and state civil penalties, and coordinate with all impacted departments including tax, payroll, legal and human resources.
- In situations which the Labor Code exempts from the strict ABC Test, the primary factor considered in determining whether a worker is an employee or an independent contractor remains whether the employer has the right to direct and control the work.
- Written agreements with contract workers should demonstrate the parties' intent to preserve an

[272] *Id.*

independent contractor relationship and where possible should include language tracking the applicable Labor Code exemption, including the applicable statutory business to business and professional services contract exceptions.

- State agencies may hire firms, not individuals, as independent contractors when doing so will result in cost savings to the state and will not displace employees or jeopardize affirmative action efforts.
- Although independent contractors cannot typically sue under many statutes that protect employees, they can sue under some, and it remains prudent for employers to ensure that such workers are not subject to unlawful employment practices, such as harassment.
- Employees of independent contractors generally may not sue the hiring entity for damages resulting from most work-related injuries.

Overview of Employment Discrimination Laws

SUMMARY OF THE LAW

This chapter provides a general overview of key federal and state laws that prohibit discrimination and retaliation in the workplace. Subsequent chapters discuss specific types of discrimination and recent legal developments (race, religion, gender, age, and disability).

FEDERAL LAW

Title VII of the 1964 Civil Rights Act

Title VII of the 1964 Civil Rights Act[1] prohibits employment discrimination based on a person's race, color, national origin, sex, or religion. An employer cannot lawfully use these criteria to recruit, hire, fire, compensate, promote, classify, train, refer for employment, or extend any other privilege of employment to an employee or applicant. Title VII requires that employers reasonably accommodate the sincerely held religious beliefs of applicants and employees, unless doing so would impose an undue hardship on the operation of the employer's operation.

Title VII also prohibits employers from retaliating against an employee or applicant who has opposed any practice made an unlawful employment practice under Title VII or who has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII.[2]

Title VII covers both private and public employers with fifteen or more employees.[3] Title VII also applies to labor organizations and employment agencies. The "payroll method" is used to determine the number of employees an employer has at any given time, meaning that the test is whether the employer has 15 or more employees on its payroll.[4]

The Pregnancy Discrimination Act of 1978

The Pregnancy Discrimination Act of 1978[5] amended Title VII to specifically provide that the prohibition of sex discrimination includes discrimination on the basis of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. (For a complete discussion of sex discrimination, see Chapter 16.)

The Civil Rights Act of 1991

The Civil Rights Act of 1991 ("CRA") does not create any new substantive rights, but rather, modifies the rights and remedies available under existing civil rights statutes. The CRA amends Title VII, the ADA, the Rehabilitation Act, the ADEA, and section 1981 of the Civil Rights Act of 1866 to allow for compensatory and punitive damages, as well as for jury trials under Title VII, the ADA, and the Rehabilitation Act. The Ninth Circuit has ruled that the CRA creates a private right of action against a public employer for violating section 1981.[6] Before the CRA, private

[1] 42 U.S.C. §§ 2000e et seq.
[2] 42 U.S.C. § 2000e-3(a); *Robinson v. Shell Oil Co.* (1997) 519 U.S. 337, 117 S.Ct. 843.
[3] The threshold number of employees for Title VII is not a limitation on federal court jurisdiction, but rather an element of the employee's claim. As such, it cannot be challenged for the first time after trial. *Arbaugh v. Y&H Corp.* (2006) 546 U.S. 500, 126 S.Ct. 1235, on remand (5th Cir. 2006) 446 F.3d 573.
[4] *Walters v. Metropolitan Educational Enterprises, Inc.* (1997) 519 U.S. 202, 117 S.Ct. 660.
[5] 42 U.S.C. § 2000e(k).
[6] Federation of African-American Contractors v. City of Oakland (9th Cir. 1996) 96 F.3d 1204.

plaintiffs could not directly sue a public employer who violated section 1981.

Title I of the Americans with Disabilities Act of 1990

Title I of the Americans with Disabilities Act of 1990[7] ("ADA") prohibits employment discrimination against persons with physical or mental disabilities.[8] With the enactment of the ADA Amendment Act ("ADAAA"), effective January 1, 2009, Congress implemented various changes to the ADA with the intent ensuring the ADA provides a broad scope of protection. The ADA covers most public and private employers with 15 or more employees.[9] (For a complete discussion of disability discrimination, see Chapter 14.)

The Age Discrimination in Employment Act

The Age Discrimination in Employment Act ("ADEA")[10] prohibits discrimination on the basis of age against employees and applicants age 40 years or older. The ADEA prohibits age discrimination in all employment practices including hiring, firing, compensation, employment terms and conditions, and job opening advertisements. The ADEA covers both public and private employers with 20 or more employees, as well as labor organizations, apprenticeship and training programs, and employment agencies. The ADEA provides an exception for highly compensated executives who may be retired at age 65 and who receive at least $44,000 in annual retirement income. (For a complete discussion of age discrimination, see Chapter 17.)

The American Recovery and Reinvestment Act

The American Recovery and Reinvestment Act of 2009[11] ("ARRA"), commonly referred to as the "Stimulus Bill," provides new whistleblower protections. Under the ARRA, employees of private employers and state and local governments that have received a contract, grant, or other payment from funds made available under the Stimulus Bill, may disclose waste, fraud, gross mismanagement, or a violation of law related to stimulus funds without fear of reprisal. The ARRA's whistleblower protection is quite broad, contains an employee-friendly burden of proof, and unlike other whistleblowing statutes, expressly protects internal reports made to an employer in the ordinary course of an employee's job duties.

The Equal Pay Act

The Equal Pay Act[12] ("EPA") is part of the Fair Labor Standards Act[13] ("FLSA") and is set forth in section 6(d) of the FLSA. The EPA prohibits discrimination on the basis of sex in wages paid for "equal work" on jobs requiring equal skill, effort, and responsibility when those jobs are performed under similar working conditions. Unequal pay is allowed, though, where disparity exists due to seniority or merit system. However, unequal pay is not permitted when pay structure is based solely on employees' salary history. Employers are subject to the EPA only if they are covered by the FLSA.

The Genetic Information Nondiscrimination Act of 2008

In recognition of scientific advances, Congress enacted The Genetic Information Nondiscrimination Act of 2008[14] ("GINA") to prohibit discrimination on the basis of genetic information in both the insurance and employment contexts. Under GINA, genetic information is not limited to DNA testing data but more broadly includes family health history information.

The first part of GINA, Title I, applies to group health insurance plans sponsored by private employers, unions, state and local government employers, issuers of Medical supplemental insurance (Medigap), and issuers of group and individual health insurance. Title II of GINA is applicable to employers of 15 or more employees and

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[7] 42 U.S.C. §§ 12101 et seq.
[8] *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* (2012) 132 S.Ct. 694, 705, 181 L.Ed.2d 650, the Supreme Court adopted the "ministerial exception" for the first time finding that religious employers cannot be sued under the ADA and other laws prohibiting discrimination by "ministerial" employees.
[9] 42 U.S.C. § 12111(5(A).
[10] 29 U.S.C. §§ 621 et seq.
[11] American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5, 123 Stat. 115 (2009)).
[12] 42 U.S.C. §§ 2000e(k) et seq.
[13] 42 U.S.C. §§ 12101 et seq.
[14] 42 U.S.C. §§ 2000ff et seq.

prohibits the use of genetic information in the employment context, restricts employers' collection of genetic information, and imposes strict limitations on the power of employers to disclose genetic information. Under GINA, employers may no longer ask for family health histories as part of any employment-related medical examination.

The Civil Rights Act of 1866 and 1871: The Reconstruction Statutes

The federal civil rights statutes adopted after the Civil War are referred to as the "Reconstruction Statutes" and were enacted to effectuate the Thirteenth Amendment. Section 1981[15] guarantees all "persons within the jurisdiction of the United States," the rights to make and enforce contracts, sue, and give evidence, and the full and equal benefit of all laws, regardless of race. Section 1981 expressly prohibits discrimination in contractual relationships including "the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[16] (For a more complete discussion of race discrimination, see Chapter 15.)

Section 1983[17] itself creates no substantive rights, but provides individuals with the right to sue and hold personally liable any person who violates their civil rights. A two-year statute of limitations applies to all section 1983 actions.[18]

The Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act[19] prohibits discrimination against any employee or applicant because of the individual's past, present, or future application for uniformed service or performance of such service. The prohibition extends to decisions regarding hiring, retention, reemployment, promotion, and any other employment benefit.

THE EEOC'S ROLE IN ENFORCING ANTI-DISCRIMINATION LAWS

The Equal Employment Opportunity Commission ("EEOC") monitors compliance with and enforces Title VII, the ADEA, the ADA, and other federal anti-discrimination laws. Before an employee can file a court claim under any of these laws, the employee first must file a charge with the EEOC. Generally, the employee must file a verified charge within 300 days of the alleged violation,[20] although an EEOC relation-back regulation permits a claimant to verify the charge after the time for filing has passed.[21]

The EEOC must investigate the charge and determine if reasonable cause exists to believe the charge is true. If no reasonable cause exists, the EEOC must dismiss the charge and promptly notify the charging party and the accused employer. But if the EEOC concludes that reasonable cause exists, it must eliminate the unlawful practice by informal methods of conference, conciliation, and persuasion. The EEOC may, but is not required to, bring a civil lawsuit against the employer. The EEOC has authority to bring suit to enjoin an employer from engaging in unlawful employment practices, and to pursue reinstatement, back pay, and compensatory or punitive damages.[22] The EEOC must make a reasonable cause determination within 120 days from the date the charge was filed.[23]

If the EEOC dismisses a charge, it must notify the charging party in a "right-to-sue letter" that the party may bring a civil lawsuit in trial court against the employer within 90 days of the date the charging party receives the letter.[24] The 90-day period acts as a limitations period and courts measure the start of the limitations period from the date

[15] 42 U.S.C. § 1981.
[16] 42 U.S.C. § 1981(b).
[17] 42 U.S.C. § 1983.
[18] There is no statute of limitations under federal law for § 1983 actions, but federal courts look to the comparable statute in the forum state. *Wilson v. Garcia* (1985) 471 U.S. 261, superseded by statute as stated in *Jones v. R.R. Donnelley & Sons Co.* (2004) 541 U.S. 369. The comparable statute in Code Civ. Proc., § 335.1, which applies to personal injury actions. Pursuant to this statute, an individual has a two-year limitation period. Code Civ. Proc., § 335.1; *Hacienda Valley Mobile Estates v. City of Morgan Hill* (9th Cir. 2003) 353 F.3d 651, 655.
[19] 38 U.S.C. §§ 4301 et seq.
[20] 42 U.S.C. § 2000e-5(e).
[21] *Edelman v. Lynchburg College* (2002) 535 U.S. 106, 122 S.Ct. 1145.
[22] *EEOC v. Waffle House, Inc*. (2002) 534 U.S. 279, 122 S.Ct. 754.
[23] 42 U.S.C. § 2000e-5(b).
[24] 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.19(a).

on which a right-to-sue notice letter arrived at the claimant's address-of-record. When the date of actual receipt is unknown, courts estimate that date based on the date that the EEOC issued the notice, with some mailing time. The court in the case of *Payan v. Aramark Management Services Limited Partnership*[25] decided that the mailing time should be three days. Payan filed her lawsuit 98 days after the EEOC issued her a right-to-sue notice. Given the three days mailing time, her claim was untimely and the case was dismissed.

The EEOC also must issue a right-to-sue letter if it has not filed a civil claim or entered into a conciliation agreement with the charging party within 180 days from the date the charge is filed.[26]

The EEOC has repeatedly and unequivocally advised that individuals cannot waive their right to file discrimination charges under any of the EEOC enforced civil rights laws. If an employer requires employees to relinquish their rights under civil rights laws, the EEOC will issue discrimination charges.

The "Lilly Ledbetter" Fair Pay Act

Title VII of the 1964 Civil Rights Act was amended on January 29, 2009, when President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 ("Ledbetter Act").[27] The purpose of the Ledbetter Act, as set forth in the Preamble, was:

to amend Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes.[28]

The Ledbetter Act overturns the U.S. Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Company* which rejected the argument that the statute of limitations period for filing a wage discrimination claim resets each time an employee receives the paycheck or other form of compensation that is based on the act or decision that is challenged as discriminatory, the "paycheck rule."[29]

OTHER FEDERAL ANTI-DISCRIMINATION LAWS

Immigration Reform and Control Act

The Immigration Reform and Control Act[30] ("IRCA") prohibits the employment of unauthorized aliens and creates an employment verification system that is intended to identify and screen out individuals who are not legally entitled to work in the United States. In response to concerns that the IRCA would result in discrimination against individuals who appeared "foreign," the IRCA contains specific provisions that prohibit employment discrimination based on an individual's citizenship or national origin. The prohibition extends to hiring, firing, recruiting, and referral practices.

Expanding on the anti-discrimination principles based on the national origin provisions of the IRCA, the EEOC has issued guidelines on "national origin" discrimination and harassment. The EEOC's guidelines make it clear that national origin discrimination under Title VII of the Civil Rights Act of 1964 includes discrimination based on:

- Ethnicity: whether an individual belongs or does not belong to a particular ethnic group;
- Physical, linguistic, or cultural traits: which may include a person's accent, dress style, or other traits associated with a certain origin;
- Perception: regardless of the individual's actual origin, if the individual is discriminated based on a subjective belief of a particular national origin;
- Association: whether a person is associated (e.g., spouse or child) with an individual from a particular national origin.

[25] (9th Cir. 2007) 495 F.3d 1119.
[26] 42 U.S.C. § 2000e-5(f)(1).
[27] Pub. L. No. 111-2, 123 Stat. 5 (2009) (amending 42 U.S.C. § 2000e-5(e)).
[28] *Id.*
[29] 550 U.S. 618, 127 S.Ct. 2162, 2174 (2007).
[30] 8 U.S.C. §§ 1324 et seq. The relevant rules are codified at 8 C.F.R. Parts 270 and 274a.

Moreover, according to the EEOC's guidelines, employers must ensure that any language-based decisions, e.g., accents, fluency, and "English-only" policies, are rooted in legitimate business reasons.

Federal Contractors and Recipients of Federal Funding

Employers who contract with the federal government, provide goods or services to a federal contractor, or receive federal funding, have additional obligations to comply with federal equal opportunity laws. These special obligations are set forth in various statutes and regulations, including those summarized below.

Title VI of the 1964 Civil Rights Act

Title VI of the 1964 Civil Rights Act[31] prohibits any activity or program receiving federal funding from discriminating against individuals based on race, color, or national origin. Where an agency receives federal financial assistance for even one program, the entire agency must still comply with Title VI.

The Rehabilitation Act of 1973

The Rehabilitation Act of 1973[32] prohibits discrimination against qualified individuals with physical or mental disabilities by recipients of federal funds, including private organizations, and state and local government. Section 504[33] of the Act provides that no qualified individual with a disability shall be excluded from participation in, be denied benefits under, or be subjected to discrimination under any program or activity receiving federal financial assistance solely by reason of his or her disability.

Executive Order 11246

Executive Order 11246 applies to all employers that have contracts with the federal government or federal contractors in excess of $10,000. This Executive Order requires compliance with the antidiscrimination provisions of Title VII and was amended by Executive Order 13672 to add sexual orientation and gender identity as protected characteristics.[34] Additionally, Executive Order 11246 mandates covered employers to adopt affirmative action programs to ensure representations of minorities and women in their workforce that is statistically consistent with the number of such individuals in the relevant pool of qualified applicants.[35]

Executive Order Preventing and Combating Discrimination of the Basis of Gender Identity or Sexual Orientation

President Biden issued Executive Order 13988 on January 20, 2021. This Executive Order directs all federal agencies to interpret protections against discrimination based on sex to include discrimination based on sexual orientation, gender identity, and gender expression.[36]

COVID-19 AND ANTI-DISCRIMINATION LAWS

Employer must comply with anti-discrimination laws during the COVID-19 pandemic. The EEOC posted a question-and-answer document, "*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*" on its website.[37] The EEOC Guidance is updated regularly.

CALIFORNIA LAW

In addition to federal laws, California employers must comply with a variety of state laws prohibiting discrimination. Many of the statutes increase employee protections against discrimination and provide for greater damages awards than available under federal laws. The main sources of equal employment protection in California are summarized below.

The California Constitution

The California Constitution, Article I, section 8 provides that a "person may not be *disqualified from entering or pursuing* a business, profession, vocation, or employment because of sex, race, creed,

[31] 42 U.S.C. § 2000d.
[32] 29 U.S.C. §§ 701 et seq.
[33] 29 U.S.C. § 794.
[34] 30 Fed. Reg. 12319; 79 Fed. Reg. 42971.
[35] 30 Fed. Reg. 12319, 1965 U.S. Cong. & Admin. News 4416.
[36] 86 Fed. Reg. 7023.
[37] See, eeoc.gov/coronavirus.

color, or national or ethnic origin."[38] Thus, the unlawful denial of employment or termination from employment violates the fundamental public policy of California as expressed in the constitution.

The Fair Employment and Housing Act

Similar to the federal statutes, the California Fair Employment and Housing Act ("FEHA") prohibits employment discrimination based on race ("race" is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles, which includes, but is not limited to, such hairstyles as braids, locks, and twists),[39] color, national origin/ancestry, sex,[40] gender, gender identity, gender expression,[41] and religion.[42] The FEHA also prohibits discrimination based on age, marital status, sexual orientation, physical or mental disability, medical condition, genetic information, and military or veteran status.[43]

Unpaid interns and volunteers are protected under the FEHA,[44] as are undocumented immigrants.[45] Additionally, national origin discrimination includes discrimination on the basis of possession of an "AB 60 driver's license," or a license issued to an undocumented immigrant.[46]

The definition of "employees" covered under FEHA also was expanded to include individuals with disabilities who have special licenses to work at nonprofit sheltered workshops, day programs, or rehabilitation facilities. Accordingly, these disabled employees who were previously excluded from FEHA discrimination laws are now permitted to bring a complaint against their employer for any form of discrimination prohibited by FEHA.[47]

In addition to prohibiting discrimination based upon protected characteristics, the FEHA has been amended to prohibit discrimination based upon "a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."[48] The FEHA applies to both public employers, and private employers with five or more employees.

In the seminal 1998 case of *Reno v. Baird*,[49] California's Supreme Court concluded that supervisory employees may not be held personally liable for discrimination, but may be held personally liable for harassment because harassment consists of a type of conduct not necessary for a supervisor's job performance. Similarly, in *Jones v. The Lodge at Torrey Pines*,[50] the court ruled that although employers may be held liable, supervisors may not be held personally liable for retaliation claims within the discrimination context.

The FEHA was recently amended to:

- Expand an employer's potential liability for acts of non-employees to all forms of unlawful harassment (removing the "sexual" limitation).[51]
- Prohibit employers from requiring an employee to sign (as a condition of employment, raise, or bonus): (1) a release of the FEHA claims or rights or (2) a

[38] Cal. Const., art. I, § 8.
[39] Gov. Code, 12926(w), (x), as amended by Stats. 2019, 2019 Cal. Legis. Serv. Ch. 58.
[40] Gov. Code, § 12926(q)(1), as amended by Stats. 2012, ch. 701, expands FEHA's protections against discriminatory practices in employment based on sex by including breastfeeding and medical conditions related to breastfeeding in the definition of "sex."
[41] Gov. Code, § 12940(a). Gov. Code, § 12949, provides as follows: "Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity or gender expression."
[42] Gov. Code, §§ 12900 et seq.; Gov. Code, § 12926(p), as amended by Stats. 2012, ch. 287, expands FEHA's protections against religious discrimination by amending § 12926(p) to include a religious dress practice or religious grooming practice as a "religious belief" and/or "observance."
[43] Gov. Code, §§ 12921, 12940(a). Employment decisions prohibited under FEHA include not only those concerning hiring, compensation, and other employment terms but also participation in labor organizations and employment training programs. Gov. Code, § 12940(b-c). Likewise, employers and licensing boards may not make non-job-related inquiries about an applicant's or employee's genetic information, or express limitations or specifications for employment or licensure based on genetic information. Gov. Code, §§ 12940(d), 12944(a), (c).
[44] Gov. Code, § 12940(c).
[45] *Salas v. Sierra Chemical* (2014) 50 Cal.4th 407.
[46] Gov. Code, § 12926(v).
[47] Gov. Code, § 12926.05.
[48] Gov. Code, § 12926(m).
[49] (1998) 18 Cal.4th 640, 76 Cal.Rptr.2d 499.
[50] (2008) 42 Cal.4th 1158, 72 Cal.Rptr.3d 624, rehg. den. April 20, 2008.
[51] Gov. Code, § 12940(j)(3(B).

document prohibiting disclosure of information about unlawful acts in the workplace, including non-disparagement agreements. This provision does not apply to negotiated settlement agreements to resolve the FEHA claims filed in court, before administrative agencies, alternative dispute resolution, or through the employer's internal complaint process.[52]

- Prohibit a prevailing defendant from being awarded attorney's fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.[53]
- Authorize (but not require) employers to provide bystander intervention training to its employees.[54]

The recent amendment to the FEHA further provides:

- In a workplace harassment suit, "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."[55]
- "[A] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."[56]
- The "existence of a hostile work environment depends on the totality of the circumstances and a discriminatory remark, even if made not directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination."[57]
- Unless it is part of an employee's job duties, sexual harassment does not vary definitionally based on a workplace's historical tolerance of sexual behavior, rejecting the California Court of Appeal's ruling in *Kelley v. Conco Companies*.[58]
- Hostile work environment claims involve issues "not determinable on paper," making summary judgment on the issue only "rarely appropriate."[59]

Additionally, the FEHA requires employers with 50 or more employees to provide sexual harassment training to all supervisory employees every two years, and within six months of initial appointment to a supervisory position. Training must also address abusive conduct, defined as conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Examples of abusive conduct include verbal abuse, use of derogatory epithets, conduct that a reasonable person would find intimidating, and sabotage of another person's work performance.[60] The FEHA also requires sexual harassment training to address gender identity, gender expression, and sexual orientation.

A recent update to the FEHA now requires employers with five or more employees to provide, by January 1, 2020:

- At least two hours of classroom or other effective training and education regarding sexual harassment prevention to supervisory employees; and
- One hour of sexual harassment prevention training and education to nonsupervisory employees. New employees must be trained within six months of hire.[61]
- Sexual harassment training for temporary or seasonal employees or any employee who is hired to work for less than six months. The training must be completed within 30 calendar days after the hire date or within 100 hours worked, whichever

[52] Gov. Code, § 12964.5.
[53] Gov. Code, § 12965(b).
[54] Gov. Code, § 12950.2.
[55] Gov. Code, § 12923(a); *Harris v. Forklift Systems* (1993) 510 U.S. 17, 26.
[56] Gov. Code, § 12923(b); *Brooks v. City of San Mateo* (2000) 229 F.3d 917.
[57] Gov. Code, § 12923(c); *Reid v. Google, Inc.* (2010) 50 Cal.4th 512.
[58] Gov. Code, § 12923(d); *Kelley v. Conco Companies* (2011) 196 Cal.App.4th 191.
[59] Gov. Code, § 12923(e); *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243
[60] Gov. Code, § 12950.1.
[61] Gov. Code, § 12950.1(a).

occurs first. If the temporary employee is provided by a temporary services employer, the training must be provided by the temporary services employer, not the client.[62]

- Sexual harassment prevention training for migrant and seasonal agricultural workers at the time of hire and at least once every two years.[63]

Certain local agency officials are also required to undergo sexual harassment prevention training within six months of election or appointment and every two years thereafter.[64] The standard for training is that if the "local agency provides any type of compensation, salary, or stipend to a local agency official of that agency, then all local agency officials of that agency shall receive sexual harassment prevention training and education..."[65]

THE DFEH'S ROLE IN ENFORCING CALIFORNIA'S EMPLOYMENT DISCRIMINATION LAWS

The Department of Fair Employment and Housing ("DFEH") enforces the FEHA and other California anti-discrimination laws. Employees must file a claim with the DFEH before seeking to vindicate FEHA rights in court. A complainant must file a complaint with the DFEH within three years of the alleged unlawful practice, however, the statute of limitations may be tolled while an employee voluntarily pursues internal administrative remedies with the employer prior to filing a DFEH complaint.[66] For wrongful termination claims under the FEHA (as well as contract and tort law claims), this one-year statute of limitations begins to run on the actual termination date, not the date of notification of the termination.[67] The one-year period for filing DFEH complaints may be extended for an additional 90 days if the person alleging harm first obtains knowledge of the unlawful practice more than one year after the date that they allegedly occurred.[68] Other extensions are available in certain other circumstances.[69] The DFEH has 45 days from the date the complaint is filed to serve it on the employer or person who allegedly violated the FEHA.[70] The DFEH must then investigate the complaint.

If the complaint is valid, the DFEH must attempt to eliminate the unlawful practice by conference, conciliation, mediation, or persuasion. In the case of failure to eliminate an unlawful practice, the DFEH may bring its own civil action on behalf of the person claiming to be aggrieved.[71]

If the DFEH does not bring a civil action within 150 days after the complaint is filed, it must notify the complainant that it will, upon request, issue a right-to-sue letter to the complainant.[72] The right-to-sue letter must inform the complainant that the complainant may file a civil claim in superior court against the employer within one year from the date of the right-to-sue letter.

Public entity employers have civil service provisions by charter, ordinances, rules, regulations, or policies that allow aggrieved employees to complain of discrimination through administrative procedures. The California Supreme Court concluded in *Schifando v. City of Los Angeles* that a public employee need not pursue internal administrative remedies before filing a FEHA complaint,[73] as it had concluded with respect to state employees in *State Personnel Board v. Fair Employment & Housing Commission*.[74] A public employee may choose between pursuing claims under the FEHA or pursuing his or her civil service remedies.[75] This exception to the exhaustion of remedies rule established under *Schifando*, however, does not apply to non-FEHA claims.[76]

[62] Gov. Code, § 12950.1(h)(1).
[63] Gov. Code, § 12950.1(h)(2).
[64] Gov. Code, § 53237 *et seq.*
[65] Gov. Code, § 53237.1(a).
[66] *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88; 84 Cal.Rptr.3d 734.
[67] *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 59 Cal.Rptr.2d 20; *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 84 Cal.Rptr.2d 658.
[68] Gov. Code, § 12960(d)(1).
[69] Gov. Code, §§ 12960(d)(2) – (d)(4).
[70] Gov. Code, § 12962.
[71] Gov. Code, § 12965(a).
[72] Gov. Code, § 12965(b).
[73] *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 6 Cal.Rptr.3d 457.
[74] (1985) 39 Cal.3d 422, 217 Cal.Rptr. 16.
[75] *Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1087.
[76] *Williams v. Housing Authority of the City of Los Angeles* (2004) 121 Cal.App.4th 708, 17 Cal.Rptr.3d 374.

OTHER STATE ANTI-DISCRIMINATION LAWS

California Equal Pay Law

The California Equal Pay Law is set forth in sections 1197.5 and 1199.5 of the California Labor Code,[77] and is enforced by the Division of Labor Standards Enforcement. It requires employers to provide equal pay without regard to an individual's sex, race, or ethnicity when performing substantially similar work, in light of factors such as skill, effort, responsibility, and similar working conditions. As with the federal law, exceptions exist for differentials based on a seniority or merit system. Additionally, differentials based on a system that measures earnings by quantity or quality of production or a bona fide factor other than sex, such as education, training, or experience, are allowed under California law.

However, the burden is on the employer to demonstrate that these exceptions apply, that reliance on each factor was reasonable, and that such factors account for the entire wage differential. As with federal law, California law provides that an individual's salary history cannot, by itself, justify a disparity in compensation.

Additionally, employees may no longer be prohibited from discussing their own wages, the wages of other employees, or inquiring about another employee's wages. Employers are prohibited from inquiring about salary history.

Other Protections Under the California Labor Code

The California Labor Code prohibits discrimination and retaliation against an employee for exercising rights in a variety of employment contexts, including the following:

- engaging in "lawful conduct occurring during nonworking hours away from the employer's premises;"[78]
- filing or receiving workers' compensation benefits;[79]
- filing a claim with the Labor Commissioner;[80]
- filing an Occupational Safety and Health Administration ("OSHA") complaint;[81]
- reporting information to a government or law enforcement agency;[82]
- serving on a jury or a witness in court;[83]
- participating in a judicial proceeding relating to a crime in which the employee is a victim or the family member, domestic partner, or child of a crime victim;[84]
- disclosing the amount of employee's wages or salary or information about working conditions to other persons;[85]
- attending a child's school activity or requested meeting with school official after giving reasonable notice;[86]
- taking time off as a result of being a victim of domestic violence;[87]
- taking time off to seek medical attention for injuries caused by a crime or abuse, including psychological counseling, if the employer employs 25 or more employees;[88]
- participate in safety planning for employees who are victims of crimes or abuse if the employer employs 25 or more employees;[89]
- taking time off to train for or participate in emergency firefighting or rescue duty;[90]
- refusing to submit to a polygraph, lie detector, or similar test;[91] and
- disclosing information to a government or law enforcement agency where the employee reasonably believes that the information discloses a violation or noncompliance with state or federal law or regulations.[92]

Additionally, most employers are prohibited from asking an applicant to disclose an arrest or detention that did not result in a

[77] Lab. Code, §§ 1197.5, 1199.5.
[78] Lab. Code, § 96(k).
[79] Lab. Code, § 132(a).
[80] Lab. Code, § 96.
[81] Lab. Code, § 6310.
[82] Lab. Code, § 1102.5.
[83] Lab. Code, § 230.
[84] Lab. Code, § 230.2.
[85] Lab. Code, §§ 232, 232.5, 923; *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 122 Cal.Rptr.2d 204.
[86] Lab. Code, § 230.8.
[87] Lab. Code, §§ 230(c), 230.1.
[88] Lab. Code, § 230.1(a)(1)-(3).
[89] Lab. Code, § 230.1(a)(4).
[90] Lab. Code, §§ 230.3, 230.4.
[91] Lab. Code, § 432.2.
[92] Lab. Code, § 1102.5 – 1102.8.

conviction, or information concerning a referral to, and participation in, any pretrial or post-trial diversion program, or concerning a conviction that has been judicially dismissed or ordered sealed or from using such information as a factor in connection with employment.[93]

Discrimination is also prohibited in building and construction trade apprenticeship programs on the basis of enumerated categories including sex, gender, race, national origin, religious creed, and disability.[94]

The Military & Veterans Code

The California Military & Veterans Code[95] protects veterans from employment discrimination and grants certain employment rights to veterans and active service members, which was recently amended to include those service members in the federal or state military reserves. Additionally, the FEHA prohibits discrimination and harassment on the basis of an individual's military or veteran status.

The Health & Safety Code

The California Health & Safety Code[96] prohibits discrimination against individuals based on the results of an HIV blood test. Section 120980(f) provides that the results of a blood test detecting whether an individual has been exposed to the HIV virus shall not be used to determine insurability or suitability for employment. The statute also provides for the imposition of civil and criminal penalties for the willful disclosure of covered test results.

State Contractors and Recipients of State Funding

Government Code Section 11135

Under Government Code section 11135, any program or activity funded directly by the state, or receiving financial assistance from the state, is expressly prohibited from discriminating against individuals on the basis of "ethnic group identification, religion, age, sex, color, or disability." A plaintiff must have been personally injured by the alleged discriminatory conduct to sue under this provision.[97] This provision also prohibits discrimination based upon a perception that the individual has any of the protected characteristics or is associated with any person who has, or is perceived to have, any of the protected characteristics.

Government Code Section 12990

Government Code section 12990 imposes obligations to ensure nondiscrimination upon any employer who contracts with the State of California for public works, goods, or services. Such employers must establish a nondiscrimination program pursuant to the regulations of the Department of Fair Employment and Housing ("DFEH"). The Office of Compliance Programs ("OCP") monitors and reviews the nondiscrimination programs to ensure compliance.[98]

Immigration and Discrimination

Several laws in recent years have expanded or created protections based on immigration status.

The FEHA's prohibition on national origin discrimination explicitly extends to undocumented immigrants who hold special "AB 60" driver's licenses.[99]

Employers are prohibited from verifying the immigration status of existing employees, or applicants who have not yet received an offer of employment. There is an exception for job positions for which federal law requires employers to use the E-Verify system.

Employers are prohibited from cooperating with federal immigration officials in certain circumstances. Employers may not provide voluntary consent for consent to immigration agents to enter nonpublic areas of the workplace, and are prohibited from voluntarily providing employee records. There are exceptions for federal law, court orders, and subpoenas.[100]

[93] Lab. Code, § 432.7
[94] Lab. Code, § 3073.9.
[95] Mil. & Vet. Code, §§ 394 et seq.
[96] Health & Saf. Code, § 120980(f).
[97] *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 24 Cal.Rptr.3d 474, review den. (2005) 2005 Cal.LEXIS 4617.
[98] Cal. Code Regs., tit. 2, §§ 11099 et seq.
[99] Gov. Code, § 12926(v).
[100] Gov. Code, §§ 7282, 7282.5.

RECENT LAWS RELATING TO DISCRIMINATION, HARASSMENT, AND RETALIATION

Extended Statute of Limitations

California Labor Code section 98.7 was amended effective January 1, 2021 to extend to one-year the time limit for an employee to file a complaint with the DLSE. Previously, an employee who believed that they were discharged or otherwise discriminated against was required to file a complaint with the DLSE within six months after the alleged violation.[101]

Legislative Employee Whistleblower Protection Act

The Legislative Employee Whistleblower Protection Act imposes criminal and civil liability on a member of the Legislature or legislative employee who interferes with, or retaliates against, a legislative employee's exercise of the right to make a protected disclosure. A "protective disclosure" is defined as a good faith allegation made by a legislative employee to specified entities that a member of the Legislature or a legislative employee has engaged in, or will engage in, activity that may constitute a violation of any law, including sexual harassment, or a violation of a legislative standard of conduct. The Act was recently amended to expand the definition of "protective disclosure" to also include a complaint made at the request of a legislative employee and a complaint made against a nonemployee in specified circumstances.[102]

Attorneys' Fees Authorized for Whistleblower Claims

The Labor Code was amended to expressly authorize courts to award reasonable attorneys' fees to a worker who prevails on a "whistleblower" claim under the Labor Code.[103]

Expansion of Fair Pay Act

Because the California gender wage gap has not seen significant improvement, the Legislature amended the Equal Pay laws in 2017 and 2019 by providing that an individual's salary history cannot justify a disparity in compensation.[104] The recent amendment clarifies that an employer is not prohibited from asking an applicant about his or her salary expectation for the position sought by such applicant.[105]

PROVING AND DEFENDING DISCRIMINATION CLAIMS

To prove that an employer discriminated against an employee, an employee must establish a causal connection between the employer's adverse action and a prohibited basis. A causal connection may result from either the employer's disparate treatment of the employee or from the adverse impact of the employer's employment practices.

Disparate Treatment

Disparate treatment occurs when an employer intentionally discriminates against an employee using prohibited criteria. Direct evidence of the employer's intent, such as a written policy or memorandum, may establish disparate treatment. Without direct proof, however, the employee may establish a circumstantial case by showing that the employee:

- belongs to a protected class of individuals (e.g., a racial minority);
- was qualified for the position sought or performing competently in the position held;
- suffered an adverse employment action (such as termination, demotion, or denial of available job despite his or her qualifications); and
- was involved in some circumstance suggesting a discriminatory motive (e.g., persons with equal qualifications accepted or given preferential treatment).[106]

To proceed beyond the initial pleading stage in an employment discrimination lawsuit, however, a complaint need not set out the specific facts that address each of the four criteria for a circumstantial case as established in *McDonnell Douglas*.[107] The Ninth Circuit ruled in *Maduka v. Sunrise*

[101] Lab. Code, § 98.7.
[102] Gov. Code, § 9149.32.
[103] Lab. Code, § 1102.57.
[104] Lab. Code, § 432.3(j).
[105] Lab. Code, § 432.3(i)
[106] *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817.
[107] *Ibid.*

Hospital that a complaint asserting a claim for employment discrimination must contain only a "short and plain statement of the claim showing that the pleader is entitled to relief."[108] The court stated that this standard of pleading "applies to any claim to which the *McDonnell Douglas* framework is applicable,"[109] including claims brought under section 1981, the ADEA, or Title VII.

The evidence required to establish a *prima facie* case may vary depending on the type of adverse employment action involved.[110] If an employee can establish a *prima facie* case of discrimination, the burden then shifts to the employer to respond with a legitimate, nondiscriminatory reason for its actions. The burden then shifts back to the employee to prove that the employer's stated reason is a "pretext" or cover-up for discrimination. Temporal proximity is sufficient to shift the initial burden to the employer to articulate a nondiscriminatory reason for the adverse employment action, but it is not sufficient to meet the employee's second burden to show a triable fact about whether the employer's articulated reason was untrue or pretextual.[111] A jury may, under some circumstances, infer that discrimination occurred based on the falsity of the employer's explanation.[112] An employer may defend a disparate impact claim by showing that it did not treat the employee differently than other employees. For example, an employer may show that it laid off employees of all ages for economic reasons and that it did not single out any age group.[113] An employer also may defend a disparate treatment case by showing that the same person both hired and fired the employee, and both actions occurred within a short period of time. Under such circumstances, a strong inference arises that there was no discrimination.[114]

[108] (9th Cir. 2004) 375 F.3d 909.
[109] *Edwards v. Marin Park, Inc.* (9th Cir. 2004) 356 F.3d 1058, 1062.
[110] *McDonnell Douglas Corp. v. Green, supra.*
[111] *Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 60 Cal.Rptr.3d 45.
[112] *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 120 S.Ct. 2097.
[113] *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 113 S.Ct. 2742.
[114] *Bradley v. Harcourt, Brace & Co.* (9th Cir. 1996) 104 F.3d 267, 270.

Disparate Impact

In addition to the prohibition against overt discrimination, Title VII also prohibits employment practices that may appear neutral but adversely impact individuals in a protected class.[115] Under the disparate impact theory, an employer's intent is irrelevant. Instead, the question is whether an employer's facially neutral selection criteria or other employment practice has a disproportionate adverse impact on a protected class of individuals (e.g., a racial minority, women, or older employees). Objective criteria such as standardized tests, personal interviews, and other subjective criteria may cause a disparate impact.[116] Statistical evidence is often used to prove that the employer's hiring or promotion process unfairly screened out a particular group of protected individuals.

An employer may successfully defend a disparate impact claim by showing that the specific employment practice does not cause a disparate impact. For example, the data an employee uses may be statistically insignificant and insufficient to prove a claim. Alternatively, if the employment practice causes a disparate impact, the employer still may defend the claim by demonstrating that business necessity required the practice. This defense will be successful only if the employer can demonstrate that no alternative, nondiscriminatory business practice was feasible.[117]

Mixed Motive Cases

Title VII violations also can occur when the employer's disparate treatment is based on a mixture of prohibited and legitimate motives. The Civil Rights Act of 1991 provides that "an unlawful employment practice is established" when a protected characteristic is "a motivating factor" in an employment action. Consequently, an unlawful employment practice encompasses any situation in which a protected characteristic

[115] *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S.Ct. 849.
[116] *Watson v. Fort Worth Bank and Trust* (1988) 487 U.S. 977, 108 S.Ct. 2777.
[117] *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1432, *cert. den.* (1986) 475 U.S. 1109, 106 S.Ct. 1516.

was a motivating factor in an employment action, even if there were other motives.[118] But if the employer can demonstrate that it would have taken the same action anyway for lawful reasons, the court may not award monetary damages or order reinstatement or promotion.[119] The employer may still be liable, however, for declaratory relief, injunctive relief, and attorneys' fees. To prove a mixed motive case, the employee must present evidence showing that the employer knowingly gave substantial weight to an impermissible criterion such as gender or race, even if that criterion was only one of the factors considered. The burden of proof then shifts to the employer to demonstrate that it would have taken the same action even if it had not considered the prohibited criterion.[120] (See page 13-16 for a discussion of the California Supreme Court's expansion of the mixed-motive defense to claims under FEHA.)

PROVING AND DEFENDING RETALIATION CLAIMS

Title VII, ADA, ADEA, EPA, the Rehabilitation Act, GINA, FEHA, the Labor Code, and other state employment discrimination law prohibit employers from retaliating against employees who engage in a "protected activity," such as making a discrimination complaint. But the standards for retaliation claims differ under the two laws.

Title VII states that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[121]

The U.S. Supreme Court ruled in *Burlington-Northern v. White* that the scope of Title VII's anti-retaliation provision "extends beyond workplace-related or employment-related acts and harm."[122] The court also ruled that Title VII's anti-retaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or applicant, that is, those that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[123]

The California Supreme Court ruled in *Yanowitz v. L'Oreal, Inc.*, a case decided one year before *Burlington-Northern*, that an employee seeking recovery under the FEHA on a theory of unlawful retaliation must demonstrate that he or she has been subjected to an adverse *employment* action that materially affects the *terms, conditions, or privileges of employment.*[124] The *Yanowitz* court also ruled that an employee's conduct alone may constitute protected activity for purposes of the FEHA's anti-retaliation provision.[125] Yanowitz's refusal to terminate a female sales associate, because she believed that to do so constituted sex discrimination, was a protected activity even though she did not explicitly tell her supervisor that she considered his order to be discriminatory.

Under *Yanowitz*, only workplace-related or employment-related retaliatory acts and harm are actionable under the FEHA. This is more stringent than the *Burlington-Northern* standard for Title VII retaliation claims. The difference is not based on differences in the statutory language because the relevant wording of the FEHA retaliation prohibition is nearly identical to that found in Title VII.[126] Although the courts have not yet taken up the issue of whether *Burlington-Northern* will affect California law,[127] in *Taylor v. Los Angeles Department of Water and Power*,[128] the appellate court reversed the trial court,

[118] *Costa v. Desert Palace Inc*. (9th Cir. 2001) 268 F.3d 882, affd. (2003) 539 U.S. 90, 123 S.Ct. 2148.
[119] 42 U.S.C. § 2000e-5(g)(2)(B).
[120] *Desert Palace v. Costa* (2003) 123 S.Ct. 2148.
[121] 42 U.S.C. § 2000e-3(a).
[122] *Burlington-Northern and Santa Fe Railway Co. v. White* (2006) 548 U.S. 53, 126 S.Ct. 2405, 2414.
[123] *Id.* at p. 2415.
[124] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 32 Cal.Rptr.3d 436 (emphasis added).
[125] *Id.* at p. 1043.
[126] Gov. Code, § 12940(h).
[127] See, e.g., *McRae v. Dept. of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 48 Cal.Rptr.3d 313.
[128] (2006) 144 Cal.App.4th 1216, 51 Cal.Rptr.3d 206, *disapproved of on other grounds by Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal. 4th 1158, 1162.

finding that under either the "materiality test" approved by the California Supreme Court or the "deterrence test" approved by the U.S. Supreme Court, Taylor sufficiently pled that he experienced adverse employment action. Under the materiality test, the court found that the actions were adverse employment actions that were "material" to the terms, conditions, or privileges of Taylor's employment. Under the deterrence test, they were actions that would be likely to deter a reasonable city engineer with similar tenure and promotional objectives from making or supporting a discrimination charge.

Protected activities include opposing any practice forbidden under the FEHA, filing a complaint regarding discrimination or harassment, or testifying or assisting in any proceeding under the FEHA. Additionally, a request for a disability or religious accommodation is a "protected activity," regardless of whether the accommodation is granted. Thus, any adverse employment action in response to such request for reasonable accommodation will support a claim for retaliation.

Employee Need Not Initiate Complaint in Order to Be Protected.

The U.S. Supreme Court has continued to expand the concept of actionable retaliation. Most recently, the Supreme Court ruled that an employee may have a viable retaliation claim under Title VII even if he or she does not initiate a complaint. Rather, an employee's report of inappropriate behavior during an internal investigation qualifies as protected activity under Title VII as a form of opposition to inappropriate conduct.[129]

DEFENSES AGAINST DISCRIMINATION AND RETALIATION

Federal and state laws prohibiting discrimination recognize various defenses. The applicability of a particular defense depends, in part, upon under what theory of discrimination the claim is based. Employers may assert defenses that are either procedural or substantive in nature.

The Employer's Action Was Justified by a Legitimate, Nondiscriminatory Reason.

In a disparate treatment discrimination claim, the employer's presentation of a coherent, independent, and legitimate reason behind the decision-maker's employment action may defeat a discrimination claim. The employer also may create a strong inference of no discriminatory motive where the employer establishes that the employment decision involving hiring and firing or promoting and firing occurs within a relatively short time period and is made by the same actor.[130]

The Bona Fide Occupational Qualification Defense

Pursuant to federal law and under limited circumstances, employers may discriminate on the basis of prohibited criteria if a "bona fide occupational qualification" ("BFOQ") exists that is reasonably necessary for the normal operation of the particular business.[131] Under state law, an employer may utilize the BFOQ defense only if the employer can prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined.[132] The BFOQ exception applies only to hiring decisions and does not apply to race discrimination. This defense is used mainly in age and sex discrimination cases. Courts construe this defense very narrowly.

Business Necessity

Employers that maintain a practice that appears neutral but creates an adverse impact on a protected class may defeat a discrimination claim by proving an overriding legitimate business purpose exists such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it was designed to serve.[133] However, the defense may be undermined if

[129] *Crawford v. Metropolitan Gov. of Nashville & Davidson County* (2009) 129 S.Ct. 846.

[130] *Coghlan v. American Seafoods Co*. (9th Cir. 2005) 413 F.3d 1090.
[131] 42 U.S.C. § 2000e-2(e)(1).
[132] 2 Cal. Code Regs. Tit. 2 § 11010(a).
[133] 2 Cal. Code Regs. Tit. 2 § 11010(b).

the plaintiff establishes that an alternative practice would accomplish the same business purpose with a less discriminatory impact.[134] California courts have permitted the assertion of the business necessity defense in disparate impact cases.[135] The U.S. Supreme Court has rejected business necessity as a defense in ADEA disparate impact cases.[136]

"Avoidable Consequences" Doctrine

An employer may assert the "avoidable consequences" doctrine to mitigate the damages an employee is barred from recovering damages that the employee could have avoided by reasonable effort.[137]

Affirmative Action Plan

Absent a showing of discrimination, an employment practice may be established as lawful where it conforms to a bona fide affirmative action plan, a nondiscrimination plan pursuant to Labor Code section 1431, or a court or agency order.

Security Regulations

An employment practice that is necessary due to applicable security regulations may be lawful, even if it operates in a discriminatory manner.[138]

The After-Acquired Evidence Doctrine

The after-acquired evidence defense is available when an employee falsifies an employment application or engages in misconduct warranting discharge, and the employer discovers the employee's wrongdoing only after the employee files a discrimination claim. This defense, though, cannot be used to bar federal discrimination claims.[139] However, an employer may use the defense to limit damages associated with such claims.

[134] *Ibid.*
[135] *Harris v. Pan American World Airways* (9th Cir. 1980) 649 F.2d 670, 674; *Johnson Controls, Inc. v. FEHC* (1990) 218 Cal.App.3d 517, 540-542, 267 Cal.Rptr. 158.
[136] *Meacham v. Knolls Atomic Power Laboratory* (2008) 554 U.S. 84, 128 S.Ct. 2395.
[137] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 6 Cal.Rptr.3d 441.
[138] 42 U.S.C. § 2000e-2(g); Gov. Code, § 12940; FEHC Reg. § 7287.7(d).
[139] *McKennon v. Nashville Banner Publishing Co*. (1995) 513 U.S. 352.

Exhaustion of Administrative Remedies

Employees seeking to prosecute claims under Title VII or FEHA must ordinarily exhaust their administrative remedies in a timely manner with the EEOC and DFEH before filing a court action.

State Employer Immunity

As a general rule, state employers are immune from federal lawsuits under the Eleventh Amendment to the U.S. Constitution which provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Court decisions have interpreted this language to bar lawsuits brought by citizens against their own states in federal court unless Congress supersedes a state's sovereign immunity. Note, however, that the U.S. Supreme Court has ruled in a few cases that Congress has overstepped its authority in doing so.[140]

REMEDIES

A California employee who successfully establishes a case of unlawful discrimination or retaliation may obtain a number of different remedies depending upon the specific law at issue. Under Title VII, a court may order injunctive relief, front pay, back pay, affirmative relief including an order to hire, reinstate, promote, change specific employment practices, and pay reasonable attorneys' fees, interest, and costs. Under section 102 of the CRA, the court may also award limited compensatory and punitive damages up to certain limits based on the size of the employer in cases of intentional discrimination under Title VII, the ADA, and the Rehabilitation Act.[141] In addition, punitive damages are not available against governmental employers.[142]

In cases of discrimination brought under the ADEA and EPA, an individual may recover unpaid wages, liquidated damages, and

[140] *Alden v. Maine* (1999) 527 U.S. 706, 119 S.Ct. 2240; *Freeman v. Oakland Unified School Dist.* (9th Cir. 1999) 179 F.3d 846.
[141] *E.E.O.C. v. Wal-Mart Stores Inc*. (9th Cir. 1998) 156 F.3d 989.
[142] Civil Rights Act of 1991, § 102(b)(1).

reasonable attorneys' fees and costs. For successful FEHA claims, the individual may recover all of the relief provided by Title VII and other federal laws, as well as unlimited compensatory and, with the exception of actions against governmental employers, punitive damages.

In *Harris v. City of Santa Monica*, the California Supreme Court stated that an employee's damages in a discrimination action could be limited when there is evidence of a "mixed motive."[143] Wynona Harris sued the City for sex discrimination under FEHA alleging that she was fired because she was pregnant.[144] The City's position was that it had legitimate, non-discriminatory reasons for terminating her at-will, probationary employment.[145] The key dilemma before the Court was that, although FEHA clearly prohibits adverse actions because of a person's sex, physical disability, or other protected characteristics, in "mixed motive" cases involving a combination of discriminatory and legitimate reasons, there is no single "true" reason for the employer's action.[146] The Court found that awarding an employee economic or non-economic damages where the employer could show that it would have made the same decision without any discrimination would result in an unjustified windfall for the plaintiff.[147] The Court therefore concluded that under the FEHA, when a jury finds that unlawful discrimination was a substantial factor motivating the plaintiff's termination, and the employer demonstrates it would have made the same decision at the same time absent such discrimination, a plaintiff may not be awarded damages, back pay or an order of reinstatement.[148] However, the plaintiff may be entitled to declaratory relief, injunctive relief, and reasonable attorneys' fees and costs.[149]

[143] (2013) 56 Cal.4th 203, 152 Cal.Rptr.3d 392.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 215.
[147] *Id.* at 232-234.
[148] *Id.* at 241.
[149] *Id.*

AFFIRMATIVE ACTION

California's Constitution Prohibits Public Employers from Using Race or Gender Based Preferences.

In 1996, California voters approved Proposition 209 which prohibits any state or local government from giving preferential treatment on the basis of race or gender when hiring or promoting individuals in government jobs, choosing persons or entities to receive lucrative government contracts, and admitting students to California's public schools or universities. Proposition 209 added section 31 to article I of the California Constitution, and states in part:

> "(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

In August of 2010, the California Supreme Court issued a decision *Coral Construction v. City and County of San Francisco*[150] in which two construction companies challenged San Francisco's Minority/Women/Local Business Utilization Ordinance, which gave preferential treatment to minority-owned and women-owned business enterprises seeking city contracts. The decision rejected the City's challenge to Prop 209 under various theories, limiting the use of preferential treatment to those "extreme cases" of intentional discrimination. (See Chapter 16 for a full discussion of the decision.)

The *Coral Construction* decision was consistent with the Ninth's Circuit's consideration of a similar constitutional challenge to Proposition 209 in *Coalition for Economic Equity v. Wilson*.[151] The Ninth Circuit ruled that Proposition 209 did not violate equal protection principals, and Title VII did not preempt it under the U.S. Constitution's Supremacy Clause.

[150] (2010) 50 Cal.4th 315, 113 Cal.Rptr.3d 279.
[151] (9th Cir. 1997) 122 F.3d 692, stay den. (1997) 521 U.S. 1141, 118 S.Ct. 17, *cert. den.* (1997) 522 U.S. 963, 118 S.Ct. 397.

Since its enactment, various government programs have been invalidated as in violation of Proposition 209. In *Kidd v. State of California*,[152] a California appellate court applied Proposition 209 and ruled that the State Personnel Board's supplemental certification program that enabled female and minority job applicants to be considered for Department of Fish and Game employment, even though they did not meet competitive exam requirements, violated California's Constitution and civil service statutes.

Because Proposition 209 closely parallels Title VII, courts have relied on the history and interpretation of Title VII when applying Proposition 209. For example, in *Hi-Voltage Wire Works Inc. v. City of San Jose*,[153] the City of San Jose adopted a program requiring contractors bidding on city projects to utilize a specified percentage of minority and women subcontractors, or alternatively, to document their efforts to include minority and women subcontractors in their bids. In reaching its decision that the city's program was unlawful, the California Supreme Court stated that "Congress did not intend by Title VII to guarantee a job to every person regardless of qualifications ... Discriminatory preference for any group, minority, or majority, is precisely and only what Congress has proscribed."[154] The court ruled that the program's participation goal authorized or encouraged a discriminatory quota, plainly running counter to the express intent of both Title VII and Proposition 209.

Following the California Supreme Court's decision in *Hi-Voltage Wire Works*, a California appellate court ruled that state affirmative action statutes were unconstitutional under both Proposition 209 and the federal and state equal protection clauses.[155] Among those invalid statutes were Government Code sections 19790 through 19799, which required each state agency and department to establish goals and timetables designed to overcome any identified underutilization of minorities and women.

The Federal Equal Protection Clause Also Limits Affirmative Action Programs.

The Fourteenth Amendment's Equal Protection Clause prohibits a public employer from classifying applicants on the basis of race, except as a last resort to remedy well-defined instances of racial discrimination. Any racial and ethnic distinctions are inherently suspect and require the most exacting judicial examination.[156]

The U.S. Supreme Court applies the "strict scrutiny" constitutional review test to state and local governments' race-based actions.[157] Under the strict scrutiny test, an employer must show both: (1) a compelling governmental interest justifying a race conscious employment program; and (2) that the means the employer chooses are "narrowly tailored" to meet the stated goal. The Supreme Court provides the following guidance for applying the strict scrutiny test to state and local government affirmative action plans:

Compelling Governmental Interest

In order to meet the test's first prong, an employer must show prior discrimination by the same governmental unit imposing the preference, as opposed to the general population or industry. "The public employer must have a firm basis for determining that affirmative action is warranted."[158] An employer can meet this standard by showing a sufficient statistical disparity between its work force's racial composition and the qualified relevant labor market's racial composition. This disparity must support a *prima facie* Title VII "pattern or practice" claim,[159] or demonstrate a "gross disparity" between the employer's work force's racial

[152] *Kidd v. State of Cal.* (1998) 62 Cal.App.4th 386, 72 Cal.Rptr.2d 758.
[153] (2001) 24 Cal.4th 537, 101 Cal.Rptr.2d 653.
[154] *Id. at* p. 549, citing *Griggs v. Duke Power Co.* (1971) 401 U.S. 424 at 429, 430-431.
[155] *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 112 Cal.Rptr.2d 5.
[156] *Wygant v. Jackson Bd. of Ed*. (1986) 476 U.S. 267, 106 S.Ct. 1842, rehg. den. (1986) 478 U.S. 1014, 106 S.Ct. 3320.
[157] *City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 109 S.Ct. 706; *Wygant v. Jackson Bd. of Ed., supra*, 476 U.S. 267; *Hunter v. U. of Cal.* (9th Cir. 1999) 190 F.3d 1061, cert. den. (2000) 531 U.S. 877, 121 S.Ct. 186.
[158] *Wygant v. Jackson Bd. of Ed., supra*, 476 U.S. at p. 292.
[159] *City of Richmond v. J.A. Croson Co., supra*.

composition and the relevant qualified labor pool's racial composition.[160]

Narrowly Tailored

In order to meet the test's second prong, an employer must demonstrate that the plan is narrowly tailored to meet its goals. An employer may demonstrate that its affirmative action plan is narrowly tailored by showing that:

- preference is given only in job categories where the targeted group has historically been underrepresented;
- persons benefiting from the plan are qualified; and
- goals are linked to the number of minorities (or women) in the qualified labor pool, rather than to the general local population.

Courts also will look at the plan's flexibility and duration. A plan that is limited in duration and provides for periodic re-evaluation meets the narrowly-tailored standard. Finally, courts will look to whether the plan affects innocent third parties by, for example, imposing non-minority layoffs to meet its goals.

The Ninth Circuit used an equal protection analysis to invalidate an affirmative action law in *Monterey Mechanical Co. v. Wilson*.[161] A California law requiring general contractors to make good faith efforts to hire minority- and women-owned subcontractors was unconstitutional because it established impermissible "classifications" based on race and gender. The court applied strict scrutiny and struck down the statute because the state made no showing that the statute was narrowly tailored to remedy past discrimination.

KEY ISSUES

- Title VII of the 1964 Civil Rights Act prohibits employment discrimination based on a person's race, color, national origin, sex, or religion. Federal law also proscribes discrimination on the basis of physical and mental disability, pregnancy and childbirth, age, genetic information, and military service.
- Under federal law, employers may not discriminate on the basis of sex in wages paid for "equal work," and the statute of limitations for filing lawsuits under Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act now runs from the date of the most recent paycheck evidencing the discrimination.
- Under the FEHA, as well as related statutes, California law provides even broader protections for workers, prohibiting discrimination not only on race, color, national origin, sex, religion, genetic information, gender identity, and gender expression.
- The California Constitution prohibits public employers from using race or gender based preferences, and the Equal Protection clause of Fourteenth Amendment to the U.S. Constitution forbids public employers from classifying applicants on the basis of race, except as a last resort to remedy well-defined instances of racial discrimination.
- Under the FEHA, employers may not discriminate on the basis of gender-related appearance or behavior whether or not stereotypically associated with the person's assigned sex at birth. Employers also must allow employees to appear or dress consistently with the employee's own gender expression.

[160] *Maryland Troopers Assn., Inc. v. Evans* (4th Cir. 1993) 993 F.2d 1072 (gross disparity not found where percentage of African-Americans in relevant qualified labor pool was 18.8% and percentage of African-American state trooper employees was 17.1%).
[161] (9th Cir. 1997) 125 F.3d 702, rehg. en banc, den. (9th Cir. 1998) 138 F.3d 1270.

Disability Discrimination

SUMMARY OF THE LAW

INTRODUCTION

Disabled California workers generally turn to two statutes to remedy workplace disability discrimination: The federal Americans with Disabilities Act ("ADA")[1] and the California Fair Employment and Housing Act ("FEHA").[2] Both laws prohibit employers, including public employers, from discriminating against qualified employees on the basis of disability. Both laws enable aggrieved employees to obtain monetary damages from employers and to enjoin employers from engaging in future discriminatory conduct.

