LABOR AND EMPLOYMENT LAW

CALIFORNIA LAWYERS ASSOCIATION

presents

2023 Public Sector Conference

In One Year and Out The Other: Year In Review

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Speakers:

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Conference Reference Materials

THE YEAR IN REVIEW – APRIL 2022 TO APRIL 2023

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I. NEW LEGISLATION

SB 191 – New Employee Orientations (Effective June 30, 2022 – June 30, 2025)

Existing law requires employers to provide exclusive representatives with access to new employee orientations. SB 191, effective through June 30, 2025, provides that where an employer has not held an in-person new employee orientation within thirty (30) days, the exclusive representative may schedule a thirty (30) minute meeting with the employee during work hours and on paid time. Upon request, the employer must also provide the exclusive representative with space to hold the meeting within seven (7) days. Disputes regarding implementation of these new statutory provisions may be resolved through interest arbitration.

SB 1131 – Public Employee Address Confidentiality (Effective September 22, 2022)

The Safe at Home program allows specified confidential victims and health care service providers to apply for substitute addresses for use in public records. SB 1131 expands the Safe at Home program to include public employees and contractors who are subject to violent threats, harassment, and intimidation because of their work for a public entity.

SB 1162 – Pay Transparency (Effective January 1, 2023)

SB 1162 requires all employers with 15 or more employees to disclose pay scales in job postings and upon request by an applicant and/or employee. Employers are required to maintain records of each employee's job title and wage rate history for the duration of the employment plus three (3) years. Any person who claims to be aggrieved by a violation of these requirements has a right to private action and may file a complaint with the Labor Commissioner, which could result in civil penalties up to $10,000. If the employer fails to keep records of wage rate history as required by SB 1162, there is a rebuttable presumption in favor of the claimant.

AB 204 – Health Care Worker Retention Payments (Effective January 1, 2023)

Existing law requires the State Department of Health Care Services ("DHCS") to establish a clinic workforce stabilization retention payment program to provide funds to eligible clinics, including federally qualified health centers and rural health clinics. The funds are to be used as retention payments to eligible employees, who are not supervisors or managers, in an

amount up to $1,000. Qualified clinics must submit (1) the name and mailing address of eligible employees; (2) the employee's professional license, certification, or registration, if applicable, and (3) any other information as required by DHCS. Within sixty (60) days of receipt of funds, the qualified clinic must pay eligible employees a retention payment of up to $1,000 on a pro rata basis.

SB 931 – Civil Penalties for Discouraging Union Membership (Effective January 1, 2023)

Existing law prohibits public employers from discouraging employees from union membership. SB 931 requires the Public Employment Relations Board ("PERB") to award attorneys' fees and costs to the prevailing party of such a charge. Additionally, public employers who are found to have discouraged union membership will be assessed civil penalties up to $100,000. PERB will analyze the public employer's annual budget, the severity of the violation, and any prior violations by the public employer in determining the proper penalty.

SB 1334 – Meal and Rest Breaks in Public Sector Health Care Settings (Effective January 1, 2023)

Existing law requires private employers to provide paid ten (10) minute rest breaks for every four hours worked and unpaid thirty (30) minute meal breaks for every five hours worked. SB 1334 expands these provisions to employees in public sector health care settings. SB 1334 does not apply to employees who are covered by a collective bargaining agreement that provides meal and rest breaks and provides a monetary remedy equivalent to one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

This law will likely inspire other legislative efforts to make various Labor Code provisions apply expressly to the public sector workforce.

AB 1041 – Protected Leave for Care of a Designated Person (Effective January 1, 2023)

Existing law provides protected leave for family care and medical leave. AB 1041 expands California Family Rights Act ("CFRA") and California paid sick leave statutes to protect leave taken to care for a "designated person." Under CFRA, a "designated person" is

defined as “any individual related by blood or whose association with the employee is the equivalent of a family relationship.” California paid sick leave statutes define “designated person” as “a person identified by the employee at the time the employee requests paid sick days. Employers may limit an employee to designate one “designated person” per 12-month period.

AB 1949 – Bereavement Leave (Effective January 1, 2023)

AB 1949 requires employers to provide five (5) days of unpaid protected bereavement leave for the death of a family member. Employers are required to permit employees to use accrued and available leave balances to remain paid during bereavement leave. AB 1949 also makes it an unlawful employment practice for an employer to discriminate or interfere with an employee’s right to use bereavement leave.