Until January 1, 2009, the FEHA tended to be the first choice of many aggrieved employees. With the enactment of the ADA Amendments Act ("ADAAA") effective January 1, 2009, federal law became more attractive to aggrieved employees. In enacting the ADAAA, Congress expressed its dissatisfaction with United States Supreme Court decisions that limited the ADA and made it more difficult for employees to prove discrimination. According to Congressional findings, the ADAAA amendments are intended to "carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA."[3]

However, even with the lower standards and revised definitions established by the ADAAA, the FEHA may continue to be the first choice of many aggrieved employees because the requirements to establish claims are still less than under the ADA. In fact, the California Legislature expressed its intent that the ADA provide a "floor of protection" over which the FEHA provides "additional protections."[4] State employees cannot sue the state for monetary damages under the ADA, but may do so under the FEHA.[5] For all employees, the FEHA provides the possibility of higher monetary awards against employers. In addition, a plaintiff suing in a civil action in California state court does not need a unanimous jury verdict to recover.[6]

WHICH EMPLOYERS DO THE LAWS COVER?

The ADA covers most private and public employers with 15 or more employees.[7] However, there are some exceptions. For instance, the Ninth Circuit has ruled that a state prisoner, who performed assigned work for a private employer through a convict labor program run by the state department of corrections, was not the prisoner's "employer" within the meaning of the ADA because the prisoner was required by state law to perform work detail under the program.[8] Furthermore, the ADA does not cover the federal government, and the U.S. Supreme Court has determined that the Eleventh Amendment prevents employees of

[1] 42 U.S.C. §§ 12101 et seq.
[2] Gov. Code, §§ 12900 et seq.
[3] 42 U.S.C. § 12101(b)(1).
[4] Gov. Code, § 12926.1(a).
[5] *Board of Trustees of the U. of Alabama v. Garrett* (2001) 531 U.S. 356, 121 S.Ct. 955, 147 CPER 50.
[6] Cal. Const., art. I, § 16; accord, Code Civ. Proc., § 618.
[7] 42 U.S.C. § 12111(5)(A). Exceptions are the United States, corporations wholly owned by the United States government, Indian tribes, and bona fide private membership clubs (other than labor organizations) that are exempt from taxation under § 501(c) of title 26. 42 U.S.C. § 12111(5)(B).
[8] *Castle v. Eurofresh* (9th Cir. 2013) 731 F.3d 901.

state agencies from suing their state employer for monetary damages under the ADA.[9] California school districts and community college districts are state agencies for Eleventh Amendment purposes.[10]

Depending on the law that created them, California special districts may enjoy Eleventh Amendment immunity. But the Eleventh Amendment does not afford immunity from suit by their employees for other local agencies, including cities and counties.

In the Ninth Circuit, which includes California, the Eleventh Amendment also prevents employees from suing the State of California in federal court for money damages for retaliation, at least when the retaliatory conduct relates to employment.[11] Notably, however, the Eleventh Amendment does not prevent state agency employees from using the ADA to sue state officials for equitable relief, for example, to compel them to abandon discriminatory practices.[12]

The FEHA covers substantially more employers than does the ADA. The non-discrimination provisions of the FEHA cover all employers of five or more employees, including state employers, cities, and any "political or civil subdivision of the state," but excluding religious associations and corporations not organized for private profit.[13] With respect to unlawful harassment because of a disability, the FEHA's requirements extend to all employers who regularly employ or contract with at least one person.[14] Although employers that are arms of the State are exempt from suit by employees for monetary damages under the ADA, the same exemption does not apply under the FEHA.[15]

WHOM DO THE LAWS PROTECT?

Both laws protect the *working disabled*. As one court observed, the ADA is designed to ensure "that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps."[16] As a consequence, the law does not protect persons whose disabilities are so severe that they cannot work,[17] or persons whose "disability" is merely temporary.[18] The status of an individual as an "employee" may also be dispositive of disability claims under the FEHA. For example, the California Court of Appeal has ruled that participants in the Adult Offender Work Program administered by the Fresno County Probation Department who received no quantifiable, significant financial remuneration for their services were not County employees for purposes of bringing claims under the FEHA.[19]

Both the ADA and the FEHA protect employees from discrimination based on perceived disability, a record of disability, or their association with disabled persons. The FEHA has also extended its protection to include a person with a perceived *potential* disability.[20] Both laws also protect all applicants and employees, whether or not disabled, from non-job-related medical inquiries and examinations, including genetic testing. The FEHA also protects individuals regarded or treated as having or having had a condition that is not presently disabling but that might become a disability in the future.[21] The ADA protects impairments that are episodic or in remission if they would

[9] *University of Alabama, supra* (2001) 531 U.S. 356, 121 S.Ct. 955. The Ninth Circuit has further ruled that a State agency may not be sued for violations of the ADA via a claim brought under § 1983 of the Civil Rights Act of 1871. See *Okwu v. McKim* (9th Cir. 2012) 682 F.3d 841.
[10] *Belanger v. Madera Unified School Dist.* (9th Cir. 1992) 963 F.2d 248, *cert. den.* (1993) 507 U.S. 919, 813 S.Ct. 1280 (decided under § 1988); *Grosz v. Lassen Community College Dist.* (E.D.Cal. 2008) 572 F.Supp.2d 1199.
[11] *Demshki v. Monteith* (9th Cir. 2001) 255 F.3d 986, 989.
[12] *Ex parte Young* (1908) 209 U.S. 123, 28 S.Ct. 441; *Hason v. Medical Board* (9th Cir. 2002) 279 F.3d 1167, 1171, rehg. den. en banc (9th Cir. 2002) 294 F.3d 1166, and cert. dismissed (2003) 538 U.S. 901, 123 Ct. 1385.
[13] Gov. Code, § 12926(d).
[14] Gov. Code, § 12940(j)(4)(A).
[15] *University of Alabama v. Garrett* (2001) 531 U.S. 356, 121 S.Ct. 955; state employees include school district and special district employees, but not city employees.
[16] *Halperin v. Abacus Tech. Corp*. (4th Cir. 1997) 128 F.3d 191, 200, quoting *Forrisi v. Bowen* (4th Cir. 1986) 794 F.2d 931, 934, abrogated on other grounds by *Baird ex rel. Baird v. Rose* (4th Cir. 1999) 192 F.3d 462, 469 n. 7.
[17] *Kennedy v. Applause, Inc*. (9th Cir. 1996) 90 F.3d 1477, 1481, 1482; *Weyer v. Twentieth Century Fox Film Corp*. (9th Cir. 2000) 198 F.3d 1104.
[18] *Sanders v. Arneson Products, Inc*. (9th Cir. 1996) 91 F.3d 1351, 1353-1354, *cert. den.* (1997) 520 U.S. 1116, 117 S.Ct. 1247.
[19] *Talley v. County of Fresno* (2020) 51 Cal.App.5th 1060.
[20] Cal. Code Regs., tit. 2, § 11065, subd. (d)(6).
[21] Gov. Code, § 12926, subds. (i)(5), (k)(5).

substantially limit a major life activity when active.[22]

WHAT ARE COVERED DISABILITIES UNDER THE LAW?

The ADA and the FEHA differ widely in their definition of "disability." In general, the basic rule is that a disability is a "physical or mental condition" (FEHA) or "impairment" (ADA) that "limits" (FEHA) or "substantially limits" (ADA) one or more major life activities.

What Is the Definition of "Disability" Under the FEHA?

In the FEHA, the California Legislature has expressed its intent that "the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling."[23] The Legislature has further expressed its intent that the protection afforded under the ADA be viewed as a "floor of protection" over which the FEHA provides "additional protections."[24]

Similarly, in issuing revised regulations under the FEHA in 2012, the Department of Fair Employment and Housing ("DFEH") expressed its intent to expand the scope of the regulations to encompass the widest possible definition of "disability." The definition of "disability" in the 2012 regulations includes the following eight sub-definitions: mental disability, physical disability, special education disability, a record or history of disability, a perceived disability, a perceived potential disability, a medical condition (involving cancer-related health impairments and genetic characteristics), and anything covered by the ADA/ADAAA that is broader than the FEHA.[25]

"Physical disability" under the FEHA includes, but is not limited to, a physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of several statutorily-specified "body systems": the neurological, immunological, musculoskeletal, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, or endocrine systems, or special sense organs.[26] Each of these conditions must limit a major life activity to qualify as a covered disability. In addition, "physical disability" includes "any other health impairment" other than those listed, that "requires special education or related services."[27] Examples of physical disabilities includes but are not limited to, deafness, blindness, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cerebral palsy, and chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis, and heart disease.[28]

"Mental disability" under the FEHA includes, but is not limited to, a "mental or psychological disorder or condition," including but not necessarily limited to mental retardation, organic brain syndrome, emotional or mental illness, and "specific learning disabilities" that the statute does not further define.[29] The 2012 regulations clarify that the following are included in the definition of "mental disability": emotional or mental illness, intellectual or cognitive disability (formerly referred to as "mental retardation"), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and other chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.[30] As with physical disabilities, each of these must limit a major life activity to qualify as a covered disability.

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[22] 42 U.S.C. § 12102(4)(D).
[23] Gov. Code, § 12926.1(b); see also *Goldman v. Standard Insurance Co.* (9th Cir. 2003) 341 F.3d 1023, (noting that "California's disability antidiscrimination law has never required that a plaintiff be regarded as presently limited by her disability. The 2000 amendments, although making other changes to the existing definition of disability under California law, merely clarified that the definition does not include such a limitation nor has it ever done so").
[24] Gov. Code, § 12926.1(a).
[25] Cal. Code Regs., tit 2, § 11065.
[26] Gov. Code, § 12926(k)(1)(A).
[27] Gov. Code, § 12926(k)(2).
[28] Cal. Code Regs., tit. 2, § 11065, subd. (d)(2); see also Gov. Code, § 12926.1(c).
[29] Gov. Code, § 12926(i)(1).
[30] Cal. Code Regs., tit. 2, § 11065, subd. (d)(1).

In addition, "mental disability" includes "any other mental or psychological disorder or condition" other than those listed that "requires or has required in the past special education or related services."[31] Referred to as a "special education disability" in the 2012 regulations, this may include a "'specific learning disability,' manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities."[32] It includes "conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and development aphasia."[33]

Under the FEHA, "disability" does not include "compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs, and sexual behavior disorders."[34] Disability also does not include "conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis. These excluded conditions have little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders."[35] The FEHA does not prohibit an employer from distinguishing between disability-caused misconduct and the disability itself when the misconduct involves threats or violence against coworkers.[36] Of particular note, a California appellate court has clarified that an employee's anxiety and stress that is attributed solely to the supervisor's standard oversight of work, and is not a pre-existing condition, does not constitute a mental disability under FEHA.[37]

Overall, the DFEH has stressed the expectation that employers will not spend much time analyzing whether employees are disabled, and will focus instead on how to accommodate an employee.

What Is the Definition of "Disability" Under the ADA?

In adopting its revised post-ADAAA regulations in 2011, the EEOC stressed that its goal was to promote the intent of the ADAAA so that the focus in disability discrimination claims centers more on whether discrimination occurred than on whether a disability existed.[38] To that end, the EEOC restructured its regulations in keeping with the ADA's definition of disability to emphasize that a person satisfying any one of the ADA's three "prongs" will satisfy requirements for being "disabled" within the meaning of the law.[39]

- "Actual disability": A physical or mental impairment that substantially limits one or more major life activities;[40]
- "Record of disability": Having a written or unwritten[41] record of a past physical or mental impairment that substantially limited a major life activity;[42]
- "Regarded as" disabled: When a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor.[43]

With one exception, an individual need not rely on one prong over another in bringing disability claims, and need qualify under just one of the prongs to do so. The only exception affects claims for denial of reasonable accommodation, which may not be brought on a "regarded as" basis, and are limited to the first two prongs.[44]

[31] Gov. Code, § 12926(i)(2); Cal. Code Regs., tit. 2, § 11065, subd. (d)(3).
[32] Cal. Code Regs., tit. 2, § 11065, subd. (d)(3).
[33] *Ibid.*
[34] Cal. Code Regs., tit. 2, § 11065, subd. (d)(9)(A).
[35] Cal. Code Regs., tit. 2, § 11065, subd. (d)(9)(B).
[36] *Wills v. Superior Ct.* (2011) 195 Cal.App.4th 143, rev. den. July 20, 2011.
[37] *Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78.
[38] 29 C.F.R. Part 1630 Appendix, Introduction.
[39] *Id.*
[40] 42 U.S.C. § 12102(1)(A).
[41] Prior to the EEOC's issuance of its post-ADAAA regulations, the courts had split as to whether disability based on a "record" of an impairment required a tangible document. The revised regulations do not, themselves, resolve the issue, but in its Appendix, the EEOC noted that "[a]n individual may have a 'record of' a substantially limiting impairment – and thus be protected under the 'record of' prong of the statute – if a covered entity does not specifically know about the relevant record." See Appendix to 29 C.F.R. § 1630.2(k).
[42] 42 U.S.C. § 12102(1)(B).
[43] 42 U.S.C. § 12102(1)(C).
[44] 29 C.F.R. §§ 1630.2(o)(4), 1630.9(e).

Notably, the EEOC has stressed that the showing required under the "regarded as" prong is lower than under the other two prongs, because an impairment no longer need actually substantially limit" a "major life activity." In a change from pre-ADAAA jurisprudence,[45] as long as the impairment is neither transitory (meaning it actually lasts, or is expected to last, fewer than six months)[46] nor minor (a term left undefined in the ADAAA and regulations) it will suffice for a "regarded as" claim alleging actions such as harassment, hiring and firing, or termination. Accordingly, even an impairment that lasts less than six months but is not minor, or is minor but lasts more than six months, will suffice to establish a "regarded as" claim.

Although the EEOC's pre-ADAAA regulations identified HIV as a *per se* disability, its revised regulations instead identify numerous impairments that "[g]iven their inherent nature" will "virtually always be found to impose a substantial limitation on a major life activity" for purposes of constituting an "actual disability" or "record of disability. An "individualized assessment," is still required, but the EEOC has determined that for the impairments listed, such an assessment "should be particularly simple and straightforward." This standard applies for the following impairments for which the EEOC has determined "it should easily be concluded" that they will "at a minimum, substantially limit the major life activities indicated" and "may substantially limit additional major life activities not explicitly listed": deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed "mental retardation") substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; HIV infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.[47]

Prior to the ADAAA, the U.S. Supreme Court had declined to adopt a view that any impairment is a "*per se*" disability, even HIV, ruling instead that HIV is a disability when it substantially limits a woman's major life activity of reproduction.[48] Similarly, at least one federal appellate court had refused to consider alcoholism a disability *per se*.[49] The revised regulations now clarify that no impairment is a "*per se*" disability but, at the same time, provide a clear framework for resolution of claims regarding common impairments, such as those listed above.

Lastly, EEOC regulations exclude pregnancy from the definition of "disability," but specify that a pregnancy-related impairment that substantially limits a major life activity may constitute an "actual" disability, and may support a finding of a "record of" that impairment. Similarly, a pregnancy-related impairment may be covered under the "regarded as" prong if it is the basis for a prohibited employment action and is neither "transitory" nor "minor."[50]

[45] This change specifically overrules the ruling in *Sutton* (1999) 527 U.S. 471, 119 S.Ct. 2139, where the Supreme Court required plaintiffs to show that their employers not only subjectively regarded them as impaired and were substantially limited in a major life activity but also that these same employers subjectively regarded those limitations as disqualifying the employee from a broad range of jobs in the eyes of other employers. The ADAAA dispenses entirely with Sutton's subjective "substantial limitation" test. Under the ADAAA, whether an employer believes an employee is substantially impaired in a major life activity no longer matters. In enacting the new "regarded as" language of the ADAAA, Congress made clear that an employee "meets the requirement of 'being regarded as having such an impairment' if the individual shows that an action (e.g., disqualification for a job, program, or service) was taken because of an actual or perceived impairment, whether or not that impairment actually limits or is believed to limit a major life activity." H. Rep. (2008) 110-730, pp. 13-14.

[46] 42 U.S.C. § 12102(3)(B).

[47] 29 C.F.R. § 1630.2(j)(3)(iii).

[48] *Bragdon v. Abbott* (1998) 524 U.S. 624, 118 S.Ct. 2196.

[49] *Burch v. Coca-Cola Co.* (5th Cir. 1997) 119 F.3d 305.

[50] Appendix to 29 C.F.R. § 1630.2(h).

What Is a "Physical or Mental Impairment" Under the ADA?

The EEOC's regulations revised to reflect changes enacted in the ADAAA, define "physical or mental impairment" as:

- any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
- any mental or psychological disorder, such as intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.[51]

As the EEOC regulations explain, the definition of "physical or mental impairment" in the post-ADAAA regulations primarily remains based on the definition of the term "physical or mental impairment" found in the regulations implementing section 504 of the Rehabilitation Act.[52] However, the definition has been adapted to add body systems beyond those provided in the section 504 regulations and to make clear that the list is non-exhaustive.[53]

The EEOC's regulations exclude from the definition of disability individuals currently[54] engaging in illegal drug use, whether or not those individuals suffer from excluded psychoactive substance use disorders.[55] However, the regulations provide that being a recovered user of illegal drugs is protected under the ADA from discrimination on that basis.[56] In applying that provision, the courts have reasoned that an individual must no longer be illegally using drugs and also must have been in recovery long enough to be stable.[57]

In addition, the regulations exclude transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders; compulsive gambling, kleptomania, and pyromania; and psychoactive substance use disorders resulting from current illegal use of drugs.[58] The regulations expressly provide that homosexuality and bisexuality are not considered to be impairments and thus are not disabilities.[59]

The EEOC has further specified in its regulations that the definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone as long as they are (1) within "normal" range, and (2) are not the result of a physiological disorder.[60] The definition of an impairment also does not include common personality traits such as poor judgment or a quick temper, unless such traits are symptoms of a mental or psychological disorder. Similarly, the EEOC excludes poverty, lack of education, and having a prison record from the definition of impairments. In terms of age, the EEOC draws a distinction between "advanced age," which, in and of itself, is not an impairment, and medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis, which would constitute impairments. Further, the EEOC has specified that predisposition to illness or disease is not an impairment.[61]

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[51] 29 C.F.R. § 1630.2(h).
[52] 34 C.F.R. Part 104.
[53] Appendix to 29 C.F.R. § 1630.2(h).
[54] In interpreting the meaning of "current," the Circuit courts have adopted various qualitative standards; however, none has articulated a bright line rule as to when drug should or should not be considered "current." See *Mauerhan v. Wagner Corp.* (10th Cir. 2011) 649 F.3d 1180 (collecting cases).
[55] 29 C.F.R. § 1630.3(a); see *Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828.
[56] 29 C.F.R. § 1630.3(b). But see *Santiago Lopez v. Pacific Maritime Assn.* (9th Cir. 2011) 657 F.3d 762 (ruling that one-strike rule that disqualified anyone who had tested positive for drugs from being considered for a position as a longshoreman did not violate the ADA or FEHA because there was no evidence that the rule was intentionally discriminatory or disparately affected drug addicts).
[57] *Brown v. Lucky Stores, Inc.* (9th Cir. 2001) 246 F.3d 1182, 1187-1188; *McDaniel v. Mississippi Baptist Medical Center* (S.D.Miss. 1995) 877 F.Supp. 321, 327, affd. (5th Cir. 1995) 74 F.3d 1238.
[58] 29 C.F.R. § 1630.3, subd. (d)(1)-(3).
[59] 29 C.F.R. § 1630.3, subd. (e).
[60] Appendix to 29 C.F.R. § 1630.2(h).
[61] *Ibid.*

What Are "Major Life Activities" Under the FEHA?

The definition of "major life activities" under the FEHA is "broadly construed" and includes "physical, mental, and social activities and working."[62] In addition, the regulations specify that the following are major life activities: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working."[63] It also includes "the operation of major bodily functions."[64]

What Are "Major Life Activities" Under the ADA?

The ADA, as amended by ADAAA, now expressly enumerates specific examples of major life activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.[65] Noting that the list of examples in the ADAAA is non-exhaustive, the EEOC has expanded the list in its revised regulations to include sitting, reaching, and interacting with others as additional examples.

Notably, the ADAAA further expands the statutory definition of major life activities by including major bodily functions such as functions of the immune system, normal cell growth, digestive, bowel, respiratory, endocrine, and reproductive functions.[66] Again, noting that the list is non-exhaustive, the EEOC's revised regulations further include special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions as examples of major bodily functions.[67] To further ensure broad coverage, the revised regulations also specify that the operation of a major bodily function may include the operation of an individual organ (such as the liver, pancreas, or kidney) within a body system.[68]

Although U.S. Supreme Court decisions had limited "major life activities" to those permanent or long-term activities that are "of central importance to most people's daily lives," by enacting the ADAAA, Congress rejected the judicially-developed "central importance" requirement and the EEOC's pre-ADAAA requirement that the ability to perform the activity be "significantly restricted," finding them too high. The EEOC's revised regulations similarly anticipate that courts will be called to consider whether activities not listed are "major life activities, "and stress that in doing so, the term "major" must not be interpreted strictly and should not impose a "demanding standard" in determining whether an individual has a "disability."[69]

Prior to its announcement of the "central importance" test, the U.S. Supreme Court had ruled in *Bragdon v. Abbott* that the "touchstone" for determining whether an activity is a "major life activity" is the activity's significance in the life of the average person, including private acts as well as public, economic, and daily activities.[70] Although the Court's ruling in *Bragdon v. Abbott* may prove to be overly-narrow in light of the expanded statutory and regulatory definitions of "major life activities," it is interesting to note that the EEOC has specifically commented that the "central importance" test was "at odds" with the Court's statement in *Bragdon* that a "major life activity" does not have to have a "public, economic or daily aspect."[71]

Overall, the law in this area likely will be in flux as the courts encounter new functions claimed to be "major life activities" and evaluate the continuing validity of prior decisions.[72]

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[62] Gov. Code, § 12926, subds. (i)(1)(C), (k)(1)(B)(iii).
[63] Cal. Code Regs., tit. 2, § 11065, subd. (l)(1).
[64] Cal. Code Regs., tit. 2, § 11065, subd. (l)(2).
[65] 29 C.F.R. § 1630.2, subd. (i); Appendix to 29 C.F.R. § 1630.2(i).
[66] 42 U.S.C. § 12102, subd. (a)(2)(B).
[67] 29 C.F.R. § 1630.2, subd. (i)(1)(ii).
[68] *Ibid.*
[69] 29 C.F.R. § 1630.2, subd. (i)(2).
[70] (1998) 524 U.S. 624, 639.
[71] See Appendix to 29 C.F.R. § 1630.2, subd. (i), quoting *Bragdon*, *supra*.
[72] See e.g. *Hentze v. CSX Transportation, Inc.* (S.D. Ohio 2020) 477 F.Supp.3d 644, in which the U.S. District Court for the Southern District of Ohio ruled as a matter of first impression that the activity of "test-taking" did not qualify as a "major life activity" under the ADA.

HOW DO THE FEHA AND THE ADA DIFFER WITH RESPECT TO THE MAJOR LIFE ACTIVITY OF "WORKING?"

In the FEHA, the Legislature has specifically defined "working" as a major life activity[73] and decreed that an impairment amounts to a covered disability if it prevents an individual from performing the essential functions of even one job ("a particular employment" or a "class or broad range of employments").[74]

Prior to the ADAAA, the EEOC considered working a major life activity, albeit one of last resort.[75] That is, the EEOC believed that working should be considered only if an individual's impairment did not also substantially limit other major life activities. Courts interpreting the ADA, including the Ninth Circuit, agreed with the EEOC, finding that an impairment that prevented an individual from performing a broad range of jobs was a disability that substantially limits the individual in the major life activity of working.[76] But the U.S. Supreme Court had questioned whether "working" could ever be a major life activity.[77]

The ADAAA makes clear that working is a major life activity by including it, without limitation, among the specific statutory examples.[78] Although the EEOC's post-ADAAA regulations retain its pre-ADAAA provision that a determination as to whether an impairment substantially limits working should be made by reference to either difficulty in performing a "class of work," or in performing a "broad range of jobs in various classes," the EEOC has provided additional guidance aimed at clarifying the prior uncertainty. Specifically, in defining a "class," the revised regulations encompass either performance of the "nature of the work" involved or performance of "job-related requirements that an individual is limited in meeting." To illustrate, the regulations explain that an example of the "nature" of working could be driving commercial vehicles, performing clerical work, or performing law enforcement work. According to the EEOC, "job-related requirements" could be functions such as standing for prolonged periods, heavy lifting, or working in conditions with high temperatures or excessive noise that the person is expected to perform in his/her current job and would also be expected to perform in similar jobs.[79] Notably, though, the EEOC has stressed that "[d]emonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working."[80]

However, as a practical matter, the EEOC has also noted that with the expansion of the definition of "major life activities" to include functioning of major body systems, it will be unusual for working to be the only "major life activity" that is substantially limited by a physical or mental impairment. This means that employees will likely be able to claim that they are "disabled" within the meaning of the ADA without reference to their particular work.[81]

Overall, this newly expansive view of working and other major life activities clearly calls into question the ongoing validity of pre-ADAAA jurisprudence in which determination that a particular function was not a "major life activity," defeated an employee's claim of disability discrimination on the ground that the employee was not "disabled." For instance, the Ninth Circuit had found that the inability to travel extensively was not a major life activity under the old ADA, thus defeating the discrimination claims of an employee who suffered "abdominal distress" that the Ninth Circuit recognized as "affecting his digestive system."[82]

Until additional guidance is available from significant development of post-ADAAA decisions, the rulings of prior decisions, particularly those in which a disability met

[73] Gov. Code, § 12926, subds. (i)(1)(C), (k)(1)(B)(iii).
[74] Gov. Code, § 12926.1, subd. (c).
[75] 29 C.F.R. § 1630.2, subd. (i).
[76] *Thompson v. Holy Family Hospital* (9th Cir. 1997) 121 F.3d 537, 540-541.
[77] *Sutton*, *supra*.
[78] 42 U.S.C. § 12102, subd. (a)(2).
[79] Appendix to 29 C.F.R. § 1630.2, subd. (i).
[80] *Ibid.*
[81] As discussed later in this Chapter, however, this determination is critical in showing that an employee is "qualified" for purposes of asserting disability discrimination claims.
[82] *Coons v. Secretary of the U.S. Dept. of the Treasury* (9th Cir. 2004) 383 F.3d 879 (decided under the Rehabilitation Act using ADA standards).

the heightened "major life activity" standard, remain instructive. For instance, in another pre-ADAAA decision, the Ninth Circuit ruled that evidence that an employee had trouble breathing and experienced chest pain when working in temperatures above 90 degrees was sufficient, without further comparative evidence, to establish that he was substantially limited in major life activities such as breathing, thinking, and performing physical acts in connection with his job. Accordingly, the employee was permitted to proceed to a jury on his claim that he had been terminated when he refused to drive a vehicle that was not air conditioned.

HOW DOES A PHYSICAL OR MENTAL CONDITION "LIMIT" A MAJOR LIFE ACTIVITY UNDER THE FEHA?

The FEHA covers persons with disabilities that limit at least one major life activity. A covered physical or mental condition limits a major life activity if it makes the achievement of the major life activity difficult.[83] Deciding two companion cases, the California Supreme Court ruled that the Prudence Kay Poppink Act, which amended the FEHA in 2000, did not change California law with respect to the requirement that an impairment "limit" a major life activity in order to constitute a "disability."[84] The Poppink Act "clarified" that California law provides broader disability protections than federal law, specifically stating that "the law of this state requires a 'limitation' upon a major life activity, but does not require ... a 'substantial limitation,'"[85] and standardized this definition of disability across California civil rights laws.

HOW DOES AN IMPAIRMENT "SUBSTANTIALLY LIMIT" A MAJOR LIFE ACTIVITY UNDER THE ADA?

The ADA recognizes disabilities only if they "substantially limit" a major life activity.[86] Under the EEOC's pre-ADAAA regulations, a "substantial" limitation "refers to the inability to perform a major life activity as compared to the average person in the general population or [to] a significant restriction 'as to the condition, manner, or duration' under which an individual can perform the particular activity."[87]

Although the ADAAA retains this requirement, Congress has disavowed a number of decisions by the U.S. Supreme Court, thus calling into question the continuing force of lower courts' decisions relying on those principles. Like much of the ADA jurisprudence, this area of law remains in flux and there are comparatively few appellate decisions that have been decided under the ADAAA. According to the Congressional findings incorporated into the ADAAA, the EEOC and the U.S. Supreme Court incorrectly interpreted the term "substantially limits" to establish a greater degree of limitation than Congress intended.[88] Under the ADAAA, "substantially limits" must be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.[89] To qualify as "substantially limiting," the impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity.[90]

As formulated by the U.S. Supreme Court, determining whether an impairment "substantially limits" an individual required an individualized inquiry into the person's actual, present condition.[91] The U.S. Supreme

[83] Gov. Code, § 12940, subds. (i)(1)(B), (k)(1)(B)(ii); *see also* Cal. Code Regs., tit. 2, § 11065, subd. (l)(3).
[84] *Colmenares v. Braemar Country Club, Inc*. (2003) 29 Cal.4th 1019, 130 Cal.Rptr.2d 662 (deciding both *Witkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205, and *Colmenares v. Braemar Country Club* (2001) 89 Cal.App.4th 778)). In its ruling, the California Supreme Court disapproved the following cases "to the extent they hold or suggest the federal law's substantial limitation test applies to claims of physical disability brought under the FEHA": *Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1039-1040, 101 Cal.Rptr.2d 353; *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 629, 86 Cal.Rptr.2d 497; *Muller v. Automobile Club of So. Cal.* (1998) 61 Cal.App.4th 431, 442, 71 Cal.Rptr.2d 573; *Pensinger v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709, 721, 70 Cal.Rptr.2d 531; and *Gosvener v. Coastal Corp.* (1996) 51 Cal.App.4th 805, 813, 59 Cal.Rptr.2d 339.
[85] Gov. Code, § 12926.1(c).
[86] 42 U.S.C. § 12102(2)(B).
[87] *Thompson v. Holy Family Hospital* (9th Cir. 1997) 121 F.3d 537,, citing 29 C.F.R. § 1630.2, subds. (j)(1)(i)-(ii).
[88] ADAAA, Pub. Law 110-325, § 2, subds. (a)(4-8) & (b)(6).
[89] 29 C.F.R. § 1630.2, subd. (j)(1)(i).
[90] 29 C.F.R.. § 1630.2, subd. (j)(1)(ii).
[91] *Toyota Motor Mfg., Kentucky, Inc., supra*, 534 U.S. at p. 198, 122 S.Ct. at pp. 691-692.

Court had reasoned that because the ADA uses the present tense, it "is properly read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability."[92] As a result, the U.S. Supreme Court had determined that the question is not whether the individual's impairment "might," "could," or "would" be substantially limiting under some circumstances, but whether it actually does substantially limit the individual. Similarly, when the impairment is episodic or in remission and may again become active, the question is whether impairment would substantially limit a major life activity when active.[93] Under that approach, the ADA did not require employers and courts to speculate about a person's condition or to make a disability determination on the basis of generalized information about the condition or about how the condition might affect the average person. Instead, employers and the courts must determine the degree to which a person's actual impairment presently affects that individual's major life activities.

In *Fraser v. Goodale*,[94] decided prior to the ADAAA, the Ninth Circuit established an approach for determining when an impairment is "substantially limiting." According to the Ninth Circuit, to determine if an individual's impairment is substantially limiting, a court must look at "the nature, severity, duration, and impact of the impairment."[95] Rebecca Ann Fraser, a "brittle" diabetic whose condition was difficult to control, contended that her employer refused to accommodate her disability by refusing to allow her to eat at her desk. Ms. Fraser later collapsed at work. U.S. Bancorp, her employer, countered that Ms. Fraser was not disabled, because her diabetes did not "substantially limit" a major life activity. In *Fraser,* under then-existing law, the Court considered mitigating measures in determining whether Ms. Fraser's impairment substantially limited a major life activity. Ms. Fraser was able to show that even the extreme mitigating measures she used did not control her diabetes. In addition, the measures themselves, which involved monitoring blood sugar and food intake and eating precisely determined foods several times daily, were a constant burden on the major life activity of eating. Nonetheless, focusing on the frequency, the Ninth Circuit found that Ms. Fraser's inability to care for herself four times in a five-month period was not a substantial limitation.[96]

In another Ninth Circuit case interpreting when an impairment is "substantially limiting" under the ADA, *Wong v. Regents of the University of California*,[97] the Court examined the issue in the context of a medical student with a learning disability that limited the student's ability to process and communicate information. Because of his disability, Mr. Wong had to re-read material several times and he read very slowly. Mr. Wong requested that the University of California provide him accommodation by allowing him more time to pass exams and meet standards. The university refused Mr. Wong's request for accommodation and expelled him for failure to meet academic requirements. Based on Mr. Wong's graduation, *magna cum laude*, from San Francisco State University and Mr. Wong's earned master's degree in cellular/molecular biology, the Court concluded that he had achieved considerable academic success, beyond the attainment of most people or of the average person. As such, the Ninth Circuit reasoned that it was appropriate to impose a higher burden of proof on Mr. Wong. Based on his failure to meet this heightened burden, the Ninth Circuit ruled that Mr. Wong was not "substantially limited" in learning, and did not meet his burden of proving that he was disabled under either the ADA or the Rehabilitation Act.[98] It is unclear whether a court would follow *Wong* in light of the changes made by the ADAAA.

The Ninth Circuit applied a more flexible standard in *Gribben v. United Parcel Service*. Mr. Gribben, a driver for UPS, had requested regular assignment to an air conditioned

[92] *Sutton*, 527 U.S. at p. 482, 119 S.Ct. at p. 2146.
[93] 42 U.S.C. § 12102(a)(4)(D).
[94] (9th Cir. 2003) 342 F.3d 1032, 1039, *cert. den. U.S. Bancorp v. Fraser* (2004) 541 U.S. 937, 124 S.Ct. 1663.
[95] *Fraser, supra*.
[96] *Ibid.*
[97] (9th Cir. 2005) 410 F.3d 1052.
[98] *Ibid.*

vehicle because his doctor had told him that he could not perform certain activities for more than twenty minutes in temperatures exceeding ninety degrees. However, UPS failed to consistently provide an air conditioned vehicle and terminated Mr. Gribben when he refused to drive a vehicle that was not air conditioned. The trial court had refused to let Mr. Gribben's discrimination claim proceed to a jury because he had not provided comparative evidence about an average person's ability to work in hot weather, and thus had not established that his impairment limited a major life activity. However, the Ninth Circuit determined that Mr. Gribben's testimony that he had trouble breathing and experienced chest pain when working in temperatures above ninety degrees was sufficient, without further comparative evidence, to establish that he was substantially limited in major life activities such as breathing, thinking, and performing physical acts in connection with his job.

Yet another Ninth Circuit case, *Weaving v. City of Hillsboro*, interpreted the meaning of "substantially limiting" under the ADA where a police officer who was diagnosed with ADHD was terminated due to "severe interpersonal problems" between himself and other employees.[99] In the *Weaving* matter, the Ninth Circuit reversed a jury verdict and ruled that as a matter of law the jury could not have found on the evidence that ADHD substantially limited Mr. Weaving's ability to work or interact with others within the meaning of the ADA. In evaluating Mr. Weaving's claims that he was substantially incapacitated from the major life activity of working, the Court found that the record did not "contain substantial evidence showing that Mr. Weaving was limited in his ability to work compared to most people in the general population."[100] The Court noted that although interacting with others is a major life activity, in this case, Mr. Weaving demonstrated technical competence and had been promoted in his job. Mr. Weaving's problems interacting with others was his only work impairment and there was insufficient evidence to find that this impairment rose to the level of disability under the ADA.

The Court in *Weaving* distinguished its decision in *McAlindin v. County of San Diego*,[101] noting that *McAlindin* involved a plaintiff who was "essentially housebound," and was described by a doctor as being "barely functional." Conversely, the Court found that "Weaving's ADHD may well have limited his ability to *get along* with others. But that is not the same as a substantial limitation on the ability to *interact* with others .... To hold otherwise would be to expose to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues."

Mitigating Measures Under the FEHA

Whether a disability limits a major life activity must be determined without regard to any mitigating measures the individual might use to eliminate or reduce the limitation(s) of the disability, unless the mitigating measure itself limits a major life activity.[102] Mitigating measures can include medication, low-vision devices (as distinguished from ordinary eyeglasses or corrective lenses); medical supplies, equipment, or appliances, prosthetics; wheelchairs, braces, canes, and other assistive devices; and auxiliary aids and services.[103]

Mitigating Measures Under the ADA

In now-overruled decisions, such as *Sutton v. United Airlines*, the U.S. Supreme Court had taken the position that mitigating measures, such as medications or medical supplies that ameliorate impairments' effects are considered in determining whether a person is substantially limited in a major life activity.[104] However, the ADAAA makes clear that, with the exception of "ordinary eyeglasses or contact lenses,"[105] the

[99] (9th Cir. 2014) 763 F.3d 1106 cert. den. sub nom; *Weaving v. City of Hillsboro, Or.* (2015) 135 S.Ct. 1500.
[100] *Id.* at 1111.
[101] (9th Cir. 1999) 192 F.3d 1226.
[102] Gov. Code, §§ 12926, subds. (i)(1)(A), (k)(1)(B)(i), 12926.1(c).
[103] Cal. Code Regs., tit. 2, § 11065(n).
[104] (1999) 527 U.S. 471; *Murphy v. UPS* (1999) 527 U.S. 516; *Albertson's v. Kirkingburg* (1999) 527 U.S. 555.
[105] 42 U.S.C. § 12102, subd. (4)(E)(i)(I).

"ameliorative effects" of mitigating measures are *not* considered in determining whether an individual's impairment substantially limits a major life activity.[106] The ADAAA includes the following statutory list of examples of mitigating measures:

- Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses),[107] prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;[108]
- Use of assistive technology;[109]
- Reasonable accommodations or auxiliary aids or services; or[110]
- Learned behavioral or adaptive neurological modifications.[111]

In addition, the EEOC's post-ADAAA regulations add psychotherapy, behavioral therapy, and physical therapy to the statutory list.[112]

This clarification undoubtedly would have affected the analysis in cases such as *Fraser*, in which the Ninth Circuit considered the diabetic employee's mitigating measures, such as monitoring her blood sugar and following a limited diet requiring multiple daily meals during a workday, in its analysis of potential substantial limitations due to her diabetes.[113]

Of particular note, the EEOC regulations further distinguish between the *ameliorative* effect of a mitigating measure and its potential *negative* effect. For example, although the measures taken by the diabetic employee in *Fraser* aided in controlling her diabetes, the evidence showed that the measures, themselves, were a constant burden on the major life activity of eating for that employee.[114] Under the post-ADAAA regulations those negative, non-ameliorative effects would appropriately factor into finding that the impairment of diabetes substantially limited that major life activity.[115]

Importantly, the rules regarding mitigating measures apply solely to assessment of substantial limitation. Assessment of an employee's entitlement to reasonable accommodation, or an employer's defense based on "direct threat," may still be made with consideration of both positive and negative effects of mitigating measures. Similarly, although an employer may not require an individual to use a mitigating measure, failure to do so may also affect whether an employee is "qualified" for a job or poses a direct threat.[116]

ARE THERE OTHER DIFFERENCES BETWEEN THE FEHA AND THE ADA WITH RESPECT TO THE DEFINITION OF "DISABILITY?"

The FEHA specifically provides that its definition of disability includes any coverage or protection that the ADA, as amended by the ADAAA, provides, if that coverage or protection is broader than what the language of the FEHA's definitions appears to cover.[117]

In its post-ADAAA regulations, the EEOC has stressed that the requirement in the ADAAA that an impairment be neither "transitory" nor "minor" applies solely to the "regarded as" prong in defining "disability." To that end, as one of its "rules of construction," the EEOC's regulations state that an impairment lasting fewer than six months may be substantially limiting.[118]

IS THE EMPLOYEE "OTHERWISE QUALIFIED"?

Under the ADA, an individual who is "disabled" under any of the three prongs must also be "qualified" to perform the job in question to receive protection under the law.[119] That is, the individual must be able to

[106] 42 U.S.C. § 12102, subd. (4)(E).
[107] To clarify this distinction, the ADAAA specifies that "ordinary eyeglasses or contact lenses" means "lenses that are intended to fully correct visual acuity or eliminate refractive error" whereas "low-vision devices" means "devices that magnify, enhance, or otherwise augment a visual image." See § 12102(4)(E)(iii)(I)-(II).
[108] 42 U.S.C. § 12102, subd. (4)(E)(i)(I).
[109] 42 U.S.C. § 12102, subd. (4)(E)(i)(II).
[110] 42 U.S.C. § 12102, subd. (4)(E)(i)(III).
[111] 42 U.S.C. § 12102, subd. (4)(E)(i)(IV).
[112] 29 C.F.R. § 1630.2, subd. (j)(1)(vii).
[113] Fraser, *supra*.
[114] *Ibid.*
[115] 29 C.F.R. § 1630.2, subd. (j)(4)(ii).
[116] Appendix to 29 C.F.R. § 1630.2, subd. (j)(1)(vi).
[117] Gov. Code, § 12926, subd. (l).
[118] 29 C.F.R. § 1630.2, subd. (j)(1)(ix).
[119] See 42 U.S.C. § 12112(a). Notably, the EEOC has highlighted the change of terminology in its regulations

perform the essential functions of the job held or desired, with or without reasonable accommodation,[120] and must possess any required training, education, licenses, or similar minimum requirements for the position. Importantly, the Ninth Circuit has ruled in *Johnson v. Board of Trustees*[121] that an employer is not liable for failure to reasonably accommodate an employee by failing to take steps that would permit him or her to be "qualified" as long as those minimum requirements are not discriminatory in effect. There, Ms. Johnson had not completed sufficient credits to renew her teaching certificate because she had been unable to complete the required coursework due to a "major depressive episode." She requested that the school board apply for a waiver from the State of Idaho that would permit her to continue to teach, but the board had declined, with that decision ultimately resulting in Ms. Johnson's termination. As the Ninth Circuit explained, the board's decision did not trigger liability because the lack of credits "rendered [Johnson] unqualified" so that the board had no legal obligation to accommodate her request. However, in circumstances in which a purported "qualification" screens out applicants with disabilities on its face, the court's determination whether the disabled person is "qualified" may be made without reference to the discriminatory criteria. For example, in *Bates v. UPS,* the Ninth Circuit, addressing UPS' hearing standard that categorically eliminated deaf applicants, found that the disabled plaintiffs were required to show they were "qualified" only in that they satisfied the prerequisites for the position *not* connected to the challenged hearing requirement.[122] The burden then fell to UPS to show that its hearing requirement was job-related and consistent with business necessity; however, the Ninth Circuit ruled that UPS had not met the burden because it could not show that hearing, alone, made the difference between drivers getting into an accident and avoiding an accident.

The FEHA also protects only qualified individuals from adverse employment decisions. But the appellate courts continue to disagree whether the FEHA's provisions requiring employers to engage in a good faith interactive process and to offer reasonable accommodation apply for all employees and applicants with known disabilities, or only to "qualified" disabled individuals.[123] A "qualified individual…is an applicant or employee who has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."[124] The law in this area is still developing, and employers should keep this distinction and the FEHA's broad ameliorative purpose in mind whenever an employee requires accommodation.

In the past, courts had also disagreed whether, in an FEHA disability discrimination case, the plaintiff must prove the capacity to perform the essential functions of the job, or whether the employer must establish that the plaintiff could not perform the essential job duties. In the California Supreme Court's decision of *Green v. State of California*,[125] the Supreme Court ruled that the plaintiff must prove that he or she was qualified for the position. This requirement is expressly recognized and adopted in the new FEHA regulations which clearly placed the burden of proof on the plaintiff to prove that he or she is an otherwise qualified individual with a disability.[126]

However, the California Court of Appeal has ruled that an employee may state a claim for disability discrimination based on an employer acting on a mistaken belief about the employee's ability to perform a job, even where was no evidence of "animus" or "ill

under which it no longer refers to "a qualified individual with a disability" as a further effort to underscore the separate analysis regarding "disability" and "qualification" called for under the ADAAA. See 29 C.F.R. § 1630.2(m).

[120] 42 U.S.C. § 12111, subd. (8).

[121] (9th Cir. 2011) 666 F.3d 561.

[122] *Bates v. UPS* (9th Cir. 2006) 465 F.3d 1069

[123] Gov. Code, §§ 12940(m), (n); *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344, 360-361, 118 Cal.Rptr.2d 443, 453-454; but see *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256, 102 Cal.Rptr.2d 55, 62-63, rev. den. (2001) 2001 Cal.LEXIS 1629.

[124] Cal. Code Regs., tit. 2, § 11065(o).

[125] (2007) 42 Cal.4th 254, 64 Cal.Rptr.3d 390.

[126] Cal. Code Regs., tit. 2, § 11066(a).

will."[127] Where there is evidence of animus, however, that evidence may support an employee's claim that an employer's stated reason is pretext for discrimination.[128]

Finally, as noted previously, the ADAAA also does not require that reasonable accommodation be provided to individuals "regarded as" disabled who are not also "actually" disabled or have a "record of" disability. Such individuals must demonstrate their ability to perform the essential functions of the job in question, without consideration of reasonable accommodation.

WHAT ARE A POSITION'S "ESSENTIAL FUNCTIONS"?

The EEOC's regulations and the FEHA both define "essential functions" as "the fundamental job duties of the employment position the individual with a disability holds or desires."[129] "Essential functions" do not include a position's marginal functions, meaning that an employee who is unable to perform those functions may nonetheless be "qualified."[130]

A particular job function may be "essential" under both laws in at least three ways:

- The position exists for the purpose of performing the function; for example, if the individual is hired to type documents, then typing is an essential function of that position; or
- Only a few employees are available among whom the performance of the function can be distributed; for example, in a small office where employees frequently find themselves working alone, all employees may be required to greet office visitors, making the ability to greet visitors an essential function of all office positions; or
- Incumbents in the position are hired specifically for their expertise or ability to perform the function, which is highly specialized; for example, if an individual is hired to operate specific machinery, then operating that machinery is an essential function of the position.[131]

But an employee who cannot perform marginal functions, such as the ability to occasionally answer a telephone when staff normally assigned to that function are occupied, may still be "qualified" under the ADA and the FEHA.

In determining whether a particular function is "essential," both the FEHA and the ADA will look to:

- the employer's judgment as to which functions are essential;
- written job descriptions prepared before advertising or interviewing applicants for the job, but employers cannot elevate marginal functions to the status of "essential functions" merely by including them in a written job description;[132]
- the amount of time spent on the job performing the function;
- the consequences of not requiring the incumbent to perform the function;
- the terms of a collective bargaining agreement;
- the work experiences of past incumbents in the job;
- the current work experience of incumbents in similar jobs;[133]
- reference to the importance of the performance of the job function in prior performance reviews;[134] or
- other relevant evidence.

Recent decisions regarding claims under both the ADA and FEHA underscore that employers should be cautious in relying solely on a job description as evidence of a position's essential functions and should also undertake an individualized review of the work actually performed by the employee seeking reasonable accommodation, such as

[127] See *Wallace v. County of Stanislaus* (2016) 145 Cal.App.4th 109; *see also Gwynn v. Superior Court of Los Angeles County* (2019) 42 Cal.App.5th 47(mistaken belief that employee had filed for long term disability, which requires certification that the employee was unable to work at all, with or without reasonable accommodation, was not a legitimate, non-discriminatory reason for purposes of defending a disability discrimination claim).
[128] See *Moore v. Regents of the U. of Cal.* (2016) 248 Cal.App.4th 216.
[129] 29 C.F.R. § 1630.2(n); Gov. Code, § 12926(f).
[130] *Ibid.*
[131] 29 C.F.R. § 1630.2(n)(2)(i)-(iii); Gov. Code, §§ 12926(f)(1)(A)-(C).
[132] *Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 887.
[133] 29 C.F.R. § 1630.2(n)(3)(i)-(vii); Gov. Code, §§ 12926(f)(2)(A)-(G).
[134] Cal. Code Regs., tit. 2, §§ 11065(e)(2)(A)-(H).

through a job function analysis. For example, in *Abara v. Altec Industries*,[135] the employee, Mr. Abara was able to point to numerous forms of evidence that the essential functions of his position were administrative in nature and required no accommodation, which the trial court found sufficient to defeat the employer's claim that it had terminated Mr. Abara because his essential functions were those of an "arduous warehouse job" and his physical restrictions could not be reasonably accommodated. By contrast, in *Samper v. Providence St. Vincent Medical Center*,[136] the Ninth Circuit ruled that the hospital employer had met its burden of showing that regular attendance was an essential function of a NICU nurse, based on evidence such as Ms. Samper's own admission that her absences had caused problems with teamwork and created hardships for her coworkers, the job description, which listed attendance and punctuality as essential functions, and the testimony of Ms. Samper's supervisor who explained that NICU nurses have specialized training, that finding a replacement, particularly on short notice, is difficult, and understaffing can compromise patient care.[137]

In terms of essential functions for police officers, courts are increasingly receptive to employers' claims that physical agility remains an essential function for all sworn positions. For example, in *Lui v. City and County of San Francisco*, the California Court of Appeal ruled that the possible need for mass mobilization of all sworn officers during emergencies or large-scale protests supported a finding that an officer who was medically required to "avoid physically strenuous work and minimize physical contact" could not perform the essential functions of any sworn police position, including those with primarily administrative duties.[138]

DOES THE EMPLOYEE REQUIRE "REASONABLE ACCOMMODATION"?

Accommodation for Performance of Job Duties

The concept of "reasonable accommodation" is important to disability discrimination in two respects. The determination as to whether or not an individual is capable of performing essential job functions must be made in light of reasonable accommodations that enable the individual to perform the function. Failure to reasonably accommodate a qualified individual with a disability (ADA) or a job applicant or employee with a known disability (FEHA) is a separate, distinct violation of the law.[139] Further, the FEHA now expressly provides that an employer's conduct to "retaliate or otherwise discriminate against a person for requesting accommodation for the [known physical or mental disability of an applicant or employee]" is prohibited "regardless of whether the request was granted."[140]

California law makes clear that the employer shall assess the employee's ability to perform the job in question with or without reasonable accommodation, and that this must be an individualized assessment.[141] Consequently, employers may not impose a "fully healed" or "100% healed" policy before permitting an employee to return to work after an illness or injury.[142]

Accommodation is any change in the work environment or in the way things are customarily done that enables a disabled individual to enjoy equal employment opportunities. Accommodation means modifications or adjustments:

- that are effective in enabling an applicant with a disability to have an equal opportunity to be considered for a desired job;[143]
- that are effective in enabling an employee to perform the essential functions of the job the employee holds or desires;[144] or

[135] (E.D. Cal. 2011) 838 F.Supp.2d 995.
[136] (9th Cir. 2012) 675 F.3d 1233, 1235.
[137] *Id.*
[138] (2012) 211 Cal.App.4th 962, 965.
[139] ADA: 42 U.S.C. § 12112(b)(5)(A); FEHA: Gov. Code, § 12940(m).
[140] Gov. Code, § 12940(m)(2); see also Cal. Code Regs., tit. 2, § 11068(k).
[141] Cal. Code Regs., tit. 2, § 11068(d)(i).
[142] Cal. Code Regs., tit. 2, § 11068(i).
[143] Cal. Code Regs., tit. 2, § 11065(p)(1)(A); see also 29 C.F.R. § 1630.2(o)(1)(i).
[144] Cal. Code Regs., tit. 2, § 11065(p)(1)(B); see also 29 C.F.R. § 1630.2(o)(1)(ii).

- that are effective in enabling an employee with a disability to enjoy equivalent benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.[145]

Accommodation includes making existing facilities and equipment that employees use readily accessible to and usable by disabled individuals.[146] This obligation to provide reasonable accommodation applies to those areas that must be accessible for the employee to perform essential job functions, as well as to non-work areas (e.g., break rooms, training rooms, restrooms).[147]

Accommodation is required when it would enable a disabled individual who satisfies a position's job-related requirements to perform the position's essential functions. For example, raising a desk's height may enable an engineer who uses a wheelchair to perform the essential functions of an engineering position. Reasonable accommodation may also include: job restructuring; establishing part-time or modified work schedules; acquisition of equipment or devices for use on the job; modifying testing procedures, training protocols, or workplace policies and rules;[148] hiring qualified readers or interpreters;[149] permitting the employee to bring a "support animal" to the workplace;[150] permitting the employee to work from home;[151] extending an employee's probationary period;[152] and redesigning workload patterns.

A paid or unpaid leave of absence is also a type of reasonable accommodation "when the employee cannot presently perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery."[153] The FEHA regulations specifically state that holding an employee's job open "or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and does not create an undue hardship for the employer."[154] California employers should proceed with caution in attempting to terminate or otherwise negatively affect the employment of an employee who has recently completed an FMLA/CFRA leave of absence or an approved leave of absence under employer rules. When combined with the FEHA's mandate that the employer must initiate the interactive process when an employer is aware of the possible need for an accommodation because the employee has exhausted FMLA/CFRA or other leave of absence, the law is clear that something more than what is required by leave laws and policies may be required as a reasonable accommodation. It is also important to note that a leave of absence may be taken on a reduced schedule basis or intermittently, if supported by reasonable medical documentation.[155]

Reasonable accommodation may include reassignment to a vacant position, if the employee desires the position and can perform its essential functions, with or without reasonable accommodation. Employers considering accommodating a disabled employee through reassignment must look not only at currently available jobs, but also at those that will be available within a reasonable time period in any Department in the Agency.[156] Under the FEHA, employers may only consider reassignment as a reasonable accommodation if at least one of the four circumstances is present:

1. the employee cannot perform the essential functions of his/her current position, even with reasonable accommodation;

[145] Cal. Code Regs., tit. 2, § 11065(p)(1)(C); see also 29 C.F.R. § 1630.2(o)(1)(iii).
[146] 29 C.F.R. § 1630.2(o)(2)(i).
[147] 29 C.F.R. § 1630.2(o)(2)(i); Gov. Code, §§ 12926(n)(1)-(2).
[148] *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686.
[149] 42 U.S.C. § 12111(9); see also Cal. Code Regs., tit. 2, § 11068, subd. (a)(2).
[150] A "support animal" is an animal that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression. Cal. Code Regs. tit. 2, § 11065, subd. (a)(3).
[151] Cal. Code Regs., tit. 2, § 11069(e).
[152] *Hernandez v. Rancho Santiago Community College Dist.* (2018) 22 Cal.App.5th 1187, 1189.
[153] Cal. Code Regs., tit. 2, § 11068(c).
[154] *Ibid.*
[155] Cal. Code Regs., tit. 2, § 11069, subds. (d)(9)-(10).
[156] *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078.

2. reasonably accommodating the employee in his/her current position would create an undue hardship;
3. the employer and employee agree that reassignment is preferable to being accommodated in his/her current position; or
4. the employee requests reassignment in order to gain access to medical treatment that is not easily accessible at the current location.[157]

A temporary reassignment is not considered a reasonable accommodation, but an employer may offer, and an employee may choose to accept or reject a temporary assignment during the interactive process.[158]

The employer may modify workplace rules to reassign the disabled employee; for example, if company policy requires employees to compete for job openings, it would be a reasonable accommodation, absent undue hardship, to reassign the disabled employee without requiring the employee to compete for the job.[159]

But under a merit or civil service system, assignment to a vacant position means a position within the same classification. A probationary employee was not "qualified" for a position within the meaning of the FEHA where the employee had not taken and passed the civil service examination for the position.[160] In another case, *Jenkins v. County of Riverside*,[161] the Court ruled that under the FEHA a temporary county employee was not entitled to be assigned to a permanent position as a reasonable accommodation for an injury, because doing so would be contrary to the county's salary ordinance.

Reasonable accommodation does not require employers to violate or ignore the terms of a bona fide seniority system, whether negotiated with represented employees and included in a collective bargaining agreement or imposed unilaterally by the employer. The law does not require an employer to transfer a disabled employee to a vacant position if employees with greater seniority take advantage of a bona fide workplace seniority system to bid for the vacant job. But employers may not rely on seniority systems or other negotiated work rules that were created for purposes of discrimination or that contain so many exceptions or are so frequently altered that seniority loses its significance.[162]

An employer "is not required to create a new position to accommodate an employee with a disability to a greater extent than an employer would offer a new position to any employee, regardless of disability."[163] For example, in *Raine v. City of Burbank*,[164] the California Court of Appeal ruled that the FEHA did not require an employer to convert a temporary light-duty accommodation into a permanent job for a disabled patrol officer by reclassifying a desk job reserved for civilian personnel. However, although an employer does not usually have an obligation to make a light-duty assignment permanent as a reasonable accommodation, in *Atkins v. City of Los Angeles*, the Court of Appeal reasoned that the City could be required to continue the practice of indefinite light-duty assignments as a reasonable accommodation because the practice had been long-standing and had been in place when the employees began their light-duty assignments.[165] Nor is an employer obligated to offer preferential work assignments as an accommodation.[166] The duty to accommodate also does not require an employer to eliminate a position's essential functions from a disabled

[157] Cal. Code Regs., tit. 2, § 11068, subd. (d)(1).
[158] Cal. Code Regs., tit. 2, § 11068, subd. (d)(3).
[159] *Barnett v. U.S. Air, Inc*. (9th Cir. 2000) 228 F.3d 1105, 1120, vacated on other grounds and remanded *sub nom. U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 122 S.Ct. 1516; *McAlindin v. County of San Diego* (9th Cir. 1999) 192 F.3d 1226 at 1236-1237.
[160] *Hastings Dept. of Corrections* (2003) 110 Cal.App.4th 963, 2 Cal.Rptr.3d 329.
[161] (2006) 138 Cal.App.4th 593, 41 Cal.Rptr.3d 686, review den. (2006) 2006 Cal.LEXIS 9405.
[162] *U.S. Airways, Inc., supra*, 122 S.Ct. at pp. 1524-1525 (seniority systems); *Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 891-892 (negotiated transfer policy).
[163] Cal. Code Regs., tit. 2, § 11068(d)(4).
[164] (2006) 135 Cal.App.4th 1215, 37 Cal.Rptr.3d 899, review den. (2006) 2006 Cal.LEXIS 4472.
[165] (2017) 8 Cal.App.5th 696. Specifically at issue in *Atkins* was a practice where police recruits who were injured during the Police Academy would be placed in an administrative assignment as part of a light-duty program. Historically, recruits had been permitted to remain in these assignments indefinitely. In September 2009, the City discontinued this practice, and medically separated recruits in this assignment.
[166] *Scotch v. Art Inst. of Cal.* (2009) 173 Cal.App.4th 986.

individual's job duties.[167] Nor does accommodation require adjustments or modifications that are primarily for the disabled individual's personal benefit. The employer must, however, provide items that are designed specifically or required to meet job-related needs.