SB 1100 – Disruptive Persons at Public Meetings (Effective January 1, 2023)

Existing law under the Brown Act authorizes legislative bodies to adopt reasonable regulations on public comments. SB 1100 expands these rights and authorizes the presiding member of the legislative body to remove disruptive individuals from public meetings. The presiding member must warn the individual that their behavior is disrupting the meeting and that failure to cease the disruptive behavior will result in their removal.

SB 1439 – Limits on Campaign Contributions (Effective January 1, 2023)

The Political Reform Act prohibits officers of a public agency from accepting or soliciting a contribution of more than $250 from any party in a proceeding involving a license, permit, or other entitlement for use while the proceeding is pending before the agency and for three (3) months after a final decision is rendered. SB 1439 expands the prohibition on contributions from three (3) months to twelve (12) months. Additionally, SB 1439 extends these prohibitions to local government agencies whose members are directly elected by the voters, which were previously exempt.

AB 473 – CPRA Statutory Citations (Effective January 1, 2023)

AB 473 recodifies and reorganizes the California Public Records Act ("CPRA") as Government Code section 7920 et seq. AB 473 is non-substantive in effect.

New State Holidays (Effective January 1, 2023)

AB 2596 designates Lunar New Year a state holiday. Lunar New Year occurs on the second new moon following the winter solstice, or the third new moon following thew winter solstice should an intercalary month intervene. State employees have the option to receive eight (8) hours of holiday credit in lieu of personal holiday credit.

AB 1801 designates April 24, "Genocide Remembrance Day," a state holiday. AB 1801 authorizes public schools and community colleges to close in recognition of Genocide Remembrance Day. State employees have the option to receive eight (8) hours of holiday credit in lieu of personal holiday credit. Genocide Remembrance Day is excluded from the list of judicial holidays.

AB 1655 designates June 19, "Juneteenth," a state holiday. In 2021, federal legislation passed designating Juneteenth a public holiday. AB 1655 amends the Education Code to clarify that Juneteenth is a holiday appointed by the President requiring public schools and community colleges to close. Public school and community college employees who work on Juneteenth are entitled to holiday pay. Additionally, state employees may elect to take paid time off in recognition of Juneteenth.

Minimum Wage and Salary Increase (Effective January 1, 2023)

Although not a new law, California's minimum wage increased to $15.50 per hour for all employers, regardless of the number of employees. Because the minimum salary threshold for exempt employees is defined as a multiple of the state minimum wage, the 2023 minimum salary threshold that must be paid to an exempt employee is $64,480 annually.

AB 2188 – Cannabis Discrimination (Effective January 1, 2024)

The California Fair Employment and Housing Act ("FEHA") prohibits employment discrimination on the basis of enumerated protected statuses. AB 2188 makes it unlawful for an

employer to discriminate against an employee or prospective employee on the basis of the individual's use of cannabis off-duty and away from the workplace. AB 2188 does not preempt state or federal laws requiring drug testing and is subject to certain exemptions. AB 2188 does not permit individuals to possess or be under the influence of cannabis at the workplace.

II. CASE LAW

Title VII/FEHA/ADA/ADEA

Opara v. Yellen (9th Cir. 2023) 57 F.4th 709

A Nigerian Internal Revenue Service ("IRS") Revenue Officer with twenty-seven (27) years of experience was terminated following an investigation into allegations that she violated internal protocol by accessing acquaintances' tax filing data without their permission. The employee filed a formal equal employment opportunity ("EEO") complaint against the Department of the Treasury ("Department") alleging discrimination based on age and national origin. After completing an internal investigation, the Department issued a final agency decision concluding that the employee "failed to establish a prima facie case" on the two (2) allegations.

Subsequently, the employee filed a complaint against the Secretary of the Treasury in district court, asserting claims of discrimination based on age and national origin in violation of ADEA and Title VII of the Civil Rights Act of 1964. The district court granted summary judgment in favor of the defendant. Plaintiff appealed.

The Ninth Circuit Court found that Plaintiff established a prima facie case of age discrimination; however, the employer met its burden to provide legitimate, nondiscriminatory reasons for the proposed removal, reassignment, and eventual termination, which were consistent with the employer's internal guidelines. Plaintiff failed to present evidence sufficient to raise a genuine issue of fact that the proffered reasons were pretextual. The court concluded that, although very little evidence is necessary to raise a genuine issue of fact regarding an employer's motive, Plaintiff's uncorroborated allegation about an official's comments regarding age was not enough to create an issue as to pretext.

Price v. Victor Valley Union High School District (2022) 85 Cal.App.5th 231

In 2003, La Vonya Price ("Plaintiff") had a serious stroke. Initially, she was paralyzed. Eventually, she regained use of her body and learned how to speak, stand, and walk again. But she did not fully recover. Plaintiff worked intermittently as a part-time substitute special education aide at the Victor Valley Unified School District ("District"). She did not have to undergo a physical evaluation to work as a substitute. She then got an offer for a full-time position, which was contingent on passing a physical examination. The position required Plaintiff to work one-on-one with autistic students, who would sometimes run away from teachers and aides, including Plaintiff. A physician assistant conducted Plaintiff's physical examination. He found her medically unsuitable for the position, given that she had balance and strength deficits in her right leg that increased her risk of falling. Based on this report, the District rescinded the job offer, terminated her as a substitute, and disqualified her from any future employment with the District. The District told her the job offer was rescinded because she failed the physical examination. A District representative told her several times she was "a liability."

Plaintiff filed a lawsuit alleging disability discrimination, failure to accommodate a disability, failure to engage in the interactive process, retaliation, and failure to prevent discrimination and retaliation. The District moved for summary judgment. The trial court granted the District's motion for summary judgment. Plaintiff appealed.

The Court of Appeal reversed finding triable issue of fact concerning her claims. A jury could reasonably conclude that Plaintiff suffered or was regarded as suffering from a disability, could perform essential duties without reasonable accommodations, and experienced an adverse employment action given the actual or perceived disability.

The Court of Appeal agreed with the trial court's decision to summarily dismiss Plaintiff's other claims, including the alleged failure to engage in the interactive process, retaliation, and failure to prevent discrimination and retaliation. Regarding the plaintiff's claim

that the District failed to accommodate her disability, the Court of Appeal noted Plaintiff acknowledged that she never asked the District for accommodation.

Arega v. Bay Area Rapid Transit District (2022) 83 Cal.App.5th 308

African American employees ("Plaintiffs") who were in a bargaining unit represented by a union brought an action against their employer, the Bay Area Rapid Transit District ("BART"), alleging BART discriminated against them based on race by promoting less qualified individuals over them, and asserting disparate treatment and disparate impact claims under the Fair Employment and Housing Act ("FEHA").

BART moved for summary judgment, the trial court granted summary judgment in favor of BART and denied Plaintiffs' motion to set aside judgment. Plaintiffs appealed and BART moved to dismiss the appeal.

Plaintiffs made several arguments on appeal, including that the trial court erroneously granted BART's summary judgment because genuine issues of material fact existed with regard to both their disparate treatment and disparate impact claims asserted under FEHA. The Court of Appeal explained a plaintiff can prove a disparate treatment discrimination claim under FEHA by direct evidence or circumstantial evidence. Plaintiffs contended there was direct evidence of animus sufficient to defeat summary judgment. They relied on the declaration of the Chief Steward Plaintiffs ("CSPs"). However, Plaintiffs' opening brief did not include adequate record citations. The California Rules of Court require litigants to support each point raised by citation to authority, and to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (California Rules of Court 8.204(a)(1)(B), (C).) The Court of Appeal will not consider the evidence set forth in the moving papers to which objections have been made and sustained. Accordingly, it did not consider the CSPs' declaration, the only evidence Plaintiffs offered as direct evidence of discriminatory animus. The Court of Appeal held Plaintiffs did not meet their burden of producing direct evidence to establish the existence of a triable issue of material fact as to whether BART discriminated against them based on race in violation of FEHA.

As to circumstantial evidence, Plaintiffs argued they established that BART's reasons for not promoting them were pretextual. Again, Plaintiffs' briefing included no citations to the record. Further, none of the proffered evidence appeared in the record. In sum, Plaintiffs failed to meet their responsive burden of producing circumstantial evidence to establish a triable issue of material fact on their disparate treatment claim.

Disparate impact claims on the other hand, involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Plaintiffs' disparate impact claim failed because they did not exhaust their administrative remedies. Plaintiffs' arguments on appeal did not address the court's finding that the undisputed facts established no significant disparity and did not identify statistical evidence in the record that establishes a statistical disparity that demonstrated a disparate impact. The record included no statistical evidence that was presented to the trial court. The absence of any such evidence defeated their disparate impact claim. None of Plaintiffs' factual assertions were accompanied by proper citations to the record, nor was the supporting evidence. Even if they were in the record and properly cited, they did not establish triable issues of fact with respect to employees' disparate impact claim because they did not present the requisite statistical proof that is key to the claim. Plaintiffs did not meet their burden of producing circumstantial evidence to establish the existence of a triable issue of material fact as to whether the employer discriminated against them based on race in violation of FEHA.