As discussed above, the appellate courts are split on the issue of whether an employee must be able to prove that he/she would have been able to perform the essential functions of a job with reasonable accommodation to successfully pursue a separate claim for failure to accommodate or engage in the interactive process under the FEHA. The law in this area is still developing.[168] Under the FEHA, employers may not deny reasonable accommodation on the sole ground that an employee with a known disability can no longer perform the job's essential functions but must consider whether a reasonable accommodation would facilitate performance.[169]

Other Work-Related Accommodations

It is important to bear in mind that the protections of the ADA and the FEHA are broader in scope than just performance of job duties. Specifically, the prohibition against disability discrimination (which encompasses the duty to provide reasonable accommodation) extends to "job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; and other terms, conditions, and privileges of employment."[170] For example, in *E.E.O.C. v. UPS Supply Chain Solutions*,[171] the Ninth Circuit was called upon to determine whether the employer had provided accommodations sufficient to permit a deaf employee equal participation in weekly department meetings, comprehension of the employer's harassment policy and related documents, and online job training. Ultimately, finding that there were questions of fact both as to whether the accommodations that UPS provided were effective, and as to whether UPS was aware that the accommodations were not effective, the Ninth Circuit reversed the trial court judgment in favor of the employer and directed that the claims proceed to trial.

WHAT IS THE INTERACTIVE PROCESS?

Whenever an employee notifies the employer that the employee has a disability and requests accommodation, the ADA requires a "mandatory" dialogue between the employer and employee, called the "interactive process."[172] The 2012 FEHA regulations define the interactive process as "timely, good faith communication between the employer or other covered entity and the applicant or employee or, when necessary because of the disability or other circumstances, his or her representative to explore whether or not the applicant or employee needs reasonable accommodation for the applicant's or employee's disability to perform the essential functions of the job, and if so, how the person can be reasonably accommodated."[173]

Employers and employees have a mutual duty to engage in the interactive process in good faith.[174] The FEHA regulations are clear that both the employer and the employee have the obligation to "exchange essential

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[167] Cal. Code Regs., tit. 2, § 11068(b).

[168] Compare *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344 (employee need not prove that he/she can perform the essential functions of the job to prevail on a failure to accommodate claim under Gov. Code, § 12940(m)) with *Nadaf-Rahrov v. Neiman Marcus Group* (2008) 166 Cal.App.4th 952; 83 Cal.Rptr.3d 190, and *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 246 (employee must prove that he or she could have performed the essential functions of the job with reasonable accommodations). Compare also *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal.App.4th 413, 425, rev. den. Feb. 20, 2008 (employee may prevail on a claim for failure to engage in the interaction process under Gov. Code § 12940(n) without showing that a reasonable accommodation was possible) with *Nadaf-Rahrov, supra* (employee must prove availability of a reasonable accommodation to prevail under § 12940(n)) and *Scotch*, *supra*, at 994 (same).

[169] *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344, 118 Cal.Rptr.2d 344.

[170] 42 U.S.C. § 12112, subds. (a), (b)(5)(A); *see also* Cal. Code Regs., Tit. 8, §§ 11070-73.

[171] (9th Cir. 2010) 620 F.3d 1103.

[172] *Barnett, supra*, 228 F.3d at 1114, vacated on other grounds and remanded sub nom. *U.S. Airways, Inc., supra*, 535 U.S. at p. 406, 122 S.Ct. at p. 1525; see Stevens, concurring, explaining that the Ninth Circuit's ruling regarding an employer's obligation to engage in an interactive process is "untouched" by the majority opinion, 535 U.S. at p. 407, 122 S.Ct. at p. 1526.

[173] Cal. Code Regs., tit. 2, § 11065, subd. (j).

[174] *Humphrey v. Memorial Hospitals Assn*. (9th Cir. 2001) 239 F.3d 1128, cert. den. (2002) 535 U.S. 1011, 122 S.Ct. 1592.

information identified [in the regulations] without delay or obstruction in the process."[175] The FEHA continues to rely on the articulation of the interactive process in the EEOC's interpretive guidance to the ADA.[176] Both laws make failure to engage in an interactive process with, or to offer reasonable accommodation to, a qualified disabled individual separate and distinct bases for a finding of unlawful discrimination.[177]

WHEN MUST EMPLOYERS ENGAGE IN AN INTERACTIVE PROCESS?

Under both the FEHA[178] and the ADA,[179] an employer has an affirmative duty to offer reasonable accommodation if the employer knows about the disability. Although reasonable accommodation is not required under either the ADA or the FEHA if the employer does not know about the disability,[180] it is important for employers to remember that "knowledge" can come from a variety of sources – not just information provided by the employee. Usually an employer learns that an employee has a disability requiring accommodation only when the employee tells the employer. But some disabilities may be obvious. In addition, employers who observe an employee's significant behavioral changes or deteriorating work may be required to initiate the interactive process themselves. It is important for employers to educate supervisors on these obligations because it is most frequently a supervisor who observes or becomes aware of some fact providing notice that accommodation could be necessary.

These considerations are reflected in the FEHA regulations, which specify that an employer "shall initiate an interactive process" when one of the following three situations are present:

1. an applicant or employee with a known physical or mental disability or medical condition requests reasonable accommodations, or
2. the employer or other covered entity otherwise becomes aware of the need for an accommodation through a third party or by observation, or
3. the employer or other covered entity becomes aware of the possible need for an accommodation because the employee with a disability has exhausted leave under the California Workers' Compensation Act, for the employee's own serious health condition under the CFRA and/or the FMLA, or other federal, state, employer, or other covered entity leave provisions and yet the employee or the employee's health care provider indicates that further accommodation is still necessary for recuperative leave or other accommodation for the employee to perform the essential functions of the job. An employer's or other covered entity's offer to engage in the interactive process in response to a request for such leave does not violate California Code of Regulations, title 2, section 7297.4, subdivision (b)(1) & (b)(2)(A)(1), prohibiting inquiry into the medical information underlying the need for medical leave other than certification that it is a "serious medical condition."[181]

WHAT OBLIGATIONS DO EMPLOYERS AND EMPLOYEES HAVE DURING THE INTERACTIVE PROCESS?

The FEHA regulations set forth specific obligations of both the employer and employee during the interactive process.[182]

Obtaining Medical Documentation

Because employers need only accommodate persons with covered disabilities, where the existence of a disability or the need for

[175] Cal. Code Regs., tit. 2, § 11069, subd. (a).
[176] Gov. Code, § 12926.1, subd. (e); see 29 C.F.R. Part 1630, Appendix, *supra*, § 1630.2, subd. (o).
[177] Gov. Code, § 12940(n); 42 U.S.C. § 12112(5)(A); 29 C.F.R. § 1630.2(o)(3); *Barnett, supra*, 228 F.3d at p. 1116, vacated on other grounds and remanded *sub nom. U.S. Airways, Inc., supra,* 535 U.S. at p. 406, 122 S.Ct. at p. 1525; see Stevens, J., concurring, explaining that the Ninth Circuit's ruling regarding an employer's obligation to engage in an interactive process is "untouched" by the majority opinion, 535 U.S. at p. 406, 122 S.Ct. at 1526; *Zivkovic v. So. Cal. Edison Co.* (9th Cir. 2002) 302 F.3d 1080, 1089.
[178] *Prilliman v. United Air Lines, Inc.* (1977) 53 Cal.App.4th 935, 950-951, 62 Cal.Rptr.2d 142, 150, review den. (1997) 1997 Cal.LEXIS 4264.
[179] *Humphrey*, *supra*.
[180] Cal. Code Regs., tit. 2, § 11068, subd. (a).
[181] Cal. Code Regs., tit. 2, § 11069, subd. (b).
[182] Cal. Code Regs., tit. 2, § 11069, subds. (c)-(d).

accommodation is not obvious, the employer is permitted to ask for "reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation." However, employers are expressly prohibited from requiring "[d]isclosure of the nature of the disability." Employers may ask the employee or applicant to provide information from a healthcare provider stating that "the employee or applicant has a physical or mental condition that limits a major life activity or a medical condition, and a description of why the employee or applicant needs a reasonable accommodation... ." Employers may not insist on a specific type of evidence or on more proof than would be required to satisfy an expert in the particular disability field. For example, an employer may not ignore a letter from an employee's learning disability expert that the employee has a specific learning disability and insist instead on a diagnosis from a medical doctor, where the learning disability is diagnosed primarily by behavioral, not physiological, data.[183] Employers may require that an employee provide medical documents substantiating the need for continued reasonable accommodation on an annual basis if the reasonable accommodation extends beyond one year.[184]

If the employee fails to provide sufficient information, the employer must explain the insufficiencies and allow the employee an opportunity to provide sufficient information. Under the 2012 FEHA regulations, that information is insufficient "if it does not specify the existence of a FEHA disability and explain the need for a reasonable accommodation."

Good Faith Participation

After an employer determines that an employee has a covered disability, the interactive process generally involves four steps. First, the employer analyzes the particular job at issue and determines its purpose and essential functions. Second, the employer consults with the disabled individual to ascertain the precise job-related limitations caused by the individual's disability. Third, the employer consults with the disabled individual to identify potential accommodations and assesses the effectiveness of each potential accommodation to determine whether or not it enables the individual to perform the essential functions of the position. Finally, the employer considers the disabled individual's preference and selects and implements the accommodation that is most appropriate for both the employee and the employer, in the employer's determination.[185]

An accommodation need not be the "best" accommodation possible, as long as it effectively meets the disabled individual's job-related needs. If the individual refuses a reasonable accommodation, the individual is not considered qualified for the job.[186]

But an individual may reject a proposed accommodation that will not, in fact, enable the individual to perform the job's essential functions. In that situation, or where the employee accepts the proposed accommodation but the accommodation is not effective, the employer must consider whether an alternative reasonable accommodation exists.[187] An employer cannot wait for an employee to request an alternate accommodation if the employer is aware that the initial accommodation is failing.[188]

The following example illustrates the interactive process. Suppose a maintenance position requires an employee to pick up 50-pound sacks and carry them from a loading dock to a storage room, and that a maintenance worker who is disabled by a back impairment requests a reasonable accommodation. The employer analyzes the position and determines that the position's

[183] *Vinson v. Thomas* (9th Cir. 2002) 288 F.3d 1145.
[184] Cal. Code Regs., tit. 2, § 11069, subd. (f).
[185] 29 C.F.R. Part 1630, Appendix, *supra*, § 1630.9; see also Senate Report No. 101-116 at 35 (1989).
[186] 29 C.F.R. § 1630.9; 56 Fed. Reg. 35747-48 (1991); see also Cal. Code Regs., tit. 2, § 11068, subd. (f), clarifying that an employer may inform the employee that refusal of an offer of reasonable accommodation may render the individual unable to perform the essential functions of the position, but may not require a qualified individual with a disability to accept an accommodation and shall not retaliate against an employee for refusing an accommodation.
[187] EEOC: Enforcement Guidance on Reasonable Accommodation (1999) BNA 70:1401 at 7625.
[188] *Humphrey, supra*; 239 F.3d at p. 1137; *McAlindin v. County of San Diego, supra*, 192 F.3d at p. 1237.

essential function is not that the employee physically lift and carry the sacks, but that the employee cause the sacks to move from the loading dock to the storage room.

The employer then meets with the disabled employee and learns that the employee can lift sacks to waist level, but that the disability prevents the employee from carrying the sacks from the loading dock to the storage room. The employer and the employee agree that a dolly, hand truck, or motorized cart could enable the employee to transport the sacks. Assessing the situation further, the employer determines that it does not own any motorized carts, and that the carts are too costly to purchase relative to the employer's budget. But both the dolly and the hand truck are readily available and will enable the employee to relocate the sacks. The employee prefers the dolly. The employee's preference and the employer's belief that a dolly is more efficient than a hand truck prompt the employer to provide the employee with a dolly, fulfilling its duty to reasonably accommodate the employee's disability.

If an employee refuses or fails to cooperate in the interactive process, the employer may be relieved of its obligation to continue the interactive process of considering reasonable accommodations.[189] In *Allen v. Pacific Bell*, the Ninth Circuit established the required analysis to determine under the ADA and the FEHA if an employer is relieved of the duty to engage in any further interactive process. Mr. Allen was employed by Pacific Bell as a services technician, an assignment that requires climbing poles and ladders. Mr. Allen's personal physician submitted a letter to Pacific Bell stating that Mr. Allen was "unsafe and unfit to do any other type of work except a desk job."

While Pacific Bell was searching for an alternative job, Mr. Allen asked several times to be reinstated to his former services technician position. Pacific Bell asked Mr. Allen to submit medical documentation supporting his contention that his physical condition had improved. Mr. Allen failed to submit any medical evidence.

Because Mr. Allen was asked but he failed to submit additional medical evidence that would modify his doctor's prior report, Pacific Bell's determination that Mr. Allen was qualified only for desk work was appropriate. Pacific Bell did not have a duty under either the ADA or California law to engage in further interactive processes with respect to the services technician position in the absence of new medical information.

Even if Mr. Allen were not qualified to perform a services technician job with reasonable accommodation, Pacific Bell still had a duty to engage in an interactive process to consider whether an alternative accommodation within the company would be possible. Mr. Allen's collective bargaining agent and Pacific Bell had negotiated a transfer system that allowed a disabled employee to select an alternative job. The negotiated provision guaranteed a disabled employee's right to transfer back to the former job if the employee's medical condition permitted. Under these collective bargaining provisions, Mr. Allen was required to take and pass entrance tests to qualify for positions identified in the Pacific Bell job search process. Mr. Allen failed to appear for a keyboard test, and lost all further rights to additional accommodation under Pacific Bell's policies and the collective bargaining agreement. Because Mr. Allen failed to cooperate in the job-search process established by the collective bargaining agreement, he could not successfully argue that Pacific Bell refused to fulfill its interactive duty to consider reasonable accommodations.[190]

Similarly, in *Nesson v. Northern Inyo County Local District*,[191] the Court of Appeal ruled that a former radiologist could not proceed on a claim of failure to accommodate in light of evidence that he had failed to cooperate in an investigation regarding allegations of

[189] (9th Cir. 2003) 348 F.3d 1113; *see also Doe v. Department of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 738 (finding that the employee was responsible for the breakdown in communication by failing to provide sufficient medical information regarding the existence of a disability or the manner in which his disability (asthma and dyslexia) limited his work performance).

[190] *Ibid.*; *Nadaf-Rahrov, supra.*

[191] *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65, 88, disapproved of on other grounds by *Park v. Bd. of Trustees of Cal. State U.* (2017) 2 Cal.5th 1057.

his "volatile and erratic" behavior and refused to undergo psychiatric evaluation so that "whether or not a disability or reasonable accommodation existed could not be determined."

By contrast, in *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*[192] it was the employer, Neiman Marcus, that refused to discuss specific alternative positions as a reasonable accommodation unless Ms. Nadaf-Rahrov first provided a release from her physician. Neiman Marcus then terminated her employment without consulting further with her physician or giving notice that termination was imminent. The company claimed that without a doctor's release, Ms. Nadaf-Rahrov was not qualified for any position. The Court found that a jury could determine that the Neiman Marcus's failure to discuss alternative positions (and its termination of Ms. Nadaf-Rahrov before it found out whether her condition was likely to improve in the near future) was unreasonable and a failure to engage in the interactive process.

Access to Interactive Process Documents

Beyond any existing privacy protections required under numerous state and federal laws, the 2012 FEHA regulations specifically impose constraints upon access to any medical information that is obtained during the interactive process. In addition to requiring maintenance of a separate confidential file, the regulations specify that information from such a file may be released in the following three circumstances only: (1) supervisors and managers may be informed of work restrictions and any necessary reasonable accommodation; (2) first aid and safety personnel may be informed that there is a condition that may require emergency treatment; and (3) government officials investigating compliance with the disability regulations must be permitted access to relevant documents.

Right to Representation

Any employee, whether a union member or not, is entitled under the FEHA to be represented by another person during interactive process meetings.[193] A recent PERB decision also has firmly established that employers must permit represented employees to bring a union representative to interactive process meetings.[194] The nuances of the right of representation are also discussed in Chapter 3 of this book.

WHEN MAY EMPLOYERS REFUSE TO ACCOMMODATE AN EMPLOYEE?

Under the ADA, an employer may refuse to reasonably accommodate a qualified individual with a disability only when the proposed reasonable accommodation would impose an undue hardship on the employer's business.[195] "Undue hardship" means that the employer will incur significant difficulty or expense providing the accommodation and refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive.[196] "Significant difficulty" relates to the proposed accommodation's impact upon the employer's operation, including its impact on the nature and structure of the business. Evidence that the proposed accommodation is too costly is reviewed in light of the operation's overall organization and financial resources.[197]

Determining whether a proposed accommodation imposes an undue hardship requires an individualized assessment.[198] If the proposed accommodation produces undue hardship, the employer must provide a different reasonable accommodation, if one exists, unless that accommodation also would impose undue hardship.

According to the EEOC, a negative effect on coworkers' morale is not sufficient, by itself, to create an undue hardship.[199] Nor is it a sufficient defense for an employer to claim that a particular disability is not covered by the employer's current insurance plan or

[192] *Nadaf-Rahrov*, *supra*.
[193] Cal. Code Regs., tit. 2, § 11069(a) (emphases added).
[194] *Service Employees International Union, Local 1021 v. Sonoma County Superior Ct.* (2015) PERB Decision No. 2409-C.
[195] 42 U.S.C. § 12112(5)(A).
[196] 42 U.S.C. § 12112(10).
[197] 29 C.F.R. Part 1630, Appendix, *supra*, § 1630.2(p).
[198] *Morton v. UPS, Inc.* (9th Cir. 2001) 272 F.3d 1249, 1262, cert. den. (2002) 535 U.S. 1054, 122 S.Ct. 1910, overruled on other grounds in *Bates v. UPS, Inc.* (9th Cir. 2007) 511 F.3d 974, 996-998; *Humphrey, supra,* 239 F.3d at p. 1139.
[199] 56 Fed. Reg. 35752 (1991).

would increase the employer's insurance premiums or workers' compensation costs.[200]

The undue hardship defense does not protect across-the-board qualification standards or work rules that tend to screen out persons with disabilities. Such qualification standards and rules must be defended on the grounds that they are job-related and consistent with business necessity.[201] The Ninth Circuit further clarified the requirements of a business necessity defense in *Bates v. United Parcel Service*.[202] Under the ADAAA, an employer may not use qualification standards or other selection criteria based on an individual's uncorrected vision unless the standard or criteria is job related and consistent with business necessity.[203]

Although the FEHA's definition of "undue hardship" is similar to that of the ADA's, the FEHA applies the defense differently. Undue hardship is a defense to a charge of disability discrimination under the ADA; that is, the employer may be able to use undue hardship to undermine the employee's assertion that he or she is a qualified disabled individual who can perform the job's essential functions with or without reasonable accommodation.[204]

But under the FEHA, undue hardship is not a defense to disability discrimination; it is a defense only to a charge of failure to provide reasonable accommodation.[205] This distinction reduces the employee's burden at trial. Under the ADA, the employee must show that a proposed accommodation is at least facially reasonable, but under the FEHA, the employer has the burden of proving that the accommodation is unreasonable because it would impose an undue hardship.[206]

In addition to proving undue hardship, employers may defend charges that they failed to provide reasonable accommodation or to engage in the interactive process on the grounds that: (1) the employee refused an offered accommodation that was, in fact, reasonable; (2) no position that the employee could perform existed or was vacant; or (3) the employee caused the breakdown in the interactive process. In determining whether the breakdown in the interactive process was the employee's fault, the employer must consider the nature of the employee's disability.[207] The California Supreme Court has ruled that an employer need not accommodate a disability by allowing an employee to use illegal drugs.[208]

Also, in some cases, employers may be justified in failing to accommodate an employee when the employee did not sufficiently advise the employer of the need for an accommodation. Although no "magic words" are required to trigger an employer's duty to provide accommodation under the FEHA, an employee must notify the employer of his need for accommodation in some way. In *King v. UPS*,[209] Mr. King claimed that he required a modified work schedule upon his return to work from medical leave and that UPS failed to provide it. The California Court of Appeal found that Mr. King never clearly requested a modified work schedule, and that UPS could not be liable for failing to provide an accommodation of which it had no knowledge. Specifically, the court determined that UPS reasonably interpreted a physician's release allowing Mr. King to work "regular hours" as a release for full

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[200] 56 Fed. Reg. 56751 (1991).
[201] 42 U.S.C. § 12112(6); *Cripe, supra*, 261 F.3d at p. 885.
[202] *Bates*, *supra*, at 974.
[203] 42 U.S.C. § 12112, subd. (c).
[204] 42 U.S.C. § 12112; *Morton, supra*, 272 F.3d at pp. 1262, 1263, overruled on other grounds in *Bates, supra* at 974.
[205] Compare Gov. Code, § 12940(a), disability discrimination, with Gov. Code, § 12940(m), failure to provide reasonable accommodation.
[206] Compare *U.S. Airways, Inc., supra*, 535 U.S. at pp. 401-402, 122 S.Ct. at p. 1523, with *Bagatti, supra*, 97 Cal.App.4th at p. 356. See, *for example*, *Swanson v. Morongo Unified School Dist*. (2014) 232 Cal.App.4th 964 (employer had burden to demonstrate why the teaching reassignment it offered to employee was a reasonable accommodation of her work restrictions, or else to demonstrate why the employee's preferred reassignment was not reasonable).
[207] *Perez v. Proctor & Gamble Manufacturing Co.* (E.D.Cal. 2001) 161 F. Supp.2d 1110, 1123-1124.
[208] *Ross v. Ragingwire Telecommunications* (2008) 42 Cal.4th 920, 70 Cal.Rptr.3d 382. The California Legislature passed legislation (Assembly Bill 2279) intended to protect employees who use marijuana for legitimate medical purposes. However, the legislation was vetoed by the Governor.
[209] *King v. UPS, Inc.* (2007) 152 Cal.App.4th 426, rev. den. (Sept. 2007).

duty. In *Avila v. Continental Airlines, Inc.*,[210] the California Court of Appeal ruled that the alleged submission of a doctor's form stating that Mr. Avila had been hospitalized for an unspecified condition and Mr. Avila's statements to approximately 50 of "his close friends" that that he had been sick did not sufficiently put the employer on notice that Mr. Avila suffered from a qualifying disability under FEHA.

WHAT DEFENSES MAY EMPLOYERS ASSERT AGAINST DISABILITY DISCRIMINATION CLAIMS?

"Direct Threat"

An employer may legally decline to hire or retain disabled individuals who are able to perform the job but who pose a "direct threat to the health or safety of the individual or others in the workplace."[211] The "direct threat" defense grants "very narrow permission to employers to exclude individuals with disabilities not for reasons related to their performance of their jobs, but because their mere presence could endanger others with whom they work and whom they serve."[212] The EEOC regulations define "direct threat" as a significant risk of substantial harm to the health or safety of the disabled person or others that reasonable accommodation cannot eliminate.[213] The employer bears the burden of proving that the individual poses a direct threat.[214]

Although the ADA language addresses only threats to other individuals in the workplace,[215] the U.S. Supreme Court determined that employers may apply job-related rules to screen out individuals whose disabilities pose unreasonable risks to the individuals themselves or to individuals outside the workplace, such as the end-users of an employer's products.[216] The Court ruled that an employer may show that the criteria it uses to reject a disabled individual whose presence in the workplace will endanger the individual are designed to "avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating the national Occupational Safety and Health Act" or that the otherwise qualified individual has a condition, such as a contagious disease, that puts others at risk.[217]

In *Hutton v. Elf ATOCHEM North American, Inc.*,[218] the Ninth Circuit found that the "direct" threat required an individualized assessment of the individual's present ability to safely perform the job, which must be based upon reasonable medical judgment that relies upon the most current medical knowledge and the best available evidence. A court must consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. If the threatened harm is grievous, even a small risk may be significant enough for the employer to exclude the employee. Mr. Hutton, a Type I diabetic, operated equipment that produced, stored, and transferred liquid chlorine. Mr. Hutton's treating physicians agreed that the rotating shifts and prolonged hours required by the chlorine finishing operator position made it difficult for Mr. Hutton to adequately monitor his diabetes, and occasionally he lost consciousness. Although the chance that he would lose consciousness on the job was small, the potential harm included an unplanned release of chlorine, which could convert to gas and cause severe and potentially fatal harm to other workers and persons near the facility. The direct threat doctrine applied in this case.

The FEHA also recognizes a defense to a claim of disability discrimination for disabled employees whose conditions pose a "direct threat" to their own health or safety or to the

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[210] (2008) 165 Cal.App.4th 1237, 82 Cal.Rptr.3d 440 as modified WL 3974425.
[211] 29 C.F.R. § 1630.15, subd. (b)(2); *Chevron U.S.A., Inc., supra*.
[212] *Bates, supra,* 511 F.3d at 996-998.
[213] 29 C.F.R. § 1630.2, subd. (r).
[214] *Hutton v. Elf Atochem North Am.* (9th Cir. 2001) 273 F.3d 884, 893, n. 5.
[215] 42 U.S.C. § 12111(3) [defining "direct threat" as "a significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation"]; 42 U.S.C. § 12113(b) [permitting employers to refuse to hire or retain individuals who "pose a direct threat to the health or safety of other individuals in the workplace"].
[216] *Chevron USA, Inc. v. Echazabal* (2002) 536 U.S. 73, 122 S.Ct. 2045, 2051-2052.
[217] *Id.*, 536 U.S. at pp. 84-85, 122 S.Ct. at p. 2052.
[218] (9th Cir. 2001) 273 F.3d 884. See also 29 C.F.R. § 1630.2, subd. (r).

health or safety of others.[219] Specifically, the employer must establish, requiring after engaging in the interactive process, that there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in a manner that would not endanger his or her health or safety because the job imposes an imminent and substantial degree of risk to the applicant or employee.[220] For example, under a "safety-of-others" defense, a UPS vision protocol as applied to monocular drivers satisfied the standard.[221] Objective and statistical evidence showed that monocular drivers were involved in more accidents than binocular drivers, the risk of harm to others was high, the standard did not categorically exclude monocular individuals from working as full-time drivers, and the application of the protocol was individualized to each employee or applicant.

Tricky questions are presented when the misconduct presenting a direct threat arises from an employee's disability. In *Wills v. Superior Court*,[222] the California Court of Appeal ruled, based on the particular facts before it, that an employer can take corrective action to address disability-related misconduct "when the misconduct includes threats or violence against coworkers." Linda Wills, a court clerk, suffered from bipolar disorder. During manic episodes, she could become irritable and aggressive, to the point of shouting inappropriate and threatening comments. Wills also sent a series of emails to co-workers that they considered threatening. The Court employing Ms. Wills terminated her employment based on the threats and poor judgment, and Ms. Wills brought suit under the FEHA, arguing that her employer had discriminated against her based on her disability because the bipolar disorder had caused the behavior for which she was terminated. Her employer argued that it was entitled to take corrective action to address threats of violence, regardless of any disability. In affirming the trial court's judgment in favor of the employer, the Court of Appeal explained that it interpreted the FEHA "as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers."[223] The Ninth Circuit has similarly recognized an employer's defense based on its obligation to protect its employees from a disabled, but threatening worker, ruling that the employee's conduct may even result in an initial determination that he is not a "qualified individual" for ADA purposes.[224]

The Ninth Circuit also has clarified that under the ADA, an employee may be lawfully terminated for intimidating and threatening co-workers despite a doctor's determination that the employee does not pose a direct threat of harm.[225] In *Curley v. City of North Las Vegas*, the Court found that the timing of the employee's termination, which admittedly came only after his requests for accommodation and his EEOC charge, and arguably after years of the City tolerating his bad behavior, did not point to any retaliatory pretext because the evidence showed that the City was not aware of the full severity and scope of his misconduct until after the investigation had been completed.

The FEHA does not permit the defense of risk to safety of others or self-defense to be used when there is only a future risk of harm.[226] And, similar to the ADA, the FEHA requires the consideration of five factors when evaluating the merit of the defense of others or defense of self-defense (the first four are the same as the ADA):

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that potential harm will occur;
- the imminence of the potential harm; and

[219] Gov. Code, §§ 12940(a)(1), (2) [permitting employers to refuse to hire or retain an individual who "cannot perform [essential] duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodation"].
[220] Cal. Code Regs., tit. 2, § 11067, subd. (b).
[221] *EEOC, supra*, 175 CPER 56.
[222] *Wills, supra*.
[223] *Id.* at 165-166.
[224] *Mayo v. PCC Structurals* (9th Cir. 2015) 795 F.3d 941.
[225] *Curley v. City of North Las Vegas* (9th Cir. 2014) 772 F.3d 629.
[226] Cal. Code Regs., tit. 2, § 11067, subd. (d).

- consideration of relevant information about an employee's past work history.[227]

Food Handlers

The ADA contains special provisions for employers who employ individuals in food-handling jobs. The ADA requires the Department of Health and Human Services to prepare and annually update a list of infectious and communicable diseases that are transmitted through food handling. If a disabled individual has one of the listed diseases and works in or applies for a food handling position, the employer must determine whether a reasonable accommodation will eliminate the risk the individual will transmit the disease through food handling.[228] If so, the employer must provide the accommodation. If no reasonable accommodation is possible and the individual is an applicant, the employer need not hire the individual. But if the individual is a current employee, the employer must consider reassigning the employee to a vacant position not involving food handling for which the employee is qualified.

After-acquired Evidence

"After-acquired evidence" is evidence of employee misconduct, sufficient to justify the employee's nondiscriminatory termination that the employer does not discover until after discharging the employee. The rule applies when the employer concedes that the discharge was discriminatory but proves that it would have terminated the employee anyway, based on the later discovered evidence.[229] After-acquired evidence can reduce damages awarded for FEHA violations by "barring all portions of the employment discrimination claim tied to the employee's discharge."[230] The rule vindicates employees' civil rights while preventing employees from profiting from their misconduct.

The after-acquired evidence rule does not preclude an employer, whose reason for terminating an employee is that the employee is no longer physically able to perform the job, from producing evidence obtained after the employee's termination that the employee was not a qualified disabled individual at the time of the termination. For example, an employer may ask a medical expert to review the employee's medical and work records to determine whether the employee was able to perform the job's essential functions, with or without reasonable accommodation, at the time of the discharge. This type of evidence does not relieve the employer from liability for a category of damages, but instead is intended to prove that the employer acted lawfully and is not liable at all.[231]

Moreover, the nature of the after-acquired evidence may be completely unrelated to the underlying cause of action. For example, the California Supreme Court has ruled that evidence that an employee was undocumented at the time of hire and submitted a fraudulent social security number may be considered in an employer's defense of a subsequent disability discrimination claim. Although such evidence does not prevent the employee from prevailing on the claim, the employer's liability for any resulting damages will be cut off as of the date that the misconduct is discovered.[232]

The Ninth Circuit recently held that an employer could rely on after-acquired evidence that an employee had provided false information on her resume about her education and did not hold the required degree at any time during her employment.[233] The Ninth Circuit held that the employee was not a "qualified individual" under the ADA because she did not satisfy "the requisite, skill, experience, education and other job-related requirements" for the position.[234]

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[227] Cal. Code Regs., tit. 2, § 11067, subd. (e).
[228] 29 C.F.R. § 1630.16(e); 56 Fed. Reg. 35753 (1991).
[229] *Finegan v. County of Los Angeles* (2001) 91 Cal.App.4th 1, 9, 109 Cal.Rptr.2d 762, 768.
[230] *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 850, 77 Cal.Rptr.2d 12, 23; but see *Rivera v. NIBCO* (9th Cir 2004) 364 F.3d 1057 (questioning continuing validity of *Murillo* following enactment of Gov. Code, § 7).
[231] *Finegan, supra*, 91 Cal.App.4th at pp. 10-11, 109 Cal.Rptr.2d 762, 769-770.
[232] *Salas v. Sierra Chemical* (2014) 59 Cal.4th 407.
[233] *Anthony v. Trax Internat. Corp.* (9th Cir. 2020) 955 F.3d 1123 at 1126-1127.
[234] *Id.* at 1127-1128, *citing* 29 C.F.R. § 1630.2(m) and interpretative guidance at 29 C.F.R. pt. 1630, app. to § 1630.2(m). As the Ninth Circuit noted, the EEOC had filed

Faragher/Burlington Industries Defense

Employers may defend federal harassment claims under Title VII on the grounds that they have adopted an anti-harassment policy, educated employees about the policy, and consistently enforced the policy. Under these circumstances, harassment victims must take advantage of the policy's remedial process in order to succeed in a harassment lawsuit against the employer. The U.S. Supreme Court established this defense in two sexual harassment cases, *Faragher v. City of Boca Raton*[235] and *Burlington Industries v. Ellerth.*[236] Because the ADA is enforced in the same manner as Title VII, the defense may be available to employers accused of harassing employees on the basis of their disability.

In cases involving non-supervisory harassment under the FEHA, the California Court has applied a similar constructive knowledge standard as under federal law, but the FEHA imposes strict liability for cases involving harassment by a supervisor. Even so, in *Department of Health Services*, the California Supreme Court recognized that the doctrine of avoidable consequences, as applied to an employee's failure to report harassment, could limit the extent of damages for which an employer would be strictly liable.[237]

Also, public employers should note that employees bringing discrimination claims under the FEHA need not exhaust the employer's internal complaint procedures filing a complaint with the DFEH.[238]

Conflicting Laws and Regulations

Many federal laws and regulations address medical standards and safety requirements. If an alleged discriminatory action was taken in compliance with a federal law or regulation, the employer may assert as a defense that its conduct was taken to fulfill its obligation to comply with the conflicting standard.[239] The employee may rebut this defense by showing that the employer's defense is a pretext for discrimination, that the federal standard did not require the discriminatory action, or ways the employer could comply with the standard that would not conflict with the ADA.[240]

Under the ADA, employers may not apply federal or state rules that govern one set of employees to another set of employees for administrative convenience or internal consistency if those rules tend to screen out individuals with disabilities, unless the employer can prove a business necessity defense. This is a high standard. It can be met only by showing that: (a) the rules substantially promote the business' needs; and (b) either that no reasonable accommodation currently available would cure the performance deficiency or that such reasonable accommodation poses an undue hardship on the employer. For a safety-based qualification standard, the court must take into account the magnitude of the possible harm as well as the probability of occurrence. As discussed earlier, the Ninth Circuit has ruled that an employer must show that the standard fairly and accurately measures an individual employee's ability to perform the essential functions of the job and is thus "job related." In addition, the employer must show that the requirement is "consistent with business necessity, and that performance cannot be achieved through reasonable accommodation."[241]

As a further consideration, employers should proceed with caution when considering arguing that an employee should be prevented from taking a position in litigating disability claims that contradicts representations made to obtain worker's compensation or disability benefits. As one court explained, it would be the employer's burden to demonstrate that the inconsistency in claims by the employee before the court compared to those made in

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an amicus brief in the case, arguing that the regulation should be disregarded and that the court should consider only the plain language of the ADA that considers only the ability to perform essential functions. *Id.* at 1128, citing 42 U.S.C. § 12111. The EEOC emphasized that the reason for Anthony's termination was unrelated to her degree status. *Id.* at 1128.

[235] (1998) 524 U.S. 775, 807-808, 118 S.Ct. 2275, 2292-2293.

[236] (1998) 524 U.S. 742, 765, 118 S.Ct. 2257, 2270.

[237] *Department of Health Services v. Superior Ct. (McGinnis) (*2003) 31 Cal.4th 1026, 1042-43.

[238] *Schifando v. City of Los Angeles,* 31 Cal.4th 1074.

[239] 29 C.F.R. § 1630.15(e).

[240] 29 C.F.R. Part 1630, Appendix, *supra*, § 1630.15(e).

[241] *Bates, supra*, at 996-998.

another forum is "tantamount to committing fraud on the court."[242]

No Adverse Action Was Taken Against the Employee

As with discrimination claims based on other protected characteristics, employees must establish that they were subjected to an adverse employment action because of disability. However, not all changed work conditions meet this threshold. For example, in *Malais v. Los Angeles City Fire Department*,[243] the California Court of Appeal determined that the Los Angeles City Fire Department's refusal to assign a fire captain with a prosthetic leg to platoon duty did not constitute an adverse employment action. An "adverse employment action" is discrimination in the terms, conditions, or privileges of employment. Minor or trivial adverse actions that simply anger or upset an employee are not considered to materially affect the terms, conditions, or privileges of employment. There, Mr. Malais continued to receive promotions and received equivalent opportunities for overtime. The only reason that Mr. Malais was not content with special duty was that he preferred the work, schedule, and camaraderie of platoon duty. However, Mr. Malais' personal preference for a particular assignment was not significant enough to constitute an adverse employment action.

In *Featherstone v. Southern California Permanente Medical Group*, the employee submitted her resignation a few days after returning from a leave of absence, and it was promptly processed by her employer. A week later, she attempted to rescind her resignation, claiming that she was suffering from an adverse drug reaction that "caused her to do abnormal things." She provided a doctor's note confirming her hospitalization due to behavioral changes resulting from an adverse reaction to medication. The employer refused to reinstate her, and the Court ruled that under FEHA, "refusing to allow a former employee to rescind a voluntary discharge — that is, a resignation free of employer coercion or misconduct — is not an adverse employment action."[244]

WHEN DO THE LAWS PROTECT PERSONS WHO DO NOT HAVE AN ACTUAL DISABILITY, AND NEVER HAVE?

Regarded as Having a Disability

Under the ADA, the term "disability" also covers an individual treated by an employer as having an impairment even though that individual either does not have an impairment or has an impairment that does not limit major life activities. As noted earlier, the ADAAA and revised regulations no longer require that an impairment be "regarded as" having a "substantial" limitation on the ability to perform a major life activity, just a limitation that is not both "temporary" and "minor." In explaining its rationale, the EEOC cited Congress' observation that "unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments and [its] corresponding desire to prohibit discrimination founded on such perceptions."[245] In *Nunez v. HIE Holdings, Inc.*,[246] the Ninth Circuit applied this standard and emphasized that with the passage of the ADAAA, "an individual meets the requirement of being regarded as having such an impairment if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."

The FEHA also prohibits discrimination against persons on the basis of a perceived disability, which includes being regarded as, perceived as, or treated as having a disability.[247] Further, the FEHA includes "perceived potential disability" within its scope of protection.[248]

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[242] *Abara, supra,* 838 F.Supp.2d (E.D. Cal. 2011) at 1006.
[243] (2007) 150 Cal.App.4th 350, 58 Cal.Rptr.3d 444, rev. den. (2007) 2007 Cal.LEXIS 8530.
[244] *Featherstone v. Southern Cal. Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 217 Cal.Rptr.3d 258.
[245] Appendix to 29 C.F.R. § 1630.2(l).
[246] (2018) 908 F.3d 428, 434 (emphasis added).
[247] Gov. Code, §§ 12926(m); 12940(a); Cal. Code Regs., tit. 2, § 11065, subd. (d)(5).
[248] Cal. Code Regs., tit. 2, §11065(d)(6). A perceived potential disability is being regarded, perceived, or treated by the employer as having, or having had, a

Prejudice may stigmatize an individual as having an impairment that (substantially) limits major life activities even though no impairment exists. For example, the assumption that a disfigured person is limited in major life activities could trigger FEHA or ADA coverage, even though no such limitation exists.

An employer's perception of an individual's impairment need not be well-founded. On the contrary, a "regarded as" claim typically "rests on the assertion that the [employer is] acting irrationally, rather than on the basis of the true facts and rational economic calculation."[249] But an employer's reliance on a doctor's instructions or assessment of an individual's physical abilities is not an indication that the employer "regards" the employee as disabled.[250]

Under the FEHA, an employer must engage in an interactive process with an applicant or employee it regards as physically disabled, whether or not the individual is actually disabled.[251] As noted previously, the ADAAA and revised regulations clearly provide that employees regarded as having a disability are only entitled to reasonable accommodation if they also have an "actual" disability or a record of an actual disability.

Associates of Disabled Individuals

Both the ADA and the FEHA also protect individuals who have an association or relationship with a disabled individual.[252] This protection includes but is not limited to a familial relationship with a disabled individual. For example, if a qualified applicant without a disability applies for a job, and discloses to the employer that the applicant's spouse is disabled, the employer may not decline to hire the applicant because the employer believes the applicant will frequently leave work to care for the applicant's spouse. Similarly, an employer may not discharge an employee who does volunteer work for individuals with AIDS because the employer fears the employee will contract the disease. The ADA prohibits an employer that provides health benefits to its employees' dependents from reducing an employee's benefit level because the employee has a disabled dependent.

Applying these principles, the Ninth Circuit Court of Appeals ruled that a special education teacher who filed a class discrimination complaint with the U.S. Department of Education's Office for Civil Rights, alleging the County had failed to provide its disabled students with the education to which they were legally entitled, could proceed with her disability retaliation lawsuit against her employer.[253] The Court ruled that the ADA did not limit its protection against retaliation only to individuals with disabilities. More recently, the California Court of Appeal ruled in *Castro-Ramirez v. Dependable Highway Express*, that a jury should decide whether an employee who was terminated after requesting and being denied an early shift to administer dialysis to his son was discriminated against based on that association.[254]

However, an employee's opposition to the employer's actions toward the general disabled community is insufficient to establish protected activity under the FEHA.[255] In *Dinslage v. City and County of San Francisco*, an employee alleged that he was laid off and denied rehire in retaliation for his broad advocacy for the disabled community, his opposition to relocating an annual event for the disabled community, and his opposition to eliminating a program benefitting the disabled community. The appellate court found that none of these were protected activities under FEHA's retaliation provision because "discrimination by an employer against members of the

physical or mental disease, disorder, condition, or cosmetic disfigurement, anatomical loss, adverse genetic information, or special education disability that has no present disabling effect, but may become a mental or physical disability or special education disability.

[249] *Johnson v. Paradise Valley Unified School Dist.* (9th Cir. 2001) 251 F.3d 1222.

[250] *Harshbarger v. Sierra Pacific Power Co.* (D. Nev. 2000) 128 F.Supp.2d 1302, 1307, rev'd on other grounds (9th Cir. 2002) 2002 WL 54710.

[251] *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 43 Cal.Rptr.3d 874.

[252] 29 C.F.R. § 1630.8; Gov. Code § 12926(m).

[253] *Barker v. Riverside County Office of Education* (9th Cir. 2009) 584 F.3d 821.

[254] (2016) 246 Cal.App.4th 180; dec. on r'hg. (2016) 2 Cal.App.5th 1028; *rev. den*. 2016.

[255] *Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 209 Cal.Rptr.3d 809.

general public is not a prohibited employment practice under the FEHA."[256]

Confidentiality

As discussed further below, both the ADA and the FEHA protect all job applicants and employees, regardless of disability, by limiting employers' use of pre-employment and on-the-job inquiries and medical examinations and by requiring employers to keep employees' medical information confidential.[257] The FEHA and the federal Genetic Information Nondiscrimination Act ("GINA") further protect employees and applicants by prohibiting genetic testing except in limited circumstances.[258] And both the ADA and the FEHA prohibit employers from retaliating against disabled and non-disabled persons who oppose prohibited practices or who participate in the enforcement process.[259]

WHAT PRACTICES DO THE LAWS REGULATE DURING THE PRE-EMPLOYMENT PROCESS?

Job Announcements and Job Training

The FEHA specifically prohibits employers from expressing, directly or indirectly, any "limitation, specification, or discrimination" in job announcements.[260] The FEHA also specifically prohibits discrimination in selecting applicants for apprenticeship and training programs.[261]

The DFEH prohibits employers from asking applicants about their available work hours or days as a means of determining the applicant's disability status or existence of a medical condition.[262] The prohibition applies to both pre-employment inquiries[263] and application materials.[264] The new regulations require employers to use language such as "Other than time off for reasons related to your religion, a disability, or a medical condition, are there any days or times when you are unavailable to work?" or "Other than time off for reasons related to your religion, a disability, or a medical condition, are you available to work the proposed schedule?"[265] In addition, the regulations note that online application technology that "limits or screens out" applicants based on available schedule has a disparate impact on applicants based on religious creed, disability or medical condition. Accordingly, use of such technology is unlawful unless

- the use of such online application screening technology is job-related and consistent with business necessity; and
- the technology provides a mechanism for an applicant to request an accommodation.[266]

Accommodations for Applicants

An employer may not exclude a disabled individual from a job because a disability prevents the individual from taking a test or negatively influences the results of a test that is a job prerequisite. An employer must provide reasonable accommodation if it knows, before administering a test, that an individual has a disability that impairs sensory, manual, or speaking skills.[267]

PRE-EMPLOYMENT MEDICAL EXAMS AND INQUIRIES

What Questions May Employers Ask Job Applicants?

The ADA and the FEHA both prohibit employers from asking applicants before making an employment offer whether they have a particular mental or physical disability.[268] These restrictions apply to all applicants, not just disabled ones.[269]

To comply with the law's limits on health questions and medical examinations, public employers must narrowly tailor questions to focus on whether applicants will be able to perform essential job functions. Employment application forms and interview questions

[256] *Id.* at 383.
[257] 29 C.F.R. §§ 1630.13, 1630.14(d).
[258] Gov. Code, § 12940(o), 42 U.S.C. § 2000ff-1.
[259] 42 U.S.C. § 12203(a); Gov. Code, § 12940(h).
[260] Gov. Code, § 12940(d).
[261] Gov. Code, § 12940(c).
[262] Cal. Code Regs., tit. 2, § 11016, subds. (b)(1)(B), (c)(3).
[263] Cal. Code Regs., tit. 2, § 11016, subd. (b)(1)(B).
[264] Cal. Code Regs., tit. 2, § 11016, subd. (c)(3).
[265] Cal. Code Regs., tit. 2, § 11016, subds. (b)(1)(B), (c)(3).
[266] Cal. Code Regs., tit. 2, § 11016, subd. (c)(3)(A).
[267] 29 C.F.R. § 1630.11.
[268] 42 U.S.C. § 12112(d)(2)(A); 29 C.F.R. § 1630.13(a); Gov. Code, § 12940(e)(1).
[269] 42 U.S.C. § 12112(d)(2)(A); *Fredenburg v. Contra Costa County Dept. of Health Services* (9th Cir. 1999) 172 F.3d 1176, 1182.

should not ask about an applicant's health, disabilities, past medical problems, and past workers' compensation claims. In addition, investigative agencies that perform reference checks should delete any references to an applicant's disabilities or medical problems.

Under both laws, employers may ask applicants if they can perform job-related duties. An employer may describe or demonstrate a job function and ask whether applicants can perform the function with or without reasonable accommodation. For example, if an essential function of a job is to lift 50 pounds, the employer may ask job applicants if they can lift 50 pounds or require them to demonstrate that capability by a job-related test. But the employer cannot ask applicants if they have a back disability. Nor can the employer ask how an applicant became disabled, or about the disability's prognosis, nature, or severity.

Examples of pre-employment inquiries that the law prohibits are:

- Do you have any particular disabilities?
- Have you ever been treated for any of the following diseases or conditions?
- Are you now receiving or have you ever received workers' compensation?
- Have you ever taken medical leave?
- Have you ever left a job because of any physical or mental limitations?

An acceptable question on a job application form or at an oral interview would be: "Can you perform each of the following essential functions of this job?"

The ADA permits employers to ask job applicants to voluntarily disclose potential disabilities if the employer seeks to cure past discrimination and limited employment opportunities for disabled individuals. But employers should request this information only if:

- the job application or interview questions clearly specify that the information is intended only for remedial action to achieve the ADA's goals; and
- the employer clearly indicates that the information is requested on a voluntary basis, will be kept confidential, and will be used only for ADA compliance.

Both the ADA and the FEHA require employers to respond to applicants' requests for reasonable accommodation, whether during pre-employment testing, interviews, or on the job.

Employers may ask former employees who request rehire to provide medical evidence that they have recovered from known injuries that previously required accommodation.[270] However, under the provisions of the California Public Employees' Retirement Law ("PERL"), if a former State employee is reinstated from a CalPERS industrial disability retirement, the former employer may be required to return him or her to work without imposing any additional pre-hire conditions such as medical or psychological exams.[271]

What Medical Exams May Employers Require of Job Applicants?

Employers are prohibited from conducting a medical or psychological examination or inquiries of an applicant before an offer of employment is extended.[272] Under the ADA, an employer may require a post-offer, pre-employment medical examination if:

- the employer has made an employment offer that is conditioned on the examination's results;
- all entering employees are subject to the same examination;
- criteria used to screen out disabled candidates, including safety-based standards, are job-related and consistent with business necessity; and
- the examination's results are treated as confidential medical records.[273]

Under the FEHA, an employer may condition a bona fide offer of employment on the

[270] *Harris v. Harris & Hart, Inc.* (9th Cir. 2000) 206 F.3d 838, 845.
[271] See Gov. Code, § 21190 et seq.; *see, also*, *California Department of Justice v. Board of Admin. of California Public Employees' Retirement System* (2015) 242 Cal.App.4th 133 (peace officer who was reinstated by CalPERS from her industrial disability retirement was entitled to return to her position with the state without being subject to the pre-employment medical and psychological exams set forth by the California Commission on Peace Officer Standards and Training (POST)).
[272] Cal. Code Regs., tit. 2, § 11071, subd. (a).
[273] 29 C.F.R. § 1630.14, subds. (a)-(b).

results of a medical or psychological examination or inquiry in order to determine the applicant's fitness for the job in question.[274] In addition, the following three requirements must be met:

All entering employees in similar positions are subjected to such an examination.

Where the results of such medical or psychological examination would result in disqualification, an applicant or employee may submit independent medical opinions for consideration before a final determination on disqualification is made.

The results are to be maintained on separate forms and shall be afforded confidentiality as medical records.[275]

What Limitations Do Employers Have in Determining the Timing for Medical Examinations?

As a general rule, the ADA and the FEHA allow employers to require medical exams to ensure that job applicants can safely perform the essential functions of the job, but the acts prohibit employers from requiring applicants to undergo medical exams or submit medical information until all other contingencies (e.g., background checks) to the offer have been eliminated.[276] Employers may request medical information and conduct medical exams earlier if they can demonstrate that they could not reasonably complete all of the non-medical components of the application process before making the job offer.[277] The purpose of this two-step requirement is to allow applicants to determine whether they were rejected because of a disability, and also to allow applicants to keep their medical information private unless they receive a true job offer.

Under the ADA and FEHA, an employer may qualify for an exception to the two-step process by demonstrating that it could not reasonably complete the non-medical aspects of the application process before requiring medical examinations.[278] But the Ninth Circuit has ruled that an employer's desire to speed up the hiring process to make the company more competitive in the hiring market is not sufficient justification for invoking the exception, where the employer failed to demonstrate that it had no reasonable alternatives to expedite the hiring process.[279]

In addition, under section 1031.2 of the Government Code, California has codified a similar exception for employers of prospective peace officers to permit collection of post-mandated, non-medical, and non-psychological information after a conditional offer has been made. As under the ADA, however, employers must be able to demonstrate that the non-medical and non-psychological information could not reasonably have been collected before issuing the conditional offer.

Because each screening criterion must be job-related, an employer who requires a post-offer, pre-employment medical examination should provide a carefully reviewed job description to the examining physician and ensure that the physician will evaluate only the applicant's ability to perform the job's essential or fundamental aspects. Before concluding that an applicant's disability precludes performance of the job or that the applicant cannot meet safety-based qualification standards, the physician must directly link an applicant's medical condition to the applicant's inability to perform a particular essential job function. If a specialist physician, such as an orthopedist, concludes that an applicant is unable to perform essential job functions, then the employer should ask the physician to suggest possible ways to accommodate the applicant's disabling condition. Of course, the employer should also solicit the applicant's ideas regarding accommodation, because the applicant will frequently suggest creative and possibly less expensive means of accommodation.

Public employers should ensure that the examining physician bases the assessment on testing measures that objectively and reliably predict the applicant's ability to perform essential functions. For example, if

[274] Cal. Code Regs., tit. 2, § 11071, subd. (b).
[275] Cal. Code Regs., tit. 2, § 11071, subds. (b)(1)-(3).
[276] 42 U.S.C. § 12112(d)(3); Gov. Code, § 12940(e)(3).
[277] Cal. Code Regs., tit. 2, § 11071, subd. (b).
[278] *Id.*
[279] *Leonel v. American Airlines, Inc.* (9th Cir. 2005) 400 F.3d 702, 710-711.

an x-ray reveals an abnormal condition in an applicant's lower back, the employer should question a physician's conclusion that the applicant cannot perform an essential function (e.g., lifting 50 pounds) if the physician has not also analyzed or measured the condition's symptoms through other valid testing mechanisms.

Even if an employer's physician concludes that an applicant cannot perform essential or fundamental functions, the employer should not reject the applicant based on that medical opinion alone. The ADA does not prohibit a job applicant from submitting an independent or rebuttal medical evaluation from the applicant's own physician before the employer can disqualify the applicant, and the FEHA regulations expressly permit an applicant to do so.[280] Employers should carefully consider these medical evaluations because an applicant's physician may know more about the disability's symptoms and effect on the applicant's performance.

The FEHA's requirements are stricter: A covered employer may make *pre-offer* disability-related inquiries, including medical examinations, only with respect to an applicant's ability to perform job-related functions,[281] and *post-offer* disability-related inquiries and exams only if they are "job-related and consistent with business necessity" and required of all new employees entering the same job class.[282] An exam that might be legal under the ADA – because it is not used to screen out disabled candidates[283] – might well be prohibited by the FEHA.

Moreover, since the GINA took effect in late November 2009, the genetic testing previously upheld under the ADA has been prohibited under federal law as well. The GINA prohibits employers from discriminating on the basis of genetic information or retaliating against an individual for opposing an unlawful act or practice under the GINA.[284] In addition, under the GINA, employers are prohibited from collecting genetic information from their employees, except for rare circumstances such as testing for adverse effects from hazardous workplace exposures.[285]

Confidential Medical Files

The ADA requires employers to keep the results of medical exams and inquiries in confidential medical files. Employers may disclose this confidential information only to:

- supervisors and managers, to inform them about the employee's work restrictions and accommodations;
- first aid and safety personnel, to enable them to provide emergency treatment;
- government officials investigating ADA complaints;[286] and
- state officials collecting information on behalf of the state workers' compensation system.[287]

To protect confidentiality, employers should file medical records separately from other personnel records.

But employees can waive this protection – for example, by alleging in a lawsuit that an employer's conduct caused mental distress or aggravated a preexisting disability[288] – and parties in other legal proceedings may also have a right to view an employee's confidential medical file. For example, the National Labor Relations Board granted access to a disabled employee's medical file when the employer transferred the employee to a desirable position in order to accommodate the employee's disability. The Board ruled that a union representing employees with greater seniority could review the records in order to evaluate the merits of a grievance its members wanted to file.[289] A Kansas court allowed a disabled employee to view the medical files of fellow workers who were allegedly accommodated for disabilities similar to the one for which the disabled employee sought accommodation.[290] The EEOC issued an

[280] Cal. Code Regs., tit. 2, § 11071(b)(2).
[281] Gov. Code, § 12940(e)(2).
[282] Gov. Code, § 12940(e)(3); Cal. Code Regs., tit. 2, §§ 11071(a)-(b).
[283] *Norman-Bloodsaw v. Lawrence Berkeley Laboratory* (9th Cir. 1998) 135 F.3d 1260.
[284] 42 U.S.C. § 2000ff-1(a).
[285] 42 U.S.C. § 2000ff-1(b).
[286] 29 C.F.R. § 1630.14(b)(1)(i)-(iii).
[287] 29 C.F.R. Part 1630, *supra*, § 1630.14(b).
[288] *Doe v. City of Chula Vista* (S.D.Cal. 1999) 196 F.R.D. 562, 569.
[289] *Roseburg Forest Products Co*. (2000) 331 N.L.R.B. No. 124, reported at 333 N.L.R.B. 999.
[290] *Scott v. Leavenworth Unified School Dist.* (D.Kan. 1999) 190 F.R.D. 583, 586-587.

opinion letter analyzing the potential conflict between the ADA confidentiality requirements pertaining to medical information and a union's right to obtain certain information necessary for collective bargaining.[291]

Physical Agility Tests

Physical agility tests are not considered medical examinations, and may be given at any point in the application process. As with all pre-employment tests, physical agility tests must be given to all applicants regardless of disability, and under the FEHA, the tests must be related to job performance.[292] Under the ADA, if a test screens out disabled individuals, then the employer must demonstrate that the test concerns an essential function, is job-related, and is consistent with business necessity. The employer must also show that reasonable accommodation does not enable the individual to successfully perform the test.[293]

Drug Tests

The ADA permits employers to take a firm stand against illegal drug use. Employers may regulate alcohol and drug use in the follow ways:

- prohibiting employees' use of alcohol and illegal use of drugs at work;
- requiring that employees not be under the influence of alcohol or use illegal drugs at work;
- requiring that all employees behave in conformance with the 1988 Drug-Free Workplace Act's requirements;
- holding an employee who uses illegal drugs or who is an alcoholic to the same employment or job performance qualification standards that the employer holds other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;
- requiring that employees employed in an industry subject to specific government regulations comply with the regulations' standards (if any) regarding alcohol and illegal drug use (e.g., Departments of Defense and Transportation and the Nuclear Regulatory Commission); and
- requiring that employees employed in sensitive positions comply with any Department of Defense and Department of Transportation regulations that apply to employment in sensitive positions.[294]

Tests for illegal drug use are not considered medical examinations under the ADA.[295] But if the drug test reveals information about an individual's medical conditions beyond whether the individual currently uses illegal drugs, then the employer must treat that information as a confidential medical record.[296] For example, the test may reveal the presence of lawfully prescribed medication. In addition the Ninth Circuit has ruled that an employer's "one-strike" policy under which an applicant who fails a pre-employment drug test is disqualified from any future employment does not have an disparate impact on recovering addicts in violation of the ADA or the FEHA.[297] The Court reasoned that because the rule eliminated all candidates who tested positive for drug use, whether because of a disabling drug addiction or because of an untimely decision to try drugs recreationally, it did not disparately impact drug addicts. However the Ninth Circuit has ruled that when an employer has received a letter documenting an applicant's status as a recovering addict, its subsequent refusal to hire the applicant based on the "one strike" rule may support a claim of unlawful discrimination.[298]

Because drug tests are not considered medical examinations, and because the ADA does not protect persons currently using illegal drugs,[299] employers may test for illegal drugs before extending a job offer without demonstrating that the test is job-related

[291] November 1, 1996, letter from Ellen J. Vargas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board.
[292] Cal. Code Regs., tit. 2, § 11070(b)(2).
[293] 29 C.F.R. Part 1630 Appendix, § 1630.10, § 1630.14(a).
[294] 29 C.F.R. § 1630.16(b)(1-6).
[295] 29 C.F.R. § 1630.16(c)(1).
[296] 29 C.F.R. § 1630.16(c)(3).
[297] *Lopez v. Pacific Maritime Assn.* (9th Cir. 2011) 657 F.3d 762.
[298] *Hernandez v. Hughes Missile System* (9th Cir.2004) 362 F.3d 564.
[299] 29 C.F.R. § 1630.3(a); see *Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828, cert. den. (1996) 516 U.S. 1048, 116 S.Ct. 711.

and consistent with business necessity. Nevertheless, employers must still comply with state and federal laws and regulations governing medical examinations and drug testing.[300]

Similarly, the FEHA regulations exclude testing for current illegal drug use from the definition of a medical or psychological examination for applicants.[301] For current drug use, including medical marijuana, the FEHA regulations provide that the applicant or employee "is not protected as a qualified individual under the FEHA when the employer acts on the basis of such use, and questions about current illegal drug use are not disability-related inquires."[302] However, inquiries about past addiction to illegal drugs or questions regarding past participation in a rehabilitation program are "disability-related because past drug addiction generally is a disability. Individuals who were addicted to drugs, but are not currently using illegal drugs are protected under the FEHA from discrimination because of their disability."[303]

However, for public agencies, the constitutional implications of pre-employment drug testing are still unclear due to a conflict between the California Supreme Court and the Ninth Circuit Court of Appeals.[304] In general, based on the California Supreme Court's ruling in *Loder v. City of Glendale*, California law permits post-offer pre-employment drug testing where an employer can point to a legitimate need to control drug use in the workplace or to facts showing a high incidence of drug-related misconduct on the job.[305] However, the *Loder* decision was called into question by the Ninth Circuit's ruling in *Lanier v. City of Woodburn*.[306] Public employers wishing to require pre-employment drug or alcohol tests of their applicants are strongly encouraged to seek legal advice before proceeding.

WHAT PRACTICES DO THE LAWS REGULATE DURING EMPLOYMENT?

An employer's obligation to refrain from disability discrimination continues throughout a disabled individual's tenure with the employer. The accommodation process is flexible and ongoing, and employers must be prepared to reassess job requirements and potential reasonable accommodations as the job or the employee's abilities change. For example, an employee with a degenerative disease may require additional work station modifications, time off, or changes to peripheral job functions as the disease progresses. In general, the burden is on the employee to alert the employer to the need for additional accommodations. But an employer who notices observable changes in employee ability or performance may be required to suggest that existing accommodations be reassessed.

Work Rules

Employers generally may apply the same reasonable job-related work rules and production/performance standards to disabled as well as non-disabled employees. Where meeting performance or production standards is an essential job function, employers may discipline or discharge employees who fail to meet those standards. Employers may also discharge disabled as

[300] For example, see Civ. Code, § 56.20, § 19, and the 1991 Omnibus Transportation Employee Testing Act, 49 U.S.C. § 45101, 49 C.F.R. § 382.101–382.727, and 49 C.F.R. § 40.321–30.333.
[301] Cal. Code Regs., tit. 2, § 11071, subd. (a).
[302] Cal. Code Regs., tit. 2, § 11071, subd. (d)(2)(A).
[303] Cal. Code Regs., tit. 2, § 11071, subd. (d)(2)(B).
[304] See *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 59 Cal.Rptr.2d 696, *cert. den.* (1997) 522 U.S. 807, 118 S.Ct. 44; *see also Lanier v. City of Woodburn* (9th Cir. 2008) 518 F.3d 1147 (striking down pre-employment drug testing requirements that were previously approved of by the *Loder* court).
[305] *Loder, supra,* at 853-854, 882, 59 Cal.Rptr.2d at 699, 718, cert. den. (1997) 522 U.S. 807, 118 S.Ct. 44: "After an applicant has completed the initial, substantive portion of the application process (consisting, typically, of written and/or oral examinations, performance tests, background and reference checks, etc.), *and has been selected by the city for employment* or promotion, the applicant is notified that his or her hiring or promotion is conditioned upon successful completion of a preplacement medical examination that includes a drug and alcohol screening component ... . [W]e conclude that when, as in the case before us, the drug screening program is administered in a reasonable fashion *as part of a lawful preemployment medical examination* that is required of each job applicant, drug testing of all job applicants is constitutionally permissible ... " (emphases added).
[306] (9th Cir. 2008) 518 F.3d 1147.

well as non-disabled employees for misconduct.[307]

Exceptions to this general rule arise in two instances: where modification of a work rule, production standard, or workplace policy is itself a reasonable accommodation, and where the employee's disability "causes" the poor performance or behavior. For example, an employer may institute a work rule requiring all employees to be at their desks at 8:00 a.m. A disabled employee who treats a disability with medication that causes early morning drowsiness may not be able to report to work on time. Unless being at a desk by 8:00 a.m. is an essential function of the employee's position, relaxing the reporting rule for this employee may be a reasonable accommodation that allows the employee to perform the job.

Where the disability itself causes the unacceptable conduct or failure to satisfy a work rule, the ADA considers discipline on the basis of the conduct to be discipline on the basis of the disability itself.[308] If the employee in the previous example could not report to work on time because of the disability itself – for example, cluster migraine headaches – the employer could not terminate the employee without first trying to reasonably accommodate the disability by changing the employee's work hours, granting a leave of absence for treatment, or providing intermittent time off.[309] In another example of a disability causing unacceptable conduct, in *Humphrey v. Memorial Hospitals Association*,[310] Carolyn Humphrey had an obsessive-compulsive disorder ("OCD"). Because her ritualistic behavior compelled her to spend six to eight hours washing and dressing, Ms. Humphrey was often tardy or absent from work. The employer could not discipline Ms. Humphrey for her absences because the missed work was part of Ms. Humphrey's OCD.

Drug Use

Under the ADA, employees with a record of drug addiction and employees who are regarded as drug addicts can be qualified disabled individuals. But employers may refuse to hire, discipline, or terminate these employees under certain circumstances.

The ADA prohibits discrimination against past drug users who have completed or are currently enrolled in a supervised drug rehabilitation program and who are no longer using drugs, or who are otherwise rehabilitated.[311] The ADA also prohibits discrimination against anyone wrongly regarded as being disabled because of a drug abuse problem.[312]

It remains an open question how long a drug user must be rehabilitated to receive protection. The ADA clearly excludes from protection employees who are *currently* using illegal drugs, and employers remain free to refuse to hire, accommodate, or retain workers on the basis of their current drug use.[313] For past users, though, the circuits have not reached agreement. According to one court, the ADA's phrase "no longer engaging in such use"[314] means that an individual has been in recovery long enough to be stable.[315] In the private sector, the NLRB ruled that individuals who had only recently attempted to wean themselves from drugs probably were not qualified disabled individuals.[316]

In many cases, employees disciplined for drug use also engaged in workplace misconduct, which is grounds for discipline in and of itself, whether or not the employee

[307] See, e.g., *Arteaga v. Brinks, Inc.* (2008) 163 Cal.App.4th 327; *Alamillo v. BNSF Railway Co.* (2017) 869 F.3d 916.
[308] *Humphrey, supra*. In 2008, the EEOC published The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, which is available at www.eeoc.gov. This publication provides helpful guidance for evaluating the performance of persons with disabilities, and where the employee's disability may affect his/her performance.
[309] *Kimbro v. Atlantic Richfield Co*. (9th Cir. 1989) 889 F.2d 869, 879, *cert. den. sub nom. Atlantic Richfield Co. v. Kimbro* (1990) 498 U.S. 814, 111 S.Ct. 53; *Den Hartog v. Wasatch Academy* (10th Cir. 1997) 129 F.3d 1076, 1086; see also *Wills, supra*, at 165 (noting that "there is no uniform rule among the federal courts regarding whether an employer may distinguish between disability-caused misconduct and the disability itself.")
[310] *Humphrey, supra*. As noted previously, however, the Court of Appeal has recognized a narrow exception where arguably disability-related misconduct entailed a threat to other employees. See *Wills, supra*.
[311] 42 U.S.C. § 12114(b); 29 C.F.R. § 1630.3(b)(1).
[312] 29 C.F.R. § 1630.3(b)(3).
[313] 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3(a).
[314] 42 U.S.C. § 12114(b)(2).
[315] *McDaniel v. Mississippi Baptist Medical Center* (S.D. Miss. 1995) 877 F.Supp. 321, 327-328, affd. (5th Cir. 1995) 74 F.3d 1238; see also note 46, *supra*.
[316] *Collings, supra*, 63 F.3d at p. 833.

is a qualified disabled individual, unless the misconduct resulted from the employee's non-drug-related disability. Employers, however, may discipline employees solely for illegal drug use. This is especially true if the employer has adopted and enforces a drug-free workplace policy[317] or the employer's requirement that employees be drug-free is job-related. For example, a drug counseling agency may terminate a drug user who recently completed rehabilitation.[318]

Whether an employer can enforce a blanket prohibition on hiring or retaining recent drug users remains unclear in light of the U.S. Supreme Court's emphasis on individualized assessments. In the Ninth Circuit, employers may not apply blanket disability-neutral "no rehire" rules to successfully rehabilitated former employees.[319] And if an employer intends to enforce a blanket prohibition on hiring or retaining drug users, the employer must have a clearly identified written policy.[320]

The FEHA prohibits discrimination on the grounds that an individual, such as a rehabilitated alcoholic or drug user, may become disabled in the future.[321]

Notably, because possessing and using marijuana is illegal under federal law, an employer has no duty to accommodate an employee's marijuana use, even if it is for medicinal purposes and legal under the California Compassionate Use Act of 1996. The California Supreme Court has ruled that employers have legitimate interests in not employing people who use illegal drugs. If employers were required to allow marijuana use, the employer would be precluded by the Drug-Free Workplace Act from contracting with the state for provision of goods or services. An employer has a legitimate interest in avoiding the well documented problems associated with employee abuse of drugs and alcohol such as increased absenteeism, diminished productivity, greater health costs, increased safety problems, and potential liability to third parties.

Further, under the Adult Use of Marijuana Act of 2016, which legalized the recreational use of marijuana for persons over the age of 21 in California, the rights of employers to prohibit the use of marijuana by applicants and employees was preserved, and employers may still prohibit the "use, consumption, possession, transfer, display, transportation, sale or growth of marijuana in the workplace…"[322]

Nothing in the FEHA precludes an employer from firing, or refusing to hire, a person who uses an illegal drug, including marijuana. The FEHA, like the ADA, requires only reasonable accommodation, and an employer need not accommodate a disability by allowing an employee to use illegal drugs.[323]

School districts should be aware that the Education Code prohibits employing or retaining individuals convicted of a controlled substance offense.[324] A school district governing board may employ an individual with a substance offense conviction in a classified position only if the board determines that the individual has been rehabilitated for at least five years.[325] School districts also must determine whether applicants for permanent or temporary classified or certificated positions have previously been convicted of violent or serious crimes, as defined in the Penal Code.[326] Although drug possession and use are not presently included in these definitions, "serious felonies" include offering certain illegal drugs to minors.[327]

Alcohol Use

Although the courts uniformly hold that an employer can require an employee or prospective employee to be drug free for a period of time after rehabilitation, those decisions address only drug use and not alcoholism. Nevertheless, employers may

[317] 29 C.F.R. § 1630.16(b).
[318] *McDaniel, supra*.
[319] *Hernandez, supra.*
[320] *Ibid.*
[321] Gov. Code, § 12926, subds. (i)(5), (k)(5).
[322] Health & Saf. Code, § 11362.45(f).
[323] *Ross, supra*; see also Cal. Code Regs., tit. 2, § 11071, subd. (d)(2)(A).
[324] Ed. Code, §§ 44836 (certificated employees) and 45123 (classified employees).
[325] Ed. Code, § 45123.
[326] Pen. Code, §§ 667.5(c) (violent felonies) and 1192.7(c) (serious felonies).
[327] Pen. Code, § 1192.7, subds. (c)(24), (28).

discipline alcoholic employees for inappropriate conduct even when the conduct results from alcoholism. Employers may hold employees disabled by alcoholism to the same performance and conduct standards non-disabled employees must meet.[328] Employers also may enforce zero tolerance alcohol policies, as long as employers evenly apply the policies.

Where an employee's alcoholism affected job performance before the employee entered a rehabilitation program, an employer may request a valid doctor's note indicating that the employee has remained free from drugs and/or alcohol since completing the program.[329] Similarly to other disabilities, because the employee has put his or her ability to perform at issue by entering the program, the employer may require the employee to pass a "fitness-for-work" exam before returning the employee to work, without violating the ADA's prohibition on "pre-employment" inquiries.[330]

Mental Disability

Under both the FEHA and the ADA, an employer must reasonably accommodate a mentally-disabled employee unless the accommodation imposes an undue hardship on the employer's business.[331] For example, where an employee has no customer contact or regular employee contact, the employer can accommodate a disability that causes the employee's deteriorating appearance and asocial demeanor by waiving employer rules requiring a neat appearance and courteous treatment of coworkers.[332]

Employers generally may apply the same reasonable job-related work rules and production/performance standards to mentally disabled employees that they apply to other employees. Employers may discipline or discharge mentally disabled employees who fail to meet performance standards or who engage in misconduct as long as the employer would impose the same discipline on other employees.[333] But conduct that relates to a disability may be considered part of the disability, and the employer may not discipline the employee for misconduct that results from the employer's failure to accommodate the mental disability.[334]

An employer must reasonably accommodate a disabled employee who violates a job-related conduct rule to permit that employee to meet the rule in the future, barring undue hardship. For example, an employer may be required to grant an employee's request for a leave of absence for treatment as a reasonable accommodation, to enable the employee to meet work rules in the future.

But the employer need not reasonably accommodate the employee for past misconduct. And an employer need not rescind appropriate disciplinary action if the employee does not disclose the disability until after the discipline was imposed and the conduct standard the employee violated is job-related and consistent with business necessity.[335] Again, "The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities" which was published by the EEOC provides helpful guidance in this area.

Employee Medical Exams and Inquiries

During employment, employers may require employees to submit to medical examinations or respond to medical inquiries only if those exams and inquiries are part of voluntary health care programs or are job-related and consistent with business necessity.[336] These restrictions protect all employees, not just those the employer knows are disabled.[337]

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[328] *Gonzalez v. California State Personnel Bd.* (1995) 33 Cal.App.4th 422, 436, 39 Cal.Rptr.2d 282, 291.
[329] 29 C.F.R. § 1630.14(c).
[330] *Yin v. State of Cal.* (9th Cir. 1996) 95 F.3d 864, *cert. den.* (1997) 519 U.S. 1114, 117 S.Ct. 955; *Harris & Harris, supra*, 206 F.3d at 844-845, adopting reasoning of *Grenier v. Cyanamid Plastics* (1st Cir. 1995) 70 F.3d 667, 675.
[331] 42 U.S.C. §§ 12111(9), and 12112(b)(5); 29 C.F.R. § 1630.2(o).
[332] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (3-25-97) EEOC Notice No. 915.002; see also *Wills*, *supra*.
[333] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, *supra*. See also the Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, *supra*.
[334] *Humphrey, supra*.
[335] *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 237, 66 Cal.Rptr.2d 830, 836.
[336] 29 C.F.R. § 1630.14(c); Gov. Code, § 12940(f)(2).
[337] 42 U.S.C. § 12112(d)(4)(A); *Fredenburg, supra*, 172 F.3d at p. 1182.

Job-related examinations may include fitness-for-duty exams when an employee is returning from medical leave[338] or is absent excessively and performing poorly when at work.[339] Notably, the Ninth Circuit has ruled that, at least for peace officers, "the business necessity standard may be met even before an employee's work performance declines if the employer is faced with significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job."[340] However, the Court cautioned, "We reiterate that the business necessity standard is quite high, and is not to be confused with mere expediency." The Court, citing *Sullivan v. River Valley School District*,[341] further explained that "[a]n employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job-related functions." The Ninth Circuit found that the City had an "objective, legitimate basis to doubt Officer Brownfield's ability to perform the duties of a police officer." It further noted that the appropriateness of the fitness-for-duty examination was "heavily colored by the nature of Officer Brownfield's employment" because police officers are "likely to encounter extremely stressful and dangerous situations during the course of their work." A California appellate court followed this line of reasoning when it ruled that a peace officer with mental health issues could be required to undergo a fitness-for-duty examination immediately after being restored to employment following her FMLA leave.[342]

The fitness-for-duty examination may inquire into the employee's ability to perform each essential job function listed in a detailed description of the employee's job. If the employee is returning from a medical leave, the exam should focus on the employee's present ability to perform essential functions. The exam also may determine whether reasonable accommodations are necessary or available.[343]

Alternatively, the employer may ask an employee returning from injury leave to provide a doctor's certificate stating that the employee can perform essential job functions or requires identified accommodations. The Ninth Circuit has determined that a doctor's certificate is a medical inquiry, not an examination, under the ADA.[344]

Because employers need accommodate only persons with covered disabilities, employers may require employees who request accommodation to produce reasonable evidence that they are in fact disabled. But employers may not insist on a specific type of evidence or on more proof than would be required to satisfy an expert in the particular disability field.[345]

Employers also may require periodic physical examinations where required by federal or state law or where the employee's physical abilities are essential to job performance.[346] These exams must be narrowly focused to satisfy the requirements of job-relatedness and business necessity. And both the ADA and the FEHA permit an employer to provide voluntary medical examinations as part of an employee health program.[347]

Retirement and Health Care Plans

Both the ADA and the amended FEHA prohibit discrimination against qualified disabled employees with respect to any employment term,[348] including fringe benefits like medical plans and service and disability retirement plans. Disability discrimination laws do not require employers to provide these plans and do not establish benefit levels. But employers who provide such plans must make them equally available to qualified employees, without regard to disability.

[338] *Harris, supra,* 206 F.3d at p. 844.
[339] Yin, *supra*.
[340] *Brownfield v. City of Yakima* (9th Cir. 2010) 612 F.3d 1140.
[341] (6th Cir. 1999) 197 F.3d 804, 811.
[342] *White v. County of Los Angeles* (2014) Cal.App.4th 690, 170 Cal.Rptr.3d 472.
[343] 29 C.F.R. § 1630.14(c).
[344] *Harris, supra*, 206 F.3d at p. 843 at n.7.
[345] *Vinson v. Thomas* (9th Cir. 2001) 288 F.3d 1145, 1153, *cert. den. sub nom. Hawaii v. Vinson* (2003) 537 U.S. 1104, 123 S.Ct. 962.
[346] 29 C.F.R. Part 1630 Appendix, *supra*, § 1630.14(c).
[347] 29 C.F.R. § 1630.14(d); Gov. Code, § 12940(f)(2).
[348] 42 U.S.C. § 12112(a); Gov. Code, § 12940(a).

Retirement Plans

An employer violates the ADA if it discriminates against disabled individuals in offering or administering disability and service retirement plans. A disability retirement plan provides a lifetime income for an employee who becomes unable to work because of illness or injury, without regard to the employee's age. A service retirement plan provides a lifetime income to employees who reach a minimum age stated in the plan (most commonly age 60 or 65) and/or who complete specified years of service with the employer.

For either type of plan, an employer violates the ADA if it treats a qualified disabled individual less favorably because of that individual's disability. The employer also violates the ADA if it denies individuals covered by the ADA access to a plan that would be available to individuals not covered by the ADA.[349]

Medical Plans

The ADA also prohibits employment discrimination with regard to both insured and self-insured medical plans.[350] An insured plan is purchased from an insurance company or other organization, such as a health maintenance organization. In a self-insured plan, the employer directly assumes the insurer's liability.

A medical plan distinction is any difference in benefit terms. Under EEOC regulations,[351] a distinction is disability-based if it singles out a particular disability (e.g., deafness, AIDS), a discrete disability group (e.g., cancers, muscular dystrophies), or disability in general (e.g., all conditions that substantially limit a major life activity). On one hand, the EEOC takes the position that a medical plan that limits benefits for AIDS treatment contains a disability-based distinction because a cap on AIDS benefits affects only disabled individuals.

On the other hand, noting that "some health insurance plans provide fewer benefits for 'eye care' than for other physical conditions," the EEOC takes the position that "such broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability. Consequently, although such distinctions may have a greater impact on certain individuals with disabilities, they do not violate the ADA."[352]

In other words, the EEOC states that exclusion of a specific treatment for blindness (or infertility) is not a disability-based discrimination that violates the ADA. Because health insurance distinctions that apply equally to all cannot be discriminatory, an employer's provision of a group health insurance plan that did not cover a favored infertility treatment did not violate the FEHA.[353]

If a disability-based distinction exists, the employer bears the burden of justifying the distinction. To do this, the employer must show that the ADA's "safe harbor" provisions protect the plan.

Safe Harbor

The ADA permits employers to justify their retirement and medical plan distinctions by meeting the Act's "safe harbor" provisions:[354] (1) the plan is bona fide in that it exists and pays benefits, and its terms have been accurately communicated to eligible employees (insured and self-insured plans); and (2) the plan's terms are not inconsistent with applicable state law as interpreted by the appropriate state authorities (insured plans). The employer must also prove that its reliance on the "safe harbor" provisions is not a subterfuge to evade the ADA's purposes.

EEOC regulations find a "subterfuge" when the employer cannot defend the plan on actuarial grounds.[355] But several federal

[349] See Questions and Answers About Disability and Service Retirement Plans Under the ADA (5-11-95) EEOC Notice No. 915.002.
[350] 29 C.F.R. §§ 1630.4(f), 1630.6(a).
[351] Interim Enforcement Guidance on the application of the Americans with Disabilities Act of 1990 to disability-based distinctions in employer provided health insurance (6-8-93) EEOC Notice No. 915.002.
[352] EEOC, Interim Enforcement Guidance on Application of ADA to Health Insurance, Notice No. 915.002, June 8, 1993.
[353] *Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 33 Cal.Rptr.3d 287.
[354] 42 U.S.C. § 12201(c).
[355] Interim Enforcement Guidance on the application of the Americans with Disabilities Act of 1990 to disability-

appellate courts have rejected this interpretation.[356] According to these courts, the "plain meaning of the phrase 'subterfuge to evade'" implies "a scheme, plan, stratagem, or artifice of evasion." Under this view, the ADA's reference to use of a "subterfuge to evade" requires that the employer *intend* to evade the law's purposes.[357]

Because the amended FEHA uses similar language to prohibit discrimination in employment terms and conditions, it should be interpreted in much the same way.

WHAT OTHER PRACTICES DO DISABILITY DISCRIMINATION LAWS PROHIBIT?

In addition to prohibiting discrimination, the ADA and the FEHA prohibit employers from coercing or harassing disabled applicants and employees and from retaliating against any employee who opposes discriminatory practices or participates in investigations of alleged discrimination.

Coercion

Both the amended FEHA and the ADA prohibit employers from coercing employees to forgo benefits the laws provide,[358] for example, by threatening employees with immediate termination if they fail to agree to a "last chance" agreement that inadequately protects their rights,[359] by interfering with an employee's right to file a grievance or to take other action to protect ADA or FEHA rights, or by demanding that an employee relinquish a reasonable accommodation.[360]

Threatening an employee with transfer, demotion, or forced retirement unless the employee foregoes a statutorily protected reasonable accommodation also violates the ADA's interference clause.[361] The Ninth Circuit ruled in *Brown v. City of Tucson*[362] that demanding that an employee either stop taking medication that prevents her from performing night duties, or face demotion or forced retirement, constitutes unlawful interference with rights the ADA protects. Brown's department had granted her a reasonable accommodation freeing her from night work due to medication that made her too drowsy at night to work safely, but her new supervisor tried to compel her to forego that accommodation.

To protect themselves from coercion and intimidation claims, employers should consider giving the employee ample time to review any documents with independent counsel or other advisor of the employee's choice.

Harassment

The U.S. Supreme Court has ruled that a claim for harassment or hostile work environment exists under language in Title VII of the 1964 Civil Rights Act that is almost identical to the ADA.[363] At least two federal appellate courts, the Fourth[364] and Fifth Circuits,[365] have ruled that an employee may also bring a hostile environment harassment claim under the ADA. The Ninth Circuit has not yet considered whether such a claim is available.[366]

The California Supreme Court clarified that evidence of disability discrimination may also be used as evidence of disability harassment.[367] Further, the Court upheld the jury's finding that a supervisor, who knew of the employee's disability, harassed the employee by making rude and belittling comments about the employee to other co-workers, openly ostracizing her at the office, demeaning her abilities, and expressing disapproval when the employee needed to take breaks or absences due to her disability.

As it relates to harassment, employers should consider the legislative declarations

based distinctions in employer provided health insurance, *supra*, EEOC Notice No. 915.002.

[356] See cases collected in *EEOC v. Aramark Corp.* (D.C. Cir. 2000) 208 F.3d 266, 271.

[357] *Ibid.*

[358] 42 U.S.C. § 12203(b); 29 C.F.R. § 1630.12(b); Cal. Code Regs., tit. 2, § 11071(a).

[359] See, e.g., *Robison v. City of Manteca* (2000) 78 Cal.App.4th 452, 457-458, 92 Cal.Rptr.2d 748, 752-753.

[360] *Brown v. City of Tucson* (9th Cir. 2003) 336 F.3d 1181.

[361] 42 U.S.C. § 12203(b).

[362] *Brown, supra.*

[363] Compare, e.g., 42 U.S.C. § 12112(a) (ADA) with 42 U.S.C. § 2000e-2(a)(1) (Title VII).

[364] *Flowers v. So. Regional Physician Services, Inc*. (5th Cir. 2001) 247 F.3d 229, 233.

[365] *Fox v. General Motors Corp.* (4th Cir. 2001) 247 F.3d 169, 176.

[366] See *Brown, supra*.

[367] *Roby v. McKesson Corp*. (2010) 47 Cal.4th 686.

made in Government Code section 12923(a)-(e),[368] which include the following:

- Approval of Justice Ruth Bader Ginsburg's concurrence in *Harris v. Forklift Systems* that in a workplace harassment suit, "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."[369]
- A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.
- The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly within the context of an employment decision or uttered by a non-decisionmaker, may be relevant circumstantial evidence of discrimination.
- Harassment cases are rarely appropriate for disposition on summary judgment.

Applying these principles in *Calderon v. Department of Corrections and Rehabilitation*, the Court of Appeal upheld a jury verdict in favor of a correctional officer on his disability harassment claim. There, Augustine Caldera, a correctional officer with the California Department of Corrections and Rehabilitation, spoke with a stutter, and other prison employees, including a supervisor, had mocked and mimicked his stutter in front of others at least a dozen times over a two-year period.[370]

In *Doe v. Department of Corrections & Rehabilitation*, the employee asserted that various actions of his supervisor created a hostile work environment.[371] To begin with, the Court observed that unlike discrimination, which is based on official actions, harassment claims focus on the "social environment of the workplace" and whether the workplace becomes "intolerable" due to conduct that is "avoidable and unnecessary to job performance."[372]

The Court commented further that "[w]orkplaces can be stressful and relationships between supervisors and their subordinates can often be contentious. But FEHA was not designed to make workplaces more collegial; its purpose is to eliminate more insidious behavior like discrimination and harassment based on protected characteristics."[373] In this case, the Court found that each of the actions alleged was within the appropriate scope of duties for Mr. Doe's supervisor.[374] The Court also found no evidence of a causal nexus between the supervisor's actions and Mr. Doe's asthma or dyslexia.[375] Lastly, the Court found an allegation of failure to process a request for reasonable accommodation was not sufficient to establish a harassment claim.[376] In addition to involving an action within appropriate official scope, the denial of the accommodation request was based on the "objectively nonhostile, nonabusive reason" that Mr. Doe failed to provide "medical substantiation."[377]

Retaliation

Both the ADA and the FEHA prohibit employers from retaliating against individuals who oppose practices the law forbids or who file complaints or testify or participate in proceedings to enforce the law.[378] The law protects "any individual," including applicants and employees who are not disabled or who are handicapped but not currently able to perform the essential

[368] Gov. Code, § 12923, subds. (a)-(e).
[369] *Harris v. Forklift Systems* (1993) 510 U.S. 17, 26.
[370] *Calderon v. Department of Corrections and Rehabilitation* (2018) 25 Cal.App.5th 31, 34.
[371] *Doe, supra,* 43 Cal.App.5th at 736-737.
[372] *Id.* at 736.
[373] *Id.* at 737.
[374] *Id.*
[375] *Id.* at 738.
[376] *Id.*
[377] *Id.*
[378] 42 U.S.C. § 12203(a); Gov. Code, § 12940(h); see also EEOC Guidance on Retaliation Under Civil Rights Statutes (1998) BNA Americans With Disabilities Act Manual 70:1361.

functions of the job. The Ninth Circuit has adopted the Title VII framework for evaluating ADA retaliation claims.[379] California courts applying the FEHA also use a Title VII analysis.[380]

In addition, the California Legislature has amended the FEHA to specify that making a request for reasonable accommodation is a form of protected activity, even if the request is not granted.[381]

California courts have recently issued a number of decisions providing guidance as to what activities are (or are not) protected. For example, in *Castro-Ramirez v. Dependable Highway Express*, the Court of Appeal determined that a jury should decide whether an employee who objected to working a late shift that prevented him from administering dialysis to his son, and who was subsequently terminated, was retaliated against by his employer.[382]

The California Court of Appeal has provided some guidance as to what constitutes an adverse action for purposes of retaliation. In *Doe v. Department of Corrections & Rehabilitation*, the Court clarified that an adverse action must have a material effect on terms, conditions, or privileges of employment. The Court noted that typical examples can include "ultimate employment actions" such as termination and demotion decisions as well as "actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement."[383] By contrast, "[m]inor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee" do not arise to the level of adverse action.[384] In *Doe*, the employee alleged that his supervisor criticized his work "during an interrogation-like meeting" regarding Mr. Doe's work product, ordered a watch commander to conduct a "wellness check" after Mr. Doe did not report to work one day, accused Mr. Doe of bringing a cell phone to work and required a watch commander to escort him to his car to verify that the phone was there, and assigned him to work on a day that he had planned to, and ultimately did, attend a scheduled union meeting.[385] The Court determined that none of the allegations involved had the necessary material effect on Mr. Doe's employment to sustain a discrimination claim.[386]

Mr. Doe also alleged that needing to take two medical leaves rather than receiving his requested accommodation was a form of adverse action.[387] The Court was not convinced, noting that Mr. Doe had requested to take the leaves and the record did not show that CDCR refused to pay Mr. Doe during his leaves.[388] Further, the Court declined to categorize "mere denial" of a reasonable accommodation as a form of adverse action, given that a separate cause of action exists to address allegations regarding an employer's failure to provide reasonable accommodation.[389]

WHAT REMEDIES ARE AVAILABLE?

ADA Damages

Remedies for job discrimination under Title I of the ADA are identical to those provided under Title VII of the Civil Rights Act of 1964 ("Title VII").[390]

These include both equitable remedies – remedies intended to make the complainant "whole," such as hiring, reinstatement, back pay, reasonable attorneys' fees, and costs – and compensatory damages, available when an employer has intentionally discriminated, including compensation for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary

[379] *Barnett, supra,* 228 F.3d at p. 1121, vacated on other grounds, *U.S. Airways, Inc., supra,* 535 U.S. 391, 122 S.Ct. at p. 1525.
[380] *Flait v. North American Watch Corp*. (1992) 3 Cal.App.4th 467, 475-476, rehg. den. (1992) 1992 Cal.App.LEXIS 276.
[381] Gov. Code, § 12940(m)(2).
[382] *Castro-Ramirez, supra*, 2 Cal.App.5th 1028.
[383] *Doe*, *supra*, 43 Cal.App.5th at 734, *citing Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054.
[384] *Id.*
[385] *Id.* at 735.
[386] *Id.*
[387] *Id.*
[388] *Id.*
[389] *Id.* at 735-736.
[390] 42 U.S.C. § 2000e (as amended 1991) [Title VII], 12117(a) [ADA].

losses.[391] Punitive damages also may be recovered against private employers who act with "malice or reckless indifference to" a victim's rights, that is, who discriminate with the knowledge that their conduct might be illegal.[392] Victims cannot recover punitive damages against public employers.[393] Private employers may avoid punitives for their agents' discriminatory acts if they adopt an antidiscrimination policy, educate their employees about the policy, and enforce the policy.[394] Notably, the Ninth Circuit has followed other courts in ruling that, because the statutory scheme and language of the ADA is similar to Title VII, individual defendants should not be held personally liable for ADA violations.[395]

Recovery of compensatory and punitive damages is limited to $50,000 for employers of more than 14 and fewer than 101 employees; $100,000 for employers with more than 100 and fewer than 201 employees; $200,000 for employers with more than 200 and fewer than 501 employees, and $300,000 for employers with more than 500 employees.[396] Damages may not be awarded against an employer that makes good faith efforts to reasonably accommodate a disabled individual in a manner that would provide the individual with an equally effective employment opportunity. Back pay is limited to the period beginning two years before the claimant initially filed an administrative charge.[397]

The EEOC also may seek equitable relief, including injunctive relief, to compel employers to implement the law and to make individual complainants whole. Notably, the EEOC has adopted a Strategic Enforcement Plan for fiscal years 2012-2016 to integrate all components of the EEOC's private, public, and federal sector enforcement with the announced goal of focusing and coordinating the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.[398]

Employers who fail to abide by the terms of a court order or court-approved consent decree may be held in contempt of court and sanctioned.

The "prevailing party" in an ADA lawsuit can recover attorneys' fees and litigation costs.[399] A defendant can recover attorneys' fees under the ADA only if the employee's lawsuit is "frivolous, unreasonable, or without foundation."[400]

FEHA Damages

The ADA specifically does not invalidate or limit any remedies afforded by state law that provide greater protection for disabled individuals than the ADA.[401] In a FEHA civil action against a public employer, an individual can recover: equitable relief such as hiring, reinstatement, or training; monetary damages for lost wages; compensatory damages for pain, suffering, humiliation, and embarrassment;[402] and attorneys' fees.[403] State employers, including school districts and special districts, may be compelled to correct unlawful practices and sued for money damages under the FEHA. Courts can also exact punitive damages against private employers that willfully violate the law. These monetary damages are not capped.

When mandatory dispute resolution fails to resolve a claim filed with the DFEH, the Director of the DFEH has discretion to bring a civil action in which the court may grant these same forms of relief.[404]

A prevailing defendant in a FEHA lawsuit, including a public agency, may recover litigation costs.[405] As with the ADA, a defendant may recover attorneys' fees only if the employee's lawsuit is frivolous.

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[391] Civil Rights Act of 1991, 42 U.S.C. § 1981.
[392] *Kolstad v. American Dental Assn.* (1999) 527 U.S. 526, 535-536, 119 S.Ct. 2118, 2124-2125.
[393] Civil Rights Act of 1991, § 102(b)(1).
[394] *Cadena v. Pacesetter Corp*. (10th Cir. 2000) 224 F.3d 1203, 1210, cited with approval in *Winarto v. Toshiba America Electronic Components, Inc*. (9th Cir. 2001) 274 F.3d 1276, 1292.
[395] *Walsh v. Nevada Dept. of Human Resources* (9th Cir. 2006) 471 F.3d 1033.
[396] Civil Rights Act of 1991, § 102(b)(3).
[397] 42 U.S.C. § 2000e-5(g)(1).
[398] The strategic enforcement plan is available at http://www.eeoc.gov/eeoc/plan/sep.cfm.
[399] 42 U.S.C. § 12205.
[400] *Brown, supra*.
[401] 29 C.F.R. § 1630.1(c)(2).
[402] Gov. Code, § 12926(a).
[403] Gov. Code, § 12965.
[404] Gov. Code, § 12965(c).
[405] *Brown, supra*.

In *Williams v. Chino Valley Independent Fire District*, the California Supreme Court ruled that the same standard applied for a defendant's recovery of costs under the FEHA as for recovery of attorney's fees. Specifically, the Court stated that "an unsuccessful FEHA plaintiff should not be ordered to pay the defendant's fees or costs unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit."[406]

GINA Damages

Remedies under the GINA are similar to those provided under Title VII and other nondiscrimination laws, including compensatory and punitive damages. The GINA expressly forecloses claims based on disparate impact, but leaves open the possibility of such claims in the future after further study.

New Developments 2021

CASES

California Court of Appeal Rules That Teacher Could State a Claim Based on Failure to Accommodate "Electromagnetic Hypersensitivity."

Plaintiff Laurie Brown, a long-term teacher, informed Los Angeles Unified School District ("LAUSD") that the Wi-Fi system installed at her worksite caused various symptoms that her doctor diagnosed as "electromagnetic hypersensitivity," and requested reasonable accommodations. After the first interactive process meeting, LAUSD agreed to disconnect the Wi-Fi access points in Plaintiff's assigned classroom and allowed her to use a hardwired computer lab with Wi-Fi turned off. Plaintiff claimed that these accommodations were ineffective and requested additional accommodations such as lining her classroom with materials that block Wi-Fi and radio frequencies. LAUSD denied this request but, after a series of meetings, agreed to contract with an expert to conduct an electromagnetic field inspection. The parties were thereafter unable to agree on an expert, and LAUSD denied her request for an accommodation, asserting that the campus was safe.

Plaintiff, while she was out on medical leave, filed suit against LAUSD alleging disability discrimination, retaliation, and failure to provide reasonable accommodations under FEHA. The trial court dismissed Plaintiff's case on demurrer, finding that she had not pled adequate facts to state any of her claims.

On appeal, the California Court of Appeal reversed the trial court's decision with respect to Plaintiff's failure to accommodate claim. The Court ruled that Plaintiff could establish a claim for failure to accommodate because she had alleged that LAUSD "reneged on its agreement, [concluded the work environment was safe without conducting an inspection], and took no further action."[407]

The concurring opinion of the Court of Appeal noted that this Court is "the first court in the United States of America—a nation of over 300 million people—to allow a claim that 'Wi-Fi can make you sick.'"[408]

California Court of Appeal Rules that Employee Was not Limited to Worker's Compensation Remedies for Emotional Distress due to Employer's Failure to Accommodate.

Plaintiff Anahit Shirvanyan was a long-term Los Angeles Community College District ("LACCD") employee working as a kitchen assistant, a position that involved largely manual duties, when she developed carpal tunnel syndrome. She thereafter complained of pain daily while performing her duties and later injured her shoulder in a work accident.

Plaintiff filed for workers' compensation based on her wrist and shoulder injuries and then later sued LACCD for: (1) disability discrimination; (2) failure to engage in the interactive process; and (3) failure to provide a reasonable accommodation. Plaintiff argued that she developed major depressive disorder as a result of LACCD's FEHA violations and sought monetary damages for

[406] *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 99-100.

[407] *Brown v. Los Angeles Unified School Dist.* (2021) 60 Cal.App.5th 1092, 1108.

[408] *Id.* at 1111.

her emotional distress. Following a trial, the jury found that LACCD failed to provide a reasonable accommodation and failed to engage in the interactive process. The jury awarded over $2,000,000 in economic and non-economic damages. LACCD appealed, in part on the grounds that Plaintiff's remedies for emotional distress were solely available through the workers' compensation process ("workers' compensation exclusivity.")

The California Court of Appeal reversed the jury's findings but ruled that Plaintiff's recovery of emotional distress damages was *not* barred by workers' compensation exclusivity because the injury was caused by LACCD's failure to provide a reasonable accommodation.

GUIDANCE

EEOC Guidance on Opioid Use

On August 5, 2020, the EEOC issued new guidance for employers clarifying that employees who are not engaged in the current illegal use of drugs and are qualified for employment are entitled to reasonable accommodations under the following circumstances:

- If they are taking prescription opioid medication that interferes with their everyday functioning;
- If they have a diagnosis of "opioid use disorder" ("OUD") that qualifies as a disability under the ADA (i.e., substantially limits a major life activity); or
- If they are recovering from an opioid addiction that qualifies as a disability under the ADA and require reasonable accommodations to help prevent relapse.[409]

Guidance Regarding Mandatory COVID-19 Vaccination Policies, Medical Inquiries

On March 4, 2021, the Department of Fair Employment and Housing issued guidance entitled, "DFEH Employment Information on COVID-19."[410]

"Under the FEHA, an employer may require employees to receive an FDA-approved vaccination against COVID-19 infection so long as the employer does not discriminate against or harass employees or job applicants on the basis of a protected characteristic, provides reasonable accommodations related to disability or sincerely-held religious beliefs or practices, and does not retaliate against anyone for engaging in protected activity (such as requesting a reasonable accommodation)."[411]

Employers may require employees or applicants to submit proof of vaccination. The DFEH clarified that "simply asking employees or applicants for proof of vaccination is not a disability-related inquiry, religious creed-related inquiry, or a medical examination."[412]

On May 28, 2021, the U.S. Equal Employment Opportunity Commission ("EEOC") similarly issued technical guidance clarifying that:

- Federal laws do not prevent employers from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers provide reasonable accommodations as may be necessary;
- Federal laws do not prevent or limit employers from offering incentives to employees to be vaccinated or provide documentation of vaccination; and
- Employers can provide employees and their families with information to educate them regarding the COVID-19 vaccine and to raise awareness of the benefits of vaccination.[413]

[409] EEOC, "Information for Employees on Opioid Use," (Aug. 5, 2020), available at: https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees.
[410] DFEH, "DFEH Employment Information on COVID-19" (Mar. 4, 2021), available at: https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf.
[411] *Id.* at p. 7.
[412] *Id.* at p. 10.
[413] EEOC, "EEOC Issues Updated COVID-19 Technical Assistance," May 28, 2021, available at: https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance.

KEY ISSUES

- Employers have an affirmative duty to engage in the interactive process whenever (1) an employee or applicant requests a reasonable accommodation; (2) the employer becomes aware of the need for an accommodation by observation or because the employee has exhausted leave for a work-related injury or serious medical condition (i.e., FMLA/CFRA leave) and the employee's health care provider indicates that further accommodation is necessary. In most cases, this duty to engage in the interactive process may be triggered before the employer can verify that the employee has a disability.
- Employees are obligated to participate in the interactive process, and to provide additional medical information when that information is critical to the employer's analysis of potential reasonable accommodations. This is especially important when the initial medical information provided was vague. Employers should be mindful to document their efforts to obtain such information, as well as the need for such information, during the interactive process.
- Employers are not required to grant accommodations that eliminate "essential functions" of the position. Employers should carefully review and update job descriptions to include "essential functions," based on current practices and needs.
- Employers imposing mask or COVID-19 vaccine mandates should be prepared to document and engage in the interactive process with any employees who request an accommodation to such mandates.

Race Discrimination

Summary of the Law

RACE DISCRIMINATION CLAIMS UNDER TITLE VII AND FEHA

Title VII of the federal Civil Rights Act of 1964[1] and California's Fair Employment and Housing Act[2] ("FEHA") prohibit employers from discriminating against job applicants, employees, volunteers, or unpaid interns[3] on the basis of their race, color, or national origin. The FEHA also prohibits discrimination based upon a person's ancestry.[4] The prohibitions apply to almost all employment actions, including hiring, firing, promotion, transfer, training, compensation, and other terms, conditions, and privileges of employment. Employees can bring discrimination claims based on theories of disparate treatment, adverse impact, retaliation, or race-based hostile environment. (Please refer to Chapter 13 for an overview of anti-discrimination laws and a more complete discussion of the different discrimination theories.)

Protected Categories

A person's "race" refers to his or her ancestry or ethnic characteristics.[5] Race and color are two different concepts but both are protected categories. National origin refers to the country from which an individual or his or her ancestors originated.[6] National origin is distinguished from citizenship, which is not a protected category.[7]

The Equal Employment Opportunity Commission ("EEOC") emphasizes in its Compliance Manual[8] that Title VII prohibits race and color discrimination based not only on ancestry and physical traits, but also on more subtle characteristics like culture, race-linked illness, perception of race, reverse race discrimination, and association with a particular racial group. Skin color is recognized as a basis for a Title VII claim, as the guidance makes clear that an African-American employer would violate Title VII by refusing to hire other African-Americans because their skin is either lighter or darker than the employer's own skin. This example also illustrates that race or color discrimination may occur between persons of the same race or ethnicity.

EEOC regulations also address "related protected bases" of discrimination. This refers to the intertwining of racial and religious identity (as in the case of an employee who is both Asian-American and Hindu), overlapping race and national origin, and the like. The Compliance Manual also explains the related concept of "intersectional discrimination," which occurs, for example, when an employer discriminates only against African-American women. The Compliance Manual makes it clear that such discrimination is prohibited, even if there is no evidence of discrimination against Caucasian women or African-American men.

Title VII and FEHA protections are not limited to "minority" groups. These laws prohibit discrimination against Caucasians as well as other racial groups.[9] And the protections against race and color discrimination apply

[1] 42 U.S.C. § 2000e-2(a).
[2] Gov. Code, § 12940(a).
[3] Gov. Code, § 12940(a), *amended by* 2014 Cal. Legis. Serv. Ch. 302 (A.B. 1443).
[4] Gov. Code, § 12940(a).
[5] *Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 858, 31 Cal.Rptr.2d 617, 624.
[6] *Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 88, 89, 94 S.Ct. 334, 337.
[7] *Ibid.*
[8] EEOC Compliance Manual, § 15 ("Race and Color Discrimination"), April 19, 2006.
[9] *Griggs v. Duke Power Co*. (1971) 401 U.S. 424, 430-431, 91 S.Ct. 849, 853.

to persons associated with a member of the protected class, such as a spouse.[10]

Disparate Treatment

Disparate treatment occurs when an employer treats an individual differently because of his or her race, color, national origin, or ancestry. A plaintiff alleging disparate treatment under Title VII must establish a *prima facie* case of discrimination. Under the test established by the U.S. Supreme Court in *McDonnell Douglas Corporation v. Green*,[11] a plaintiff must show that he or she: (1) belongs to a protected class; (2) was qualified for the position; (3) was subject to an adverse employment action; and (4) that similarly situated people outside the class were treated more favorably. The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the action. If the employer does so, the plaintiff must show that the reason is pretextual, either by showing that the discriminatory reason was more likely, or that the employer's explanation is not believable.[12] The plaintiff may offer either direct or circumstantial evidence to establish that the employer's claimed legitimate, nondiscriminatory reason is actually a pretext for race discrimination.[13] Disparate treatment may occur when an employer gives false and misleading information about job requirements, opportunities, and application procedures to qualified minority applicants.[14] Disparate treatment also occurs when employers exclude minorities from certain positions,[15] isolate them from customer contact, or deny them employment benefits because of their race.[16]

In the Ninth Circuit, courts infer that an individual who hires but later fires the same employee, or who promotes but later demotes the employee, is not motivated by discrimination.[17] This "same actor inference" increases the burden on the complaining employee to prove that discrimination occurred.

In some cases, a successful grievance can change the adverse nature of an employment action, negating that element of a disparate treatment claim. But that does not occur if an employer knows its employees are entitled to certain opportunities, but forces only employees of a certain race to use the grievance procedure to obtain them. In that situation, successfully grieving an adverse employment action does not preclude an employee from pursuing a claim of discrimination.[18]

Disparate treatment on the basis of national origin can include denying employment benefits because of an individual's ethnic accent unless: (1) clear verbal communication is required for successful job performance; and (2) the individual's accent so severely impedes communication that the individual cannot perform essential duties. The individual's speech must be so difficult to understand that the individual is not qualified for the position. In most instances, adverse employment action taken because of an individual's accent may constitute direct evidence of disparate treatment.[19]

Adverse Impact

The adverse impact theory targets employment practices that appear neutral, but in fact discriminate against protected groups and are not justified by business necessity. Neutral employment criteria that may be subject to challenge include intelligence tests, educational requirements, training, and grooming regulations. Employees often use statistical evidence to support an adverse impact theory. For example, they use "pass-fail" rate data to challenge objective employment tests, comparing the pass-fail rate among

[10] *Watson v. Nationwide Ins. Co.* (9th Cir. 1987) 823 F.2d 360, 361-362.
[11] (1973) 411 U.S. 792, 93 S.Ct. 1817.
[12] *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 101 S.Ct. 1089.
[13] *Cornwell v. Electra Center Credit Union* (9th Cir. 2006) 439 F.3d 1018.
[14] *International Brotherhood of Teamsters v. U.S.* (1977) 431 U.S. 324, 97 S.Ct. 1843.
[15] *Wilmore v. City of Wilmington* (3rd Cir. 1983) 699 F.2d 667.
[16] *Carter v. Duncan-Huggins, Ltd*. (D.C. Cir. 1984) 727 F.2d 1225.
[17] *Coghlan v. American Seafoods Co., LLC* (9th Cir. 2005) 413 F.3d 1090.
[18] *Fonseca v. Sysco Food Services* (9th Cir. 2004) 374 F.3d 840.
[19] *Jiminez v. Mary Washington College* (4th Cir. 1995) 57 F.3d 369, *cert. den.* (1995) 116 S.Ct. 380; *Odima v. Westin Tucson Hotel* (9th Cir. 1995) 53 F.3d 1484.

protected group members to the pass-fail rate among majority group members.[20]

If statistical evidence establishes an adverse impact on a protected group, an employer may use the business necessity test to refute the claim. Under this test, the selection criteria is lawful if it predicts or significantly correlates with successful job performance. EEOC and California Fair Employment and Housing Commission ("FEHC") regulations require that if a selection procedure has an adverse impact on members of a racial or ethnic group, the test must be validated in accordance with the Uniform Guidelines on Employee Selection Procedures.[21]

For example, the California Basic Education Skills Test ("CBEST"), a teacher credentialing exam, was found to have an adverse impact on Hispanic, African-American, and Asian-American test takers, but it does not violate Title VII because it tests skills that are related to a teacher's duties and is consistent with business necessity.[22]

Pay disparities between minorities and non-minorities, standing alone, will not support a discrimination claim if there is no racially discriminatory barrier deterring minorities from applying for the higher paying positions. For example, employees of the Los Angeles County Sheriff's Department received higher pay than other county police officers. Most of the officers in the lower paid classifications were racial minorities, while the sheriff's department was comprised mainly of non-minority employees. Officers in the lower paid classifications sued under both disparate impact and disparate treatment theories. In *Frank v. County of Los Angeles*,[23] the Court of Appeal found the evidence insufficient to support these claims. As to disparate impact, the evidence established that the county's classification and pay policies had a disparate impact on all county police officers, regardless of their race. There was no racially discriminatory barrier deterring minorities from applying for the higher paying positions. As to disparate treatment, there was insufficient evidence that the county's policies were racially motivated. Racial animus could not be shown simply by the pay disparity, and the disparity was not shown to be associated with race.

Discarding promotion-based exam results that negatively impact a particular race because of fear of possible lawsuits is a violation of Title VII. Once an employer has established a process for promotions and the promotion selection criteria are made clear, the employer cannot then invalidate the results because this would upset the employee's legitimate expectation not to be judged on the basis of race. In *Ricci v. De Stefano*,[24] the U.S. Supreme Court decided under what circumstances an employer, utilizing a test for promotion that produced an adverse racial impact, could choose to ignore the test results. The Court found that there was tension between section 2000e-2(a)(1) of Title VII, prohibiting employment decisions because of an individuals' race, and section 2000e-2(k)(1)(A)(i), which requires action by the employer in certain circumstances if the employer's practice causes a disparate impact on a racial group. In evaluating the decision by the City of New Haven to refuse to certify firefighter captain and lieutenant test results that produced a disparate impact, the Court ruled that this constituted prohibited race-based action unless the city could establish there was a "strong basis in evidence" that the test was deficient and that discarding the test was necessary to avoid violating the disparate impact provision of Title VII.[25]

Plaintiffs who do not challenge the adoption of an employment practice still can assert a disparate impact claim later to challenge the application of that practice, so long as the application of the practice occurred within the statutory time limit. In *Lewis v. City of Chicago*,[26] the U.S. Supreme Court ruled that minority firefighters alleging claims of disparate impact discrimination based on the City of Chicago's use of the results of a performance exam – the mirror image of the facts in *Ricci v. DeStefano* – were not

[20] *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, 91 S.Ct. 849.
[21] 29 C.F.R. Part 1607; Cal. Code. Regs. tit. 2, § 7287.4(a).
[22] *Association of Mexican-American Educators v. State of Cal.* (9th Cir. 2000) 231 F.3d 572.
[23] (2007) 149 Cal.App.4th 805, 57 Cal.Rptr.3d 430.
[24] (2009) 129 S.Ct. 2658.
[25] *Id.* at pp. 2676-79.
[26] (2010) 130 S.Ct. 2191.

precluded from asserting violations of Title VII by the applicable statute of limitations.[27] The firefighters alleged that the examination – which failed to produce any "well-qualified" minority candidates – had a disparate impact on minority candidates, in violation of 42 U.S.C. section 2000e(k)(1)(A)(i), or Title VII. However, under section 2000e-5(e)(1), they were required to bring this charge to the EEOC within 300 days of a violation, and it was undisputed that more than 300 days had passed since the City had established the allegedly discriminatory policy. The Court ruled that the applicant firefighters could nonetheless assert their claims as long as any cause of action for disparate impact accrued during the 300-day statutory period. The Court rejected the idea that the firefighters could maintain a disparate impact claim only by challenging the establishment of the policy itself. Instead, the Court noted that pursuant to Title VII, a disparate impact violation occurs whenever an employer uses a policy or practice that results in a disparate impact, and not only when that policy or practice is first established. The Court concluded that the "use" of a discriminatory employment practice was actionable, separate and apart from the adoption or initial implementation of the policy or practice.[28]

Race-Based Harassment

The FEHA specifically prohibits harassment based on "race, religious creed, color, national origin, [and] ancestry ... ."[29] And federal courts recognize that a working environment charged with ethnic or racial discrimination can violate Title VII.[30] Employers have an affirmative duty to maintain a race harassment-free environment.[31] If an employer has actual or constructive knowledge of harassment, and fails to remedy it, the employer may be held liable, even if it had a formal policy prohibiting harassment.[32] If an employer knows that race harassment is occurring, the employer must investigate and end the harassment.

The racial harassment legal standard mirrors the sexual harassment standard.[33] The Ninth Circuit has stated that in order to prevail on a hostile workplace claim premised on either race or sex, an employee must show: (1) that the employee was subjected to verbal or physical conduct of a racial or sexual nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter employment conditions and create an abusive work environment.[34] The offending conduct can include threats to physical safety, verbal harassment such as racial epithets, visual harassment such as derogatory posters and cartoons, and other conduct that unreasonably interferes with an employee's work performance.[35]

As with sexual harassment, in order to be actionable, racial harassment must be sufficiently severe or pervasive that it alters the conditions of the victim's employment and creates an abusive working environment. Isolated race harassment incidents generally do not create a hostile work environment.[36] On the other hand, the severity of the incident is relevant. "Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment' than the use of an unambiguously racial epithet such as ['n-word'] by a supervisor in the presence of his subordinates."[37] Derogatory racial statements, even when made outside of the presence of an employee-plaintiff, are admissible evidence of the employer's intent to discriminate.[38]

The Ninth Circuit has ruled that the offensiveness of race-based harassment is judged from the perspective of a reasonable person of the same racial or ethnic group as

[27] *Id.* at pp. 2196-2198.
[28] *Id.* at pp. 2196-2198.
[29] Gov. Code, § 12940(j)(1).
[30] See *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 66, 106 S.Ct. 2399, 2404-2405.
[31] Gov. Code, § 12940(k).
[32] *Davis v. Monsanto Chem. Co*. (6th Cir. 1988) 858 F.2d 345, 350; *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103.
[33] *Ibid.*
[34] *Gregory v. Widnall* (9th Cir. 1998) 153 F.3d 1071.
[35] *Harris v. Forklift Systems* (1993) 510 U.S. 17, 114 S.Ct. 367.
[36] *Aguilar v. Avis Rent-A-Car System, Inc.* (1999) 21 Cal.4th 121, 130, 87 Cal.Rptr.2d 132, 138; *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634; cf. *McGinest, supra.*
[37] *Rodgers v. Western-Southern Life Ins. Co*. (7th Cir. 1993) 12 F.3d 668, 675.
[38] *Pantoja v. Anton* (2011) 198 Cal.App.4th 87.

the plaintiff.[39] This mirrors the standard for a female plaintiff's claim of gender-based harassment which is assessed from the perspective of a reasonable woman.[40] For example, in *Ash v. Tyson Foods, Inc.*,[41] the U.S. Supreme Court considered the Title VII claims of two African-American employees whose manager referred to each of them as "boy" on various occasions. The Court ruled that the manager's use of the term "boy" could be evidence of racial discrimination, even though in many situations and for some races, "boy" carries no racial connotations. The Court reasoned that although the word "boy" would not always be evidence of racial animus, it did not follow that the term, standing alone, is always benign.

Employer Liability for Racial Harassment

Under Title VII, an employer's liability for harassment may depend on the status of the harasser. If the harasser is a supervisor, employers are vicariously liable for harassment. A fellow employee is treated as a "supervisor" for purposes of establishing vicarious liability if he or she is empowered by the employer to take tangible employment actions against the victim, such as hiring, firing, promoting, or disciplining.[42] But if no tangible employment action was taken against the employee, the employer may assert the "*Burlington/Faragher* defense" used in sexual harassment cases. (See Chapter 16, Gender Discrimination, for a discussion of this defense.)

Although the affirmative defense is available in Title VII claims, the affirmative defense does not technically apply to state claims under the FEHA, although an employer may limit its damages by proving that the damages the plaintiff suffered could have been avoided by reporting harassment incidents to the employer.[43]

With respect to harassment from fellow employees, the FEHA[44] and Title VII[45] limit liability to cases where the employer knew or should have known of the conduct and did nothing to remedy it, whether or not the employer's inaction was motivated by bias.[46] Employers can defend these claims by showing that they took immediate corrective action to stop the conduct. Delay and ineffective measures that result in continuation of the conduct, however, will not satisfy the law's requirement of prompt remedial action.[47] Also, if racial hostility pervades the work environment, the fact that it is targeted at more than one race or ethnic group will not provide the employer with a defense.[48]

Employer Liability for Harassment by Third Parties

On September 30, 2018, SB 1300 was signed and approved by the Governor of California enacting amendments to sections 12940 and 12965 of the FEHA. Existing law provided that employers may be responsible for the acts of non-employees, with respect to sexual harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

Key changes now include that employers may be responsible for all types of harassment prohibited under the FEHA, not just sexual harassment. See Chapter 13 for more in-depth analysis.

Retaliation

Under the FEHA, it is an "unlawful employment practice" for:

"any employer ... or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."[49]

[39] *McGinest, supra.*
[40] *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 878-79.
[41] (2006) 546 U.S. 454, 126 S.Ct. 1195.
[42] *Vance v. Ball State U.* (2013) 133 S.Ct., 2434, 2456.
[43] *State Dept. of Health Services v. Superior Ct.* (2003) 31 Cal.4th 1026, 6 Cal.Rptr.3d 441.
[44] See Gov. Code, § 12940(j)(1).
[45] See 29 C.F.R. § 1604.11(d).
[46] *Galdamez v. Potter* (9th Cir. 2005) 415 F.3d 1015.
[47] *McGinest, supra*.
[48] *Ibid.*
[49] Gov. Code, § 12940(h).