The Court of Appeal affirmed the grant of summary judgment in favor of the employer.

Bitner v. Department of Corrections and Rehabilitation (2023) 87 Cal.App.5th 1048

Plaintiffs, nurses employed by California Department of Corrections and Rehabilitation ("CDCR" or "Employer"), brought a class action lawsuit against the Employer alleging, among other things, that they were subjected to acts of sexual harassment by male prison inmates, but that CDCR failed to prevent or remedy the situation in violation of the California Fair Employment and Housing Act ("FEHA").

The trial court granted summary judgment in favor of CDCR on the ground that it was entitled to statutory immunity under Section 844.6, which generally provided that "a public entity is not liable for…[a]n injury proximately caused by any prisoner." Plaintiffs appealed.

On appeal, Plaintiffs argued that there is no California authority that directly addresses the question of whether the statutory immunity provided in Section 844.6 extends to claims brought under FEHA. The Plaintiffs asserted that the Court of Appeals should interpret Section 844.6 as excluding FEHA claims from its grant of immunity. Secondly, Plaintiffs argued that, even if claims under FEHA were not exempt from the immunity granted in Section 844.6, the evidence presented on summary judgment was not sufficient to trigger application of Section 844.6. The Court of Appeal disagreed with the Plaintiffs as to both points.

First, on the issue of statutory interpretation, the Court of Appeal found the language of Section 844.6 to be clear and unambiguous and concluded that nothing in the plain meaning of the statute's words suggest that an exception should be read into the statute for claims brought pursuant to FEHA.

Second, the Court of Appeals addressed and dismissed the remainder of Plaintiffs' arguments as unpersuasive. Plaintiffs asserted that (1) competing cannons of statutory construction suggest FEHA should take precedence over Section 844.6; (2) FEHA creates a "direct" duty, and thus, must be interpreted to take precedence over Section 844.6; (3) Section 815.6 imposes direct liability for the breach of a statutorily mandated duty, overriding the immunity provided in Section 844.6; and (4) public policy considerations support the finding of an exception to Section 844.6 in the context of FEHA claims. The Court found that FEHA is a statutory scheme that imposes a general legal duty, and Section 844.6 is clearly the more specific statute when compared with FEHA. As a result, the rule of statutory construction that a more specific statute prevails over a more general one did not support the Plaintiffs' position.

The Court of Appeal affirmed the trial court's judgment.

Atalla v. Rite Aid Corporation, et al (2023) 89 Cal.App.5th 294

Hanin Atalla ("Atalla"), a pharmacist at Rite Aid, alleged that a district manager sexually harassed her, among other claims. Atalla's claimed Eric Lund ("Lund"), the district manager, had initiated a number of late-night text messages to her, including a video of him engaging in a sexual act and a photo of his genitals. The record reflects Atalla and Lund had a long-standing friendship before Atalla began working at Rite Aid, and thereafter. Even Atalla had testified that her preexisting relationship with Lund "was wholly unconnected to her work" and that even before they worked together, they "texted about a range of topics, extensively and frequently, including … concerning family, vacations, food and dining, alcohol and drinking, people and pets, exercise, as well as chit chat about work," and "regularly met for coffee and lunch, got together for holiday and birthday dinners, and were acquainted with each other's spouses."

Atalla sued. Rite Aid did not dispute Lund had sent the sexually explicit communications. Instead, it maintained it was not liable for harassment based on Lund's conduct because he was not acting in his capacity as a supervisor at the time. The trial court granted summary judgment for Rite Aid based on Atalla's sexual harassment claim, among others. Atalla appealed.

The Court of Appeal affirmed summary judgment for Rite Aid, agreeing with the trial court's determination. Regarding the sexually explicit pictures and video Lund sent to Atalla, the Court concluded that it was not work-related and, thus, could not form the basis of a harassment claim against Rite Aid. The Court noted that Lund sent the photo and video while intoxicated at a hotel late in the evening and Atalla received the texts at her home. The Court of Appeal concluded Rite Aid was not strictly liable for Lund's harassing conduct because Rite Aid demonstrated the harassment occurred outside of work and that Atalla a willing participant in the personal friendship that pre-existed Atalla's employment.

The FEHA makes an employer strictly liable for sexual harassment by a supervisor, but only if the supervisor is acting in the capacity of supervisor when the harassment occurs.

Lin v. Kaiser Foundation Hospitals (2023) 88 Cal.App.5th 712

Suchin Lin ("Plaintiff") was a software quality assurance associate engineer in the innovation and transformation (I&T) department of Kaiser. In December 2018, Kaiser started planning to lay off some employees as part of a reduction in force ("RIF") to help it meet the next year's budgetary goals.