Regulations adopted by the FEHC additionally provide that it is unlawful retaliation:

"for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the commission or Department or their staffs."[50]

To establish a *prima facie* case of retaliation under the FEHA and Title VII, a plaintiff must show that: (1) he was engaged in a protected activity; (2) the employer subjected him to an adverse employment action; and (3) there was a causal link between the protected activity and the employer's action.[51] But employee retaliation claims filed under Title VII must be proved using the "but-for" causation test, which requires the finding that the employer acted "because of" the protected conduct.[52] The standard for proving employer retaliation in violation of Title VII state and federal law differ in their interpretation of the term "adverse action." The U.S. Supreme Court has adopted the "deterrence test"[53] and the California Supreme Court has adopted the "materiality test"[54] to determine if an employer's actions constitute an adverse action. Under the Title VII "deterrence test," "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[55] Under the FEHA's "materiality test," a retaliation claim lies only for an employment action that materially affects the terms and conditions of employment.[56]

In the seminal 1998 case of *Reno v. Baird*,[57] the California Supreme Court concluded that supervisory employees may not be held personally liable for discrimination but could be held personally liable for harassment because harassment consists of a type of conduct not necessary for a supervisor's job performance. Similarly in *Jones v. The Lodge at Torrey Pines*,[58] the Court ruled that although employers may be held liable, supervisors may not be liable for retaliation claims within the discrimination context.

"Materiality Test" and "Deterrence Test"

In *Taylor v. Los Angeles Department of Water and Power*,[59] the Appellate Court reversed the Trial Court, finding that under either the "materiality test" approved by the California Supreme Court or the "deterrence test" approved by the U.S. Supreme Court, Eric Taylor sufficiently pled that he experienced adverse employment action. Taylor alleged a continuous course of conduct that resulted in a low rank on the civil service list for full engineer, a position for which he had been groomed prior to his subordinate's race discrimination complaints. Under the materiality test, the Court found that the actions were adverse employment actions that were "material" to the terms, conditions, or privileges of Taylor's employment. Under the deterrence test, they were actions that would likely deter a reasonable city engineer with similar tenure and promotional objectives from making or supporting a discrimination charge.

Proximity of Protected Activity and Adverse Action is Insufficient in Itself to Show Retaliatory Motive.

Loggins v. Kaiser Permanente[60] involved an alleged retaliatory termination. Plaintiff Dianne Loggins claimed that she was

[50] Cal. Code Regs., tit. 2, § 11021(a).
[51] *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476, 4 Cal.Rptr.2d 522.
[52] *University of Tex. Southwestern Medical Center v. Nassar* (2013) 133 S.Ct. 2517, 2534.
[53] *Burlington Northern & Santa Fe Ry. v. White* (2006) 126 S.Ct. 2405.
[54] *Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 32 Cal.Rptr.3d 436.
[55] *Burlington Northern, supra,* 126 S. Ct. at p. 2408.
[56] *Yanowitz, supra*, 36 Cal.4th at p. 1036; see also *McRae v. Department of Corrections* (2006) 142 Cal.App.4th 377, 48 Cal.Rptr.3d 313; *Taylor v. City of Los Angeles* (2006) 144 Cal.App.4th 1216, 51 Cal.Rptr.3d 206.
[57] (1998) 18 Cal.4th 640, 76 Cal.Rptr.2d 499.
[58] (2007) 42 Cal.4th 1158, 72 Cal.Rptr.3d 624.
[59] (2006) 144 Cal.App.4th 1216, 51 Cal.Rptr.3d 206.
[60] (2007) 151 Cal.App.4th 1102, 60 Cal.Rptr.3d 45.

terminated in retaliation for her race discrimination complaint. Kaiser presented evidence that Loggins' employment was terminated because an investigation showed that she had spent excessive work time and work resources furthering her outside personal business, in violation of her employer's policies. The appellate court found that Loggins sufficiently alleged a causal link between the protected activity and Kaiser's actions because the race discrimination complaint came shortly before the adverse employment action. Accordingly, the burden shifted to Kaiser to show a legitimate, nondiscriminatory reason for Loggins' termination. The Court found that Kaiser met its burden; Kaiser's investigation was prompt and thorough. The burden then shifted back to Loggins to show that Kaiser's articulated reasons were untrue. Loggins' only admissible evidence on the issue of pretext was that Kaiser's adverse employment action followed shortly after her discrimination complaint. The Court found that temporal proximity will not, without more, satisfy an employee's burden to show that an employer's reason for adverse action was pretextual. The employee must produce additional evidence of pretext.

The Doctrines of After-Acquired Evidence and Unclean Hands Are Not Complete Defenses to FEHA Discrimination Claims.

In *Salas v. Sierra Chemical Co.*,[61] Plaintiff Vicente Salas applied to work for Sierra Chemical Company in 2003. During the application process, Salas provided Sierra with a Social Security number and resident alien card. As it was later discovered, the Social Security number used by Salas did not belong to him.[62] Salas worked for Sierra for over three years. While working there, he injured his back. Although Sierra initially assigned Salas to modified duties to accommodate his injury, it stopped doing so after he filed a workers' compensation claim. In early 2007, Salas' supervisor told him that he could not return to work unless he was "100% recovered" from the injury. Salas did not return to work.[63]

Salas brought suit against Sierra alleging, among other causes of action, violation of his rights under the FEHA — premised on retaliation and disability discrimination. The trial court dismissed Salas' claim on the grounds that his action was barred by the doctrines of after-acquired evidence and unclean hands. The Court of Appeal affirmed.[64]

The California Supreme Court, though, reversed and remanded the matter to the trial court.[65] The Court considered whether or not the doctrines of unclean hands and after-acquired evidence, which focus on employee misconduct to limit relief, stand as a complete bar to relief for undocumented workers who falsify their legal status and subsequently bring claims under California's employment and labor laws. The Court first noted that "achievement of the FEHA's antidiscrimination goals would be substantially impaired if the doctrine of after-acquired evidence were a complete defense to claims of retaliation and discrimination."[66] The Court further noted that "in after-acquired evidence cases, the employer's alleged wrongful act in violation of the FEHA's strong public policy precedes the employer's discovery of information that would have justified the employer's decision, and to allow such after-acquired evidence to be a complete defense would eviscerate the public policies embodied in the FEHA by allowing an employer to engage in invidious employment discrimination with total impunity."[67]

Following the *Salas* decision, the California Supreme Court remanded *Horne v. District Council 16 International Union of Painters and Allied Trades*[68] to the Court of Appeal to obtain a decision consistent with its ruling in *Salas*.[69] In *Horne*, Plaintiff Raymond Horne brought suit against his former employer, District Council 16, after he, an African-

[61] (2014) 59 Cal.4th 407, 173 Cal.Rptr.3d 689.
[62] *Id.* at p. 415.
[63] *Id.* at pp. 416-417.
[64] *Id.* at pp. 417-418.
[65] *Id.* at p. 432.
[66] *Id.* at p. 430.
[67] *Ibid.*
[68] (2015) 234 Cal.App.4th 524, 530, 183 Cal.Rptr.3d 879, 883.
[69] *Id.* at pp. 529-530.

American male, was denied promotion to an "organizer" position on two separate occasions. Both positions were given to white male instead.[70] In his lawsuit, Horne alleged District Council 16 discriminated against him based on his race.[71]

During discovery, Horne admitted that he had been convicted of possession of narcotics for sale and that he had served a prison term for that conviction. In response, District Council 16 asserted that under 29 U.S.C. section 504(a), Horne's criminal conviction barred him from employment as a union organizer.[72] The Trial Court granted District Council 16's motion for summary judgment, reasoning that under the doctrine of after-acquired evidence, at the time of the employment decision, federal law prohibited Horne from serving as a union organizer.[73]

However, the Court of Appeal reversed, noting that in relying on the after-acquired evidence of Horne's felony conviction to support summary judgment, the trial court's ruling "was clearly contrary to the Salas Court's express ruling that after-acquired evidence cannot be used as an absolute bar to a worker's FEHA claims."[74]

Comparator Information May Be Key in Establishing Pretext for FEHA Discrimination Cases.

In *Guyton v. Novo Nordisk, Inc.*,[75] Plaintiff Andrew Guyton brought claims for race and age discrimination and retaliation under the FEHA. During his tenure at the company, Guyton failed on certain occasions to comply with the policy of his employer, Novo Nordisk, to timely log calls and record expenses. During a period of marked failure, Guyton was overlooked for a Support Manager position for which he had applied. The position was ultimately given to a younger, Hispanic candidate.

Guyton subsequently was placed on an "action plan" — a probationary form of discipline at Novo Nordisk — as a result of Guyton's policy violations. Guyton conceded that he had actually violated the policy, yet he contended that the "action plan" was discriminatory based on his race and/or age, and retaliatory due to his complaints of being treated differently than others.

Novo Nordisk maintained a policy that employees undergoing disciplinary measures could not be transferred. On this basis, Guyton was denied two separate transfer requests due to his then-current or soon-to-be issued disciplinary actions. Later, Guyton was issued a written warning and placed on a "Performance Improvement Plan" ("PIP") as a consequence for continuing to fail to timely log calls and record his expenses. Approximately one week thereafter, Guyton took a leave of absence, during which he found a new job. Without returning to work, he resigned from Novo Nordisk. Guyton subsequently filed a lawsuit against Novo Nordisk.

At summary judgment, the trial court ruled that Guyton was unable to identify any inconsistency between Novo Nordisk's proffered reason for his failure to promote and the evidence presented, which precluded Guyton's argument that the failure was pretextual.[76] Similarly, the Court decided that because Guyton admitted that he failed to follow the policies for which he was disciplined, and because he was unable to identify any proper comparators (i.e., other employees who held a similar position to Guyton, who were of different age and/or race, who were not disciplined, but had engaged in similar conduct as Guyton), Guyton could not show that his discipline – and thus his subsequent transfer denials – were pretextual.[77] Consequently, the Court ruled that Guyton was unable to defeat Novo Nordisk's legitimate business reasons for his failures to promote and to transfer him. Thus, Guyton's claims were dismissed at summary judgment.[78]

On appeal, the Ninth Circuit issued a memorandum opinion affirming the trial court's decision.[79] The Court agreed that Guyton failed to present sufficient evidence of pretext to raise a triable issue of fact and

[70] *Id.* at p. 530.
[71] *Id.* at p. 531.
[72] *Ibid.*
[73] *Id.* at p. 532.
[74] *Id.* at p. 541.
[75] 151 F. Supp. 3d 1057 (C.D. Cal. 2015).
[76] *Id.* at p. 1082.
[77] *Id.* at p. 1089.
[78] *Id.* at pp. 1091-1092.
[79] (9th Cir. 2017) 696 Fed. Appx. 246.

avoid summary judgment. The Court agreed that a supervisor's statement that she interfered with the promotion process did not show that the employer's reason was "unworthy of credence." The Court also noted that the existence of the employer's "action plan" was not pretextual because Guyton did not demonstrate that other individuals engaged in similar violations as him but were not disciplined. The Court found that any question about the timing of Guyton's PIP was not a triable issue of fact in relation to the denial of his transfer request because Guyton had admitted that his logging of calls had deteriorated just prior to the issuance of the PIP. As a result, the Court found that Guyton had not raised a triable issue of fact and affirmed the trial court's grant of summary judgment.

A Partial Statute of Limitations Defense May Be Detrimental to any Remaining FEHA Discrimination Claims.

The case of *Jumaane v. City of Los Angeles*[80] involved the use of an African-American firefighter's allegations of racial discrimination, harassment, and retaliation under the FEHA against the City of Los Angeles. Plaintiff Jabari Jumaane alleged that because he had a long history of publicly protesting racism in the fire department, he received two adverse employment actions. The first adverse action was a suspension in 1999. The second adverse employment action was a suspension from April 16 to April 30, 2001. On April 16, 2002, Jumaane filed his complaint with the DFEH alleging FEHA claims and filed suit against the City on April 18, 2003.

The first jury trial resulted in a favorable verdict for the City. Jumaane filed for a new trial based on juror misconduct and it was granted. The retrial rendered a verdict in favor of Jumaane on the causes of action for race discrimination based on a disparate impact theory, harassment, retaliation, and failure to prevent discrimination, harassment or retaliation. The jury, however, found that the City's treatment of Jumaane was not racially motivated. The City moved for Judgment Notwithstanding the Verdict, arguing that the evidence of events that occurred before April 16, 2001, one year from Jumaane's DFEH complaint, was not part of a continuing violation of FEHA and was thus outside the statute of limitations. The City also argued that evidence of events on and after April 16, 2001 was insufficient to prove discrimination, harassment, or retaliation. After the trial court denied the City's Motion, the issue was taken up on appeal.

The Court of Appeal reversed the trial court and entered judgment for the City. The Court noted that a plaintiff cannot normally recover for acts occurring more than one year before the filing of the DFEH complaint. Thus, when a defendant asserts a statute of limitations defense, it is plaintiff's burden to prove the timeliness of his DFEH complaint under the continuing violation doctrine. For the continuing violation doctrine to apply, a plaintiff must show that the conduct outside the limitations period satisfied the following three elements: (1) the conduct was similar or related to the conduct that occurred earlier; (2) the conduct was reasonably frequent; and (3) the conduct had not yet become permanent. The Court of Appeal reasoned that because Jumaane's 1999 suspension was permanent and Jumaane knew that further efforts to stop the discrimination and harassment were futile, the continuing doctrine did not apply and all of the claims related to the 1999 suspension were barred by the statute of limitations.[81] As such, the trial court's refusal to give the City's requested instruction on the continuing violation doctrine to the jury was prejudicial error.[82]

The Court further ruled that because most of Jumaane's claims were barred by the statute of limitations, the evidence of events within the limitations period were insufficient to allege a claim for race discrimination, harassment, and retaliation.

Student Assignment Policies that Rely Solely on Race Are Unlawful.

The case of *Parents Involved In Community Schools v. Seattle School District No. 1*[83] tested the legitimacy of two school districts' policies of assigning students to schools

[80] (2015) 241 Cal.App.4th 1390.

[81] *Id.* at p. 1404.
[82] *Id.* at p. 1401.
[83] (2007) 127 S.Ct. 2738.

based on race. In Seattle, Washington, the school district classified students as Caucasian or non-Caucasian, and used these racial classifications as a tiebreaker to allocate slots in particular high schools. In Jefferson County, Kentucky, the district classified students as African-American or "other" to make elementary school assignments and to rule on transfer requests.

The U.S. Supreme Court found both policies unlawful. Governmental policies based on individual racial classifications are subject to "strict scrutiny;" that is, employers must show that use of such classifications is narrowly tailored to achieve a compelling government interest. Although ameliorating the effects of past discrimination is a compelling interest, that interest was not involved in this case because the Seattle district was never segregated by law, and the Jefferson County schools, which had previously been subject to a court ordered desegregation decree, were now free of that decree.

The policies might have been lawful if they had encompassed more factors leading to student diversity. The U.S. Supreme Court previously upheld policies that encouraged student diversity by considering many factors other than race, such as having overcome personal adversity and family hardship. Here, though, race was not simply one factor weighed with others in reaching an assignment decision, but was the only factor considered.

Employers Must Protect Employees against Racial Bias from Non-Employees and Face Liability For Responding to Discriminatory Requests.

The case of *McCrary v. Oakwood Healthcare* involved a hospital patient who did not want to be treated by "black people." The patient was admitted to Defendant Oakwood Healthcare's emergency room and informed a nurse that "he did not want any black people taking care of him during his stay."[84] In response, the nurse reported the situation to a supervisor who then instructed her to record the patient's request in his medical chart and records.[85]

Subsequently, the patient was transferred from the emergency room to an area where Plaintiff Caprice McCrary, a black woman, was assigned to provide care. McCrary was employed by Defendant as a respiratory therapist and was "hard-working" and "qualified to do her job."[86]

McCrary alleged that when she attempted to provide treatment, the patient told her to leave the room because she was black and that she must not have read his chart.[87]

In response, Defendant apologized to McCrary and told her that the patient's request should have never been placed in his chart and that the patient was informed that the hospital "could not grant his request to not have African American people care for him." Shortly thereafter, the patient was moved to an area outside of McCrary's assigned area.[88]

McCrary alleged that Defendant hospital's response to the patient's request to not be treated by black people constituted race discrimination in violation of section 1981 and Michigan's Elliot-Larsen Civil Rights Act because Defendant allowed the assignment of its employees to care for the patient based on race.[89]

Defendant moved for summary judgment and argued that it promptly corrected the situation and that "at least eleven African American caregivers treated the patient during his remaining stay at Oakwood."[90]

The Court denied summary judgment and ruled that "a reasonable jury could find that by recording patients' race-preference requests in the patients' record and not training its employees to reject those requests, Defendant purposefully allows for the assignment of its employees' duties based on their race."[91]

The Court relied heavily on the fact that Defendant did not have a written policy

[84] (E.D. MI 2016) 170 F.Supp.3d 981.

[85] *Id.* at p. 984.
[86] *Id.* at p. 983.
[87] *Id.* at p. 984.
[88] *Id.* at p. 985.
[89] *Id.* at p. 986.
[90] *Id.* at pp. 985-86.
[91] *Id.* at p. 988.

instructing its employees to reject racial preferences of its patients.[92] The Court reasoned that although Defendant had a general written policy regarding equal employment, it was insufficient to advise its employees how to confront patients' requests for care based on race. Moreover, the Court noted that Defendant did not conduct any training or otherwise advise its employees on how to handle race-based requests.[93]

FEHA's Statute of Limitations Starts from Date That Employment Ends Not Date of Decision.

In *Aviles-Rodriguez v. Los Angeles Community College District*,[94] the Court of Appeal ruled that a professor who brought suit for wrongful termination under FEHA was barred by the then one-year statute of limitations period.[95] Guillermo Aviles-Rodriguez was a professor who alleged that he was discriminated on the basis of his race by being denied a tenured position. The Court of Appeal concluded that the then-applicable one-year statute of limitations began to run from the last day of his employment rather than from the date of the district's decision to deny his tenure.

Race of Third Party Victim Cannot Support Claim for Discrimination.

The case of *Diego v. City of Los Angeles*[96] involved two Hispanic police officers who alleged that they suffered racial discrimination following their involvement in a fatal shooting of an unarmed and autistic Black man. The officers alleged that they were "benched" from their normal duties and kept from activities in the field because of their race. The officers' theory was that the jury could and should consider whether they were treated differently because of the race of their victim.

The jury found in favor of the officers and awarded approximately $4 million in damages. However, the Court of Appeal reversed the award and ruled that the officers relied on an improper legal theory. The Court of Appeal reasoned that although the City was prohibited from treating the officers differently because of their race, it was not prohibited from making any decision simply because it was based on race. In this case, the City assessed the risk and the political implications of returning officers of any race to the streets of Los Angeles after a fatal shooting of an innocent and unarmed man.

EEOC Guidelines on National Origin Discrimination and Harassment.

In 2016, the EEOC issued new enforcement guidelines regarding national origin discrimination and harassment under Title VII.[97] The enforcement guidelines set forth EEOC's interpretation of the law and explains how federal anti-discrimination laws and regulations apply to specific workplace situations and highlight promising practices for employers to prevent discrimination and harassment.[98] The enforcement guidelines also address unique issues specific to language, including, but not limited to accent discrimination, fluency requirements, and English only rules or policies. EEOC also provides employers with suggestions for adopting effective policies on several key subjects, including, but not limited to:

- The use of various recruitment methods to attract diverse job applicants; and
- The use of written, objective criteria for evaluating candidates during the hiring process as well as for employees during disciplinary or performance related actions.

[92] *Id.* at pp. 986-87.
[93] *Id.* at p. 987.
[94] (2017) 14 Cal.App.5th 981.
[95] In 2019, the statute of limitations under FEHA was amended from one year to three years. Gov. Code, § 12960(e).
[96] (2017) 15 Cal.App.5th 338.
[97] *EEOC Enforcement Guidance on National Origin Discrimination* (Nov. 18, 2016) U.S. Equal Employment Opportunity Commission <https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm> (as of Aug. 25, 2017).
[98] *EEOC Issues Enforcement Guidance on National Origin Discrimination* (Nov. 21, 2016) U.S. Equal Employment Opportunity Commission. <https://www.eeoc.gov/eeoc/newsroom/release/11-21-16.cfm> (as of Aug. 30, 2021).

Expanded Definition of National Origin Under FEHA

On July 1, 2018, the Fair Employment and Housing Council adopted new regulations[99] that clarify protections from national origin discrimination, including, but not limited to:

- Language use restrictions, including English-only policies, unless narrowly tailored and justified by a legitimate business necessity;
- Discrimination based on an employee's or applicant's accent or English proficiency, unless it interferes with the ability to perform the job or is justified by a legitimate business necessity;
- Height and weight requirements that have a disparate impact on the basis of national origin;
- Diverting employees or applicants to certain positions, facilities, or geographical areas; and
- Inquiries into an employee's or applicant's immigration status.

OTHER STATUTORY AND CONSTITUTIONAL RACE DISCRIMINATION CLAIMS

42 U.S.C. sections 1981 and 1983

To support a claim under Title VII or the FEHA, there must typically be an employment relationship between the plaintiff and the party accused of discrimination. Outside of the employment context, plaintiffs often bring their discrimination claims against public entities under 42 U.S.C. sections 1981 and 1983, alleging that the defendant's acts and omissions resulted in discriminatory treatment in violation of the plaintiff's right to equal protection.[100] (See Chapter 13, Overview of Discrimination Laws for a discussion of sections 1981 and 1983 claims).

In *CBOCS West v. Humphries*,[101] the U.S. Supreme Court ruled that section 1981 barred retaliation against employees who complain about racial bias. Plaintiff Hendrick Humphries, an African-American male, worked for three years at the Cracker Barrel restaurant in Bradley, Illinois. Humphries complained to an administrator that the restaurant manager made racially offensive remarks and that the manager's termination of a fellow employee had been racially motivated. The administrator took no action against the manager, but instead, fired Humphries. Humphries then filed a lawsuit, under Title VII of the Civil Rights Act of 1964 and section 1981, claiming that he had been fired because of his race and because he had complained about race discrimination.

The issue before the Court was whether section 1981 encompasses claims of retaliation against individuals who previously complained about denial of equal contract rights. Despite the fact that section 1981 does not specifically mention a cause of action for retaliation (unlike Title VII), the Court ruled that section 1981 does, in fact, encompass retaliation claims.

A section 1981 suit provides employees with a number of advantages over a Title VII action. It allows an employee to bypass Title VII's administrative procedures and directly file suit. Employees have a significantly longer time in which to sue under section 1981 than they do under Title VII. Title VII applies only to employers with 15 or more employees, but section 1981 contains no such restriction and, most importantly, Title VII provides for limited damages whereas there is no cap on damages under section 1981.

Fourteenth Amendment to U.S. Constitution

When state action is present, race discrimination may also be challenged under the Fourteenth Amendment to the U.S. Constitution. When a state agency applies an express racial classification, such as the California Department of Correction's unwritten policy to racially segregate new inmates in double cells for up to 60 days while deciding the inmates' ultimate placement, the policy is immediately suspect. Under a "strict scrutiny" standard, the agency

[99] https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/05/FinalTextRegNationalOriginDiscrimination.pdf
[100] *Brew v. City of Emeryville* (N.D.Cal. 2001) 138 F.Supp.2d 1217; *El-Hakem v. BJY Inc.* (9th Cir. 2005) 415 F.3d 1068; *Bains LLC v. ARCO Products Co.* (9th Cir. 2005) 405 F.3d 764.
[101] (2008) 128 S. Ct. 1951.

must show that its policy is narrowly tailored to serve a compelling state interest.[102]

In *Comcast v. National Association of African-American Owned Media*,[103] the U.S. Supreme Court ruled that a plaintiff alleging race discrimination under section 1981 must meet the "but for" test by demonstrating that race was the sole deciding factor, rather than a possibility that it was a motivating factor, for the defendant's action.

California Constitution, article I, section 31

Proposition 209, adopted in 1996, added section 31 to article I of the California Constitution, which states in relevant part, "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Proposition 209 is typically used to challenge affirmative action policies. For example, a California school district's transfer policy that used race as a factor in determining whether to permit the transfer was found to violate Proposition 209.[104]

Proposition 209 contains a federal funding exception, but it is narrowly construed. To qualify for the exception, an agency must have substantial evidence that it will lose federal funding if it does not use race-based measures, and the agency must narrowly tailor those measures to minimize discrimination.[105]

Recently, the California Supreme Court ruled that section 31 does not violate the political structure doctrine. In *Coral Construction v. City and County of San Francisco*,[106] two construction companies challenged San Francisco's Minority/Women/Local Business Utilization Ordinance, which mandated race- and gender-conscious remedies to relieve the effects of past discrimination in the award of city contracts. The trial court ruled that the ordinance violated the California Constitution, article I, section 31. The appellate court agreed with the trial court as to the California Constitution, but remanded the matter to the trial court to determine whether the ordinance was mandated by the U.S. Constitution as a narrowly tailored program to remedy ongoing, pervasive discrimination in public contracting. The California Supreme Court ruled that section 31 does not violate the political structure doctrine and that San Francisco's argument that the ordinance fell within the "federal funding" exemption of section 31 was without merit.[107] With respect to the final unresolved issue on remand – whether or not the federal equal protection clause requires the ordinance as a remedy for San Francisco's purposeful discrimination against minorities and women – the Court noted that "relevant decisions hold open the possibility that race-conscious measures might be required as a remedy for purposeful discrimination in public contracting."[108]

California Government Code section 12951

California Government Code section 12951 makes it unlawful for an employer to limit or prohibit the use of any language unless the rule is justified by business necessity, and notice of the circumstances and time when the rule will apply is given to employees. Business necessity means that an English-only rule must have an overriding legitimate business purpose, the rule must be necessary to the business' safe and efficient operation, and no alternative practice to the language restriction will accomplish the business purpose. Violation of this statute is sometimes alleged as an additional claim in a race discrimination complaint.

California Civil Code sections 51.7 and 52.1

A California Appellate Court ruled in *Stamps v. Superior Court*[109] that Plaintiff Robert Stamps, who claimed he was subjected to race-based workplace retaliation, violence, and intimidation, could seek damages under California Civil Code sections 51.7 and 52.1. The Trial Court had dismissed Stamps'

[102] *Johnson v. California* (2005) 543 U.S. 499, 125 S.Ct. 1141.
[103] (2020) 140 S.Ct. 1009.
[104] *Crawford v. Huntington Beach School Dist., supra.*
[105] *C & C Const., Inc. v. Sacramento Mun. Utility Dist.* (2004) 122 Cal.App.4th 284, 18 Cal.Rptr.3d 715.
[106] (2010) 50 Cal.4th 315.
[107] *Id.* at pp. 321-328.
[108] *Id.* at pp. 329-330.
[109] (2006) 136 Cal.App.4th 1441, 39 Cal.Rptr.3d 706.

complaint on the basis that these statutes are part of the Unruh Civil Rights Act which does not apply in the workplace. The Appellate Court, however, decided that neither statute is a part of the Unruh Act. Instead, section 51.7, which establishes a right to freedom from violence and intimidation by threat of violence based on race (among other things), is part of the Ralph Civil Rights Act of 1976. Section 52.1, which authorizes damages for violations of section 51.7, is part of yet another act, the Tom Bane Civil Rights Act. Finding nothing in the language or legislative history of either section that expressed a legislative intent to exclude employment discrimination or other employment cases from their reach, the Court reinstated Stamps' complaint.

California's Fair Pay Act Includes Protections against Discrimination Based on Ethnicity and Race.

The California Legislature passed Assembly Bill 1676 and Senate Bill 1063, which amends California Labor Code sections 1197.5 and 1199.5 to include protections beyond gender based disparities in pay.[110]

Effective January 1, 2017, the California Fair Pay Act prohibits an employer from paying "wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work."[111] Previously, the law only contained protections based on gender.

The law still provides exceptions for wage differentials based upon certain factors, including, existing employer seniority, merit, or earnings systems, and "bona fide factors" other than sex, race, or ethnicity, including education, training, or experience.[112] However, employers are prohibited from using employees' prior wage or salary history alone as a "bona fide factor" to justify a wage differential.[113]

[110] Lab. Code, §§ 1197.5, 1199.5.
[111] Lab. Code, § 1197.5.
[112] *Ibid.*
[113] *Ibid.*

New Developments 2021

CASES

In *Smith v. BP Lubricants*,[114] the California Court of Appeal clarified the standard of aiding and abetting employee harassment under FEHA.

Robert Smith worked at a Jiffy Lube location that invited a representative of BP Lubricants ("BP") to give its employees a presentation on a new Castrol product. During the presentation, the BP presenter allegedly made a number of racists and offensive comments directed at Smith, an African American, including telling him that he sounded like Barry White and referring to him as having "big banana hands." The other employees in attendance laughed and later crossed out his name on the schedule and replaced it with "banana hands." When Smith complained to his own boss, he was told to "let it go."

Smith brought a FEHA race discrimination suit against Jiffy Lube as well as against BP. Even though BP was not his employer, he alleged that the company "aided and abetted" Jiffy Lube's harassment and discrimination against him. The trial court dismissed his claim against BP, and Smith timely appealed.

On appeal, the Court first noted that FEHA prohibits "any person" from aiding and abetting workplace discrimination, and that "any person" could include individuals and entities who are not the employee's employer. The Court noted that "aiding and abetting" involves "concerted activities" between two actors, and articulated that BP would be liable under FEHA only if (1) Jiffy Lube subjected Smith to discrimination and harassment, (2) BP knew that Jiffy Lube's conduct violated FEHA, and (3) BP gave Jiffy Lube "substantial assistance or encouragement" to act in violation of FEHA.

The Court found Smith that had failed to satisfy the second and third prong of the standard because he failed to allege that BP and the BP presenter knew that Jiffy Lube's conduct violated FEHA or that they gave

[114] (May 12, 2021) 64 Cal.App.5th 138, 278 Cal.Rptr.3d 587.

substantial assistance or encouragement to Jiffy Lube. Agreeing with the trial court that Smith had not sufficiently pled facts demonstrating that BP aided and abetted harassment, the Court dismissed his suit against BP. As for the other claims, the Court ruled that a reasonable jury could find that the BP representative's comments were sufficiently extreme and outrageous to have resulted in infliction of emotional distress upon Smith. The Court also reversed dismissal of the Unruh Act claim on the ground that a business establishment could face liability under the Act for its racially harassing conduct directed toward a customer.

KEY ISSUES

- Title VII and the FEHA prohibit discrimination on the basis of race, color, age, religious creed, disability, marital status, medical condition, genetic information, military and veteran status, sexual orientation, national origin, and/or ancestry in all aspects of employment, including hiring, firing, compensation, and other employment terms, conditions, and privileges.
- "Disparate treatment" discrimination occurs when an employer treats an employee differently because of his or her race, color, national origin, and/or ancestry.
- An employee may establish a discrimination case on a disparate treatment theory if he or she can show that he or she: (1) belongs to a protected class; (2) was qualified for the position; (3) was subject to an adverse employment action; and (4) that similarly-situated employees outside the protected class were treated more favorably. If the employer can show legitimate, nondiscriminatory reasons for taking action against an employee, a race discrimination claim generally will not succeed. The rule is the same for other forms of discrimination.
- "Adverse impact" discrimination refers to employment practices that appear facially neutral, but in fact adversely impact protected groups and are not justified by business necessity.
- Employees claiming race discrimination using an adverse impact theory often use statistical evidence to support their allegations. If statistical evidence establishes an adverse impact on a protected group, an employer may show a business necessity in order to refute the claim.
- FEHA and Title VII also protect employees, volunteers, and unpaid interns from harassment based on race, color, age, religious creed, disability, marital status, medical condition, genetic information, military and veteran status, sexual orientation, national origin, and/or ancestry.
- Employers may be strictly liable for harassment by supervisors.
- Retaliation against an employee who complains of discrimination is also prohibited.
- 42 U.S.C. sections 1981 and 1983 prohibit discriminatory employment practices in violation of an employee's right to equal protection.
- Where state action is present, discrimination may also be challenged under the Fourteenth Amendment to the U.S. Constitution.
- The California Constitution, Article I, section 31 prohibits the state from discriminating on the basis of race in the operation of public employment, public education, or public contracting.
- Government Code section 12951 makes it unlawful for an employer to limit or prohibit the use of any language unless the rule is justified by business necessity.
- Civil Code sections 51.7 and 52.1 may provide some protection against race discrimination as part of the Unruh Civil Rights Act.

- Employers may face liability for allowing race discrimination or harassment by customers or third parties.

Sex Discrimination

SUMMARY OF THE LAW

Employees' sex discrimination claims are typically brought under Title VII of the federal Civil Rights Act of 1964[1] and California's Fair Employment and Housing Act ("FEHA")[2] These laws, along with Government Code section 11135, prohibit employers from using sex as a basis to select applicants; to hire, fire, or promote employees; or to establish employment terms and conditions. "Sex" includes both sex and gender.[3] Accordingly, adverse employment actions based on gender or gender stereotypes are unlawful. For example, Title VII bars discrimination based on a female's failure "to act like a woman" or to conform to gender stereotypes.[4] And in California, an employer may not prohibit women from wearing pants in the workplace.[5]

Sex discrimination in public schools is prohibited under different statutes. Title IX of the Education Amendments Act of 1972 prohibits sex discrimination by recipients of federal education funding and authorizes private parties to seek monetary damages for intentional violations of Title IX. Retaliating against a person because that person has complained of sex discrimination is another form of intentional sex discrimination that is included within Title IX's private cause of action.[6]

Further, public entities may face challenges under the Fair Housing Act[7] for policies that discriminate based on sex outside of the employment context. For example, a city-owned homeless shelter had adopted a "men-only" policy and was sued by a group of female and juvenile residents who had been forced to move out of the shelter. In *Community House, Inc. v. City of Boise*,[8] the United States Court of Appeals for the Ninth Circuit ordered the shelter to abandon the "men-only" policy.

ADVERSE IMPACT/DISPARATE TREATMENT DISCRIMINATION CLAIMS

To prove that an employer engaged in sex discrimination, an employee must produce evidence tending to establish a causal connection between an adverse employment action and the employee's sex.[9] This connection may result from the employer's disparate treatment of the employee or the adverse impact of employment practices.[10]

Disparate Treatment Discrimination Claims

Disparate treatment is intentional discrimination against an individual or individuals on prohibited grounds. It occurs when an employer treats similarly situated people differently in their employment because of a protected category.[11] An example of disparate treatment can be found

[1] 42 U.S.C. §§ 2000 et seq.
[2] Gov. Code, §§ 12900 et seq.; Because the anti-discriminatory objectives and public policy purposes of Title VII and the FEHA are nearly identical, federal cases interpreting Title VII are instructive when analyzing a FEHA claim. See generally *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1041-1044.
[3] Gov. Code, § 12926(q).
[4] *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 251, 109 S.Ct. 1775, 1791.
[5] Gov. Code, § 12947.5.
[6] *Jackson v. Birmingham Bd. of Ed.* (2005) 544 U.S. 167, 125 S.Ct. 1497.
[7] 42 U.S.C. § 3604. Under the Fair Housing Act, it is unlawful to "make unavailable ... a dwelling to any person because of race, color, religion, sex, familial status, or national origin."
[8] (9th Cir. 2007) 490 F.3d 1041.
[9] *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-04, 93 S.Ct. 1817; *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253-54, 101 S.Ct. 1089.
[10] *Id.*
[11] *International Brotherhood of Teamsters v. U.S.* (1977) 431 U.S. 324, 335-336, 97 S.Ct. 1843, 1854, fn. 15.

in *Breiner v. Nevada Department of Corrections*,[12] where the Ninth Circuit found that the Nevada Department of Corrections ("NDOC") violated Title VII by refusing to allow male prison guards to apply for correctional lieutenant positions at an all-female facility. The Ninth Circuit rejected the employer's position that the "female applicants only" restriction was a "de minimis" violation, and citing *Ricci v. DeStefano*,[13] noted that "the denial of a single promotion opportunity such as the one here at issue is a violation of Title VII." The Court also rejected NDOC's proposition that the requirement was a bona fide occupational qualification. Plaintiffs may meet their evidentiary burden by providing direct evidence of discrimination, such as a supervisor's statement showing biased motive or, as in this case, a hiring stipulation permitting only female applicants.

However, it may on occasion be appropriate for an employer to treat the genders differently in considering them for certain positions. In direct contrast to *Breiner*, in a recent Ninth Circuit case, the Court found that it was appropriate for the Washington Department of Corrections to designate certain positions as female-only because sex was a bona fide occupational qualification reasonably necessary to the normal operations of women's prisons. In *Teamsters Local Union No. 117 v. Washington Department of Corrections*,[14] in response to a documented history of sexual misconduct in prisons, the Department of Corrections designated 110 correctional positions as female-only positions.[15] The Court of Appeal upheld this practice, concluding that sex was an objective, verifiable job qualification for the designated positions and that the Department had considered reasonable alternatives.[16] The Court distinguished the case from the *Breiner* case, noting that in *Breiner*, Nevada prison officials designated as female-only three upper-management positions based on the assumption that men were "incapable of adequately supervising front line staff in female prisons," whereas here the sex-based job assignments were all "front line" positions requiring direct, day-to-day interaction with female inmates and was in response to numerous substantiated instances of sexual abuse implicating every job category at issue.[17]

Most discrimination claims are proven through indirect or circumstantial evidence. In such cases, the plaintiff first must establish a *prima facie* case of discrimination. The burden of persuasion then shifts to the employer to establish a legitimate, nondiscriminatory reason for its actions. Then the burden shifts back to the plaintiff, to establish that the employer's stated reason was a pretext for discrimination. This method of proof is referred to as the *McDonnell Douglas* burden-shifting analysis.[18] However, where the plaintiff shows that the adverse action was substantially motivated by a discriminatory reason, even if the employer proves that the employment decision was made for non-discriminatory reasons, the employer may still be liable for the plaintiff's attorney's fees and costs.[19] Chapter 13, Overview of Employment Discrimination Laws, contains a full discussion of the mixed-motive defense.

In Disparate Treatment Cases, Courts Must Conduct a Fact-Intensive Inquiry to Determine Which Employees Are Similarly Situated.

In a recent case, the Ninth Circuit took pains to emphasize that in conducting the *McDonnell Douglas* analysis, either under the plaintiff's *prima facie* stage or at the proof of

[12] (9th Cir. 2010) 610 F.3d 1202.
[13] (2009) 129 S.Ct. 2658, 2671.
[14] (9th Cir. 2015) 789 F.3d 979.
[15] *Id.* at 981-982.
[16] *Id.* at 982.
[17] *Id.* at 991, fn. 5.
[18] See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-04, 93 S.Ct. 1817. In some cases, a facially discriminatory policy may nonetheless be found lawful. For example, in *Community House, supra,* the Ninth Circuit noted that even intentional differential treatment may be justified under the Fair Housing Act in certain situations. The Court followed several other circuits in requiring the city to show either: (1) the restriction benefits the protected class; or (2) the restriction responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes. However, the city was unable to meet this burden in this case.
[19] *Harris v. City of Santa Monica* (2013) 56 Cal.4th, 203, 152 Cal.Rptr.3d 392. It should be noted that the California Legislature is considering Senate Bill 655, which if enacted into law, would overturn or limit *Harris v. Santa Monica*.

pretext stage, courts must not reflexively apply a "same supervisor" test without analyzing the underlying facts at issue. In *Hawn v. Executive Jet Management, Inc.*,[20] male plaintiff pilots brought a suit against their employer for gender discrimination based on the fact that female flight attendants who had engaged in similar lewd and inappropriate conduct were not disciplined or terminated like the pilots were. After a female flight attendant complained about a hostile work environment created by male pilots, an internal investigation was conducted.

The Ninth Circuit ruled that the trial court erred in finding that because the female flight attendants had a different supervisor, they were therefore not similarly situated. Because the relevant decision-maker was aware of both the allegations against the pilots and the allegations by the pilots against the female flight attendants, the fact that the two groups had different supervisors did not render them dissimilar in a material respect. Thus, in disciplining employees, employers should conduct a fact-based inquiry to determine if they are treating similarly-situated employees differently.

The U.S. Supreme Court reaffirmed these principles in *Dukes v. Wal-Mart Stores, Inc.*[21] In deciding whether to certify a class of roughly 1.5 million women, the Court interpreted the "commonality" requirements of the Federal Rule of Civil Procedure 23 to mean that the claims of each individual plaintiff must rest upon a common question, the truth or falsity of which would support a class-wide resolution of claims. The court is to conduct a fact-intensive inquiry on the similarities and the differences in the claims to determine whether there are common, class-wide claims on which the litigation can be resolved. A putative class need not show that all members were affected by a violation of the same statute; rather they must demonstrate that they were affected by the same violation of that statute. In *Dukes*, the Court found that evidence presented by members of the putative class did not rise to the level of significant proof of commonality that the company had operated under a general policy of discrimination.

Recently, the California Court of Appeal, In the Context of Discrimination and Retaliation Claims Under the FEHA, Ruled that for Comparator Evidence to Be Admissible at Trial, the Employee Is *Not* Required to Show that His or Her Qualifications Are Clearly Superior.[22]

In *Gupta v. Trustees of the California State University*, the Court found that the former professor, who was denied tenure and terminated from a public university, was not required to prove that she was clearly superior to the comparator professor, who had been granted tenure and was similarly situated to the former professor in all relevant respects, before admission of evidence regarding the comparator professor.[23] The Court reiterated the "well settled" rule that all that is required for comparator evidence to be admissible is for the comparator, who was treated more favorably, to be "similarly situated" to the plaintiff "in all relevant respects."[24]

Adverse Impact Discrimination Claims

Plaintiffs also may prove their discrimination case by the "adverse impact" theory. Under this theory, a plaintiff strives to show that a facially neutral employer practice or policy, which bears no relation to job requirements, had a disproportionate adverse impact on members of a protected class.[25] (Standards for adverse impact and disparate treatment claims are also discussed in Chapter 13, Overview of Employment Discrimination Laws.)

Regardless of the theory under which an employee alleges discrimination, the employee must produce sufficient evidence of a causal relationship between the employee's sex and the alleged misconduct. Failure to do so may lead to dismissal as a matter of law. For example, in *Jones v. Department of Corrections and Rehabilitation*,[26] the Court observed that when Jones was asked during the case whether alleged comments were prompted

[20] (9th Cir. 2010) 615 F.3d 1151.
[21] (2011) 131 S. Ct. 2541.
[22] (2019) 40 Cal.App.5th 510.
[23] *Id.* at 522.
[24] *Id.* at 520.
[25] See *International Brotherhood of Teamsters, supra*.
[26] (2007) 152 Cal.App.4th 1367, 62 Cal.Rptr.3d 200.

by her sex or race, Jones replied, "No" or "I don't know." The Court ruled that these responses were fatal to her discrimination claims.

SEXUAL HARASSMENT

Sexual harassment is a form of sex discrimination. The Equal Employment Opportunity Commission ("EEOC") and the Fair Employment and Housing Commission ("FEHC"), which interpret the federal and state anti-discrimination laws, have adopted specific standards to determine when certain conduct qualifies as sexual harassment.[27] These agencies have determined that unwelcome sexual advances, requests for sexual favors, and other verbal, physical, or visual conduct of a sexual nature constitute unlawful harassment if: (1) submission to the conduct is made an explicit or implicit term or condition of employment ("quid pro quo" sexual harassment); (2) submission to or rejection of the conduct is used as the basis for employment decisions affecting an individual (again, "quid pro quo" harassment); or (3) the conduct has the purpose or effect of either unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment ("hostile environment" harassment). Although courts typically categorize sexual harassment into two distinct fact patterns, "quid pro quo" harassment or "hostile environment" harassment, the U.S. Supreme Court has explained that these labels are not controlling for purposes of establishing employer liability, as discussed further below.[28]

Hostile environment sexual harassment occurs when the employer creates or condones an atmosphere tainted by unwelcome sexual advances, requests for sexual favors, or other verbal or physical contact of a sexual nature. To state a hostile environment claim, the harassment must be sufficiently severe or pervasive to alter the victim's employment conditions and create an abusive working environment.[29] Hostile or abusive conduct can form the basis of a claim even if the victim does not suffer physical or psychological injury.[30] On the other hand, the FEHA does not prohibit sexually coarse and vulgar language or conduct that merely offends.[31]

There is no legal requirement that hostile acts be overtly sex or gender specific in content. Although sex or gender specific content is one way to establish discriminatory harassment, it is not the only way. The question is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not.[32] For example, workplace romances and resulting favoritism can result in actionable sexual harassment claims from non-favored employees.[33] An employee may prove that the alleged harassing conduct is sex-based even if the acts are not overtly sexual but they occur because of the employee's sex.[34] An employee may also use sexual harassment of other employees to prove a supervisor's gender bias.[35] Conduct may constitute sexual harassment when the harasser and the victim are of the same sex.[36] For example, a heterosexual male is subjected to unlawful sexual harassment under FEHA when attacks on heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest.[37] A plaintiff is not required to prove the alleged harasser's sexual intent or desire in order to establish a hostile work

[27] 29 C.F.R. § 1604.11; Cal. Code Regs., tit. 2, §§ 11019(b), 11034(f)(1).
[28] *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S.Ct. 2257; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S.Ct. 2275.
[29] *Meritor Savings Bank, FSB v. Vinson* (1986) 477 U.S. 57, 106 S.Ct. 2399.
[30] *Harris v. Forklift Systems, Inc*. (1993) 510 U.S. 17, 114 S.Ct. 367.
[31] *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 42 Cal.Rptr.3d 223.
[32] *Equal Employment Opportunity Com. v. National Education Assn.* (9th Cir. 2005) 422 F.3d 840; *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 207.
[33] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 30 Cal.Rptr.3d 797.
[34] *Nichols v. Azteca Restaurant* (9th Cir. 2001) 256 F.3d 864.
[35] *Pantoja v. Anton* (2011) 198 Cal. App. 4th 87, 129 Cal.Rptr.3d 384.
[36] *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 118 S.Ct. 998.
[37] *Taylor v. Nabors Drilling U.S.A., L.P*. (2014) 222 Cal.App.4th 1228, 1233-1235.

environment.[38] Even non-employees may create a hostile work environment for employees for which the employer will be liable if the employer knows or should have known about the conduct and fails to take corrective action.[39]

Male Employees May Bring Sexual Harassment Claims

Employers should promptly and seriously address all complaints by employees, regardless of gender. In *U.S. Equal Employment Opportunity Commission v. Prospect Airport Services, Inc.*, the Ninth Circuit affirmed that female employees can be found liable for sexual harassment against male employees. Thus, both sexes are protected from discrimination and harassment.[40] In this case, Rudolpho Lamas, a recent widower, began working at Prospect Airport Services. That fall, a married co-worker, Sylvia Munoz, began a series of rejected sexual overtures. These overtures included sexual notes, a photograph of her showing off her cleavage, and telling co-workers that Lamas was interested in her. Lamas complained to Munoz's direct supervisor, who did nothing, then the supervisor's boss, who replied that he "did not want to get involved in personal matters." Nevertheless, the supervisor's boss spoke to Munoz and told her to stop. However, Munoz continued in her behavior.

The Ninth Circuit reversed the trial court's granting of summary judgment and ruled that it cannot be assumed that just because a man receives sexual advances from a woman that those advances are welcome.

Sexual Harassment Liability Under Civil Code section 51.9

Enacted in 1994, California Civil Code section 51.9 establishes a civil cause of action for sexual harassment in non-employment relationships.[41] In *Judd v. Weinstein*, the Ninth Circuit ruled that the relationship between a top film producer and a female actor was "substantially similar" to examples enumerated in Civil Code section 51.9 prohibiting sexual harassment in professional relationships due to the inherent power imbalance between the parties, so that one party was uniquely situated to exercise coercion or leverage over the other by virtue of his professional position.[42]

Employers' Liability for Sexual Harassment

The U.S. Supreme Court has ruled that under Title VII employers are always liable for a supervisor's sexual harassment if the harassment culminates in a tangible employment action such as a discharge, demotion, discipline, performance evaluation, or a recommendation for a salary increase, bonus, special assignment, or undesirable reassignment.[43] Strict liability means that the employer is liable for the harassing conduct of a supervisor whether or not the employer authorized, forbade the conduct, or even if the employer did not know of the conduct. California courts have reached the same decision under the FEHA.[44] An employer is not subject to strict liability for a supervisor's conduct that results from a completely private relationship unconnected with the employment.[45] However, liability will result from supervisory conduct related to the employer's business, even if the conduct takes place away from the regular work site.[46]

An employer is also liable for the harassing conduct of an employee's co-worker if the employer or its agents knew or should have known of the harassment and failed to take immediate and appropriate action to end the harassment.[47] Although the law expressly applies to applicants, employees, independent contractors, and unpaid interns or volunteers,[48] liability also may result for conduct of non-employees such as customers or vendors if the employer or its agents knew or should have known of the

[38] S.B. 292 (effective January 1, 2014) (amending Gov. Code, § 12940(j)(4)(C)).
[39] *Freitag v. Ayers* (9th Cir. 2006) 463 F.3d 838, amended by, reg. en banc den. by (9th Cir. 2006) 468 F.3d 528.
[40] (9th Cir. 2010) 621 F.3d 991.
[41] Civ. Code, § 51.9.
[42] *Judd v. Weinstein* (9th Cir. 2020) 967 F.3d 951.
[43] *Burlington Industries, Inc., supra.*
[44] *State Dept. of Health Services v. Superior Ct.* (2003) 31 Cal.4th 1026, 6 Cal.Rptr.3d 441.
[45] *Id.* at 1041.
[46] *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 56 Cal.Rptr.3d 501.
[47] Gov. Code, § 12940(j)(1).
[48] *Ibid.*

harassment and failed to take immediate and appropriate action to end the harassment.[49] An employer also can be liable for harassment of an independent contractor by one of its employees, so long as the plaintiff proves that the perpetrator was a supervisor or agent or that the perpetrator's employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action.[50] This potential exposure underscores the importance of ensuring that every supervisor receives proper training on how to detect and respond to unlawful harassment. Finally, although individual supervisors may not be held personally liable for discrimination, under the FEHA, individual supervisors may be personally liable for harassment.[51]

Employers' Affirmative Defense

Employers have an affirmative defense, or means to limit harassment liability, only in those cases where there is no tangible employment action. In Title VII claims, the employer may be able to avoid liability or limit damages by establishing the following: (1) it exercised "reasonable care" to prevent and promptly correct the harassment; and (2) the employee unreasonably failed to use the employer's complaint procedures, or failed to take other measures to avoid harm.[52] This defense is often referred to as the *Faragher/Ellerth* affirmative defense and underscores the importance of effective complaint procedures.

Under the FEHA, the employer may not eliminate liability, but may reduce or eliminate damages owed to a harassed employee by meeting the requirements of the *Faragher/Ellerth* test and also establishing that the reasonable use of the procedures would have prevented at least some of the harm the harassed employee suffered. In such a case, the employer's liability is limited to those damages that could not have been prevented.[53] This defense is often referred to as the "avoidable consequences doctrine."

Employers' Obligation to Take Prompt and Appropriate Remedial Action

Employers must promptly investigate sexual harassment complaints and intervene to stop the harassment.[54] Even in cases where the harassment already has ceased, employers must conduct a prompt and thorough investigation and take action to prevent future harassment. The fact that the harassment has stopped does not release an employer from the duty to take remedial action.[55] An employer must not only take steps to eliminate harassing conduct, but also must take action to deter further inappropriate conduct.[56]

Courts will find employers liable for harassing conduct unless they take swift and decisive action.[57] In evaluating the effectiveness of the employer's action, a court may consider steps taken by other employers that were not taken by the employer at issue, such as in *Freitag*.[58] An employer may discipline or terminate an employee for harassment provided that it has reasonable grounds for believing that the misconduct occurred. If the employer has reasonable grounds for its belief, the employer will not be liable for a wrongful termination lawsuit even if the conduct did not *actually* occur.[59]

Although the Ninth Circuit has ruled that transferring a harassment victim to a less desirable location does not satisfy the employer's remedial obligations, not every transfer is adverse to the victim. The employer may consider the ease of moving

[49] *Ibid.*
[50] *Hirst v. City of Oceanside* (2015) 236 Cal.App.4th 774, 790-791.
[51] *Reno v. Baird* (1998) 18 Cal.4th 640, 76 Cal.Rptr.2d 499.
[52] *Burlington Industries, Inc., supra; Montero v. AGCO Corp*. (E.D. Cal. 1998) 19 F.Supp.2d 1143, aff. by (9th Cir. 1999) 192 F.3d 856; *Davis v. Team Elec. Co.* (9th Cir. 2008) 520 F.3d 1080, 1097.
[53] *State Dept. of Health Services, supra,* 31 Cal.4th at 1044.
[54] *Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773; *Holly D. v. California Inst. of Technology* (9th Cir. 2003) 339 F.3d 1158; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872.
[55] *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1528-1529 as amended (April 24, 1995).
[56] *Id.*
[57] *Steiner v. Showboat Operating Co*. (9th Cir. 1994) 25 F.3d 1459.
[58] *Freitag, supra* (Pelican Bay ignored corrective actions that other prisons instituted for similar problems, such as installing semi-opaque finish on control towers and cells and imposing serious discipline on repeat offenders.).
[59] *Cotran v. Rollins Hudig Hall Internat*. (1998) 17 Cal.4th 93, 69 Cal.Rptr.2d 900.

the employees and their relative importance to the business.[60]

School Employers May Face Sex Discrimination Claim for Mishandling Sexual Harassment Investigations

A student's allegation that a university's investigation into sexual misconduct allegations against him was one-sided because it failed to consider his version of the alleged assault or to follow up with the witnesses and evidence that he offered in his defense, and that those involved in his disciplinary case divulged confidential and privileged information about the investigation, were sufficient to state a Title IX sex discrimination claim.[61]

Employers' Obligation to Disclose Complaint Procedure

To receive the benefit of the affirmative defense, employers must not only implement effective procedures or mechanisms to permit employees to report harassment; they also must ensure that employees are aware of them. For *Myers v. Trendwest*,[62] the Court denied Trendwest a complete defense to a harassment claim where Trendwest had implemented an anti-harassment policy and "hotline" for complaints and the plaintiff did not report the harassment. Although Trendwest distributed information about its anti-harassment policy to employees and had posters regarding sexual harassment in its offices, it did not inform employees specifically about the DFEH remedies as required by the FEHA.

RETALIATION CLAIMS

Both federal and state law prohibit an employer from terminating an employee in retaliation for sexual harassment or discrimination complaints, or other activity protected under Title VII or the FEHA. In order to establish a *prima facie* case of retaliation under either federal or state law, an employee must demonstrate that: (1) the employee engaged in an activity protected under Title VII or the FEHA; (2) the employer subjected the employee to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action.[63] In some cases, the temporal proximity between the protected activity and the retaliation may be sufficient to support an inference of causation, even without other evidence of retaliation.[64] An employer can defend against such a claim by asserting that it acted not in response to the employee's complaints, but for legitimate and non-retaliatory reasons.

Under Title VII, the U.S. Supreme Court has ruled that retaliatory actions include any action by an employer that is "materially adverse" and could dissuade a reasonable employee or job applicant from exercising protected rights—whether job-related or not.[65] In *Thompson v. North American Stainless*,[66] the U.S. Supreme Court found that even third-parties are not excluded from the operation of Title VII's anti-retaliation provisions. In *Thompson*, Eric Thompson's employment was terminated after his fiancée/co-worker filed an EEOC charge against her supervisor for gender discrimination. Ultimately, the Court found that an aggrieved person under Title VII includes any person with an interest arguably sought to be protected by statutes.

The Court also has ruled that an employer must consider the specific context when evaluating whether an action is retaliatory. Certain acts may have a materially adverse effect on some employees and not others. Employees who participate in internal investigations may not be retaliated against as a result of such participation.[67]

In the case of *Yanowitz v. L'Oreal USA, Inc.*,[68] the California Supreme Court set forth a different standard for retaliation claims under the FEHA. There, the court held an employee pursuing a retaliation claim under

[60] *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184.
[61] *Schwake v. Arizona Board of Regents* (9th Cir. 2020) 967 F.3d 940.
[62] *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 56 Cal.Rptr.3d 501.
[63] *Ray v. Henderson* (9th Cir. 2000) 217 F.3d 1234, 1240; *Reeves v. Safeway Stores* (2004) 121 Cal.App.4th 95, 16 Cal.Rptr.3d 717.
[64] *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802.
[65] *Burlington Northern & Santa Fe Ry. Co. v. White* (2006) 548 U.S. 53.
[66] (2011) 131 S. Ct 863.
[67] *Crawford v. Metropolitan Gov. of Nashville* (2008) 129 S. Ct. 846.
[68](2005) 36 Cal.4th 1028, 32 Cal.Rptr.3d 436.

the FEHA must demonstrate that he or she has been subjected to an adverse *employment* action that materially affects the *terms, conditions, or privileges of employment.* The *Yanowitz* court also ruled that an employee's conduct alone may constitute protected activity for the purposes of the FEHA's anti-retaliation provision.

An employer might be liable for retaliatory discharge when the supervisor who initiates disciplinary actions acts with retaliatory motive, even if the cause for discipline is separately investigated and a manager with no knowledge of the employee's sexual harassment complaints discharges the employee.[69] The theory is that the manager who terminated the employee acted as the conduit of another's prejudice – the "cat's paw" of the individual with the bad motive.

Regarding the potential liability of individual supervisors, co-workers, or non-employees for retaliation, the California Supreme Court ruled in the case of *Jones v. The Lodge at Torrey Pines*, that non-employer individuals may not be held liable under the FEHA for retaliation.[70] (See Chapter 13, Overview of Anti-Discrimination Laws, for a discussion of this case.)

PREGNANCY DISCRIMINATION AS SEX DISCRIMINATION

Discrimination on the basis of pregnancy, childbirth, breastfeeding/lactating, or related medical conditions is treated as sex discrimination under both Title VII and the FEHA.[71] Courts disagree, though, about an employer's duty to make special accommodations for pregnant workers. Under Title VII, most courts do not require light duty assignments for pregnant employees unless the employer offers light duty to other employees suffering nonoccupational disabilities.[72] Recently, in *Young v. United Parcel Service, Inc.*, the U.S. Supreme Court articulated a modified version of the *McDonnell Douglas*[73] burden-shifting analysis which applies to certain employees suing for failure to accommodate pregnancy-related disabilities.[74] Specifically, the Supreme Court modified the *prima facie* case for an employee suing under the Pregnancy Discrimination Act (which added new sections to Title VII's sex discrimination provisions) claiming her pregnancy-related work restrictions were not accommodated by her employer while other employees' non-pregnancy-related work restrictions were.[75] Such an employee now makes out a *prima facie* case by showing: (1) she belongs to the protected class; (2) she sought accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others "similar in their ability or inability to work." Under the FEHA, an employer violates the law by "refus[ing] to provide reasonable accommodation" requested by an employee on the advice of her health care provider for conditions related to pregnancy, childbirth, breastfeeding/lactating, or related medical conditions.[76] Additionally, an employer may not impose its own view onto a pregnant employee regarding the propriety of an employee's decision to continue working during pregnancy.[77] Employers also have an obligation to facilitate and support breastfeeding in the workplace, and failure to do so exposes employers to potential liability for sex discrimination.[78] Effective January 1, 2020, an employer now must provide a reasonable amount of break time to allow employees to express breast milk "each time the employee has need to express milk."[79] Labor Code section 1031 specifies that a lactation room must contain a surface to place a breast pump and personal items, contain a place to sit, and have access to electricity or alternative devices, including,

[69] *Reeves, supra.*
[70] *Jones v. The Lodge at Torrey Pines* (2008) 42 Cal.4th 1158, 72 Cal.Rptr.3d 624.
[71] 42 U.S.C. § 2000e(k); Gov. Code §§ 12926(r), 12945(a)-(b); 29 C.F.R. §§ 1604.1-1604.11; *Equal Employment Opportunity Com. v. Houston Funding II, Ltd.* (5th Cir. 2013) 717 F.3d 425.
[72] *Spaziano v. Lucky Stores, Inc.* (1999) 69 Cal.App.4th 106, 81 Cal.Rptr.2d. 378.
[73] *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-04, 93 S.Ct. 1817.
[74] *Young v. United Parcel Serv., Inc.* (2015) 135 S. Ct. 1338, 1354.
[75] *Id.*at 1354.
[76] Gov. Code, § 12945(c)(1); Cal. Code Regs., tit. 2, §§ 11035-11039.
[77] *Sasco Elec. v. FEHC* (2009) 176 Cal.App.4th 532, 97 Cal.Rptr.3d 482.
[78] Gov. Code, § 12926; *Dept. of Fair Employment & Housing v. Acosta Tacos (Chavez)* FEHC Dec. No. 09-03-9, 2009 WL 2595487 (Cal. F.E.H.C.).
[79] Lab. Code, § 1030.

but not limited to, extension cords or charging stations needed to operate an electric or battery-powered breast pump, among other specifications.[80] Additionally, employers shall provide access to a sink with running water and a refrigerator suitable for storing milk (or another cooling device) in close proximity to the employee's workplace.[81] Finally, where a multipurpose room is used for lactation among other uses, the use of the room for lactation shall take precedence over the other uses, but only for the time it is being used for lactation purposes.[82] The Labor Code statute includes a number of exceptions for certain employers based on operational, financial, and space limitations.[83] Employers must take note that good intentions alone do not justify so-called "fetal protection policies," aimed at prohibiting pregnant employees from performing certain duties. Unless an employer is able to establish that sex is a bona fide occupational qualification, it will be liable for sex discrimination should it enforce such a policy because it "does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females."[84] As one court stated, "The Court encourages all employees to be mindful of their pregnant employees, to ensure that employees are aware of any radiation risks and to accommodate those women who voluntarily declare their pregnancy in order to limit their exposure to radiation. Here, however, the court is faced with a facially discriminatory policy which strips women of any agency in their occupational desires while pregnant, and that the court cannot condone."[85]

MARITAL STATUS DISCRIMINATION

The FEHA prohibits discrimination based on marital status.[86] The regulations interpreting the FEHA define marital status as "an individual's state of marriage, nonmarriage, divorce or dissolution, separation, widowhood, annulment, or other marital state."[87] However, the FEHA does not prohibit employers from implementing nepotism policies in keeping with terms specified in the statute and in regulations issued by the FEHC.[88]

CALIFORNIA FAMILY RIGHTS ACT

The California Family Rights Act ("CFRA"), requires employers with at least five employees to provide at least 12 weeks of job-protected, unpaid leave to employees in order to care for the employee's child, parent, spouse, domestic partner, grandparent, grandchild, or sibling, or to care for themselves.[89] Further, employers with five or more employees, are required to provide at least 12 weeks of job-protected, unpaid leave to employees to bond with a child.[90]

SEXUAL ORIENTATION DISCRIMINATION

The FEHA expressly prohibits discrimination based on sexual orientation or gender-related characteristics, including transgender status.[91] It was further clarified that all personnel in California – including transgender, non-binary, and gender non-conforming employees – by removing all gender-specific pronouns and replacing them with gender-neutral terms.[92] Employees must be offered the opportunity to seek, obtain, and hold employment without discrimination because of sexual orientation. This includes protection from harassment based on sexual orientation. Employers must not discriminate on the basis of sexual orientation in providing training, compensation, or employment privileges.[93]

[80] Lab. Code, § 1031.
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*
[84] *International Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 200, 111 S.Ct. 1196.
[85] *Equal Employment Opportunity Com. v. Catholic Healthcare West* (C.D.Cal. 2008) 530 F.Supp.2d 1096, 1106, n.10 (applying the ruling in *Johnson Controls, supra,* to a policy prohibiting pregnant employees from working in fluoroscopy labs).
[86] Gov. Code, § 12940(a).
[87] Cal. Code Regs., tit. 2, § 11053(a).
[88] Gov. Code, § 12940(a)(3)(A); Cal. Code Regs., tit. 2, § 11057.
[89] Gov. Code, § 12945.2
[90] *Ibid.*
[91] Gov. Code, §§ 12921 and 12940.
[92] AB 1556 (2017).
[93] Gov. Code, §§ 12921 and 12940(j)(1).

Further, as a result of the U.S. Supreme Court decision in *Obergefell v. Hodges*,[94] gay marriages are now legal in all 50 states; thus, married gay couples are now entitled to receive all state and federal benefits that come with a marriage legally recognized in their state, including Social Security survivor benefits, immigration rights, and family leave. In *Obergefell*, the Supreme Court ruled that the Fourteenth Amendment to the United States Constitution requires states to license same-sex marriages and to recognize same-sex marriages lawfully licensed and performed in other states.

SEXUAL ORIENTATION AND GENDER IDENTITY IN PUBLIC SCHOOLS

The Education Code prohibits discrimination on the basis of sexual orientation, gender, gender identity, or gender expression in any program or activity conducted by an educational or postsecondary institution that receives, or benefits from, state financial assistance, or that enrolls students who receive state student financial aid.[95] The Education Code also includes an equal opportunity policy statement, committing to afford all persons, regardless of their sexual orientation, gender, or gender identity, equal opportunities in the public schools.[96] This applies to both school employees and students. Public schools also must provide equal access to facilities and activities in accordance with a student's gender identity, irrespective of the gender listed in the student's records.[97]

Education Code section 66251 includes as prohibited bases of discrimination any basis contained in the Penal Code prohibition against hate crimes.[98] The Penal Code defines "gender" as "the victim's actual sex or the defendant's perception of the victim's sex, and includes the defendant's perception of the victim's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the victim's sex at birth."[99] Because the Legislature intended this language to protect transgendered individuals, people such as those who have undergone sex change operations, who are in the middle of transitions, or act in ways outside of gender stereotypes, are protected against discrimination under the Education Code.

Same sex, student-on-student sexual harassment also may be actionable under Title IX of the Education Act of 1972, which provides that no person shall, on the basis of sex, be excluded from or subjected to discrimination under any education program or activity receiving federal financial assistance.[100] Recently, in the case of *Parents for Privacy v. Barr*, the Ninth Circuit ruled that a policy that allows transgender students to use school bathroom and locker facilities that match their self-identified gender in the same manner that cisgender students utilize those facilities does not create actionable sex harassment under Title IX.[101]

MANDATORY SEXUAL HARASSMENT TRAINING FOR SUPERVISORY EMPLOYEES

As an additional obligation under the FEHA, California employers with 5 or more employees are required to provide supervisory employees with two hours of sexual harassment training within six months of becoming a supervisor, and once every two years thereafter.[102] Non-supervisory employees must complete at least one hour of sexual harassment training, and once every two years thereafter.[103] The training must include practical guidance regarding federal and state sexual harassment laws, which includes information concerning prevention, correction, and available remedies, as well as practical examples of harassment based on gender identify, gender expression, and sexual orientation.[104] Employers must adhere to record-keeping requirements.[105] Government Code section 12950.1 was amended to allow employers

[94] *Obergefell v. Hodges*, 135 S.Ct. 2584 (U.S. June 26, 2015) No. 14-556, 2015 WL 2473451, at *4.
[95] Ed. Code, §§ 200, 220, 66251, and 66270.
[96] Ed. Code, § 200.
[97] Ed. Code, §§ 221.5, 221.7.
[98] Pen. Code, § 422.6(a).
[99] Pen. Code, § 422.76.
[100] 20 U.S.C. § 1681(a).
[101] (9th Cir. 2020) 949 F.3d 1210, 1240.
[102] Gov. Code, § 12950.1.
[103] *Ibid.*
[104] Gov. Code, § 12950.1.
[105] Cal. Code. Regs., tit. 2, § 11024(b)(2).

until January 1, 2021 to meet the training requirement.[106]

The regulations address important issues and questions, such as whether e-learning is permissible (it is), trainer qualifications (attorneys, human resource professionals, psychologists, and others with the proper knowledge and expertise), and managing and tracking the ongoing compliance obligations.[107]

Pursuant to regulations issued by the FEHC, training must include the following information:

- A definition of unlawful sexual harassment under the FEHA and Title VII;
- FEHA and Title VII statutory provisions and case law principles concerning prohibition of unlawful sexual harassment, discrimination, and retaliation in the workplace;
- The types of conduct that constitutes sexual harassment.
- Remedies available for sexual harassment victims in civil actions; potential employer/individual exposure/liability.
- Strategies to prevent sexual harassment in the workplace.
- Supervisors' obligation to report sexual harassment, discrimination, and retaliation of which they become aware.
- Practical examples, such as factual scenarios taken from case law, news and media accounts, and hypotheticals based on workplace situations and other sources, which illustrate sexual harassment, discrimination, and retaliation using training modalities such as role plays, case studies, and group discussions.
- The limited confidentiality of the complaint process.
- Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment.
- The steps necessary to take appropriate remedial measures to correct harassing behavior, including an employer's obligation to conduct an effective workplace investigation of a harassment complaint.
- What to do if a supervisor is personally accused of harassment.
- The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Either the employer's policy or a sample policy shall be provided to the supervisors. Regardless of whether the employer's policy is used as part of the training, the employer shall give each supervisor a copy of its anti-harassment policy and require each supervisor to read and to acknowledge receipt of that policy.
- A review of the definition of "abusive conduct" as defined by Government Code section 12950.1(g)(2), including a discussion of its negative effects and elements.

REQUIREMENTS REGARDING SEXUAL ANTI-HARASSMENT AND ANTI-DISCRIMINATION POLICIES

Regulations issued by the FEHC require that covered employers have written anti-discrimination and anti-harassment policies:

- Lists all current protected categories covered under the FEHA.
- Indicates that managers, supervisors, coworkers, and third parties with whom employees come into contact are prohibited from engaging in unlawful conduct under the FEHA.
- Creates a complaint process to ensure that complaints receive: (a) an employer's designation of confidentiality, to the extent possible; (b) a timely response; (c) impartial and timely investigations by qualified personnel; (d) documentation and tracking for reasonable progress; (e) appropriate options for remedial actions and resolutions; and (f) timely closures.
- Provides a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor, such as a confidential complaint hotline, designated company representative, and/or the DFEH and the EEOC.
- Instructs supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so the employer can try to resolve the claim internally.

[106] Gov. Code, § 12950.1.
[107] Cal. Code. Regs., tit. 2, § 11023.

- Indicates that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.
- States that confidentiality will be kept by the employer to the extent possible, but not indicate that the investigation will be completely confidential.
- Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures shall be taken.
- Makes clear that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.[108]

The policy must be disseminated to employees by: (1) Printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return; (2) Sending the policy via e-mail with an acknowledgment return form; (3) Posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies; (4) Discussing policies upon hire and/or during a new hire orientation session; and/or (5) Any other way that ensures employees receive and understand the policies.[109]

New Developments 2021

LEGISLATION

Significant Changes to California Family Rights Act

Effective January 1, 2021, not only does the CFRA now apply to employers having as few as five employees, but it will also extend leave rights to employees who care for an adult child, domestic partner, grandparent, grandchild, or sibling.[110] The former requirement that an employee must work at a location that has 50 employees within a 75-mile radius was eliminated.[111] Further, if parents work for the same employer, both parents, not just one, are eligible for leave for child bonding.[112] Finally, leave taken for pregnancy, childbirth, or related medical conditions is a separate right and does not count as CFRA leave.[113]

KEY ISSUES

- An employer in a sex discrimination case is subject to the burden-shifting analysis set forth in *McDonnell Douglas Corp. v Green*: The plaintiff first must establish a prima facie case of discrimination. The burden of persuasion then shifts to the employer to establish a legitimate, nondiscriminatory reason for its actions. Then the burden shifts back to the plaintiff to establish that the employer's stated reason actually was a pretext for discrimination.
- Unlawful sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal, physical, or visual conduct of a sexual nature perpetrated against a male or female employee if: (1) submission to the conduct is made a term or condition of employment; (2) submission to or rejection of the conduct is a basis for employment decisions affecting an individual; or (3) the conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment. Proof of the alleged harasser's sexual intent or desire is not a necessary to establish a hostile work environment.
- "Me too" evidence of sexual harassment is admissible to prove hostile work environment harassment.
- Employers face strict liability for sexual harassment in the absence of an affirmative defense. An employer may use the *Faragher/Ellerth* affirmative defense against sexual

[108] Cal. Code. Regs., tit. 2, § 11023(b).
[109] Cal. Code. Regs., tit. 2, § 11023(c).
[110] Gov. Code, § 12945.2.
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*

harassment claims, asserting that it exercised "reasonable care" to prevent and promptly correct the harassment; and that the employee unreasonably failed to use the employer's effective and openly disclosed harassment reporting procedures, or failed to take other measures to avoid harm.

- Employers with 5 or more employees are required to provide to their supervisory employees two hours, and non-supervisory employees one hour, bi-annually, of practical guidance regarding federal and state sexual harassment laws, including a component on gender identity, gender expression, and sexual orientation.
- In order to establish a prima facie case of retaliation against an employer under either federal or state law, an employee must demonstrate that: (1) the employee engaged in an activity protected under Title VII or the FEHA; (2) the employer subjected the employee to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action. However, non-employer individuals may not be held liable under the FEHA for retaliation.
- Title VII protects a third-party employee, such as a fiancée or relative, from workplace retaliation after that third-party's significant other engages in an activity protected by statute.
- Women working for a common employer seeking certification as a class must sufficiently meet the commonality requirement set forth in Federal Rules of Civil Procedure 23.

Age Discrimination

SUMMARY OF THE LAW

The federal Age Discrimination in Employment Act ("ADEA")[1] and the California Fair Employment and Housing Act ("FEHA")[2] both prohibit employment discrimination against individuals aged 40 years and older. Government Code section 11135 also prohibits age discrimination by any employer receiving state financial assistance. These statutes prohibit age discrimination in hiring, promotion, compensation, discipline, transfer, rehiring, discharge, and other work conditions. Employees also may bring tort claims for wrongful discharge in violation of the public policy against age discrimination.[3]

THE ADEA

Employers Covered

The ADEA applies to employers with 20 or more employees, and to the State and its political subdivisions.[4] Although the ADEA defines employer to include "any agent," this term refers to *respondeat superior* liability – meaning that the employer is liable for the acts of its agent(s). Individual supervisors are not personally liable under the ADEA.[5]

The U.S. government and government-owned corporations are exempt from the ADEA. Furthermore, although the ADEA purports to apply to "a State or a political subdivision of a State,"[6] the U.S. Supreme Court has ruled they may not be sued by state employees for monetary damages under the ADEA unless they have expressly waived their sovereign immunity.[7] States are still subject to EEOC enforcement actions under the ADEA

The ADEA prohibits discrimination by making it unlawful for employers to do any of the following based on an employee's age:

- to fail or refuse to hire, or to discharge, any individual or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment;
- to limit, segregate, or classify employees in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee; or
- to reduce the wage rate of any employee in order to comply with the ADEA.[8]

It is also unlawful to retaliate against an employee for opposing an ADEA violation, filing an ADEA charge, or otherwise participating in the enforcement of the ADEA.[9]

Proving an ADEA Claim

The proof required in an ADEA claim depends upon the type of claim asserted. Three types of age discrimination may be alleged:

1. Disparate Treatment

Disparate treatment occurs when an employer treats some employees less favorably than others because of their age. To prove disparate treatment, an employee

[1] 29 U.S.C. §§ 621 et seq.
[2] Gov. Code, §§ 12900 et seq.
[3] *Stevenson v. Superior Ct.* (1996) 47 Cal.App.4th 135, 50 Cal.Rptr.2d 206, review granted and op. superseded (1996) 53 Cal.Rptr.2d 301, revd. (1997) 16 Cal.4th 880, 66 Cal.Rptr.2d 888.
[4] 29 U.S.C. 630(b); *Mount Lemmon Fire Dist. v. Guido* (2018) 139 S.Ct. 22.
[5] *Miller v. Maxwell's Internat.* (9th Cir. 1993) 991 F.2d 583.
[6] 29 U.S.C. § 630(b).
[7] *Kimel v. Florida Bd. of Regents* (2000) 528 U.S. 62, 120 S.Ct. 631 (ruling that Congress cannot abrogate Eleventh Amendment immunity under the ADEA); but, see also, *Mount Lemmon Fire Dist.*(2018) *supra* (noting that in another case, *EEOC v. Wyoming* (1983) 460 U.S. 226, the U.S. Supreme Court ruled that applying the ADEA to state and local governments does not encroach on States' sovereignty or on the Tenth Amendment).
[8] 29 U.S.C. § 623(a).
[9] 29 U.S.C. § 623(d).

must prove that the employer acted with a discriminatory motive. The employee's age must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome.[10] Disparate treatment age discrimination may be proved by either direct or circumstantial evidence. A rebuttable presumption of discriminatory motive may be created by showing that the employee:

- was age 40 or older;
- suffered an adverse employment action, such as being repeatedly passed over for promotions,[11] or terminated;[12]
- was qualified for the job or was satisfactorily performing the job; and
- was replaced by or passed over for a promotion in favor of a substantially younger employee with equal or inferior qualifications (no replacement is necessary where the employee is terminated as part of a reduction in force).[13]

An age difference of less than ten years between the plaintiff and the person who replaced the plaintiff, or who was hired or promoted instead of the plaintiff, creates a rebuttable presumption that the age difference is insubstantial.[14]

The Ninth Circuit evaluated the pleading standard for an ADEA case in *Sheppard v. David Evans and Associates*.[15] The plaintiff in that case filed a 17-paragraph complaint that spanned a total of two-and-a-half pages. The Court observed that a plaintiff establishes a *prima facie* case of disparate treatment discrimination under the ADEA by alleging that: (1) she was at least 40 years old; (2) she was performing her job satisfactorily; (3) she was discharged; and (4) she was either replaced by a substantially younger employee with equal or inferior qualifications *or* discharged under circumstances otherwise giving rise to an inference of age discrimination.[16] Further, according to *Diaz v. Eagle Produce Ltd. Partnership*, an inference of discrimination can be established by showing that the employer had a continuing need for the employee's skills and services or by showing that others not in the employee's protected class were treated more favorably.[17] In order to establish the fourth element, the plaintiff in the *Sheppard* case only alleged that five younger people who performed jobs similar to hers kept their jobs. The Court found that this allegation gave rise to a plausible inference that the plaintiff's employer had a continuing need for her skills and services (because her job duties were still being performed), and that persons outside of the plaintiff's protective class were treated more favorably.

When an employee lacks direct evidence, the employee may prove age discrimination by circumstantial evidence using the same three step burden-shifting analysis applicable in Title VII cases: (1) the initial burden is on the employee to establish a *prima facie* case of discrimination; (2) the burden then shifts to the employer to show a legitimate, nondiscriminatory reason for its action; and (3) the burden shifts back to the employee to produce evidence showing that the employer's stated reason is a pretext and that its true motive was discriminatory.[18] However, this burden shifting does not apply in mixed-motive cases.[19]

An employer's stray remarks made during the scope of employment may create a strong inference that an adverse employment action was the result of intentional age discrimination. Such was the case in *Mangold v. California Public Utilities Commission*,[20] where a commission director told an older employee seeking a promotion, "[W]e want fresh young blood in this group."[21]

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[10] *Reeves v. Sanderson Plumbing Products* (2000) 530 U.S. 133, 120 S.Ct. 2097.
[11] *Herr v. Nestle, U.S.A.* (2003) 109 Cal.App.4th 779, 135 Cal.Rptr.2d 477.
[12] *Enlow v. Salem-Keizer Yellow Cab Co.* (9th Cir. 2004) 371 F.3d 645, amended by (2004) 389 F.3d 802, *cert. den.* (2005) 125 S.Ct. 1837.
[13] *Coleman v. Quaker Oats Co*. (9th Cir. 2000) 232 F.3d 1271.
[14] *France v. Johnson* (9th Cir. 2015) 795 F.3d 1170, 1174.
[15] (9th Cir. 2012) 694 F.3d 1045.
[16] *Diaz v. Eagle Produce Ltd. Partnership* (9th Cir. 2008) 521 F.3d 1201, 1207.
[17] *Id.* at 1207-1208.
[18] *Gross v. FBL Financial Services* (2009) 129 S.Ct. 2343, 2349 n. 2 (noting that the Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) utilized in Title VII cases is appropriate in the ADEA context).
[19] *Ibid.*
[20] (9th Cir. 1995) 67 F.3d 1470.
[21] *Id.* at 1474.

After the employee told the director that he had completed certain graduate courses, the director said, "You're still too old."[22] Another director commented to an older employee, "We're going into a bright new future in which we have an excellent staff of young professional people," and "Older employees, unfortunately, don't take advantage of all the opportunities that are offered to them."[23] In addition to these comments, a group of directors issued a memo stating the "overall effort should be to keep as many of our younger, talented staff employed within the constraints of civil service rules."[24] The Ninth Circuit ruled that while these comments standing alone may not have established a discrimination claim, when considered together they strongly inferred age discrimination, especially because senior decision makers made the statements.

Remarks made in an interview process may also support an inference of age-based discrimination. In *Shelley v. Geren*,[25] the Ninth Circuit found evidence that two individuals involved in the hiring process inquired about projected retirement dates during the hiring process, and, by implication, that they considered age and projected retirement dates relevant to the hiring decision was sufficient evidence to create a triable issue of fact as to whether the employer's reason for hiring a younger worker was for a non-discriminatory reason.

In contrast, isolated use of colloquialisms may be insufficient to establish a discriminatory motive. The Ninth Circuit ruled in *Pottenger v. Potlatch Corp.*[26] that when a company president referred to "an old business team," an "old business model," and "deadwood," the remarks were insufficient to cast doubt on the employer's legitimate explanation for terminating an older employee, and did not support an inference of age discrimination.

Rejecting an applicant who is "overqualified" may create an inference of discrimination unless the employer can demonstrate that it had objective, non-age-related, and legitimate business reasons to reject applicants with substantial experience.[27]

An employer who fires an employee over age 40 and replaces the employee with a younger employee may be in violation of the ADEA, even if the new employee is over age 40. In *O'Connor v. Consolidated Coin Caterers*,[28] the U.S. Supreme Court unanimously decided that "[t]he fact that one person in the protected class has lost out to another person in the protected class is ... irrelevant, so long as he has lost out because of his age."[29]

An employer may not use an employee's immigration status to meet its burden of demonstrating a legitimate, nondiscriminatory reason for its action. In *Santillan v. USA Waste of California, Inc.*,[30] the employer terminated a 32-year employee for performance reasons but then later offered to reinstate him if he met three conditions including passing an "e-Verify" test (which is an electronic verification system that is used to check the work authorization status of employees through federal records). The employee was unable to meet this condition to the employer's satisfaction, and the company asserted that as the reason for its refusal to reinstate the employee. The Ninth Circuit ruled against the employer, finding that the employer's action contravened California's public policy. California Labor Code section 1171.5 provides that "All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state." The Court ruled that this statute leaves no room for doubt about California's public policy with regards to the irrelevance of immigration status in enforcement of state labor and employment rights.

[22] *Mangold, supra*.
[23] *Ibid.*
[24] *Ibid.*
[25] (9th Cir. 2012) 666 F.3d 599.
[26] (9th Cir. 2003) 329 F.3d 740.
[27] *Taggert v. Time, Inc*. (2nd Cir. 1991) 924 F.2d 43; *E.E.O.C. v. Ins. Co. of North America* (9th Cir. 1995) 49 F.3d 1418.
[28] (1996) 56 F.3d 542, revd. (1996) 517 U.S. 308, 116 S.Ct. 1307.
[29] *Ibid.*
[30] (9th Cir. 2017) 853 F.3d 1035.

2. Disparate Impact

Disparate impact discrimination occurs when a facially-neutral employment policy adversely affects the members of a protected group. The disparate impact theory focuses on the consequences, not the purpose, of an employment practice. While the ADEA authorizes recovery in disparate impact claims, it is significantly narrowed by permitting employers to take action that is otherwise prohibited, if the employer can show that the differentiation is based on reasonable factors other than age (the "RFOA" provision).

For disparate impact claims, the ADEA analysis differs from Title VII. Under Title VII disparate impact claims, the employer's motive is irrelevant. By contrast, ADEA disparate impact plaintiffs must overcome the statute's "RFOA" provision which looks to whether differentiation is based on reasonable factors other than age.[31]

The U.S. Supreme Court has ruled that the RFOA provision narrows the scope of disparate impact liability under the ADEA, reasoning that the provision reflects the historic difference between the levels of discrimination against those protected by Title VII and those protected by the ADEA.[32]

In order to establish an RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and was administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known or should have been known to the employer.[33] The following is a non-exhaustive list of considerations relevant to establishing whether a practice was reasonable:[34]

- The extent to which the factor is related to the employer's stated business purpose;
- The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;
- The extent to which the employer limited supervisors' discretion to assess employees subjectively;
- The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
- The degree of harm to individuals within the protected age group, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

3. Age-based Harassment

Age-based harassment is the creation of a hostile work environment that subjects an employee to age-based comments or conduct that unreasonably interferes with his or her work performance.

Employers May Favor Older Employees Under the ADEA.

The ADEA protects older workers but does not prohibit employment decisions that discriminate against younger workers. In *General Dynamics v. Cline*,[35] the U.S. Supreme Court ruled that an employer did not violate the ADEA when it entered into a collective bargaining agreement that eliminated health benefits for all future retirees, with the exception of current employees who were at least 50 years old. Employees who were at least 40 and consequently protected under the ADEA, but who were under 50 and so without the promise of benefits, sued the employer for age discrimination. The U.S. Supreme Court ruled that the "...text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, [shows] that the statute does not mean to stop an employer from favoring an older employee over a younger one."[36]

Exclusive Remedy

In *Ahlmeyer v. Nevada System of Higher Education*,[37] the Ninth Circuit ruled that the ADEA is the exclusive remedy for claims of age discrimination in employment and that

[31] 29 C.F.R. § 1625.7.
[32] *Smith v. City of Jackson* (2005) 544 U.S. 228, 125 S.Ct. 1536.
[33] 29 C.F.R. § 1625.7(e)(1).
[34] Disparate Impact and RFOA under the ADEA, 77 Fed.Reg. 19080 (Mar. 30, 2012); 29 C.F.R. § 1625.
[35] (2004) 540 U.S. 581, 124 S.Ct. 1236.
[36] *Id.*, 124 S.Ct. at p. 1248.
[37] (9th Cir. 2009) 555 F.3d 1051.

separate causes of action under 42 U.S.C. section 1983 could not be brought.

Standards of Proof and Available Remedies for Federal Workers

In *Babb v. Wilkie*,[38] the U.S. Supreme Court clarified the causation standard for federal workers asserting ADEA claims. The Court ruled that employees of the federal government state a claim under the ADEA if age played "a factor" in the personnel decision at issue. However, under this standard of proof, a federal worker's remedies are limited to prospective injunctive relief. A federal worker may still recover monetary damages such as back pay, but in order to recover traditional compensatory damages, the federal employee must meet the "but for" standard of proof.

THE FEHA

Employers Covered

In 2002, age was added as a protected category under Government Code section 12940. The FEHA applies to employers with five or more employees.[39] Absent proof of harassment, individual managers and supervisors are not personally liable for employment discrimination or retaliation under the FEHA.[40]

Unlike the ADEA, the FEHA does not exempt government employers. Government employees have the right to sue their employers for age discrimination under the FEHA in state court. The FEHA provides an exemption only for religious organizations that are not organized for private profit.[41] Before filing a lawsuit based on a FEHA claim, however, an employee must exhaust available administrative remedies by filing a complaint with the Department of Fair Employment and Housing, which can resolve the claim, prosecute it before the Fair Employment and Housing Commission, or issue the complainant a "right-to-sue" letter.

Unlawful Practices

The FEHA makes it unlawful "for an employer, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." The FEHA also prohibits the use of salary as a basis for differentiating between employees when terminating employment if using salary as a criterion adversely impacts older employees as a group.[42]

In addition, the FEHA specifically prohibits age-based harassment.[43]

Similar to the ADEA and Title VII, the FEHA prohibits employers from retaliating against an employee for opposing a FEHA violation, or for filing a complaint, or testifying or assisting in any FEHA proceeding.[44]

Proving a FEHA Claim

Similar to proving an ADEA claim, FEHA claimants may rely on either the disparate treatment or disparate impact theory. The two theories of liability are distinct, and an employee who files a lawsuit must specify which concept the employee believes is implicated.[45] Establishing a *prima facie* case of discrimination under the FEHA requires the same proof as is required for an ADEA claim. The employee must show that:

- the employee was age 40 or older;
- the employee suffered an adverse employment action;
- the employee was qualified for the job or was satisfactorily performing the job; and
- the employee was replaced by a significantly younger person (except where a reduction in force is in effect).

[38] (2020) 140 S.Ct. 1168.
[39] Gov. Code, § 12926(d).
[40] *Reno v. Baird* (1998) 18 Cal.4th 640, 76 Cal.Rptr.2d 499; *Winarto v. Toshiba America Electronics Components* (9th Cir. 2001) 274 F.3d 1276; *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal. 4th 1158.
[41] Gov. Code, § 12926(d).
[42] Gov. Code, § 12941.
[43] Gov. Code, § 12940(j).
[44] Gov. Code, § 12940(h).
[45] *Rosenfeld v. Abraham Joshua Heschel Day School* (2014) 226 Cal.App.4th 886, 896.

An employee alleging age discrimination under the FEHA ultimately must prove that the employer's adverse employment action was based on the employee's age. Because most employees do not have direct evidence of an employer's discriminatory motive, California courts utilize the same three step burden-shifting analysis in FEHA cases that is used in ADEA and employment discrimination cases generally.[46] (See ADEA discussion above.)

In order to prove age discrimination, an employee may present evidence of comments and statements made by employees and decision-makers suggesting an age bias. As an example, a supervisor's statement to a co-worker that "[w]e shouldn't have lunch anymore or talk socially at work ... People are starting to notice I'm favoring the younger and pregnant ones" was sufficient to suggest that the supervisor had a bias against older workers.[47] Based upon Justice O'Connor's concurrence in *Price Waterhouse v. Hopkins*,[48] some courts have created a doctrine under which stray remarks are deemed irrelevant and insufficient, on their own, to support a claim of age discrimination. In *Reid v. Google*,[49] the California Supreme Court rejected such an expansive reading of the "stray remarks" doctrine, and affirmed that all relevant evidence should be considered in deciding a case of age discrimination under the FEHA. Stray remarks, like other evidence, should not be reviewed in isolation, but rather, considered with all the evidence in the record.[50] When a plaintiff alleges age discrimination based on circumstantial evidence, "context is key."[51]

In 2019, the California Legislature added a new section to the FEHA declaring its intent regarding the standards for proving discrimination and harassment, making clear that a single incident of harassing conduct may be sufficient to create a triable issue of fact regarding the existence of a hostile work environment.[52]

Recovering Costs as a Prevailing Defendant in a FEHA Claim

In *Williams v. Chino Valley Independent Fire District*,[53] the California Supreme Court took up the issue of whether a defendant prevailing in a FEHA action is entitled to its ordinary costs (filing fees and transcript costs, among others) as a matter of right pursuant to Code of Civil Procedure section 1032, or only at the discretion of the trial court pursuant to Government Code section 12965. Further, if the Court is to exercise discretion in deciding whether to award costs, whether the standard the trial court is to consider is the same as the rule applicable to attorney fee awards in certain federal civil rights actions.[54]

The Court, noting that the issues are ones of statutory interpretation, first considered the language of the statutes at issue. Government Code section 12965(b) states, in relevant part: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees." The Court found that this language states an exception to Code of Civil Procedure section 1032(b). Rather than being silent as to either party's recovery of costs, the statute expressly states that both parties are allowed costs at the trial court's discretion.

The Court next turned its attention to how trial courts should exercise their discretion when the prevailing party in the case is a defendant. The statute, by its terms, does not distinguish between awards to plaintiffs or defendants. But the Court found that the legislative history of the bill that preceded the FEHA and the underlying policy

[46] *Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 100 Cal.Rptr.2d 352.
[47] *Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736.
[48] (1989) 490 U.S. 228; 95 S.Ct. 2362, stating that stray remarks – "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decision process itself" – do not constitute direct evidence of discriminatory intent and do not suffice to shift the burden to the employer, but could be probative of discrimination. (Superseded on other grounds by statute.)
[49] (2010) 50 Cal.4th 512.
[50] *Id.* at 540.
[51] *Merrick v. Hilton Worldwide, Inc.* (9th Cir. 2017) 867 F.3d 1139 (finding insufficient evidence that employer's actual motive for layoff was discriminatory).
[52] Gov. Code, § 12923.
[53] (2015) 61 Cal.4th 97.
[54] *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412.

distinctions reflected in the history compel a more stringent standard for prevailing defendants than plaintiffs. The Court ultimately decided that, consistent with federal law,[55] a defendant who prevails in a Title VII claim may recover fees and costs only if the trial court determines that the plaintiff's action was frivolous, unreasonable, or without foundation.

In 2019, the FEHA was amended to similarly prohibit a prevailing defendant's ability to recover fees and costs "unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so."[56]

AGE DISCRIMINATION CLAIM WAIVERS

ADEA Waivers

A waiver of an employee's rights under the ADEA is unenforceable if it does not comply with the strict requirements for waivers described in the Older Workers Benefits Protection Act. Such was the case in *Oubre v. Entergy Operation, Inc.*,[57] where the employee's waiver of her age discrimination claims was ineffective because it did not: (1) give her enough time to consider her options; (2) give her seven days to change her mind; or (3) make specific reference to ADEA claims. To be effective, the following conditions must be met:

- The entire waiver agreement must be in writing.
- The waiver must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate. Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.
- The waiver must not be misleading or misinforming, or fail to inform participants and affected individuals.
- Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations.
- The waiver must specifically refer to the ADEA by name.
- The waiver must advise the individual in writing to consult with an attorney before executing the agreement.[58]

Employers should make every effort to ensure that ADEA waiver language is clear to the employee who will be signing the document. Although an ADEA waiver must advise the employee to consult with an attorney, the purpose of that consultation is not to clarify language that by law should already be clear.[59]

A terminated employee over age 40 may challenge the legality of an age discrimination waiver, without first having to surrender any severance pay that the employee received in exchange for signing the waiver.[60]

FEHA Waivers

The Older Workers Benefits Protection Act, which imposes detailed requirements for enforceable waivers of ADEA claims, does not apply to the FEHA. A waiver of an age discrimination claim under the FEHA is valid as long as it is "knowing and voluntary."[61]

BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION

The bona fide occupational qualification ("BFOQ") exception permits age-based disqualification in certain cases. For ADEA claims, this exception requires a two-part test. To justify an age-based disqualification, the employer must show that: (1) the requirement is reasonably necessary to its business' essence; and (2) assessing individual capabilities would not be practical.[62] This exception applies infrequently, but sometimes applies in cases concerning plane or motor vehicle operation. In those cases, the employer meets the test's second prong by establishing that some

[55] *Id.* at 421.
[56] Gov. Code, § 12965(b).
[57] (1998) 522 U.S. 422, 118 S.Ct. 838.
[58] 29 C.F.R. Part 1625.22.
[59] *Syverson v. IBM* (9th Cir. 2006) 461 F.3d 1147, amended by (2007) 472 F.3d 1072.
[60] 29 C.F.R. Part 1625; see also *Oubre, supra*.
[61] *Skrbina v. Fleming Cos., Inc*. (1996) 45 Cal.App.4th 1353, 1366-67, 53 Cal.Rptr.2d 481.
[62] *Western Air Lines v. Criswell* (1985) 472 U.S. 400, 105 S.Ct. 2743.

protected class members (i.e., individuals aged 40 and over) possess a trait precluding safe and efficient job performance, and the employer cannot ascertain that by means other than knowing the applicant's membership in that class.[63]

A similar exception occurred in *Weiland v. American Airlines, Inc.*[64] In that case, which presented a particularly unique set of circumstances, the plaintiff turned 60 years old on December 7, 2007. At that time, certain air carriers, including American Airlines, were required by 14 C.F.R. section 121.383(c) (the Federal Aviation Administration's "Age 60 Rule") to cease scheduling pilots from operating aircraft when the pilot turned 60. Less than a week later, on December 13, 2007, Congress enacted the Fair Treatment for Experienced Pilots Act ("FTEPA"), delaying the age at which pilots must cease flying from 60 to 65. The FTEPA is explicitly non-retroactive, unless the pilot meets one of two exceptions. The exception applicable in the *Weiland* case was persons "in the employment of that air carrier in such operations on such date of enactment as a required flight deck crew member."

Henry Weiland was a "check airman" prior to turning 60 on December 7, 2007. His duties included evaluating pilots in land-based simulators and in the air during cockpit line checks, and piloting aircraft, which duties meet the definition of a "required flight deck crew member." After his 60th birthday though, American Airlines ceased scheduling Weiland for active duty and advised him that he would be retired on January 1, 2008 pursuant to American Airlines' policy. Weiland then sued claiming that he was discriminated against because of his age.

The Ninth Circuit decided that Weiland could not maintain his action because the FTEPA did not cover him. American Airlines thus acted lawfully in ceasing to schedule Weiland for duty after December 7, 2007. The Court found that Weiland could not have been employed by American Airlines as a "required flight deck crew member" as of the enactment of the FTEPA on December 13, 2007 because, as of Weiland's 60th birthday on December 7, 2007, American Airlines was required to cease scheduling him from operating aircrafts pursuant to the FAA's Age 60 Rule. He actually was *prohibited* from acting as a required flight deck crew member after his 60th birthday. The Court was sympathetic to the fact that the rule was changed just days after Weiland's birthday, but that ultimately did not change the result of the case.

PENSION FUNDS MUST COMPLY WITH THE ADEA.

Pension plans must comply with the ADEA. In *Lee v. California Butchers' Pension Trust Fund*,[65] a pension fund contained in a collective bargaining agreement denied a retired employee credits for total years of service after the employee reached age 70½, despite the fact that the employee continued working after age 70½. The employee sued the pension plan, claiming that it discriminated against him on the basis of his age. Rejecting the pension plan's argument that the ADEA did not apply to trusts because the ADEA regulates only "an employer, an employment agency, a labor organization, or any combination thereof," the Ninth Circuit ruled that the function of the term "or any combination thereof" was intended to embrace trusts established or maintained by employers and unions together. Consequently, the pension plan violated the ADEA when it denied the employee his pension increase.

The ADEA permits employers to maintain employee benefit plans based on a bona fide seniority system that provides older employees with different retirement, pension, or insurance benefits. But these benefit plans must fall within the ADEA's prescribed guidelines. Most importantly, special benefit plans for older employees must cost the employer at least the same amount as benefit plans for younger employees, and the plans must not require or permit involuntary retirement because of age. Negotiated salary schedules, with ascending salaries based on years of

[63] *Usery v. Tamiami Trail Tours* (5th Cir. 1976) 531 F.2d 224.
[64] (9th Cir. 2015) 778 F.3d 1112.
[65] (9th Cir. 1998) 154 F.3d 1075.

experience, are bona fide seniority systems that the ADEA permits.[66]

ADEA section 9 grants to the EEOC the authority to provide exemptions from the ADEA's prohibitions and authorizes the EEOC to "establish such reasonable exemptions to and from any or all provisions of [the Act] as it may find necessary and proper in the public interest." The EEOC issued a proposed regulation that allows employers to reduce health benefits for retirees as soon as they become eligible for Medicare to respond to its finding that employer sponsored retiree health benefits were decreasing. Rather than maintaining retiree benefits at pre-Medicare eligibility levels for all retirees to avoid discrimination lawsuits, some employers chose to reduce all retiree health benefits to a lower level.

The AARP challenged the regulation.[67] The Third Circuit found that the regulation was not arbitrary and capricious as a change in agency policy because the change in agency policy was supported by a reasoned analysis for the change. The reasons for adopting the new exemption were to respond to the unintended negative effects of the agency's prior approach; specifically, that some employers chose to terminate retiree benefits rather than adhere to a benefits level that was too costly to maintain.

New Developments 2021

California Court of Appeal Upholds Employers' Reasons for Terminating Employees

In two recent cases, the California Court of Appeal ruled that the employers had legitimate reasons to terminate their respective employees, and that the employees did not present evidence sufficient to rebut the stated reasons for termination.

The first case, *Arnold v. Dignity Health*,[68] involved a medical assistant who was disciplined on a number of occasions in the years preceding her termination. Arnold received: a written verbal warning for failing to wipe a patient's name off of a urine cup; a written warning for disruptive, disrespectful, and aggressive conduct toward a coworker, and then refused to acknowledge receipt of the written warning; and a final written warning and three-day suspension for failing to follow Dignity Health's process for addressing scheduling errors or concerns. Through her union, Arnold grieved the last two reprimands and an agreement was reached that reduced the discipline. But then Arnold received another final written warning and three-day suspension for misconduct that occurred while the grievance was pending.

A few months later, Arnold's supervisor was replaced by Denise Boroughs-Fitch. Shortly thereafter, Boroughs-Fitch and a human resources employee named Tiffany Tidwell met with Arnold regarding another instance in which Arnold failed to wipe a patient's name off of a urine cup. Borough-Fitch and Tidwell determined Arnold was responsible for failing to wipe the patient's name off of the cup, and also faulted Arnold for improperly blaming a co-worker for the incident. Boroughs-Fitch and Tidwell additionally became aware during the meeting with Arnold that she kept in her desk a picture that was inappropriate to have in the workplace. Because Arnold had previously been issued a final written warning and had previously been disciplined for failing to protect patient privacy, Boroughs-Fitch and Tidwell decided termination was the appropriate next step.

Arnold sued claiming, among other things, age discrimination. Arnold's allegations focused on age-based comments made by one of Arnold's prior supervisors, Roxanne Slaugh, and Dignity Health's executive director, Shelley Noyes. According to Arnold, Noyes and Slaugh each made approximately three comments about Arnold's age. They both said words to the effect: "Gosh, I can't believe you are that old" and asked about Arnold's retirement plans.

The Court of Appeal rejected Arnold's age discrimination claims because Arnold failed to show that Slaugh or Noyes were involved in the decision to terminate Arnold's employment. The Court also said the

[66] *U.S.E.E.O.C. v. Newport Mesa Unified School Dist*. (C.D. Cal. 1995) 893 F.Supp. 927.
[67] *AARP v. EEOC* (3rd Cir. 2007) 489 F.3d 558.
[68] *Arnold v. Dignity Health* (2020) 53 Cal.App.5th 412.

comments made by Noyes were "benign" and "even complimentary" because they were made at about the time of Arnold's birthday, which is "a natural and appropriate occasion for discussing a person's age and future plans." The Court therefore ruled, even if Noyes were involved in the decision to terminate Arnold, that the evidence showed only a weak suspicion of discriminatory animus and does not amount to substantial evidence of discriminatory animus necessary to defeat a summary judgment motion.

The second case decided recently by the Court of Appeal is *Foroudi v. Aerospace Corporation*.[69] Foroudi claimed he was selected for a company-wide reduction in force because of his age. At the time of the layoff, Foroudi was a Senior Project Engineer/Technical Lead in Aerospace's Navigation division. Under the terms of the applicable collective bargaining agreement, each year, Aerospace's management assigned to employees like Foroudi a ranking based on the employees' performance, the strength and breadth of their skills, and the utility of their skills and performance to the company. The managers placed the employees into groups or "Bins," with Bin #1 containing the highest-ranked employees and Bin #5 containing the lowest. In 2010 and 2011, Foroudi was placed in Bin #5. His ranking reflected his managers' assessment of his deficiencies in interpersonal communication skills and limited background in navigation related to GPS, despite being a technical lead on a GPS division.

In late 2011, Aerospace was notified that its funding would be significantly impacted by projected U.S. Department of Defense budget cuts, and it began implementing a company-wide reduction in force ("RIF"). Aerospace's revenue from government contracts decreased by nearly $36 million in fiscal year 2012, and it laid off 306 of its 4,000 employees in connection with the RIF. Foroudi was placed in the RIF-eligible pool given his 2011 ranking in Bin #5, and was soon thereafter notified that he would be laid off as part of the RIF. Aerospace did not hire anyone to replace Foroudi.

Foroudi claimed there was evidence that he was discriminated against due to his age because his job duties were given to an employee named Van Nuth who was fourteen years younger than Foroudi. According to Foroudi, Nuth was less qualified to perform Foroudi's duties. The Court rejected the argument because Foroudi did not show Nuth was less qualified to perform *all* of the duties of the position (*i.e.,* Foroudi's former duties and the duties of Nuth's position). Foroudi also claimed statistical evidence showed the RIF had a "severe impact" on workers over 50 years of age. Although such statistical evidence, which is typically used in disparate impact cases, can be used to show disparate treatment, it must meet a more exacting standard when used to show disparate treatment. The evidence must demonstrate a significant disparity and must eliminate nondiscriminatory reasons for the apparent disparity. Foroudi's statistical evidence did not meet this standard because age-neutral factors were considered in connection with the RIF. Such age-neutral factors were the employees' experience and performance, and the anticipated future need for the employees' skills. Accordingly, the Court of Appeal upheld the trial court's grant of summary judgment to Aerospace.

KEY ISSUES

- The ADEA and the FEHA prohibit discrimination against individuals aged 40 years and older.
- The ADEA applies to employers with 20 or more employees, but it does not apply to the U.S. government, government-owned corporations and state employees may not sue their employers under its terms, unless the state waives sovereign immunity for claims under the ADEA..
- The ADEA does not prohibit employment decisions that discriminate against younger workers.
- The FEHA applies to employers, including government employers, with five or more employees. Absent proof of harassment, individual

[69] *Foroudi v. Aerospace Corp.* (2020) 57 Cal.App.5th 992.

managers and supervisors are not personally liable for employment discrimination or retaliation based upon age.
- A waiver of employees' rights under the ADEA is unenforceable if it does not give enough time for the employees to consider their options, give them seven days to change their mind, and specifically refer to ADEA claims.
- In rare cases, employers may have a bona fide occupational qualification that permits age-based disqualification if the requirement is reasonably necessary to the business' essence and assessing individual capabilities would not be practical.
- Pension plans must comply with the ADEA.

Religious Discrimination

SUMMARY OF THE LAW

Title VII[1] and the Fair Employment and Housing Act ("FEHA")[2] prohibit religious discrimination in nearly every employment aspect, including hiring,[3] firing,[4] compensation, and other employment terms, conditions, and privileges. Title VII and the FEHA also require employers to accommodate an individual's religious beliefs and observances.[5]

"Religion" under Title VII means a sincere and meaningful belief in God, or a belief that occupies a place parallel to the place that God fills in the lives of believers in God. Title VII does not protect political and social views, such as that of the Ku Klux Klan. But atheism is considered a Title VII religious belief.[6]

The FEHA uses the term "religious creed" instead of "religion." "Religious creed" includes any traditionally recognized religion as well as beliefs, observances, or practices that an individual sincerely holds and that occupy in his or her life a place of importance parallel to that of traditionally recognized religions.[7]

Government Code section 11135 prohibits any employer who receives funds or financial assistance from the State of California from engaging in unlawful religious discrimination.

Religious discrimination and accommodation cases depend largely on the particular facts and are decided by determining whether:

- the employee holds a sincere belief;
- the employer has taken reasonable steps to accommodate that belief; and
- the accommodation constitutes an undue hardship on the conduct of the employer's business.

Despite the broad ban on religious discrimination, court decisions also protect management prerogatives. Any accommodation that requires an employer to bear more than a minimal cost or to violate a valid seniority system or collective bargaining agreement automatically constitutes an undue hardship.

ESTABLISHING A RELIGIOUS DISCRIMINATION CASE

An employee establishes a religious discrimination case by proving that:

- the employee holds a sincere religious belief;
- the employee informed the employer of the belief and its conflict with the employee's employment responsibilities; and
- the employer took an adverse employment action against the employee because of the employee's observance of the belief.[8]

If the employer can show legitimate, nondiscriminatory reasons for taking action against an employee, a religious discrimination case will not succeed. For example, in *Lumpkin v. Brown*,[9] the mayor removed a member, Rev. Eugene Lumpkin, from the San Francisco Human Rights Commission after Lumpkin appeared on a television news show and expressed his religious beliefs, making remarks that arguably advocated violence against homosexuals. The U.S. Court of Appeals for

[1] 42 U.S.C. §§ 2000(e) et seq.
[2] Gov. Code, §§ 12900 et seq.
[3] Cal. Code Regs., tit. 2, § 11062.
[4] *Id.*
[5] Cal. Code Regs., tit. 2, § 11062(d).
[6] *Young v. Southwestern Savings and Loan Assn*. (5th Cir. 1975) 509 F.2d 140, 144.
[7] Cal. Code Regs., tit. 2, § 11060.
[8] *Proctor v. Consolidated Freightways Corp. of Del.* (9th Cir. 1986) 795 F.2d 1472.
[9] (9th Cir. 1997) 109 F.3d 1498.

the Ninth Circuit upheld a federal district court's decision that the mayor dismissed Lumpkin not for his religious beliefs, but because he undermined the Commission's policies. This precluded Lumpkin's claim in state court that the removal constituted religious discrimination under the FEHA.

A religious discrimination claim will not succeed when the employee resigns on his or her own initiative. In *Lawson v. State of Washington,*[10] a newly hired police cadet, Gregory Lawson, met with a state trooper after a few days in basic training at the police academy. Lawson told the trooper that he had decided to resign because, as a Jehovah's Witness, he could not salute the flag or take an oath of allegiance to the government as the police academy rules and regulations required. The trooper accepted Lawson's resignation.

After Lawson resigned, he contacted the academy's commander of the human resources division to request information regarding the state patrol's official policy on religious accommodation. The commander told Lawson that if he wished to be a Washington State Trooper, he would have to salute the flag and swear his allegiance by taking the oath. Lawson subsequently filed federal and state claims against the Washington State Patrol for constructive discharge.

The court ruled that Lawson could not establish a *prima facie* case of religious discrimination because he could not prove that his employer had taken an adverse employment action against him. It was Lawson who first mentioned resignation to the trooper. And no one at the academy ever mentioned disciplining Lawson for refusing to comply with academy rules and regulations. The academy did not try to talk Lawson out of leaving, and the academy's manual stated that rule violations could result in discipline or termination, but those facts did not suffice to establish constructive discharge. The court ruled that the academy had no continuing duty to accommodate Lawson after he voluntarily resigned.

An employer may not make an applicant's religious practice a factor in employment decisions, even if the employee did not make a specific request for religious accommodation. Samantha Elauf is a practicing Muslim who believes that her religion requires her to wear a headscarf. She applied for a position in an Abercrombie store and was given a rating that qualified her to be hired. Abercrombie decided not to hire her because it believed her wearing of a headscarf would conflict with Abercrombie's policy that prohibited the wearing of "caps." After the Equal Employment Opportunity Comm. ("EEOC") sued Abercrombie on Elauf's behalf, the federal trial court granted the EEOC summary judgment on the issue of liability, then held a trial and awarded $20,000 in damages.[11] The Tenth Circuit reversed and awarded summary judgment to Abercrombie.[12] It concluded that Abercrombie did not have actual knowledge of her need for a religious accommodation and thus did not violate Title VII.[13]

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the U.S. Supreme Court reversed and remanded for reconsideration in light of its opinion.[14] In reaching this conclusion, the Court distinguished Title VII from other non-discrimination laws (like the Americans with Disabilities Act) because it does not impose a "knowledge requirement." Instead, Title VII is concerned with motives. In other words, an employer who makes an employment decision with the motive of avoiding an accommodation may violate Title VII, even if it has no more than an unsubstantiated suspicion that accommodation would be needed. Thus, the rule for disparate treatment claims based on a failure to accommodate a religious practice is that an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions.[15]

[10] (9th Cir. 2002) 296 F.3d 799.

[11] *EEOC v. Abercrombie & Fitch Stores, Inc.* (N.D. Okla. 2011) 798 F.Supp.2d 1272.
[12] *EEOC v. Abercrombie & Fitch Stores, Inc.* (10th Cir. 2013) 731 F.3d 1106.
[13] *Id.* at 1131.
[14] *EEOC v. Abercrombie & Fitch Stores, Inc.* (2015) 135 S. Ct. 2028, 2034.
[15] *Id.* at 2032-33.

ACCOMMODATING RELIGIOUS BELIEFS IN THE WORKPLACE

Once an employer becomes aware of the need for accommodation, either from the employee or by some other means, it must show that it made a good faith effort to accommodate an employee's religious beliefs. If the employer fails to accommodate the employee, the employer must demonstrate that it could not accommodate the employee without undue hardship.[16]

Situations that require employers to reasonably accommodate religious practices include:

- scheduled times for interviews, examinations, work, and other employment functions;
- dress standards or personal appearance requirements; and
- union membership requirement.

According to the EEOC, accommodation requests typically stem from a conflict between an employee's work schedule and a religious practice. EEOC guidelines provide the following alternatives for accommodation: voluntary substitutes or "swaps"; flexible scheduling; and lateral transfer or change of job assignments.[17] In 2016, the FEHA was amended to note that an accommodation is not reasonable if it requires segregation of an employee from customers or the public, unless expressly requested by the employee.[18]

The case of *Bhatia v. Chevron U.S.A., Inc.*[19] shows how an employer's personal appearance rules may conflict with an employee's religious beliefs. In *Bhatia*, an employee whose duties included potential exposure to toxic gas was suspended without pay from his job because he refused to comply with his employer's safety rule prohibiting beards. The employer prohibited beards because they prevented an airtight face seal in the respirators that employees wore. Bhatia established a *prima facie* religious discrimination claim by proving that he had a bona fide belief that shaving his beard would contradict the Sikh religion, that he informed his employer of his belief, and his employer responded by removing him from his machinist job. The court concluded, however, that the employer reasonably accommodated Bhatia because it suspended him without pay, while it discharged other employees who refused to shave their beards for nonreligious reasons. The employer also actively sought an alternative job for Bhatia, offered him four different positions, and promised to restore him to his machinist job if a respirator was developed that he could use safely.

An employer's duty to accommodate an employee's religion under the FEHA is not limited to practices that the tenets of that religion mandate or prohibit.[20] "There is nothing in the language of the [FEHA] that obligates an employer to accommodate only those religious practices that are required by the tenets of the employee's religion ...."[21]

Claims of religious discrimination and failure to accommodate also may arise when an employee objects to a reasonable employer rule required by regulation or statute based upon religious or moral grounds. In *Stormans, Inc. v. Selecky*, a pharmacy and individual pharmacists brought an action challenging the constitutionality of rules promulgated by the Washington State Board of Pharmacy that required pharmacies to deliver lawfully prescribed medications and prohibited discrimination against patients.[22] The pharmacists asserted that their personal religious beliefs did not permit them to dispense Plan B (a postcoital hormonal emergency contraceptive which contains the same hormones as ordinary birth control pills — estrogen and progestin — in much stronger dosages).[23] In some instances, the pharmacies employing these individuals had accommodated them by ensuring that another pharmacist who was not opposed to dispensing Plan B was scheduled to work at the same time as the objecting pharmacists, but at least one employer had indicated that the accommodation was not something that

[16] Cal. Code Regs., tit. 2, § 11060.
[17] 29 C.F.R. § 1605.2(d)(1).
[18] Cal. Code Regs., tit. 2, § 11062(a).
[19] (9th Cir. 1984) 734 F.2d 1382.
[20] *California Fair Employment and Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004.
[21] *Id.* at p. 1013.
[22] (9th Cir. 2009) 586 F.3d 1109.
[23] *Id.* at pp. 1114 and 1117.

could be offered indefinitely.[24] The *Stormans* case did not directly address discrimination or accommodation claims by the pharmacists against their employers, but such a case could arise in the future.

DEMONSTRATING UNDUE HARDSHIP

If an employer fails to accommodate an employee's religious beliefs, the employer may avoid liability only by proving that accommodation would cause the employer's business undue hardship.[25] To prove undue hardship, an employer must prove that the accommodation imposes on coworkers or disrupts the work routine. *Potential* hardships, though, do not meet this standard. One court has ruled that an employer could allow an employee to use peyote for religious purposes a few times a year without incurring undue hardship. The safety issues involved were speculative, particularly where the employee took a day off after each peyote ceremony, eliminating the risk of any job safety hazards.[26]

The case of *Opuku-Boateng v. California*[27] provides another example of an accommodation that did not create an undue hardship. In *Opuku-Boateng*, the Ninth Circuit determined that voluntary shift swapping to allow an employee to observe a Saturday Sabbath is not preferential treatment that discriminates against other employees. The employee in this case proposed voluntary shift trades. The employer presented no probative evidence that a voluntary shift trade system was infeasible. The employer also failed to establish that scheduling adjustments would have discriminated against other employees, or that those employees would have been unwilling to voluntarily trade shifts. The court did not find that accommodating the employee's religion would have affected the department's ability to accommodate other employees' scheduling needs, or that it would have led to a significant morale problem. The court reasoned that at the very least, the employer should have either temporarily scheduled the employee not to work on the Sabbath, or sought to obtain voluntary shift trades for him on a short- or long-term basis. At the end of the employee's probationary term, the employer would have been able to determine what hardships, if any, the department would have suffered.

Accommodating an employee's religious practices may create an undue hardship if the employee's conduct offends the majority of the employee's coworkers. In *Wilson v. U.S. WEST Communications*,[28] a Roman Catholic office worker took a religious vow to wear a color photograph pin of an aborted fetus. The pin carried the slogans "Stop Abortion" and "They Are Forgetting Someone." Coworkers asked the employee to remove the pin, but she refused, saying she wore the pin as a matter of principle and as a promise to God. When coworkers threatened to walk off the job and office productivity fell by 40%, the employer gave the employee three options. She could cover the pin, wear it only when inside her cubicle, or wear a pin without a photograph. The employee refused and was fired after three unexcused absences. The Appeals Court, finding that the photograph's graphic nature offended many people, including coworkers who shared the employee's religion-based opposition to abortion, ruled that allowing the employee to wear the pin created an undue hardship for her employer.

An employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against coworkers or deprive coworkers of contractual or other statutory rights. In *Peterson v. Hewlett-Packard*,[29] Hewlett-Packard began a diversity campaign that included displaying posters of five employees with the captions, "Black," "Blonde," "Old," "Gay," or "Hispanic," along with the slogan, "Diversity Is Our Strength."[30] Richard Peterson, who described himself as a devout Christian and who believed that "homosexual activities violate the commandments" responded to the posters by displaying in his work cubicle Biblical

[24] *Ibid.*
[25] *E.E.O.C. v. Townley Engineering & Mfg. Co*. (9th Cir. 1988) 859 F.2d 610, 616.
[26] *Toledo v. Nobel-Sysco, Inc.* (10th Cir. 1989) 892 F.2d 1481, 1492.
[27] (9th Cir. 1996) 95 F.3d 1461, as amended (Nov. 19, 1996).
[28] (8th Cir. 1995) 58 F.3d 1337.
[29] (9th Cir. 2004) 358 F.3d 599.
[30] *Id.* at p. 601.

scriptures condemning homosexuality. Peterson agreed to remove the postings only if his employer removed the diversity posters. Hewlett-Packard subsequently terminated Peterson for insubordination. The Ninth Circuit found that Peterson was discharged not because of his religious beliefs but because he violated the company's harassment policy and because he was insubordinate when he repeatedly disregarded the company's instructions to remove the postings from his cubicle. The Ninth Circuit also rejected Peterson's failure to accommodate claim because the only accommodation that Peterson was willing to accept would have compelled Hewlett-Packard to permit an employee to post messages intended to demean and harass his coworkers. And removing the diversity posters would have forced the company to exclude sexual orientation from its workplace diversity program. The court ruled that either choice would have created an undue hardship for Hewlett-Packard.

In *EEOC (Khan) v. Abercrombie & Fitch Stores, Inc.*,[31] the federal trial court noted that the Ninth Circuit requires "heightened proof" of undue hardship when an employer refuses to grant an accommodation related to grooming and appearance standards. Abercrombie & Fitch's grooming policy specifically prohibits the wearing of headwear.[32] Khan was hired to work as a stocker in an Abercrombie retail store.[33] Khan is Muslim and believes that Islam dictates that she wear a head scarf, also known as a hijab.[34] Khan was asked to remove the hijab while she was on the clock and, when she refused based upon her religious beliefs, she was terminated for non-compliance with the company's appearance policy.[35] The district court found Abercrombie had failed to meet its "heightened proof" burden to show undue hardship.[36] The company offered unsupported opinions of several employees that an accommodation for Khan would have threatened the core business model and the company's overall success, but had not shown any decline in sales, customer complaints or confusion, or brand damage that could be linked to Khan's wearing of a hijab during her four months working at the store.[37] Nor could the company explain how her hijab violated the policy regardless of how little time she spent on the sales floor.[38] As a result, the court granted EEOC/Khan's motion for summary judgment as to Abercrombie's undue hardship affirmative defense.[39]

SENIORITY SYSTEMS AND THE DUTY TO ACCOMMODATE

A neutral seniority system does not relieve employers from reasonably accommodating employees' religious beliefs. In *Balint v. Carson City*,[40] the Ninth Circuit ruled that the existence of a seniority system does not relieve an employer of its duty to attempt reasonable accommodation of its employees' religious practices, if an accommodation can be accomplished without modifying the seniority system and with no more than a *de minimis* cost.

Lisette Balint, a Worldwide Church of God member, applied for a job with the Carson City Sheriff's Department. Balint did not state anywhere in her application that she had religious objections to working certain shifts. The department hired her and asked her to report to work on a Friday. Balint refused, stating that Friday was her Sabbath. Balint asked the department to change her schedule to accommodate her religious beliefs. The department refused to change Balint's work schedule, arguing that any accommodation, in light of its neutral, shift-bidding seniority system, would be an undue hardship as a matter law. The city argued that § 2000e-2(h) of Title VII, which permits the operation of a bona fide seniority system "notwithstanding any other provision of this subchapter," was a complete defense to Balint's religious accommodation claim. But the Ninth Circuit ruled that the word "notwithstanding" in section 2000(e) means that bona fide seniority systems are not per se illegal and that no other provision in Title

[31] 2013 WL 4726137 (N.D. Cal. 2013).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 9-11.
[37] *Id.* at 10.
[38] *Id.*
[39] *Id.* at 11.
[40] (9th Cir. 1999) 180 F.3d 1047.

VII can transform an otherwise valid seniority system into an illegal employment practice. The court ruled that the statute cannot be interpreted to mean that employers with seniority systems are exempt from the other requirements of Title VII. The Ninth Circuit relied on the U.S. Supreme Court's decision in *Trans World Airlines v. Hardison*[41] that the provisions for religious accommodation and for seniority system protection coexist in Title VII. "[T]he Supreme Court did not regard the requirements of religious accommodation and seniority systems as mutually exclusive."[42]

The Ninth Circuit ruled that "the duty to reasonably accommodate does not include violating the terms of a seniority system.... Employers need not transgress upon their seniority systems to make accommodations, but they are required to attempt accommodations that are consistent with their seniority systems and that impose no more than a de minimis cost."[43]

PROSELYTIZING BY SUPERVISORS AND COWORKERS

The Ninth Circuit rejected the religious discrimination claim of a supervisor who challenged her termination for proselytizing a subordinate employee in *Bodett v. Coxcom, Inc.*[44]

Coxcom terminated Evelyn Bodett, a supervisor, for "a gross violation" of Coxcom's general harassment policy, which stated that, "No employee shall harass another employee on the basis of race, color, religion, sexual orientation, national origin, age, disability or veteran status; an employee who harasses another employee may be subject to corrective action, up to and including termination ... ."[45] The court ruled that Bodett failed to support her discrimination allegations with evidence that animus toward her religious beliefs, rather than Coxcom's application of its anti-harassment policy, was the true motivation for her termination.

The delicate balance between public employees' religious rights and the constitutional prohibition on governmental establishment of religion was the subject of a decision by the Ninth Circuit in *Berry v. Department of Social Services*.[46] Daniel M. Berry, a Tehama County social service worker who regularly met with clients in his cubicle, alleged that the department violated his rights under the First Amendment of the U.S. Constitution and Title VII by prohibiting him from discussing religion with his clients in his cubicle, displaying religious items in his cubicle, and using a conference room for prayer meetings.

The court ruled that the Department's interests in avoiding violations of the Establishment Clause of the First Amendment and in maintaining the conference room as a nonpublic forum outweighed the resulting limitations on Berry's free exercise of his religion at work.[47] It also ruled that the department was not required under Title VII to further accommodate Berry's views.[48]

FAITH-BASED HUMANITARIAN ORGANIZATIONS MAY BE EXEMPT

In *Spencer v. World Vision, Inc.* the Ninth Circuit ruled that a faith-based humanitarian organization is exempt under 42 U.S.C. section 2000e-1(a) from Title VII's general prohibition against religious discrimination.[49] The court determined that the exemption is not limited to churches; because if it were, there might be an Establishment Clause issue presented by a statute that favored religions that organized as houses of worship. In determining whether an organization is exempt, the Court applied the standard of whether the "general picture" of the organization is "primarily religious."[50] The majority agreed that an employer is eligible for the section 2000e-1 exemption, at least, if it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of

[41] (1977) 432 U.S. 63, 97 S. Ct. 2264.
[42] *Balint, supra.*
[43] *Ibid.*
[44] (9th Cir. 2004) 366 F.3d 736.
[45] *Id.* at pp. 741-742.
[46] (9th Cir. 2006) 447 F.3d 642.
[47] *Id.* at p. 646.
[48] *Ibid.*
[49] (9th Cir. 2011) 633 F.3d 723.
[50] *Id.* at pp. 729.

goods or services for money beyond nominal amounts."[51]

REQUIREMENT THAT CLERGY BE OF A PARTICULAR FAITH MAY BE A BONA FIDE OCCUPATIONAL QUALIFICATION

In *McCollum v. California Department of Corrections and Rehabilitation*, the Ninth Circuit ruled on issues relating to the California Department of Corrections and Rehabilitation's ("CDCR") paid chaplaincy program that employs Protestant, Catholic, Jewish, Muslim, and Native American clergy, in an effort to accommodate inmates' religious needs.[52] Those chaplains serve all inmates, but other religions also are served by volunteer chaplains. Patrick McCollum, a volunteer chaplain,[53] challenged the paid chaplaincy program claiming that he should be eligible for employment in the paid chaplaincy program. McCollum attempted to transform his employment discrimination action into an effort to vindicate the inmates' First Amendment rights. The Ninth Circuit ruled that the district court properly dismissed and granted summary judgment in favor of the defendants on McCollum's claims because, for the most part, he lacked standing. The court ultimately ruled that (1) McCollum did not have third-party standing or taxpayer standing to bring suit on behalf of the inmates, (2) his Equal Protection claim failed because he did not show any facts to suggest that he was treated differently than other similarly-situated clergy, and (3) his FEHA claim lacked merit because the prohibition on hiring him based on his religion was based on a bona fide occupational qualification ("BFOQ") – namely being a member of the clergy in the faith denominated in the job description.

In determining that being a member of the faith denominated in the job description is a BFOQ, the Court stated that the paid chaplaincy program was adopted to accommodate the religious beliefs of the inmates, so the qualification that the clergy member hired be of the faith denominated is not pretextual, but necessary to the operation of the chaplaincy enterprise. McCollum argued that the BFOQ exception could not justify an unconstitutional job classification, but the Court stated that whether the classifications are a constitutional means of accommodating inmates' free exercise rights is a question of their rights, not a question of McCollum's rights.

REVERSE RELIGIOUS DISCRIMINATION

In *Noyes v. Kelly Services*,[54] Lynn Noyes claimed that a supervisory employee at her employer, Kelly Services, was a member of a small religious group, the Fellowship of Friends, who repeatedly favored and promoted other Fellowship members. Noyes claimed that she was denied a promotion because she did not adhere to the Fellowship's beliefs. In fact, a Fellowship believer received the promotion that Noyes desired. The issue was whether Noyes should be allowed to present her claims to a jury.

Noyes established a prima facie case of employment discrimination, that is, that she belonged to a protected class (non-believers), that she was performing according to her employer's legitimate expectations, that she suffered an adverse employment action, and that other employees with qualifications similar to her own were treated more favorably. The burden then shifted to Kelly Services to show a legitimate, nondiscriminatory motive for not promoting Noyes. Kelly Services claimed that the employee promoted instead of Noyes had all of the qualities management desired, and that a non-Fellowship member recommended the employee for promotion. The burden then shifted back to Noyes to show that Kelly Services' proffered reason for the promotion was pretextual. A plaintiff can do this in one of two ways: (1) indirectly, by showing that the employer's stated reason is unworthy of credence because it is internally inconsistent or otherwise not believable; or (2) directly, by showing that unlawful

[51] *Id.* at pp. 724.
[52] (9th Cir. 2011) 647 F.3d 870.
[53] Under the 2016 amendments to the FEHA, the prohibition on religious discrimination and the duty to provide reasonable accommodations for an individual's religion applies to apprentices, unpaid interns, and volunteers. Cal. Code. Regs., tit. 2, § 11059(d).
[54] (9th Cir. 2007) 488 F.3d 1163.

discrimination more likely motivated the employer.

Noyes countered Kelly Services' purported non-discriminatory reasons for the promotion with specific, substantial evidence that undermined Kelly Services' credibility. Noyes alleged that although a non-Fellowship member initially suggested the other employee for the promotion, a Fellowship member was the ultimate decision-maker and he consistently exercised his supervisory authority in favor of Fellowship members. Noyes also pointed to evidence showing that she was more qualified for the job than the employee who was promoted. Specifically, Noyes had an MBA, and the promoted employee did not. In light of this evidence, the Ninth Circuit ruled that Noyes' claims should be presented to a jury. She did not have to show further that the "real reason" for the promotion decision was unlawful discrimination. That question was one for a jury, and not for the court at this preliminary stage.

LOYALTY OATHS

Article XX, § 3 of the California Constitution requires public employees to take and sign an oath. The government "has the right to assure itself of the substantial loyalty of those whose services are required to give effect to its purposes."[55] In *Smith v. County Engineer of San Diego County*, the Court of Appeal found that that the County properly refused to accept a qualified civil service candidate's proposed addendum to the required loyalty oath to the effect that the candidate pledged his loyalty and allegiance to the county but declared his supreme allegiance to the "Lord Jesus Christ" and expressed his dissent from the failure of the Constitution to recognize Christ.[56] The Court of Appeal reasoned that such a modification to the oath made it equivocal and went on to state, "[w]e believe it to be neither reasonable, nor good policy, in the case of public employment, to put upon civil government the burden of measuring religious beliefs against the interests and requirement of that institution. It may not raise the question itself; it should not have to evaluate the question when raised by the individual." The County "properly refused to accept the oath encumbered and compromised by appellant's injection of an unauthorized potential qualification of its meaning and clarity." Thus, a prospective employee's attempt to modify the public employee loyalty oath through the injection of language regarding his or her religious beliefs will likely be unsuccessful.

INTERTWINING OF RACE AND RELIGIOUS IDENTITY

The EEOC's Title VII Compliance Manual concerning race and color discrimination addresses, among other things, "related protected bases" of discrimination.[57] This refers to the overlap that can occur between two or more bases of Title VII protection, such as the intertwining of racial and religious identity. This and other changes to the Compliance Manual illustrate the EEOC's evolving approach to claims of discrimination that do not fit neatly within a single box like "race" or "religion." In addition, section 12 of the Compliance Manual specifically addresses religious discrimination, and provides helpful guidance for employers.[58] Although the Compliance Manual is not law, it is given particular weight by courts, and provides helpful guidance on issues relating to religious discrimination in the workplace.

There have been several cases involving related protected bases of discrimination, particularly in the aftermath of the terrorist attacks on 9/11. For example, in *Zayed v. Apple Computers*,[59] Nancy Zayed, a Muslim woman of Egyptian origin, alleged that Apple discriminated against her based on her race, national origin, religion, and gender by subjecting her to a hostile work environment in the aftermath of 9/11. The court allowed Zayed's race claim to proceed to trial. It then applied its analysis to Zayed's national origin and religion claims, finding that the three were separate but identical.

[55] (1968) 266 Cal.App.2d 645, 650.
[56] *Id.* at pp. 656-657.
[57] EEOC Compliance Manual, § 15 ("Race and Color Discrimination"), April 19, 2006.
[58] *Id.*, § 12 ("Religious Discrimination"), July 22, 2008.
[59] (N.D. Cal. 2006) 2006 WL 889571; see also *EEOC v. Go Daddy Software* (9th Cir. 2009) 581 F.3d 951 (addressing retaliation and discrimination claims brought by a Muslim of Moroccan national origin).

THE MINISTERIAL EXCEPTION

In *Our Lady of Guadalupe School v. Morrissey-Berru*,[60] the U.S. Supreme Court heard two consolidated appeals and ruled that religious schools have the authority to hire and fire educators under the "ministerial exception."

Following her termination for not complying with catechism teaching requirements, Ms. Morrissey-Berru sued the school for age discrimination under the ADEA. In the consolidated case, Ms. Biel alleged that her school discriminated against her because she requested a leave of absence to obtain breast cancer treatment. The trial courts dismissed each teacher's case based upon the "ministerial exception" which provides that the First Amendment bars employment discrimination claims brought by certain employees against religious entities, but the Ninth Circuit reversed.

On appeal, the U.S. Supreme Court reversed the Ninth Circuit noting that in a prior case, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[61] it had ruled that in employing leaders, a religious organization need not adhere to federal employment discrimination laws, creating the "ministerial exception." The Court ruled that the Ninth Circuit erred in requiring that all four *Hosanna-Tabor* conditions—the employee's formal title, the substance reflected in the title, the employee's own use of the title, and the important religious functions performed by the employee for the organization—must be met to evoke the ministerial exception.

The Court ruled that these four factors were specific to the *Hosanna-Tabor* case and should not be rigidly applied. Instead, application of the ministerial exception should be based primarily on the religious function that the position serves within the organization.

The Court also noted that "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[62]

RELIGIOUS EXEMPTIONS TO THE AFFORDABLE CARE ACT OF 2010

In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*[63] the U.S. Supreme Court ruled that the Department of Health and Human Services validly created — religious exemptions from the requirement of the Affordable Care Act of 2010 ("ACA") that employer-provided health insurance must include contraceptive coverage.

Pennsylvania challenged these exemptions, asserting that the rules were procedurally and substantively invalid under the Administrative Procedures Act ("APA"). The trial court agreed and entered an injunction against the exemptions, and the Third Circuit affirmed.

The U.S. Supreme Court, however, reversed and ruled that the ACA "is completely silent as to what" preventive-care "guidelines must contain," and gives "broad discretion" to create religious exemptions and to consider the "broad protection for religious liberty" provided by the Religious Freedom Restoration Act of 1993 ("RFRA"). The Court ruled that the guidelines "contained all of the elements of a notice of proposed rulemaking" as the APA requires. Finally, the U.S. Supreme Court rejected the Third Circuit's ruling that the exemption was invalid because the government "lacked the requisite 'flexible and open-minded attitude,'" noting there is no "open-mindedness test" under the APA.

INTERPLAY BETWEEN LGBTQ RIGHTS UNDER TITLE VII AND RELIGIOUS FREEDOM

In *Bostock v. Clayton County*,[64] the U.S. Supreme Court ruled that even if Congress may not have had discrimination based on sexual orientation in mind when it enacted Title VII, Title VII's ban on discrimination still protects gay, lesbian, and transgender employees. The decision noted that Title VII itself included protections for religious employers and that the RFRA and the First

[60] (2020) 140 S.Ct. 2049.
[61] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012) 565 U.S. 171.
[62] *Our Lady of Guadalupe School*, 140 S.Ct. at 2069.
[63] (2020) 140 S.Ct. 2367.
[64] (2020) 140 S.Ct. 1731.

Amendment allow religious groups latitude in employment decisions.

The Court's ruling was a consolidation of three appeals. One of those cases was *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, which was brought by a transgender woman, Ms. Stephens, who was fired from a Michigan funeral home after she announced that she would start working in women's clothing. Ms. Stephens filed an EEOC complaint, and the EEOC filed a lawsuit against the funeral home. The trial court ruled for the funeral home on two bases: that neither transgender persons nor gender identity are protected classes in Title VII, and that the owner of the funeral home was a devout Christian and the RFRA gave him the ability to fire Ms. Stephens. The Sixth Circuit reversed and ruled that discrimination by "sex" does include transgender persons, and that the funeral home failed to show how Title VII interfered with religious freedom under the RFRA.

The U.S. Supreme Court affirmed. In its decision, the Supreme Court noted that how these doctrines protecting religious liberty (the First Amendment and RFRA) interact with Title VII are questions for future cases. The Court explained that the funeral home unsuccessfully pursued a RFRA defense in proceedings below, but had declined to seek review of that adverse decision, and that no other religious liberty claim was therefore at issue. As a result, the Court noted that none of the employers were arguing that compliance with Title VII infringed with religious liberties or RFRA.

CHARGE-FILING REQUIREMENTS FOR RELIGIOUS DISCRIMINATION CLAIMS UNDER TITLE VII

In *Fort Bend County v. Davis*,[65] the U.S. Supreme Court ruled that the charge-filing requirement in Title VII is not a prerequisite for federal court jurisdiction where Ms. Davis had failed to check "religion" in her formal charge, but rather, was a mandatory processing rule whose violation must be raised by defendant in a timely manner to avoid forfeiting the defense. Fort Bend terminated Ms. Davis after she declined to report for work on a Sunday and attended church instead. Attempting to supplement her allegations in her EEOC charge, Ms. Davis handwrote "religion" on the intake questionnaire. A right to sue letter was issued, and Ms. Davis filed suit. The trial court granted summary judgment, but the Fifth Circuit reversed. Following remand, Fort Bend sought dismissal for lack of jurisdiction, which the federal trial court granted. The Fifth Circuit reversed, however, and found the failure to mark the claim form was not jurisdictional.

The U.S. Supreme Court agreed and ruled that Title VII's charge-filing requirement is not a non-waivable jurisdictional rule, but rather, a mandatory claim-processing rule that can be waived if the party invoking it waits too long. Truly "jurisdictional" requirements can be asserted at any point in the litigation, and are those that establish the classes of cases a court may or may not entertain (subject matter jurisdiction) and persons over whom the court may or may not exercise adjudicatory authority (personal jurisdiction). In contrast, claim-processing rules are not jurisdictional, but may be "mandatory" if a party properly raises them. However, an objection based on a mandatory claim-processing rule can be forfeited if the party who raises it waited too long, as was the case here because Fort Bend sought dismissal for lack of jurisdiction only following remand, or three years after the lawsuit was filed.

THE RELIGIOUS ORGANIZATION EXEMPTION APPLIES TO THE SALVATION ARMY

In *Garcia v. Salvation Army*,[66] the Ninth Circuit ruled that the religious organization exemption applies to the Salvation Army because its purpose and character are primarily religious. The Ninth Circuit found that the fact that the Salvation Army makes a percentage of its total income from the exchange of goods or services does not preclude the application of the religious organization exemption because it is a nonprofit organization that gives away many of its services for free, or charges a nominal fee. The Ninth Circuit also rejected Ms.

[65] (2019) 139 S.Ct. 1843.

[66] (9th Cir. 2019) 918 F.3d 997.

Garcia's argument that the exemption did not apply to her claims but applied only to hiring and firing decisions. The Ninth Circuit, however, found that the exemption is not jurisdictional and can be forfeited because it limits entitlement to relief in a narrow class of cases, and does not limit the authority of federal courts to adjudicate claims under Title VII. However, the Court also noted that, in the absence of a showing of prejudice, the exemption may be raised as an affirmative defense for the first time at summary judgment. Ms. Garcia's only asserted prejudice was that she could not take discovery on defendant's religious focus and mission. The Ninth Circuit rejected this argument because Garcia was intimately familiar with the Salvation Army.

EMPLOYER-MANDATED VACCINATIONS AND EMPLOYEES' RELIGIOUS BELIEFS

Though not arising from the Ninth Circuit, the case of *Horvath v. City of Leander*[67] is instructive. The Fifth Circuit there ruled that where an employee has refused an employer-mandated vaccination due to religious beliefs, but the employer had instead offered a position transfer, the employer had reasonably accommodated the employee, despite the fact that the position had less desirable duties and hours and resulted in a loss in income for the employee. Additionally, the Fifth Circuit ruled that the employer's decision to terminate the employee was not retaliatory, and the accommodation proposal did not violate the employee's right to freely exercise his religion, but instead offered him a way to freely exercise it.

Plaintiff Horvath, an ordained minister and firefighter for the City of Leander, objected to vaccinations mandated by the City as a tenet of his religion. The City granted flu vaccination exemptions to Mr. Horvath, but his request for exemptions to the TDAP vaccine, which immunizes from tetanus, diphtheria, and pertussis or whooping cough, was denied, and resulted in his termination.

The Fifth Circuit found that the City had provided Mr. Horvath with a reasonable accommodation for his religious beliefs. Specifically, offering to reassign Mr. Horvath to the positon of code enforcement officer, which offered the same pay and benefits and did not require a vaccine, was a reasonable accommodation. The Court was unpersuaded that the position was unreasonable because the schedule would prevent him from continuing secondary employment, which would reduce his total income by half.

The Fifth Circuit also found that while Mr. Horvath may have preferred the hours and duties of firefighting, "Title VII does not restrict an employer to those means of accommodation that are preferred by employees," nor does the loss of outside income. Similarly, the Fifth Circuit ruled that the City had a legitimate, non-retaliatory reason for terminating Mr. Horvath's employment, his defiance of a direct order — failure to select an accommodation in lieu of the TDAP vaccine.

NEW DEVELOPMENTS 2021

In *Kennedy v. Bremerton School District*,[68] the Ninth Circuit affirmed the federal district court's grant of summary judgment to the defendant school district on a public high school football coach's claims under Title VII for failure-to-rehire, disparate treatment, failure to accommodate, and retaliation arising from the school district's directive to the coach to stop praying at the 50-yard line after games and decision to place the coach on administrative leave when he failed to cooperate.[69]

With respect to the coach's failure to rehire claim, the Court held that the coach failed to show that he was adequately performing his job. Instead, the record reflected that the coach had refused to follow the district's policy and conducted numerous media appearances that led to spectators rushing the field after a football game, disregarding his and the district's responsibilities to ensure students' safety.

[67] (5th Cir. 2020) 946 F.3d 787, 800.

[68] (9th Cir. 2021) 991 F.3d 1004.

[69] The Court also affirmed the trial court's grant of summary judgment to the defendant school district as to the coach's free speech and free exercise claims under 42 U.S.C. § 1983.

Regarding the coach's disparate treatment claim, the Court held that the coach's conduct was clearly dissimilar to the personal activities of other coaches because the coach's conduct violated the Establishment Clause and the personal activities of other coaches did not.

The Court further held that the coach had presented a prima facie case of a failure-to-accommodate claim, but the district adequately showed that it initiated good faith efforts to reasonably accommodate the coach's religious practices or that it could not reasonably accommodate the coach without undue hardship. The record showed that district had repeatedly offered to work with the coach to find an accommodation that would insulate the District from an Establishment Clause violation, but the coach did not respond or indicated that the only acceptable outcome in his view would be resuming his prior practice of praying at the 50-yard line immediately following games, in full view of students and spectators. Because allowing the coach to do so would constitute an Establishment Clause violation, the district could not reasonably accommodate the coach's practice without undue hardship.

Similarly, the Court held that the coach's retaliation claim failed because the coach had refused to collaborate with the district in designing a reasonable accommodation for his religious practice and made clear that he would continue to pray on the 50-yard line immediately following games, a practice that violated the Establishment Clause. The Court held that this conduct was a legitimate nondiscriminatory reason for the adverse employment actions that the district took.

In *Small v. Memphis Light, Gas & Water*,[70] the U.S. Supreme Court denied a petition for writ of certiorari. However, in a dissenting opinion, Justice Gorsuch, with whom Justice Alito joined, argued that the *de minimis* cost test set forth in *Hardison*, which ruled that an employer does not need to provide a religious accommodation that involves more than a *de minimis* cost, "dramatically revised—really, undid—Title VII's undue hardship test." He reasoned that the *de minimis* test does not appear in the statute, was announced by the Court in a single sentence with little or no supporting analysis, could not be reconciled with the plain words of Title VII, and effectively nullified the statute's promise. He further noted that the definition of "undue hardship" called for a far more demanding standard in the context of other civil rights laws. Justice Gorsuch called for the Court to correct its mistake, stating, "There is no barrier to our review and no one else to blame. The only mistake here is of the Court's own making—and it is past time for the Court to correct it."

In *Equal Employment Opportunity Commission v. Walmart Stores East, L.P.*,[71] the EEOC asserted a claim on behalf of a job applicant for failure to accommodate religious practice under Title VII, alleging that the employer rescinded its offer of a full-time assistant manager position after the applicant revealed that, as a Seventh-day Adventist, he could not work between sundown Friday and sundown Saturday. Using the de minimis cost standard set forth in *Hardison*, the Seventh Circuit affirmed the trial court's grant of summary judgment to the employer. The Court rejected the EEOC's argument that Walmart could have offered the applicant several accommodations that would have enabled him to be an assistant manager. For instance, the EEOC's proposal that the applicant be allowed to trade shifts with other assistant managers failed because it would thrust on other workers the need to accommodate the applicant's religious beliefs. In addition, other possibilities proposed by the EEOC would have required other assistant managers to take on additional weekend shifts; made it difficult for the employer to maintain its rotation system (which was designed to ensure that all of the assistant managers would learn how to handle all of the departments); and/or required the employer to bear more than a slight burden when vacations, illnesses, and vacancies reduced the number of other assistant managers available. The Seventh Circuit noted that three Justices of the U.S. Supreme Court believe that *Hardison*'s definition of undue hardship as a "slight burden," *i.e.,* the de minimis cost test,

[70] (2021) 141 S. Ct. 1227.

[71] 992 F.3d 656 (7th Cir. 2021).

should be changed,[72] but that the Seventh Circuit's task is to apply *Hardison* unless the Justices themselves discard it.

On January 15, 2021, the EEOC approved revisions to its Compliance Manual section on Religious Discrimination, which was last updated in 2008. The recent revisions account for recent legal developments since 2008, including several U.S. Supreme Court decisions, and include important updates to the discussion of protections for employees from religious discrimination in the context of reasonable accommodations and harassment and expands the discussion of defenses that may be available to religious employers. Some of the highlights to the recent update include:

- "Religion" is broadly defined under Title VII and includes "unique beliefs held by a few or even one individual," and protections extend even to employees who do not possess any religious beliefs.
- The religious organization exemption allows qualifying religious organizations to assert as a defense to claims for Title VII discrimination or retaliation that the challenged employment actions were made on the basis of religion. The updates to the Compliance Manual clarify that no single factor is dispositive to the issue of whether a religious organization qualifies for the exemption, including an entity's for-profit status.
- The Compliance Manual reflects recent U.S. Supreme Court decisions regarding the "ministerial exception."
- Although the courts are split on this issue, the EEOC's position is that the denial of reasonable religious accommodation absent undue hardship is actionable even if the employee has not separately suffered an independent adverse employment action (such as discipline, demotion, or discharge) as a consequence of being denied accommodation.
- Examples of reasonable accommodation include flexible scheduling, voluntary swapping of shifts or assignments, lateral transfers or changes in job assignment, and modifying work practices, policies, or procedures.
- The undue hardship defense to providing religious accommodation has been defined by the U.S. Supreme Court as requiring a showing that the proposed accommodation in a particular case poses "more than a de minimis" cost or burden. This is a lower standard for an employer to meet than undue hardship under the ADA. The Compliance Manual notes that "courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work."
- An employer does not need to accommodate expression of a religious belief in the workplace where such an accommodation could potentially constitute harassment of coworkers, because that would pose an undue hardship for the employer.

Although the Compliance Manual does not have force and effect of law, it provides guidance and clarity to the public regarding existing requirements under the law or agency policies.

KEY ISSUES

- Title VII and the "FEHA" prohibit religious discrimination in nearly every employment aspect, including hiring, firing, compensation, and other employment terms, conditions, and privileges.
- Government Code section 11135 prohibits any employer who receives funds or financial assistance from the State of California from engaging in unlawful religious discrimination.
- An employee establishes a religious discrimination case by proving that (1) the employee holds a sincere religious belief, (2) the employee informed the employer of the belief and its conflict with the employee's employment responsibilities, and

[72] *Id.* (citing *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (Alito, J., concurring, joined by Thomas & Gorsuch, J.).

(3) the employer took an adverse employment action against the employee because of the employee's observance of the belief.

- If the employer can show legitimate, nondiscriminatory reasons for taking action against an employee, a religious discrimination case should not succeed.
- Once an employer becomes aware of the need for a religious accommodation, it must show that it made a good faith effort to accommodate an employee's religious beliefs or that it could not accommodate the employee without undue hardship.
- An employer can make membership of the clergy of a religion a job qualification if it is necessary to carrying out the duties of the job – in other words, if it is a bona fide occupational qualification.
- An employer may not make an employment decision that is motivated by a desire to avoid a potential need for religious accommodation.
- The employee need not notify the employer that s/he requires an accommodation for an employer to have liability under Title VII, if the decision was actually motivated by the desire to avoid the accommodation.

Leaves of Absence

SUMMARY OF THE LAW

The federal Family and Medical Leave Act ("FMLA")[1] generally entitles qualified employees up to twelve weeks of unpaid leave per year for a child's birth or adoption, to care for a spouse or an immediate family member with a "serious health condition," or when a "serious health condition" renders employees unable to work.[2] The California Family Rights Act ("CFRA")[3] is nearly identical to the FMLA.[4] Where the two laws differ, employers must follow the provision most generous for the employee. For example, covered California employers must adhere to the CFRA's more generous requirement to maintain and pay for "group health plan" coverage during any period of FMLA-CFRA qualifying leave for an eligible employee.[5]

Both the FMLA and the CFRA apply to all California public employers who must master and integrate the detailed and voluminous regulations implementing these statutes.[6] It is unlawful for an employer to interfere with, restrain, or deny an employee's exercise of FMLA rights, and an employer may not discharge an employee because the employee has opposed practices made unlawful under the FMLA.[7] Similarly, retaliating or discriminating against an employee because the employee exercised CFRA leave rights is unlawful.[8] Employers should consult the applicable regulations, as well as their collective bargaining agreements and other personnel policies, to resolve the factual, case-by-case workplace issues that arise about family and medical leave.

This chapter discusses the significant provisions relating to family and medical leaves and integrates the new regulations that went into effect last year.

EMPLOYEE ELIGIBILITY

An employee is eligible for FMLA/CFRA leave if the employee:

- has been employed by the same employer for at least twelve months, which do not need to be consecutive;[9] and
- has been employed for at least 1,250 hours during the twelve months immediately before the leave begins;[10] and
- is employed by a private employer who employs at least five people or a public employer of any size.[11]

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[1] 29 U.S.C. §§ 2601 et seq.
[2] Enacted in 1993, the FMLA became effective for all covered employers by February 1994. The Department of Labor's implementing regulations can be found at 29 C.F.R. §§ 825 et seq.
[3] Gov. Code, §§ 12945.1 et seq., and § 19702.3, which applies to the State of California.
[4] 1993 amendments to the 1991 CFRA made it almost identical to the FMLA. Subsequently, the Fair Employment and Housing Commission revised the regulations implementing the CFRA in light of the FMLA and its implementing regulations. The revised CFRA regulations incorporate by reference the FMLA regulations "to the extent they are not inconsistent." Cal. Code Regs., tit. 2, § 11097.
[5] Gov. Code, § 12945.2(f).
[6] 29 U.S.C. § 2611(4); Gov. Code, § 12945.2(c)(2). In *Nevada Dept. of Human Resources v. Hibbs* (2003) 123 S.Ct. 1972, a decision that surprised many legal commentators, the U.S. Supreme Court resolved a difference of opinion between seven federal circuit courts of appeal and the maverick Ninth Circuit by siding with the Ninth Circuit and concluding that states do not enjoy Eleventh Amendment immunity from federal court lawsuits by state employees for FMLA violations, related to the care of a spouse, son, daughter, or parent with a serious health condition, based on evidence of family-leave policies that discriminated on the basis of sex.
[7] 29 U.S.C. § 2615(a)(1)-(2).
[8] Gov. Code, § 12945.2(l)(1); Cal. Code Regs., tit. 2, §§ 11021 and 11094.
[9] 29 C.F.R. § 825.110(a)(1).
[10] 29 C.F.R. § 825.110(a)(2).
[11] Gov. Code, § 12945.2(a).

It should be noted that airline flight deck or cabin crew employees have different hourly eligibility requirements.[12]

Calculating "Twelve Months of Service"

The regulations provide that the employee's twelve months of service need not be consecutive and can include an employee's service with an employer within the past seven years.[13] Additionally, even service beyond seven years is included in the twelve month of service calculation if the break in service is occasioned by the fulfillment of his or her National Guard or Reserve military service obligation, or if a written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service.[14]

Attaining FMLA Rights During a Non-FMLA Leave

In calculating twelve months of service, the regulations provide that any week an employee is on the payroll is counted as a week of employment for the purpose of determining eligibility for FMLA, whether the employee is on paid or unpaid leave of absence, so long as other benefits or compensation are provided (e.g. workers' compensation, group health plan benefits, etc.).[15] As such, an employee with less than twelve months of service may start a leave without the protection of FMLA, and acquire FMLA protection during the leave.[16] In such a case, the employer should designate that portion of the leave where the employee has met the one year requirement as FMLA leave.[17]

Calculating "1,250 Hours of Service"

The FMLA's 1,250 hours-of-service eligibility requirement is based on the number of hours an employee has worked according to Fair Labor Standards Act requirements.[18] For example, an employer must include overtime hours in counting the hours an employee has worked.[19] The regulations clarify that an employee must reach 1,250 hours of service in the past twelve months at the time the requested FMLA is to start, not when the employee submits the request.[20] Further, in calculating the 1,250 hours of service, only hours where an employee actually performs services for the employer are included. As such, hours such as holiday pay, sick leave, or other compensatory time where no services were actually provided are not included in the 1,250 hours calculation. One court has concluded that an employee's four weeks of accrued "customary medical leave" counted toward the FMLA's twelve months of employment eligibility requirement.[21]

Employees Returning from Military Reserve or National Guard Service

Employees returning from protected service are to receive the same FMLA rights and benefits that they would have received had they remained in continuous employment.[22]

LEAVE PERIOD CALCULATION

Calculation Method

According to the regulations implementing the FMLA, an employer is permitted to choose any one of the following methods for determining the 12-month period in which the 12 weeks of leave entitlement occurs, provided that the alternative chosen is applied consistently and uniformly to all employees:[23]

The calendar year;

1. Any fixed 12-month period, such as a fiscal year or one required by state law;
2. The 12-month period beginning when an employee first takes FMLA leave; or
3. A "rolling" 12-month period measured backward from the date that the employee uses FMLA leave.

Notification of Calculation Method

The employer is required to inform employees of the method the employer uses to determine the employee's FMLA leave

[12] Gov. Code, § 12945.2(u).
[13] 29 C.F.R. §§ 825.110(b).
[14] *Ibid.*
[15] 29 C.F.R. § 825.110(b)(3).
[16] 29 C.F.R. § 825.110(d).
[17] *Ibid.*
[18] 29 C.F.R. § 825.110(c)(1).
[19] 29 C.F.R. § 785.11.
[20] 29 C.F.R. § 825.110(d).
[21] *Rollins v. Wilson County Gov.* (M.D.Tenn. 1997) 967 F.Supp. 990, affd. (6th Cir. 1998) 154 F.3d 626.
[22] 29 C.F.R. § 825.110(c)(2).
[23] 29 C.F.R. § 825.200(a, d).

entitlement when the employer informs employees of their FMLA rights. The FMLA regulations provide that when an employer fails to select a method, each employee taking FMLA leave is free to select the option most beneficial to him or her.[24] The employer may subsequently select a method of calculation, but only after giving 60 days' notice to all employees. In addition, when an employer has chosen a method for calculating FMLA leave entitlement, but then decides to change to another alternative, the employer is required to give at least 60 days' notice of the change to all of employees.[25]

Counting Holidays

If a holiday falls within a week taken as FMLA leave, the week is counted as a week of FMLA leave.[26] However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.[27] However, if the employers' business activity was temporarily ceased and employees generally are not expected to report to work for one or more weeks (e.g., school closing for winter holiday or for summer vacation, or employer's plant closing for repairs), the days that the employer's activities have ceased do not count against the employee's FMLA leave entitlement.[28]

QUALIFYING REASONS FOR TAKING LEAVE

An eligible employee is entitled to twelve workweeks of unpaid family and medical leave per twelve-month period for any of these reasons:[29]

- To bond with a new child within 12 months of the birth of the employee's son or daughter or the placement of a child with the employee for adoption or foster care;[30] or
- To care for the employee's spouse, son, daughter, or parent, or under the CFRA only, registered domestic partner,[31] parent-in-law, grandparent, or sibling[32] with a "serious health condition",[33] or
- Because of the employee's own "serious health condition" that renders the employee unable to perform the employee's job functions.[34]

The definition of the term "son" or "daughter" under the FMLA includes a person standing *"in loco parentis"* to a child.[35] *"In loco partentis"* has been interpreted by the U.S. Department of Labor ("DOL") to include an adult with no legal or biological relationship to a child, when that adult provides either day-to-day care, responsibilities, or financial support.[36]

Under the FMLA, the concept of "caring for" a spouse, child, or parent with a "serious health condition" specifically includes providing psychological comfort and care as well as physical care.[37]

An important exception to the rights guaranteed by the FMLA in California is the treatment of disabilities due to pregnancy and pregnancy-related conditions. Such disabilities are covered by FMLA (and get charged to employees' FMLA entitlement).[38] However, in California, disability due to pregnancy and pregnancy-related conditions are not covered by the CFRA, but instead are covered by California's Pregnancy Disability Leave ("PDL") law[39] (see more detailed discussion of PDL law, *infra*).

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[24] 29 C.F.R. § 825.200(e).
[25] 29 C.F.R. § 825.200(d).
[26] 29 C.F.R. § 825.110(b)(3).
[27] *Ibid.*
[28] 29 C.F.R. § 825.200(h).
[29] 29 U.S.C. § 2612; 29 C.F.R. § 825.112.
[30] Gov. Code, § 12945.2(b)(4)(C); 29 C.F.R. § 825.120.
[31] Fam. Code, § 297.5.
[32] Gov. Code, § 12945.2(b).
[33] See, e.g., *Marchisheck v. San Mateo County* (9th Cir. 2000) 199 F.3d 1068, *cert. den.* (2000) 530 U.S. 1214, 120 S.Ct. 2217 (taking a child to a foreign country and leaving him with relatives did not amount to "caring for" the child, which under the FMLA requires some level of physical and psychological care where the child is unable to take care of basic needs without help because of a serious health condition); *Tellis v. Alaska Airlines* (9th Cir. 2005) 414 F.3d 1045 (as a matter of law, providing care to a family member under the FMLA requires some actual care); *Lewis v. Postmaster General* (9th Cir. 2006) 171 Fed.Appx. 198, but superseded by SB 1383.
[34] 29 U.S.C. § 2612; 29 C.F.R. § 825.112; Gov. Code, § 12945.2(b)(4)(C).
[35] 29 U.S.C. § 2611(12).
[36] United States Dept. of Labor Administrator's Interpretation No. 2010-3.
[37] See 29 C.F.R. § 825.124; *Scamihorn v. Albertson's, Inc*. (9th Cir. 2002) 282 F.3d 1078.
[38] 29 C.F.R. §§ 825.120(a)(3), 825.701(a).
[39] Cal. Code Regs., tit. 2, § 11046, subd. (b).

"SERIOUS HEALTH CONDITION" DEFINED

Under the FMLA regulations, a "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves either "inpatient care" or "continuing treatment" by a health care provider.[40] Inpatient care requires an overnight stay in a hospital, hospice, or residential medical care facility and includes any period of incapacity and related treatment or any subsequent treatment in connection with such inpatient care (i.e., inability to work, attend school or perform other regular daily activities due to the "serious health condition," treatment therefore, or recovery therefrom).[41]

- A "serious health condition" involving continuing treatment by a health care provider includes any one or more of the following:[42]
- A period of incapacity of more than three consecutive days, plus any subsequent treatment or period of incapacity relating to the same condition. The period of incapacity also must involve either two or more in-person health care provider treatments, or at least one health care provider treatment that results in a regimen of continuing treatment under supervision.
- Any period of incapacity due to pregnancy, including morning sickness, or for prenatal care.
- Any period of incapacity or treatment due to a "chronic serious health condition." A condition is a "chronic serious health condition" if it requires periodic visits for health care provider treatment, continues over an extended period of time, and may cause episodic periods of incapacity. Asthma, diabetes, and epilepsy are examples of "chronic serious health conditions."
- A period of permanent or long-term incapacity, related to a condition for which treatment may not be effective, such as Alzheimer's, a severe stroke, or a disease's terminal stages.
- Any period of absence to receive and recover from multiple treatments, including restorative surgery after an accident or other injury; or in treatment of a condition that would likely result in incapacity for more than three days if not treated. Examples include chemotherapy and radiation treatments for cancer, physical therapy for severe arthritis, and dialysis for kidney disease.

"Continuing treatment by a health care provider" does not require that the employee consult the same individual on two or more occasions; it means that the same health condition required care from a health care provider on two or more occasions. So, for example, an employer cannot argue that an employee receiving care from an HMO did not have a "serious health condition" merely because the employee was not treated by the same physician.[43]

FMLA regulations list examples of conditions that qualify as a "serious health condition" and those conditions that do not, absent complications. For example, conditions such as the common cold, flu, earaches, upset stomach, minor ulcers, headaches other than migraine, and routine dental problems do not qualify.[44] Although a regimen of continuing treatment includes a course of prescription medication, it does not include taking over-the-counter medications, bed rest, exercise, or similar activities that can be initiated without a visit to a health care provider.[45]

The increasing number of cases interpreting and applying the FMLA continues to demonstrate the importance of the specific facts presented by each individual employee's request for leave and the importance of each part of the FMLA's multi-part definition of a "serious health condition." Applying the FMLA definitions of a "serious health condition," courts have concluded that food poisoning requiring neither inpatient care nor continued medical treatment does not qualify as a "serious health condition," while high blood pressure that substantially limits a major life activity

[40] 29 C.F.R. § 825.113.
[41] 29 C.F.R. §§ 825.114(a)(1), 825.113.
[42] 29 C.F.R. § 825.115.
[43] *Sims v. Alameda-Contra Costa Transit Dist.* (N.D.Cal. 1998) 2 F.Supp.2d 1253.
[44] 29 C.F.R. § 825.113(d).
[45] 29 C.F.R. § 825.113(c).

is an FMLA-qualifying condition.[46] Migraine headaches that require continued medical treatment and render the suffering employee unable to perform the functions of the employee's job are probably a "serious health condition" under the FMLA.[47] One court has concluded that, under the FMLA, no "serious health condition" exists after a person dies, and that the FMLA was not designed to give employees time off to handle a deceased relative's affairs.[48] A brief episode of flu-like symptoms does not meet the FMLA requirements of a "serious health condition."[49] A potentially "serious health condition" that does not meet the specific FMLA definition does not qualify for FMLA leave. For FMLA purposes, the leave must be taken for what the condition was during the relevant time period, and not for what it might become.

EMPLOYER NOTICE REQUIREMENTS

FMLA and CFRA regulations require that employers provide employees with detailed, written notices of FMLA and CFRA entitlements and obligations, even if the employer has no eligible employees.[50] Every covered employer must post and keep posted in conspicuous places on its premises a general notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints.[51] In addition to posting notices describing the FMLA and CFRA,[52] employers must include FMLA and CFRA information in any employee handbook or written leave policy.[53] If no written guidance exists, all of the posted information must be distributed to the employee upon hire, either in hard copy or electronically.[54] Employers also must provide certain written information individually to employees who request FMLA and CFRA leave. The Department of Labor and the California Department of Fair Employment and Housing provide optional forms that meet these requirements.[55] Furthermore, when a significant portion of the workforce is not literate in English, an employer must provide translation of the general notice.[56] Employers may post the general notice electronically.[57]

Eligibility Notice

The Eligibility Notice must state whether the employee is eligible for FMLA leave, and if not, provide at least one reason why the employee is not eligible.[58] When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must provide the Eligibility Notice within *five business days*, absent extenuating circumstances.[59] This provides the employer with some additional time to evaluate the situation and calculate whether the employee is eligible to take FMLA leave without compromising the employee's FMLA rights.

Rights and Responsibilities Notice

Employers also must provide written notice detailing the specific expectations and obligations of the employee and explain any consequences of failing to meet these obligations.[60] Such notice must include: any requirement to provide medical certification, the right to substitute paid leave, whether and how to pay premiums for continuing benefits, the employee's rights to maintenance of benefits during the leave, the employee's status as a "key employee," and potential consequences to job restoration rights upon expiration of FMLA leave, and employee's potential liability for payment of health insurance premiums paid by the employer during FMLA leave.[61] The employer also may provide optional information, such as whether the employer will require periodic reports of employee's status and the employee's intent to return to work. Finally,

[46] *Oswalt v. Sara Lee Corp.* (5th Cir. 1996) 74 F.3d 91.
[47] *Hendry v. GTE North, Inc.* (N.D.Ind. 1995) 896 F.Supp. 816, 827; 29 C.F.R. § 825.113(c).
[48] *Brown v. J.C. Penney Corp.* (S.D.Fla. 1996) 924 F.Supp. 1158.
[49] *Procopio v. Castrol Industrial North America, Inc.* (E.D.Pa. 1996) count dismissed at 1996 WL 684244; motion denied at (E.D.Pa. 1997) 1997 WL 255677.
[50] 29 C.F.R. § 825.300(a)(2).
[51] 29 C.F.R. § 825.300(a).
[52] 29 C.F.R. § 825.300; Cal. Code Regs., tit. 2, § 11096(a).
[53] 29 C.F.R. § 825.300(a)(3); Cal. Code Regs., tit. 2, § 11096(a).
[54] 29 C.F.R. § 825.300(a)(3).
[55] 29 C.F.R. § 825.300(a)(4); Cal. Code Regs., tit. 2, § 11096(a).
[56] 29 C.F.R. § 825.300(a)(4).
[57] 29 C.F.R. § 825.300(a)(3).
[58] 29 C.F.R. § 825.300(b)(2).
[59] 29 C.F.R. § 825.300(b).
[60] 29 C.F.R. § 825.300(c).
[61] *Ibid.*

the employer must notify the employee of any changes within *five business days* of the first notice of the need for FMLA leave subsequent to any change.[62]

Designation Notice

An employer must notify the employee when leave is designated as FMLA leave within *five business days* of making the determination whether the leave has or has not been designated as FMLA, absent extenuating circumstances.[63] The employer also must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement.[64] The final rule also permits the employer to notify the employee of the hours counted against the FMLA leave entitlement verbally or in writing.[65] A written notice may be in any form, including a notation on the employee's paystub.[66] If the notice is verbal, it must be confirmed in writing no later than the following payday (unless the next payday is in less than one week, in which case notice must be no later than the subsequent payday).[67] Notice to the employee is not "implied" where the employer takes action to train a relief employee.[68]

Consequences of an Employer's Failure to Provide Proper Notice

Failure to provide the proper notice can have significant consequences for the employer. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, or for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.[69]

The FMLA provides a civil monetary penalty for an employer's failure to comply with the posting requirement. The penalty claim belongs to the Secretary of Labor and employees cannot recover damages for an employer's failure to post a notice about the FMLA.[70] But employers who fail to provide these notices may not take action against employees who do not comply with provisions that should have been included in the notices.[71] And an employer may violate the FMLA if its failure to adequately inform an employee about its leave policies impacts the employee's FMLA rights and causes the employee to unknowingly give up FMLA benefits.[72]

EMPLOYEE NOTICE REQUIREMENTS

The regulations also impose notice requirements upon the employee. In the case of foreseeable FMLA leave, an employee must provide the employer *at least thirty days* advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a "serious health condition" of the employee or a family member, or the planned medical treatment of serious injury or illness of a covered service member.[73] In cases of an unforeseeable FMLA leave, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case.[74] Notice may be given by the employee's spokesperson if the employee is unable to do so personally.

Although an employee is required to give advance notice of the need for leave and to explain the reasons for requesting leave, an employee requesting family and medical leave for the first time for a FMLA-qualifying reason is not required to specifically mention the FMLA or the CFRA.[75] Rather, the employee must give the employer enough facts to indicate that the employee requests leave for

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[62] 29 C.F.R. § 825.300(c)(4).
[63] 29 C.F.R. § 825.300(d).
[64] 29 C.F.R. § 825.300(d)(6).
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Olofsson v. Mission Linen Supply* (2012) 211 Cal.App.4th 1236.
[69] 29 C.F.R. § 825.300(e).
[70] 29 U.S.C. § 2619(b); *Hendry, supra*.
[71] 29 C.F.R. § 825.300(e).
[72] *Cline v. Wal-Mart Stores, Inc*. (4th Cir. 1998) 144 F.3d 294; *Fry v. First Fidelity Bancorporation* (E.D.Pa. 1996) 67 Empl. Prac. Dec. p. 43,943; see also *Dintino v. Doubletree Hotels Corp*. (C.D.Pa. 1997) 4 Wage & Hour Cases 2d (BNA) 413, reconsideration den. 1998 U.S. Dist. LEXIS 10093 (1998), for another case that illustrates the importance of complying with the FMLA's notice procedures and following internal employer policies and procedures. *Bachelder v. America West Airlines, Inc*. (9th Cir. 2001) 259 F.3d 1112.
[73] 29 C.F.R. § 825.302.
[74] 29 C.F.R. § 825.303.
[75] 29 C.F.R. §§ 825.303(b), (c); Cal. Code Regs., tit. 2, § 11091(a)(1); *Manuel v. Westlake Polymers Corp.* (5th Cir. 1995) 66 F.3d 758.

a "serious health condition."[76] An employee's notice of a medical need for leave triggers the employer's duty to inquire further to determine whether the leave request is CFRA or FMLA-qualifying.[77]

The employee must give enough notice of a medical need for the leave to trigger the employer's duty to ask further.[78] For example, under the CFRA, notice that an employee has a cold or the flu is not notice of a need for a CFRA-qualifying leave.[79] And a request for vacation time to *visit* ailing parents does not constitute sufficient notice that the employee needs leave to *care* for the employee's parents, which would be covered by the CFRA.[80] Further, a request to be excused from certain work activities or events does not constitute a request for leave under the CFRA.[81]

One California court has noted that the CFRA's statutory language distinguishes between an ill parent and an ill child:

> "[I]n the case of children, the event of a birth, an adoption, or a serious health ailment justifies the leave, whereas in the case of a parent, the leave is not 'for reason of' a parent's serious health condition, but 'to care for a parent' ... who has a serious health condition."[82]

The court concluded:

> "[E]ven if notice of a child's serious health condition could put an employer on notice that CFRA-leave might be sought by the parent, the mere fact that the employee's parent is ill does not. In the context of an ailing parent, reasonable notice requires some communication, express or implied, by the employee that he or she seeks to care for the parent."[83]

RETROACTIVE DESIGNATION OF FMLA LEAVE

Oftentimes, an employer learns that an employee took an FMLA leave after the fact. Employers may retroactively designate FMLA leave with appropriate notice to the employee provided that the employer's failure to timely designate does not cause harm or injury to the employee.[84] In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.[85]

MEDICAL CERTIFICATION REQUIREMENTS

The FMLA and CFRA permit employers to require medical certification to support the need for leave due to a "serious health condition" provided the employer complies with several specific requirements.[86] First, the employer must give the employee notice of the requirement for certification, *each time that a certification is* required.[87] The regulations advise employers to request the certification at the time the employee gives notice, or within five business days thereafter or, in the case of an unforeseen leave, within five business days after the leave commences.[88] The employee is required to provide the requested certification within 15 calendar days after the request, unless it is not practicable despite the employee's diligent and good faith efforts.[89] At the time the employer requests certification, the employer must advise the employee of the anticipated consequences of the employee's failure to provide adequate certification.[90] If the employee fails to provide complete and sufficient certification, despite the opportunity to cure the certification, or fails to furnish any

[76] 29 C.F.R. §§ 825.303(b).
[77] 29 C.F.R. § 825.301(a); Cal. Code Regs., tit. 2, § 11091(a)(1); *Hendry, supra,* 896 F.Supp. at p. 828; see, e.g. *Hubins v. Operating Engineers Local Union No. 3* (N.D.Cal. 2004) 2004 WL 2203555(e-mail message provided adequate notice of employee's intent to take FMLA leave).
[78] *Johnson v. Primerica* (S.D.N.Y. 1996) 1996 WL 34148, p. 5-6.
[79] *Gibbs v. American Airlines* (1999) 74 Cal.App.4th 1, 8, review den. *Gibbs v. American Airlines* (1999) 1999 Cal. LEXIS 7829.
[80] *Stevens v. California Dept. of Corrections* (2003) 107 Cal.App.4th 285, 290-293.
[81] *Reid v. Smithkline Beecham Corp.* (S.D.Cal. 2005) 366 F.Supp.2d 989.
[82] *Stevens, supra,* 107 Cal.App.4th at p. 292 (citing Gov. Code, §§ 12945.2(c)(3)(A) and (B)) (emphasis added).
[83] *Ibid.*
[84] 29 C.F.R. § 825.301(d).
[85] *Ibid.*
[86] 29 C.F.R. § 825.305(a); Cal. Code Regs., tit. 2, § 11091(b).
[87] 29 C.F.R. § 825.305(a).
[88] 29 C.F.R. § 825.305(b).
[89] *Ibid.*
[90] 29 C.F.R. § 825.305(d).

certification, the employer may deny the employee's request to take FMLA leave.[91]

Content of the Medical Certification

When leave is taken because of an employee's own "serious health condition" or the "serious health condition" of a family member, the FMLA regulations specify the information the employer may require a health care provider to supply.[92] The DOL also has developed two optional forms to facilitate the process — one for certification by the employee's own health care provider and the other for the health care provider's certification of the family member in need of care.[93] Although employers are free to develop their own form, the form cannot request any information beyond what is specified in the regulations and the contained in the model DOL forms.[94]

Significantly, the FMLA regulations allow employers to ask for a diagnosis of what is the "serious health condition" that has precipitated the leave request.[95] This expansion spells potential danger for California employers because CFRA regulations specify that an employer *cannot* ask for a diagnosis.[96] Under California law, a diagnosis may be provided only at the employee's option.[97] Further, state law, which zealously guards privacy rights of employees and of the employee's family members, strictly limits the information that an employer may request.[98]

Under no circumstances can California employers require an employee, or an employee's family member, to disclose their "serious health conditions" underlying diagnosis in connection with accessing family and medical leave benefits.[99] California employers requesting medical certification of a "serious health condition" in connection with an employee's request for family leave to care for a child, parent, spouse, or registered domestic partner may request only:

- The date, if known, that the "serious health condition" began.
- The probable duration of the condition.
- An estimate of the amount of time that the health care provider believes the employee needs to care for the child, parent, spouse, or domestic partner.
- A statement that the "serious health condition" warrants the employee's participation in providing care during a period of treatment or supervision of the child, parent, spouse, or registered domestic partner.[100] This includes, but is not limited to, providing psychological comfort and arranging "third party" care for the family member, as well as directly providing, or participating in, the medical care.[101] A health care provider's certification that the employee is needed to provide physical care or psychological comfort to a child, parent, spouse, or registered domestic partner is sufficient. The statute defines "needed to care for" and does not require an employee to establish that no other caretakers are available.[102]

For medical certification of the employee's *own* "serious health condition," a California employer may require only:

- the date, if known, that the "serious health condition" began;
- the condition's probable duration; and
- a statement that, due to the "serious health condition," the employee is unable to work at all or is unable to perform any one or more of the employee's position's essential functions.[103]

In light of the divergence between FMLA and CFRA when it comes to the content of a medical certification request, California employers are advised to follow the more stringent requirements under CFRA.

If the employee never provides the medical certification, the leave is not FMLA or CFRA leave.[104] In some situations, terminating an

[91] *Ibid.*
[92] 29 C.F.R. § 825.306(a).
[93] 29 C.F.R. § 825.306(b).
[94] *Ibid.*
[95] 29 C.F.R. § 825.306(a)(3).
[96] Cal. Code Regs., tit. 2, §§ 11087(a), 11091(b)(2).
[97] Cal. Code Regs., tit. 2, § 11087(a).
[98] Cal. Code Regs., tit. 2, §§ 11087(a)(1), 11087(a)(2).
[99] Cal. Code Regs., tit. 2, § 11087(a).
[100] Cal. Code Regs., tit. 2, § 11087(a)(1).
[101] Cal. Code Regs., tit. 2, § 11087(a)(1)(D)(1).
[102] *Javier Mora v. Chem-Tronics, Inc.,* 16 F.Supp.2d 1192 (S.D.Cal. 1998).
[103] Cal. Code Regs., tit. 2, § 11087(a)(2).
[104] 29 C.F.R. § 825.311(b).

employee for repeatedly refusing to cooperate with an employer's legitimate request for medical certification will not violate the FMLA.[105] And under certain circumstances, an employer may terminate an employee for excessive absences that might have qualified for FMLA protection if the employee has failed to make reasonable, diligent, and good faith efforts to notify the employer and to respond to the employer's requests for medical certification.[106]

Employees Must Provide Complete and Sufficient Medical Certification.

The FMLA now contains procedures for employers to request clarification when a medical certification is incomplete or insufficient.[107] "Incomplete" certification occurs when one or more of the applicable entries on certification have not been completed.[108] Similarly, "insufficient" certification occurs when information provided is vague, ambiguous, or non-responsive.[109] If a certification is either incomplete or insufficient, an employer must notify the employee of the deficiency and provide the employee with *seven calendar days* (unless not practicable under the particular circumstances despite the employee's diligent, good faith efforts) to cure any such deficiency.[110] Supervisors and decision-makers cannot rely on incomplete medical certifications to serve as "negative certifications" to deny an employee's request for FMLA leave.[111] When certification is required by an employer, it is the employee's obligation to either provide a complete and sufficient certification or to furnish the health care provider the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's FMLA request.[112] Should an employee submit inadequate medical certification or fail to authorize the release of appropriate medical documentation, that employee may be precluded from recovering damages under the FMLA where the employer denies the employee's request for FMLA leave and subsequently discharges the employee for being absent without leave.[113]

An employer may request recertification no more often than every thirty days and only in conjunction with an employee's absence.[114] If the medical certification indicates that the minimum duration of the condition is more than thirty days, then an employer must wait until that minimum duration expires before requesting a recertification.[115] An employer, though, may request recertification in less than 30 days if the employee requests an extension of leave, circumstances described in the previous certification have changed significantly, or the employer received information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.[116]

Employer's Right to Seek Authentication and Clarification of a Medical Certification.

Right to Contact the Employee Health Care Provider

The new regulations also provide for certain circumstances when an employer may contact the employee's health care provider directly. However, under no circumstances may the employee's direct supervisor contact the employee's health care provider.[117] To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official.[118] Further, the employer's right to contact the health care provider is for the limited purpose of seeking authentication and clarification of the medical certification, *the employer may not request additional information from the health care provider.*[119]

[105] See, e.g., *Bailey v. Southwest Gas Co.* (9th Cir. 2002) 275 F.3d 1181.
[106] *Washington v. Fort James Operating Co.* (D.Or. 2000) 110 F.Supp.2d 1325.
[107] 29 C.F.R. § 825.307.
[108] 29 C.F.R. § 825.307(c).
[109] *Ibid.*
[110] *Ibid.*
[111] *Verkade v. U.S. Postal Service* (6th Cir. 2010) 378 Fed.Appx. 567, 2010 WL 2130616.
[112] 29 C.F.R. § 825.305(d).
[113] *Lewis v. U.S. (Donley)* (9th Cir. 2011) 641 F.3d 1174.
[114] 29 C.F.R. § 825.308(a).
[115] 29 C.F.R. § 825.308(b).
[116] 29 C.F.R. § 825.308(c).
[117] 29 C.F.R. § 825.307(a).
[118] *Ibid.*
[119] *Ibid.*

The new regulation defines "authentication" as providing the health care provider with a copy of the certification and requesting verification that the information on the form was completed and/or authorized by the health care provider who signed the document.[120] In contrast, "clarification" involves contacting the employee's health care provider in order to understand the handwriting on the medical certification or to understand the meaning of a response.[121] No additional information beyond that included in the certification form may be requested.[122]

Compliance with HIPAA

Any contact with the employee's health care provider must comply with the requirements of the *Health Insurance Portability and Accountability Act* ("HIPAA") Privacy Rule.[123] The FMLA regulations make clear that while an employer may not require a HIPAA consent authorizing communication with the employer, if an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear.[124]

Employer Right to Demand Additional Medical Opinions

The new "clarification" and "authentication" provisions are in addition to the second and third opinion provisions in the FMLA. An employer who has reason to doubt the validity of a medical certification may require that the employee obtain a second opinion at the employer's expense.[125] If the opinions of the employee's and the employer's designated HCP differ, the employer may require the employee to obtain certification from a third health care provider (jointly approved by the employer and the employee in good faith), again at the employer's expense.[126] This third opinion will be final and binding.[127] The employer must pay for any "out-of-pocket" travel expenses that the employee or family member incurred to obtain the second and third opinions.[128] An employer may not challenge an employee's initial medical certification in a later lawsuit alleging FMLA violations if the employer never used the FMLA's second and third opinion option.[129]

An employer may not ask for more certification information than it required for the original certification,[130] and an employer may not require an employee to see a doctor regularly employed by the employer.[131] The CFRA does not allow an employer to request any additional opinions regarding the "serious health condition" of an employee's family member.[132]

Exception for the Genetic Information Nondiscrimination Act

The EEOC issued final regulations interpreting the Genetic Information Nondiscrimination Act of 2008 ("GINA") effective 2011. In general, GINA requires employers to refrain from requesting, requiring, or purchasing "genetic information" (which is broadly defined to include, among other things, "family medical history") about an employee.[133] However, 29 C.F.R. section 1635.8(b) sets forth an important specific exception where an employer requests medical information as "required, authorized, or permitted" by federal, state, or local law, such as where an employee requests leave under FMLA to attend to the employee's own "serious health condition" or where an employee complies with the FMLA's return to work certification requirements.

FITNESS-FOR-DUTY REQUIREMENTS

The FMLA permits employers to require a fitness-for-duty certification from employees returning from a continuous leave.[134] The regulations continue to permit fitness-for-duty certifications if required of all similarly situated employees on a uniformly applied

[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid.*
[123] 45 C.F.R. §§ 164.500 et seq.
[124] 29 C.F.R. § 825.307(a).
[125] 29 C.F.R. § 825.307(b).
[126] 29 C.F.R. § 825.307(c).
[127] *Ibid.*
[128] 29 C.F.R. § 825.307(e).
[129] *Sims*, *supra*.
[130] Cal. Code Regs., tit. 2, § 11091(b)(2)(A)(1).
[131] 29 U.S.C. § 2613(c)(2); 29 C.F.R. § 825.307(b).
[132] Gov. Code, §§ 12945.2(j) and (k).
[133] 29 C.F.R. § 1635.1(a); 29 C.F.R. § 1635.3(c).
[134] 29 C.F.R. § 825.312.

basis.[135] The employer also may require the certification to specifically address the employee's ability to perform the essential functions of the employee's job.[136]

Employers must provide notice of the fitness-for-duty requirement in each designation notice.[137] Without such notice, the employer cannot require a fitness-for-duty certification when returning to work from FMLA leave.[138]

Further, if the employer requires the certification to address the employee's ability to perform the essential functions of the job, the employer also must provide a list of essential job functions with the designation notice and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions.[139] The employer may contact the employee's health care provider to clarify and authenticate the fitness-for-duty certification, as permitted with the initial medical certification process.[140] However, no second or third opinions are permitted.[141]

Employers are authorized to require a fitness-for-duty certification every 30 days (or longer interval) during an intermittent or reduced schedule leave if reasonable safety concerns exist based on the "serious health condition" that was the reason for the employee's FMLA leave.[142] "Reasonable safety concerns" means a reasonable belief that the returning employee may pose a significant risk of harm to himself/herself or others.[143] An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer failed to provide notice of the requirement of a fitness-for-duty certification in the designation notice.[144] As with all medical certifications, employers should make certain that their requests comply with all state and federal privacy laws (e.g., California's Confidentiality of Medical Information Act)[145] as well as the FMLA.

In certain circumstances, an employer may also seek medical re-evaluation of an employee's fitness for duty even after the employee has been cleared to return to work following an FMLA leave by his or her own doctor. In *White v. County of Los Angeles*,[146] the plaintiff was a District Attorney investigator who suffered from mental health issues and took an FMLA leave of absence related to those issues. When her doctor released her to return to work, the County reinstated her but placed her on paid administrative leave. The County then ordered the plaintiff to appear for a medical re-evaluation to determine her capacities to perform the duties of her job satisfactorily. She failed to appear for the evaluation and filed a lawsuit seeking injunctive relief prohibiting the District Attorney from requiring her to appear or disciplining her for failing to appear. The trial court ruled that the re-evaluation was not permissible, and the County appealed the decision. The Court of Appeal noted that although the FMLA does not allow the employer to seek a second opinion as to an employee's ability to perform her job duties *prior to reinstating* the employee, it is permissible under the FMLA for an employer to require medical examinations to evaluate fitness for duty at the employer's expense *upon the employee's return from FMLA leave*, provided the examination is job-related and consistent with business necessity. The Court noted that the employee's doctor's opinion is conclusive regarding whether the employee should be immediately returned to work at the conclusion of his or her leave of absence, but the employer may thereafter require a fitness-for-duty examination if the employer has a basis to question the employee's doctor's opinion.[147]

SUBSTITUTING PAID LEAVE OR LIGHT DUTY FOR FMLA LEAVE

The FMLA permits eligible employees to choose to substitute accrued paid leave for FMLA leave.[148] Under section 7(o) of the Fair

[135] 29 C.F.R. § 825.312(a).
[136] 29 C.F.R. § 825.312(b).
[137] *Ibid.*
[138] *Ibid.*
[139] 29 C.F.R. § 825.312(b).
[140] *Ibid.*
[141] 29 C.F.R. § 825.312(b).
[142] 29 C.F.R. § 825.202.
[143] *Ibid.*
[144] 29 C.F.R. § 825.312(d), (e).
[145] Civ. Code, §§ 56 et seq.
[146] (2014) 225 Cal.App.4th 690.
[147] *Ibid.*
[148] 29 C.F.R. § 825.207.

Labor Standards Act ("FLSA"),[149] public employers may, under certain circumstances, substitute compensatory time off ("CTO") in lieu of paying cash to a non-exempt employee who has worked overtime. Thus, a state or local government employer now can coordinate CTO with unpaid FMLA leave. The employer may request that an employee use his or her balance of CTO for an FMLA reason.[150] If the employer permits the accrual to be used in compliance with the applicable regulations, the absence which is paid from the employee's accrued CTO may not be counted against the employee's FMLA entitlement.

An employer cannot require an employee to perform modified or light duty work in lieu of taking FMLA leave.[151] However, the employee may voluntarily agree to a light duty assignment in lieu of FMLA leave.[152] Light duty assignments do not count against twelve weeks of FMLA leave or affect an employee's reinstatement rights.[153]

EMPLOYEE MAY DECLINE TO USE FMLA LEAVE EVEN IF QUALIFIED

The Ninth Circuit has ruled that an employee may affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have involved FMLA protection. In so ruling, the Court noted that the FMLA requires that once the employee alerts the employer of his or her desire to take a leave which *may* qualify under the FMLA, the employer has an obligation to obtain any additional required information through informal means to determine whether FMLA leave is actually being sought by the employee. The Court found that this obligation by the employer to ascertain whether FMLA leave is being sought strongly suggests that there are circumstances in which an employee might seek time off but intend not to exercise his or her rights under the FMLA. The Court felt that if merely referencing an FMLA-qualifying reason triggered FMLA protections, that this would place employers in an "untenable situation" if the employee had stated a desire *not* to take FMLA leave, as the employer could be liable for forcing FMLA leave on an employee. Accordingly, the Court ruled that an employee can affirmatively decline to take FMLA leave even if the reason for the leave would invoke FMLA protection.[154]

LEAVE BENEFITS AND REINSTATEMENT RIGHTS

If an employee on FMLA leave fails to pay group health insurance plan premiums, the employer must satisfy FMLA notice and waiting period requirements before it can cancel the employee's group health insurance.[155] But the rules maintain the employee's entitlement to equivalent benefits on return from FMLA leave.[156] In many instances, the employer can ensure equivalent benefits only by maintaining the benefits during the leave, even if the employee does not make required premium payments.[157] In the event the employer elects to maintain such benefits during the leave, at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.[158] The CFRA, however, specifically requires the employer to maintain and pay for "group health plan" coverage during any period of FMLA qualifying leave for an eligible employee.[159]

At the end of an eligible employee's FMLA-qualifying leave, the FMLA requires the employer to restore the employee "to the position of employment held by the employee when the leave commenced" or to offer an equivalent position.[160] Yet, under the CFRA, an employee is not entitled to reinstatement to her position where that employee fails to return to work at the end of his or her 12-week protected leave period.[161] In this circumstance, the employee's CFRA

[149] 29 U.S.C. § 207(o).
[150] 29 C.F.R. § 207(i); 29 C.F.R. § 553.25.
[151] 29 C.F.R. § 825.220(d); 29 C.F.R. § 825.702(d)(1).
[152] 29 C.F.R. § 825.220(d).
[153] *Ibid.*
[154] *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014).
[155] 29 C.F.R. § 825.212(a)(1).
[156] 29 C.F.R. § 825.209(e).
[157] 29 C.F.R. §§ 825.209, 212(b), 213.
[158] 29 C.F.R. § 825.213(b).
[159] Gov. Code, § 12945.2(f).
[160] 29 U.S.C. § 2614(a)(1)(A), (B).
[161] *Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480.

claim would be precluded even where the employer had decided not to reinstate the employee to his or her prior position upon his or her timely return from a CFRA leave.[162]

The FMLA expressly does not require, however, that an employer provide the returning employee "any right, benefit, or position of employment other than the right, benefit, or position to which the employee would have been entitled had the employee never taken leave."[163] So, for example, an employee who is notified three weeks before he requests and takes an FMLA leave that he is being replaced as an account manager, is not entitled to reinstatement to the account manager position when he returns from leave.[164]

Similarly, an employee on an approved CFRA leave for the birth and care of her child may be laid off as part of a company-wide reduction in force without violating the CFRA.[165] And the FMLA does not require employers to give returning employees any assurance of job security that they would not have been entitled to before taking FMLA leave.[166] The FMLA also does not require that an employee be restored to a job if the employee can no longer perform the job's essential functions.[167] The FMLA does not prevent an employer from terminating an employee after the employee returns from FMLA leave if the employer determines that the employee misused the leave.[168] In the Ninth Circuit, where an employer denies the reinstatement of the employee's position after taking an FMLA leave, that employer will carry the burden to establish the legitimate reason for the denial.[169]

Other Significant Regulatory Provisions

Employees or their bargaining representatives may not waive or trade off employees' FMLA rights.[170]

Employers may not consider an employee's use of FMLA leave as a negative factor in any employment action. Employers cannot count FMLA leave under "no fault" attendance policies.[171]

The regulations expressly prohibit retaliation against an employee who asserts his or her FMLA rights.[172]

PREGNANCY DISABILITY LEAVE LAW

The Pregnancy Disability Leave Law ("PDL")[173] applies to all California employers with five or more employees (full or part time), and all employees affected or disabled by pregnancy, regardless of their hours worked or length of service.[174] The regulations detail prohibitions against harassment, retaliation, and other discrimination against employees who are pregnant or perceived to be pregnant, and set forth specific rules regarding employees' rights to pregnancy disability leave.[175]

Employees Are Entitled to Four Months of Pregnancy Disability Leave.

California employers with five or more employees are now required to provide up to four months of pregnancy disability leave to employees disabled by pregnancy or related conditions, regardless of any policy of the employer that provides less than four months of leave to other temporarily disabled employees.[176] The leave entitlement is per pregnancy, not per year.[177] Employers are not required to pay employees during pregnancy disability leave.[178]

"Four month leave" means the employee gets time off for the number of days or hours the employee would normally work within four calendar months (i.e., one-third of a year or 17-1/3 weeks).[179] For example, an employee who works 40 hours/week gets 693 hours of

[162] *Ibid.*
[163] 29 U.S.C. § 2614(a)(3)(B); see 29 C.F.R. § 825.216(a).
[164] *Patterson v. Alltel Information Services, Inc.* (D.Me. 1996) 919 F.Supp. 500.
[165] *Tomlinson v. Qualcomm, Inc*. (2002) 97 Cal.App.4th 934.
[166] *Lempres v. CBS, Inc*. (D.D.C. 1996) 916 F.Supp. 15.
[167] *Tardie v. Rehabilitation Hospital of R.I.* (D.R.I. 1998) 6 F.Supp.2d 125 , affd. (1st Dir. 1999) 168 F.3d 538.
[168] See, e.g., *McDaneld v. Eastern Municipal Water Dist.* (2003) 109 Cal.App.4th 702, 708.
[169] *Sanders v. City of Newport* (9th Cir. 2011) 657 F.3d 772.
[170] 29 C.F.R. § 825.220(d).
[171] 29 C.F.R. § 825.220(c).
[172] 29 C.F.R. § 825.220.
[173] Codified at Cal. Code Regs., tit. 2, §§ 11035–11051.
[174] Cal. Code Regs., tit. 2, § 11035(h), 11035(r).
[175] Cal. Code Regs., tit. 2, § 11039.
[176] Cal. Code Regs., tit. 2, § 11042(a).
[177] Cal. Code Regs., tit. 2, § 11042(a)(5).
[178] Cal. Code Regs., tit. 2, § 11044(a).
[179] Cal. Code Regs., tit. 2, § 11042(a)(1).

leave entitlement (40 hrs x 17-1/3 weeks);[180] an employee who works 48 hours/week gets 832 hours of leave;[181] an employee who works 20 hours/week gets 346.5 hours of leave entitlement; and so on.[182]

An employee may take her leave hours intermittently, in increments no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided it is not greater than an hour.[183] These time increments will be subtracted from the employee's total hours, thus impacting the employee's available leave after the baby is born.[184]

PAID SICK LEAVE LAW

Under the Healthy Workplaces, Healthy Families Act of 2014, certain employers must provide 24 hours or three days of paid sick time to current and new employees. This law sets a minimum standard, meaning it "does not preempt, limit, or otherwise affect the applicability" of any policy that provides for greater accrual or use by employees of paid sick days.[185] It does not require an employer to provide additional paid sick days if the employer has an existing paid leave or PTO policy that meets certain criteria. Specifically, the policy must make leave available under the same conditions as in this law. It also must either: (1) satisfy the accrual, carry over, and use requirements, or (2) provide for at least 24 hours or three days of paid sick leave, or equivalent paid leave, per year of employment, calendar year, or 12-month basis.[186]

The law applies to any employer that has at least one employee who works more than 30 days per year in the state of California. In turn, an employee is eligible under the law to receive paid sick leave if the employee works for the same employer for more than 30 days within a calendar year in California.[187] This is true even if the employee is a part-time or temporary employee. The only employees excluded from coverage are: (1) employees covered by a valid collective bargaining agreement that expressly provides for paid leave and has other required provisions; (2) employees in the "construction industry" covered by a valid collective bargaining agreement with similar protections; and (3) individuals employed by an air carrier as a flight deck or cabin crew member that is subject to Title II of the Federal Railway Labor Act.[188]

Originally, in-home supportive services workers ("IHSS") were specifically excluded from coverage under this statute. However, effective July 1, 2018, coverage was expanded to include IHSS workers, although IHSS workers, however, accrue only eight hours of paid sick leave a year. After January 1, 2020, IHSS workers, though, will accrue 16 hours of paid sick leave a year, as compared with the statute's minimum requirement of 24 hours or three days of paid sick leave.[189]

Additionally, public agency retired annuitants are not considered employees under the Paid Sick Leave Law and therefore are not eligible to receive paid sick leave.[190]

Under the law, employees traditionally accrue one hour of sick leave for every 30 hours worked.[191] However, under recent legislation, an employer is permitted to apply alternative accrual methods. An employer may use a different accrual method if the accrual is on a regular basis so that an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment, or each calendar year, or in each 12 month period. An employer also may provide no less than 24 hours or three days of paid sick leave which is available to use by the completion of the employee's 120th day of employment.[192]

Employees who are exempt from overtime requirements are deemed to work 40 hours per week unless their normal workweeks are less than 40 hours, in which case they accrue paid sick days based on their normal workweeks.[193] Employees may not *use* their

[180] *Ibid.*
[181] Cal. Code Regs., tit. 2, § 11042(a)(2)(A).
[182] *Ibid.*
[183] Cal. Code Regs., tit. 2, § 11042(a)(3).
[184] Cal. Code Regs., tit. 2, § 11042(a)(2)(C).
[185] Lab. Code, § 249(d).
[186] Lab. Code, § 246(e)(1)-(2).
[187] Lab. Code, § 246(a).
[188] Lab. Code, § 245.5(a)(1)-(4).
[189] Lab. Code, § 246 (a)(2).
[190] Lab. Code, § 245.5(a)(4).
[191] Lab. Code, § 246(b)(1).
[192] Lab. Code, § 246.(b)(3)-(4).
[193] Lab. Code, § 246(b)(2).

accrued paid sick time until they have been employed with the employer for at least 90 days.[194] Sick leave pay is paid at the employee's regular hourly rate of pay, and for non-hourly employees (e.g., salaried or commission-based), is determined by dividing the employee's total wages (including overtime) by the employee's total hours worked in the full pay periods for the prior 90 days of employment.[195] Employees are allowed to carry over paid sick leave to the following year of employment, up to an accrual cap of six days/48 hours. Despite the carry over and accrual cap, an employer can limit the amount of sick leave used to three days/24 hours in any one year.[196] An employer is not required to cash out any accrued, unused sick leave upon separation from employment; however, if an employee separates and is re-hired within one year of the separation, any accrued and unused sick days must be reinstated, and the rehired employee may use them and accrue additional days immediately.[197]

Employers must allow employees to use their accrued paid sick leave for any of the following reasons: (1) diagnosis, care, or treatment of existing health condition of an employee or an employee's "family member" (defined as children, parents, spouse, registered domestic partner, grandparents, grandchildren, and siblings); (2) preventative care for the employee or employee's family member; or (3) seeking medical attention for physical or psychological injuries when the employee is a victim of domestic violence, sexual assault, or stalking.[198]

In order to use the leave, the employee must make an oral or written request. If the need for leave is foreseeable, the employee must provide reasonable advance notice. Otherwise, the employee must provide notice as soon as practicable.[199]

The law explicitly prohibits the employer from retaliating against employees for using paid sick leave or for complaining or otherwise participating in complaints or investigations about violations of the paid sick leave law.[200] Employers also are prohibited from requiring an employee to find a replacement worker to cover days for which the employee uses paid sick days.[201]

Additionally, employers must abide by certain notice and posting requirements regarding the paid sick leave law. Specifically, employers must (1) display a poster (developed by the Labor Commissioner) in each of their workplaces; (2) provide written notice to each individual employee setting forth the employee's rights under the paid sick leave law at the time of hire; and (3) provide written notice to employees on the date they are paid their wages which sets forth the amount of paid sick leave available.[202]

FMLA RELATIONSHIP WITH OTHER FEDERAL AND STATE LAWS

EEOC ADA Enforcement Guidance Addresses the FMLA Overlap.

The *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA ("Guidance")*,[203] in a question-and-answer format, details the EEOC's position on reasonable accommodation and undue hardship under Title I of the Americans with Disabilities Act of 1990.[204] Two questions specifically address the relationship between the ADA and the FMLA regarding leaves in connection with modified or part-time work schedules.

The EEOC asks, "How should an employer handle leave for an employee covered by both the ADA and the Family and Medical Leave Act," and responds, "An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take." The *Guidance* then gives the following hypothetical, among others, to illustrate its answer:

[194] Lab. Code, § 246(c).
[195] Lab. Code, § 246(k).
[196] Lab. Code, § 246(d).
[197] Lab. Code, § 246(f).
[198] Lab. Code, § 246.5(a)(1)-(2); Lab. Code, § 245.5(c)(1-7).
[199] Lab. Code, § 246(l).
[200] Lab. Code, § 246(c)(1).
[201] Lab. Code, § 246.5(b).
[202] Lab. Code, § 247.
[203] EEOC: Enforcement Guidance on Reasonable Accommodation (October 17, 2002); available online at *http:/www.eeoc.gov/policy/docs/accommodation.html*.
[204] 29 U.S.C. §§ 794 et seq.

"An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment, but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship."[205]

This hypothetical must be read carefully to distinguish it from cases discussed elsewhere in this chapter indicating that merely returning from an FMLA leave is not a sufficient reason for an employer to refuse to reinstate an employee without an ADA fitness-for-duty examination. First, the employee in the hypothetical has a *known ADA disability*. Second, the employee apparently *volunteers* the information that the employee is no longer able to perform the essential functions of his position or an equivalent position.

If the employee did not have a known ADA disability, and merely presented the employer with an FMLA health care provider's certification that the employee was able to return to work, under the FMLA, the employer could not refuse to reinstate him merely because the employer suspected or was concerned that the employee could no longer perform the position's essential functions. Unless the employer had a uniformly applied policy of requiring all employees returning from leave to submit to a fitness-for-duty exam, the employer also could not refuse to reinstate the employee returning from FMLA leave until the employee submitted to a fitness-for-duty examination. The employer could, however, require a fitness-for-duty exam if the employee's job performance and on-the-job conduct after returning from FMLA leave indicated that the employee was not able to perform the essential functions of the employee's position.[206]

The EEOC gives the identical response, "An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take," to the second FMLA related question, "How should an employer handle requests for modified or part-time schedules for an employee covered by both the ADA and the [FMLA]?"[207] The *Guidance* provides this hypothetical to illustrate this issue:

"An employee with an ADA disability requests that she be excused from work one day a week for the next six months because of her disability. If this employee is eligible for a modified schedule under the FMLA, the employer must provide the requested leave under that statute if it is medically necessary, even if the leave would be an undue hardship under the ADA."[208]

In summary, the EEOC *Guidance* regarding the interplay of the FMLA and the ADA reflects the courts' practical approach and *Legal Trends*' previous observations. The ADA and the FMLA provide coexisting and distinct entitlements and obligations. As such, the benefits and obligations they mandate may operate concurrently. The courts analyze ADA and FMLA claims separately. Employers also must separately analyze each statute's requirements, and recognize that the applicable statutory provision most generous to the employee usually prevails at each step of the analysis.

Coordination of FMLA Leave with Workers' Compensation and Other Wage Replacement Benefits

An employee's workers' compensation absence due to a job-related injury or illness also may qualify as an FMLA "serious health condition." The workers' compensation absence and the FMLA leave may run concurrently if the employer follows the FMLA notice and designation requirements. The employer and the employee can

[205] EEOC: Enforcement Guidance on Reasonable Accommodation (October 17, 2002), *supra*.
[206] See *Albert*, *supra*.
[207] EEOC: Enforcement Guidance on Reasonable Accommodation (October 17, 2002), *supra*.
[208] *Ibid.*

mutually agree to supplement workers' compensation benefits or disability benefits with paid leave during an FMLA leave.[209]

Although employees may be certified to return to light duty work under a workers' compensation plan, employees who are entitled to FMLA leave cannot be required to return to work until they exhaust their FMLA leave entitlement.[210] If an employee declines light duty in favor of FMLA leave, the employee's right to workers' compensation benefits may be suspended.[211] On the other hand, if an employee accepts light duty, the employee's FMLA right to return to the same or equivalent position with equivalent employment benefits continues until the employee's FMLA leave entitlement, including the time in the light duty job, expires.[212]

Coordination of FMLA, CFRA, PDL, and the Fair Employment and Housing Act

Significantly for California public employers, California laws governing pregnancy leave, the CFRA, and the FMLA contain several notable differences. First, unlike the FMLA and the CFRA, PDL law has no minimum hours worked requirement or minimum length of service requirement.[213] An employee may take a qualified pregnancy disability leave immediately upon employment.[214]

Second, a pregnancy-related condition qualifies as a "serious health condition" under the FMLA, but medical conditions related to an employee's pregnancy do not qualify as "serious health conditions" under the CFRA.[215] A pregnant employee is entitled to take up to four months of pregnancy disability leave if, due to her pregnancy, she is unable to perform any one or more of her job's essential functions, or she is unable to perform those functions without undue risk either to herself, the successful completion of her pregnancy, or to other persons.[216]

Consequently, FMLA leave can run concurrently with PDL, if the employer notifies the employee within the proper timeframe that the employer has designated her PDL to be FMLA leave.[217] However, the leave taken as PDL may not be taken as CFRA leave because CFRA regulations do not consider pregnancy as a "serious health condition" and do not allow an employee to take leave under the CFRA for pregnancy-related disability.[218] As a result, an employee eligible for CFRA leave is entitled to take up to four months of pregnancy disability leave, of which 12 weeks may also count as FMLA leave, and then up to an additional 12 workweeks of CFRA leave following a child's birth.

The employer obligations under PDL also must be coordinated and assessed with those obligations provided in the California Fair Employment and Housing Act (the "FEHA").[219] Under the FEHA, a disabled employee is entitled to a reasonable accommodation – which may include leave of absence for no statutorily fixed duration – provided that such an accommodation does not impose an undue hardship on the employer.[220] Thus, the FEHA may require an extended disability leave for a pregnant employee beyond what is required under the PDL.[221]

Separate from the FMLA and CFRA Requirements, California Employers Must Allow Employees to Use Sick Leave to Care for Family Members.

Labor Code section 233 requires all employers who provide sick leave to employees to permit their employees to use a specified amount of accrued and accumulated sick leave to care for an ill child, parent, spouse, domestic partner, or child of a domestic partner.

Under Labor Code section 233, any employer who provides sick leave must permit employees to use accrued and available sick leave for the diagnosis, care, treatment, or preventative care for an employee's family member.

[209] 29 C.F.R. § 825.207(e).
[210] 29 C.F.R. § 825.220(d).
[211] 29 C.F.R. § 825.702(d)(2).
[212] *Ibid.*
[213] Cal. Code Regs., tit. 2, § 11040(c).
[214] *Ibid.*
[215] Gov. Code, § 12945.2(c)(3)(C).
[216] Cal. Code Regs., tit. 2, §§ 11035(g), 11040(a).
[217] Cal. Code Regs., tit. 2, § 11045(a).
[218] Gov. Code, § 12945.2 (c)(3).
[219] *Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331.
[220] *Ibid.*
[221] Cal. Code Regs., tit. 2, § 11047.

Effective January 1, 2021, the designation of sick leave for such purposes "shall be made at the sole discretion of the employee."[222]

The amount of sick leave that must be available for this purpose is the amount that would be accrued during six months at the employee's then current rate of entitlement."[223]

"Child" includes a biological, foster, or adopted child, a stepchild, a legal ward, a child of a domestic partner, or a child of a person standing in loco parentis.[224]

Labor Code section 233 defines "sick leave" for its purposes, in part, as "accrued increments of compensated leave provided by an employer to an employee as a benefit of the employment for use by the employee during an absence from the employment for any of the following reasons:

- the employee is physically or mentally unable to perform his or her duties due to the employee's illness, injury, or a medical condition;
- the absence is for the purpose of obtaining professional diagnosis or treatment for the employee's medical condition; or
- the absence is for other medical reasons of the employee, such as pregnancy or obtaining a physical examination."[225]

Sick leave for Labor Code section 233 purposes does not include any benefit provided under an employee welfare benefit plan subject to ERISA, any insurance benefit, workers' compensation benefit, unemployment compensation disability benefit, or benefit not payable from the employer's general assets.[226]

The mandated Labor Code benefit is both narrower and broader than similar existing leave benefits under the FMLA and the CFRA. Unlike the FMLA and the CFRA, the individuals whom an employee may use sick leave to care for are not limited to an employee's child, parent, or spouse, but also include the employee's domestic partner and domestic partner's child. Unlike the FMLA and CFRA, Labor Code section 233 does not require a "*serious* health condition" to support the employee's right to use sick leave to care for an ill family member. The law requires that the employer permit an employee to use a specified amount of annual sick leave accrual merely "*to attend to an illness of a child, parent, or spouse of the employee.*" This distinction is intentional. The legislation's sponsors were concerned that existing workplace leave provisions did not permit parents to take paid time off to care for their children's minor illnesses, like the common cold or flu, which require absence from school or day care.[227]

Section 233(a) specifically "does not extend the maximum period of leave to which an employee is entitled under the FMLA or the CFRA, regardless of whether the employee receives sick leave compensation during that leave."[228] As a result, if the reason for the employee's needed leave qualified for FMLA or CFRA protection, the paid sick leave available under Labor Code section 233 would run concurrently with FMLA and CFRA leave entitlements.

The rights and remedies specified in Labor Code section 233, by its own terms, are cumulative and non-exclusive and are in addition to any other rights or remedies afforded by contract or under other provisions of law.[229] In addition, any employer policies governing using sick leave, such as providing a physician's verification of illness or injury, requiring employees to follow specific procedures to notify the employer of their absences and return to work, and specifying the minimum time increment for sick leave use, will apply to the Labor Code section 233 benefit.[230]

Employers are prohibited from denying an employee the right to use sick leave to attend to the illness of the employee's child or domestic partner's child, parent, spouse, or domestic partner or from discriminating in

[222] Lab. Code, § 233(a).
[223] Lab. Code, § 233(b)(3)).
[224] Lab. Code, §§ 233(b)(2), 245.5(c)(1).
[225] Lab. Code, § 233(b)(4).
[226] *Ibid.*
[227] Analysis for Assembly Committee on Labor and Employment, Assembly Floor, Senate Committee on Industrial Relations, Senate Rules Committee (Stats 1999 ch. 164 §1 [AB 109]).
[228] Lab. Code, § 233(a).
[229] Lab. Code, § 233(f).
[230] Lab. Code, § 233(a).

any way against an employee for using or attempting to use sick leave as required by Labor Code section 233.[231] The Labor Commissioner is charged with enforcing the law, and injured employees are entitled to reinstatement and the greater of actual damages or one day's pay, and to appropriate equitable relief.[232] An employee also may choose to bring a civil action against an employer, and if the employee prevails in court, the court may award reasonable attorneys' fees.[233]

Paid Family Leave Included for Workers Covered by SDI

California's unemployment compensation disability insurance program ("SDI") has been amended to include a family temporary disability insurance program to provide up to eight weeks of wage replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a new child.[234] Wage replacement benefits are calculated at 60 or 70 percent of the employee's wages depending upon the employee's income.[235] The SDI program, which currently covers about twelve million Californians, is employee-, not employer-, funded. These new benefits will be funded by additional member employee contributions. An employee who is entitled to FMLA and CFRA leave must take "Family Temporary Disability Insurance" ("FTDI") leave concurrently with FMLA and CFRA leave.[236]

Paid Family Leave Benefits Are Immediately Available.

As of January 1, 2018, employees are immediately eligible for paid family leave benefits, and the seven-day waiting period in order to be eligible for benefits is no longer applicable.[237]

Similarly, the application of requiring earned vacation leave to the seven-day waiting period before the employee can receive family temporary disability benefits was eliminated effective January 1, 2019, consistent with the elimination of the waiting period the prior year.[238] Nevertheless, employers may still require employees to use up to two weeks of accrued but unused vacation leave prior to receipt of these benefits.[239]

Paid Sick Leave Is Expanded to Include In-Home Supportive Services Workers.

As of July 1, 2018, in-home supportive services workers ("IHSS"), who were previously excluded from sick leave coverage, are entitled to paid sick days. Although coverage was expanded to include IHSS workers, these workers accrue only eight hours of paid sick leave a year. However, after January 1, 2020, IHSS workers will accrue 16 hours of paid sick leave a year, as compared with the statute's minimum requirement of 24 hours or three days of paid sick leave.[240]

RIGHTS AND REMEDIES UNDER THE FMLA

If an employer violates the FMLA, an employee may receive wages, employment benefits, and other compensation denied or lost to such employee by reason of the violation, or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation (such as the cost of providing care), up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered service member, or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason.[241] The employee also may receive interest on the compensatory damages, liquidated damages (in an amount equaling the preceding sums; see further discussion, *infra*) and equitable relief including, but not necessarily limited to, employment, reinstatement, and promotion.[242]

[231] Lab. Code, § 233(c).
[232] Lab. Code, § 233(d).
[233] Lab. Code, §§ 233(d), (e).
[234] Unemp. Ins. Code, § 2601.
[235] Unemp. Ins. Code, § 2655.
[236] Unemp. Ins. Code, § 3303.1(b).
[237] Unemp. Ins. Code, § 2655.
[238] Unemp. Ins. Code, § 3303.1.
[239] Unemp. Ins. Code, § 3303.1(c)
[240] Lab. Code, § 246 (a)(2).
[241] 29 C.F.R. § 825.400(c).
[242] *Ibid.*

A majority of federal trial courts have ruled that by its own terms, the FMLA does not provide for punitive damages,[243] or damages for emotional distress.[244] Courts also have concluded that loss of job security and the resulting mental distress are not recoverable under the FMLA.[245] "Out-of-pocket" expenses are not recoverable under the FMLA.[246]

Employees also may recover reasonable attorneys' fees and costs in addition to any judgment a court awards. The FMLA's statutory language mandates an attorneys' fees award when a plaintiff receives a judgment in an FMLA action; but the court has broad discretion to adjust even a mandatory attorneys' fees award to account for the limited nature of a plaintiff's recovery.[247]

Unless a court concludes that the employer acted in good faith and reasonably believed that it had complied with the FMLA, the employee is also entitled to liquidated damages equal to the amount of compensatory damages plus interest.[248] Even if an employer meets the burden of proving its good faith, the court may exercise its discretion to award liquidated damages. In fact, the Fifth Circuit has noted, *"Doubling of an award is the norm under the FMLA, because a plaintiff is awarded liquidated damages in addition to compensation lost. The trial court's discretion to reduce the liquidated damages must be exercised consistently with the strong presumption under the statute in favor of doubling."*[249]

An employee must file a lawsuit within two years after the last action that the employee contends violates the FMLA, or three years if the violation was willful.[250] Although the statute is silent on the issue, a majority of courts that have specifically addressed the issue have concluded that a plaintiff has a right to a jury trial on FMLA claims.[251]

The FMLA does not create enforceable rights on the part of an employee's family members for injuries suffered as a result of an employer's FMLA violation.[252]

The CFRA's statutory remedies are not the exclusive remedies available to employees for an employer's violation of the CFRA. Two federal trial courts have concluded that the public policy embodied in the CFRA is sufficient to support a tortuous wrongful discharge claim.[253] A state appellate court specifically has ruled that an employee may state a claim under California law for wrongful termination in violation of the public policy within the CFRA.[254] And the California Supreme Court also has determined that the policy prohibiting age discrimination in employment embodied in the state Fair Employment and Housing Act,

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[243] *Spain v. Colonial Penn Ins. Co*., 4 Wage & Hour Cas. 2d (BNA) 669; *Settle v. S.W. Rodgers Co.* (E.D.Va. 1998) 998 F.Supp. 657, affirmed in unpublished decision at (1999) 182 F.3d 309; *Divizio v. Elmwood Care, Inc*. (N.D.Ill. 1998) 1998 U.S.Dist.LEXIS 8398.

[244] *Settle, supra; Lloyd v. Wyoming Valley Health Care System, Inc*. (M.D.Pa. 1998) 994 F.Supp. 288. In *Stevens v. County of San Mateo* (N.D.Cal. 2006) 2006 WL 581092, the court easily granted the employer's summary judgment motion on the FMLA claims because federal courts have uniformly ruled that damages for emotional distress are not available in FMLA claims. Regarding the CFRA claims, however, the court noted that no California court had considered whether emotional distress damages are available for CFRA violations. The court acknowledged in a footnote that one California trial court has allowed damages for emotional distress based upon a violation of the CFRA. (See *Department of Fair Employment & Housing v. Verizon Cal., Inc.* (2003) 108 Cal.App.4th 160, 164, 133 Cal.Rptr.2d 258, noting without comment a trial award of damages for lost pay and emotional distress). The court stated that California courts are not likely to allow recovery of emotional distress damages for a CFRA violation because the CFRA and the FMLA are so closely related, but the court left the issue to the California courts to decide. As a result, the court merely declined to exercise supplemental federal jurisdiction over the employee's CFRA claim.

[245] *McAnnally v. Wyn South Molded Products* (N.D.Ala. 1996) 912 F.Supp. 512.

[246] *Nero v. Industrial Molding Corp.* (5th Cir. 1999) 167 F.3d. 921, 929.

[247] *McDonnell v. Miller Oil Co*. (4th Cir. 1998) 134 F.3d 638.

[248] 29 U.S.C. § 2617(a)(1)(A).

[249] *Nero, supra* (7th Cir. 1998) 167 F.3d. at p. 929 (citing *Shea v. Galaxie Lumber & Construction Co., Ltd.,* 152 F.3d 729, 733) (emphasis added).

[250] 29 C.F.R. § 825.400(b).

[251] *Frizzell v. Southwest Motor Freight* (6th Cir. 1998) 154 F.3d 641, rev. on other grounds and remanded (6th Cir. 1998) 154 F.3d 641; *Hemly v. Stone Container Corp*. (S.D.Ga. 1997) 957 F.Supp. 1274; *Knussman v. State of Maryland* (D.Md. 1996) 935 F.Supp. 659; *Bryant v. Delbar Products, Inc*. (M.D.Tenn. 1998) 18 F.Supp.2d 799; *Souders v. Fleming Cos., Inc*. (D.Neb. 1997) 960 F.Supp. 218 (jury trial permitted to resolve liability and back pay, but not to consider reinstatement and front pay); but see *Hicks v. Maytag Corp*. (E.D.Tenn. 1995) 1995 US Dist. LEXIS 21708 (FMLA does not allow for right to jury).

[252] *Knussman v. State of Md.* (D.Md. 1996) 935 F.Supp. 659.

[253] *Ely v. Wal-Mart, Inc.* (C.D.Cal. 1995) 875 F.Supp. 1422; Jaview Mora, *supra*.

[254] *Nelson v. United Technologies* (1999) 74 Cal.App.4th 597.

of which the CFRA is a part, is sufficient to permit an employee to state a tort claim for wrongful discharge in violation of the public policy against age discrimination.[255]

EMPLOYERS' LIABILITY UNDER THE FMLA

Individual Supervisors May be Liable Under the FMLA.

The various federal trial courts that have addressed the question of liability for an individual who violates the FMLA have reached different, contradictory conclusions. The FMLA definition of "employer" mirrors the FLSA definition, rather than the definition found in the ADA or other civil rights statutes. FMLA regulations state, "[a]s under the FLSA, individuals such as corporate officers acting in the interest of an employer are individually liable for any violations of the requirements of the FMLA."[256]

In *Mercer v. Candace Borden*,[257] the U.S. District Court for the Central District of California joined the growing weight of authority in ruling that individuals are potentially subject to liability under the FMLA.[258]

Regarding a public official's individual liability, federal courts that have addressed this issue are split regarding whether a public employee can be individually liable as an employer under the FMLA. The Third, Fifth, and Eighth Circuits have ruled that public employees can be personally liable under the FMLA.[259] In comparison, the Eleventh Circuit ruled that a public official sued in his individual capacity is not an "employer" subject to individual liability under the FMLA.[260] Although the Ninth Circuit has yet to render an opinion on this issue, trial courts within the Ninth Circuit, including a very recently published case, have found public officials to be individually liable.[261]

Lawsuits Under the Self-Care Provision of FMLA Are Barred Against States.

In *Coleman v. Court of Appeals of Maryland*,[262] the U.S. Supreme Court ruled that claims related to an employee's FMLA leave to care for his or her own personal medical issues may not be brought against states.[263] The Court found that Congress did not validly abrogate states' sovereign immunity from suits for money damages in enacting FMLA's self-care provision, requiring employers, including state employers, to allow employees to take unpaid leave for self-care.[264]

Standard for Analyzing the FMLA Discrimination Claims: Two Views

Many Federal Courts Have Refined Application of McDonnell Douglas Analysis to the FMLA Cases.

Two federal courts of appeal have provided clear descriptions of the framework that many federal courts have developed and refined for analyzing FMLA cases. In *King v. Preferred Technical Group*[265] and *Chaffin v. John H. Carter Co.*,[266] the Seventh and Fifth Circuits, respectively, distinguished between the FMLA's guarantee of substantive rights and the FMLA's prohibition on discriminatory conduct, and they adopted the Supreme Court's *McDonnell Douglas* burden-shifting framework to employees' claims that they were discriminated against or penalized for exercising their FMLA guaranteed rights.

These cases explain that the FMLA established two categories of broad protections for employees. First, the FMLA contains statutory rights. When an employee alleges a deprivation of these substantive guarantees, the employer's intent is

[255] *Stevenson v. Superior Ct.* (1997) 16 Cal.4th 880.
[256] 29 C.F.R. § 825.104(d).
[257] *Mercer v. Candace Borden* (C.D.Cal. 1998) 11 F.Supp.2d 1190.
[258] See also *Bryant, supra*; *Rupnow v. TRC, Inc.* (N.D.Ohio 1998) 999 F.Supp. 1047.
[259] See *Haybarger v. Lawrence County Adult Probation and Parole* (3rd Cir. 2012) 667 F.3d 408; *Modica v. Taylor* (5th Cir. 2006) 465 F.3d 174; and *Darby v. Bratch* (8th Cir. 2002) 287 F.3d 673.
[260] *Wascura v. Carver* (11th Cir. 1999) 169 F.3d 683, appeal after remand *Wascura v. City of So. Miami* (11th Cir. 2001) 257 F.3d 1238.
[261] *Bonzani v. Shinseki* (E.D. Cal. 2012) 2012 U.S. Dist. LEXIS 129440; and see *Morrow v. Putnam* (D. Nev. 2001) 142 F.Supp. 2d 1271.
[262] *Coleman v. Court of Appeals of Md.* (2012) 132 S.Ct. 1327.
[263] *Ibid.*
[264] *Ibid.*
[265] *King v. Preferred Technical Group* (7th Cir. 1999) 166 F.3d 887.
[266] *Chaffin v. John H. Carter Co., Inc*. (5th Cir. 1999) 179 F.3d 316 (overruled in part).

immaterial, and the employee must demonstrate by a preponderance of the evidence only entitlement to the disputed leave.[267]

Second, in addition to the substantive rights guaranteed by the FMLA, the FMLA also affords employees protection if they are discriminated against for exercising their rights under the FMLA. When an employee claims that an employer discriminated against the employee by taking adverse action against the employee for having exercised an FMLA right, the employer's intent is relevant. The issue becomes whether the employer's actions were motivated by an unlawful retaliatory or discriminatory reason.[268]

When a plaintiff alleges a retaliatory discharge under other anti-discrimination laws, courts employ the familiar burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, in the absence of direct evidence of an employer's intent. A plaintiff alleging a retaliatory discharge under the FMLA similarly must establish that the employer engaged in intentional discrimination. So, in the absence of direct evidence of discrimination, many federal courts will apply the *McDonnell Douglas* burden-shifting framework to claims that an employer discriminated against an employee exercising rights guaranteed by the FMLA.[269]

Applying the *McDonnell Douglas* analysis to establish a *prima facie* FMLA discrimination claim, the employee must establish that: (1) the employee engaged in a protected activity; (2) the employer took some adverse employment action against the employee; and (3) there is a causal connection between the employee's protected activity and the adverse employment action. If the employee establishes a *prima facie* discrimination claim, then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. If the employer meets this burden, the employee then must show that the employer's stated reason was a pretext for discrimination.

California courts also apply the *McDonnell Douglas* framework to analyze retaliation and discrimination claims under the CFRA.[270]

The Ninth Circuit Uses an "Interference" Standard to Analyze FMLA Claims.

Unlike the other Circuit Courts, the Ninth Circuit does not construe complaints alleging adverse employment actions taken against employees because they have used FMLA leave as retaliation or discrimination claims, which would require the traditional burden shifting analysis of *McDonnell Douglas.* Instead, the Ninth Circuit analyzes these complaints as claims of "interference" with rights guaranteed by the statute and uses a simpler standard derived from the statute and implementing regulations. In the Ninth Circuit, then, an employee must only establish by a preponderance of the evidence that: (1) the employee took FMLA-protected leave; (2) the employee suffered adverse employment actions; and (3) the adverse actions were causally related to the employee's FMLA leave.[271]

The "Cat's Paw" Theory of Liability May be Used Against Employers in Claims Involving Employer Interference with FMLA Rights.

Courts recently have expanded liability for violating employee FMLA rights where the decision maker took an action upon the reliance of subordinate reporting. In *Staub v. Proctor Hospital*, a case involving claims under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the U.S. Supreme Court rejected the defendant's argument that an employer is not liable unless the immediate decision-maker is motivated by discriminatory animus.[272] The Court applied the "cat's paw" theory of liability, ruling that anti-military discriminatory animus can be inferred upwards where the employee who makes the ultimate decision to punish does so in reliance upon assessments or reports

[267] *King, supra*, 166 F.3d at p. 891 (citations omitted).
[268] *Ibid.*
[269] *Ibid.*; see, e.g., *Morgan v. Hilti, Inc.* (10th Cir. 1997) 108 F.3d 1319; *Kaylor v. Fannin Regional Hospital, Inc.* (N.D.Ga. 1996) 946 F.Supp. 988, 999-1001.
[270] *Nelson, supra,* 74 Cal.App.4th at p. 613.
[271] *Bachelder, supra,* 259 F.3d at pp. 1124-25.
[272] *Staub v. Proctor Hospital* (2011) 131 S.Ct. 1186.

prepared by supervisors who possess such animus.[273]

Days after the *Staub* decision was issued, a federal court cited to *Staub* in *Blount v. Ohio Bell Telephone Co.*, a case involving the FMLA.[274] The *Blount* Court rejected the employer's argument that because the decision to punish did not reside in the managers who perpetrated the alleged discrimination, the employer should not be liable under the FMLA for the actions of the managers.[275] Citing to *Staub*, the Court ruled that "even if the decision to punish and terminate resided higher in the supervisory chain, as Defendants argue, the animus of the ... [acting managers] can be inferred upwards where it had the effect of coloring the various adverse employment actions in this suit."[276]

The "Honest Belief" Defense May Not Apply in California.

In *Capp v. Mondelez Global, LLC*, the Third Circuit Court of Appeals recently joined the Seventh and Eighth circuits in ruling that an employer's "honest belief" regarding perceived FMLA misuse can defeat a retaliation claim under the statute. Rejecting the Sixth Circuit's more narrow "honest belief" rule, which requires the employer to show that its belief was reasonably based on particularized facts, the Court ruled that the employer need only show that it honestly believed its reason for discharge, even if that belief was mistaken.[277]

Even though some Circuits have found that the "honest belief" defense is viable, the California Supreme Court recently explained that it is still an unsettled question of law as to whether California employers can rely on the "honest belief" defense under FMLA or CFRA.[278]

MILITARY FAMILY LEAVE PROVISIONS

Military Caregiver Leave

Military Caregiver Leave is a special provision that extends FMLA job-protected leave beyond the normal twelve weeks of FMLA leave. This provision also extends FMLA protection to additional family members (i.e., parent, spouse, child, or next of kin) beyond those who may take FMLA leave for other qualifying reasons. An eligible employee who is the spouse, son, daughter, parent, or next of kin of a "covered service member" will be able to take up to 26 workweeks of leave in a "single twelve-month period" to care for a covered service member with a serious illness or injury incurred in the line of active duty.[279] The twelve-month period commences on the date an employee first takes leave to care for a covered service member with a serious injury or illness.[280] One statutory limitation to during a "single twelve-month period," applies to a husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of twenty-six weeks of Military Caregiver Leave during the "single twelve-month period."[281]

Qualifying Exigency Leave

This provision makes the normal twelve workweeks of FMLA leave available to eligible employees with a covered military member (who is the employee's spouse, child, or parent) serving in the National Guard or Reserves to use for "any qualifying exigency" arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation.[282] "Qualifying exigency" refers to eight specific broad categories for which employees can use FMLA leave: (1) short-notice deployment; (2) military events and related activities; (3) child care and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities not encompassed in the other categories, but agreed to by the employer and employee.[283]

An employer may require certification completed by the covered military member's

[273] *Ibid.*
[274] *Blount v. Ohio Bell Telephone Co.* (N.D. Ohio) 2011 WL 867551 *6.
[275] *Ibid.*
[276] *Ibid.*
[277] *Capps v. Mondelez Glob., LLC* (3d Cir. 2017) 847 F.3d 144, 156.
[278] *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 921.
[279] 29 C.F.R. § 825.127.
[280] 29 U.S.C. § 2612(a)(3)-(4).
[281] 29 C.F.R. § 825.127(d); 29 U.S.C. § 2612(f)(2).
[282] 29 C.F.R. § 825.126.
[283] 29 U.S.C. § 2612(a).

active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty, or on call to active duty status in support of a contingency operation, and the dates of the covered military member's active duty service.[284]

When leave is taken to care for a covered service member with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered service member.[285] An employer requiring an employee to submit a certification for leave to care for a covered service member must accept as sufficient certification, in lieu of the Department's optional certification form (WH-385) or an employer's own certification form, "invitational travel orders" or "invitational travel authorizations" issued to any family member to join an injured or ill service member at his or her bedside.[286]

Employers should note that this FMLA leave would be in addition to the leave provided for under section 395.10 of the Military and Veterans Code. This statute requires employers to allow the spouse of a soldier serving to take up to ten days of unpaid leave while the soldier is home on leave.

New Developments 2021

LEGISLATION

Paid Family Leave Will Cover Employees Who Take Time Off for Reasons Related to Active Military Duty Starting January 1, 2021.

Pursuant to Senate Bill 1123(2018), beginning January 1, 2021, the family temporary disability insurance program will provide benefits to any employee who takes time off to participate in a qualifying exigency related to the covered active military duty, or call to cover active duty, of the employee's spouse, domestic partner, child, or parent who is a member of the U.S. Armed Forces.[287] Qualified employees will be permitted to collect paid family leave benefits if the employee takes time off.[288]

Expanded Rights for California Employees Who Are Victims of Crime or Abuse Starting January 1, 2021.

Effective January 1, 2021, Labor Code section 230(c) is amended to prohibit employers from in any way discriminating or retaliating against an employee who is a victim of a crime or abuse for taking time off work to obtain or attempt to obtain relief. Relief includes, but is not limited to, a temporary restraining order or other injunctive relief to help ensure the health, safety, or welfare of the victim or their child. In addition, employers with 25 or more employees must allow an employee "who is a victim" to take time off: (1) to seek medical attention for any injuries related to the experience; (2) to obtain services from a domestic shelter, program, or rape crisis center; (3) to obtain psychological counseling related to the experience; or (4) to participate in safety planning and take other actions to increase safety from future domestic violence, sexual assault, or stalking, and such employers must provide employees notice of these rights.[289]

The statute, as amended, broadly defines a "victim" as (1) a victim of stalking, domestic violence, or sexual assault, (2) a victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury, or (3) a person whose immediate family member, as defined, died as the direct result of a crime.[290]

CASES

The Ninth Circuit Clarifies "Willful Violation" of the FMLA.[291]

Plaintiff Andrea Olson brought claims against her employer, Bonneville Power Administration ("BPA"), for FMLA retaliation and interference. Olson worked as a Reasonable Accommodation Coordinator ("RAC") for BPA, and on or around March 24,

[284] 29 C.F.R. § 825.309(a).
[285] 29 C.F.R. § 825.310.
[286] *Id.*
[287] Unemp. Ins. Code, § 3303.
[288] *Ibid.*
[289] Lab. Code, § 230.1(a), (h).
[290] *Id.* at subd. (g)(6).
[291] *Olson v. United States Department of Energy* (9th Cir. 2020) 980 F.3d 1334.

2014, Olson took FMLA leave for anxiety. BPA did not provide Olson with notice of her FMLA rights. In June of 2014, Olson met with a BPA representative to discuss accommodations and her return to work, and BPA offered her a five-hour trial work period. Olson did not accept BPA's offer and never returned to work. Olson thereafter filed her complaint alleging FMLA retaliation and interference.

Following a bench trial, the trial court entered judgment for BPA on Olson's claims, finding that Olson failed to prove that BPA would not restore her to the same or equivalent position, and that Olson failed to prove that BPA's failure to inform her of her FMLA actually had an impact on her rights. The trial court also found that any alleged interference was not "willful"—BPA had consulted with its legal department concerning Olson's status, attempted to bring her back to work, and paid Olson for hours that she worked when she was out on FMLA leave.

On appeal, Olson did not challenge the trial court's finding that she had failed to prove that BPA would not restore her to the same or equivalent position. Instead, Olson contended that the court failed to consider how BPA's failure to notify caused her to structure her FMLA differently, and how BPA's failure to notify could have exacerbated her FMLA-qualifying anxiety. She also challenged the trial court's finding that the alleged interference was not "willful."

The Ninth Circuit did not decide whether BPA's failure to give notice of her FMLA rights constituted interference because it ruled that Olson's claims were time-barred since she filed her complaint more than two years after her meeting with a BPA representative. Under the FMLA, an action must generally be brought within two years "after the date of the last event constituting the alleged violation for which the action is brought."[292] This limitation is extended to three years for a "willful violation."[293]

The Ninth Circuit ruled that the definition of "willful" applicable to FLSA claims—which requires a showing that an employer knew or showed reckless disregard for whether its conduct was prohibited by statute—also applies to FMLA claims, and determined under this standard that the trial court's finding that the alleged interference was not "willful" was not in error.

KEY ISSUES

- FMLA generally entitles eligible employees up to 12 weeks of unpaid leave per year for a child's birth or adoption, to care for a spouse or an immediate family member with a "serious health condition," or when a "serious health condition" renders employees unable to work. The CFRA extends this right to take leave in order to care for certain family members not covered by FMLA, such as siblings, grandparents, and parents-in-law. Thus, there may be situations where an employee is able to "stack" both leaves for a total of 24 weeks.
- An employee is eligible for FMLA leave if the employee: has been employed by the same employer for at least twelve months (which do not need to be consecutive), has been employed for at least 1,250 hours during the twelve months immediately before the leave begins, and is employed at a worksite where 50 or more employers are employed by the employer within 75 miles of that worksite.
- FMLA and CFRA regulations require that covered employers provide employees with detailed, written notices of FMLA and CFRA entitlements and obligations, even if the employer has no eligible employees. Failure to provide the proper notice can have significant consequences for the employer.
- The FMLA and CFRA permit employers to require medical certification to support the need for leave due to a "serious health condition" provided

[292] 29 U.S.C. § 2617(c)(1).

[293] 29 U.S.C. § 2617(c)(2).

that the employer complies with several specific requirements.

- The FMLA permits employers to require a fitness-for-duty certification from employees returning from a continuous leave.
- At the end of an eligible employee's FMLA-qualifying leave, the FMLA requires the employer to restore the employee "to the position of employment held by the employee when the leave commenced" or to offer an equivalent position.

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