In January 2019, Plaintiff fell in her workplace and injured her left shoulder. The next day, she requested accommodation of a disability. Later that month, she requested more accommodations, including regular medical and physical therapy visits. In April 2019, Kaiser notified Plaintiff that it eliminated her position and would terminate her employment in June 2019.

Plaintiff filed a lawsuit alleging wrongful termination in violation of public policy and intentional infliction of emotional distress. Plaintiff also made the following claims under FEHA: disability discrimination, retaliation for requesting disability accommodations, failure to prevent discrimination and retaliation, failure to accommodate a disability, and failure to engage in an interactive process regarding disability accommodations.

Kaiser filed a motion for summary judgment. It argued that the I&T executive director decided to eliminate Plaintiff's position due to performance issues in December 2018 before she was injured and that it granted all her requested accommodations, including modified duties and medical leave. The trial court granted summary judgment in Kaiser's favor ruling that the evidence supported that Kaiser decided to terminate Plaintiff before it found out about her disability and did so for budgetary considerations and for the reasons stated in the RIF.

Plaintiff appealed. The Court of Appeal acknowledged that Kaiser's plan to terminate Plaintiff before she became disabled did not amount to disability discrimination. But the Court of Appeal noted that Kaiser only eliminated her position, gave final notice of the RIF list, and notified her about her termination in April 2019 after it discovered her disability. Next, the Court of Appeal ruled that while Kaiser ultimately granted all the requested accommodations, Kaiser, through Plaintiff's supervisor, failed to provide her with a specific reasonable accommodation

that she needed, namely being assigned to lighter tasks. The Court of Appeal ruled that a jury could reasonably make the following findings based on the evidence: 1) Plaintiff's selection for the RIF in December 2018 was tentative; 2) Kaiser acted upon the supervisor's retaliatory intentions; 3) Kaiser terminated Plaintiff's employment substantially because the supervisor resented her accommodation requests, even though Kaiser ultimately granted those requests; and 4) The supervisor's resentment influenced his negative ratings of the plaintiff in a performance evaluation. The Court of Appeal reversed the decision and returned the matter to the trial court for further proceedings.

USERRA

Torres v. Texas Dep't of Public Safety (2022) 142 S.Ct. 2455

Petitioner Le Roy Torres enlisted in the Army Reserves in 1989. In 2007, he was called to active duty and deployed to Iraq. While serving, Torres was exposed to toxic burn pits and returned home with constrictive bronchitis. Torres requested that his employer, Texas Department of Public Safety ("Texas"), accommodate his condition by reemploying him in a different role. Texas refused.

Torres sued Texas in state court arguing that Texas violated USERRA's mandate that state employers rehire returning servicemembers, use "reasonable efforts" to accommodate any service-related disability or find an "equivalent" position where such disability prevents the veteran from holding his prior position. 38 U.S.C. § 4313(a)(3). A divided intermediate appellate court held that Congress could not authorize private suits against nonconsenting states pursuant to its Article I powers except under the Bankruptcy clause. The Supreme Court of Texas denied discretionary review.

The Supreme Court of the United States granted Torres' petition for certiorari. Citing its recent decision in *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244 (2021) (which addressed the authorization of private suits against states to enforce the federal eminent domain power in the context of building interstate pipelines), the Court held that states waived their

sovereign immunity by ratifying the Constitution in order to yield to the federal power to raise and support the armed forces as part of the "Plan of Convention." Because the Constitutional authority of federal government to raise its defense is "complete in itself," and because the USERRA is a clear exercise of that authority, the right to enforce that authority against the state could not be conditioned on the state's consent to be sued. Accordingly, the Court reversed and remanded. Justice Thomas dissented. Justices Alito, Gorsuch, and Barret joined in that dissent.

Wage and Hour

Stone v. Alameda Health System (2023) 88 Cal.App.5th 84, judicial appeal pending

Plaintiffs, a Medical Assistant and Licensed Vocational Nurse employed by the Alameda Health System ("AHS" or "Respondent"), brought this suit against AHS alleging seven (7) claims related to wage and hour law.

The trial court dismissed all seven (7) class action claims, reasoning that AHS was a "statutorily created public agency" beyond the reach of the Labor Code and Industrial Welfare Commission ("IWC") Wage Order invoked in the complaint. Further, with regard to the Plaintiffs' Private Attorneys General Act ("PAGA") claim, the trial court held that AHS is not a "person" within the meaning of Section 18, there was no underlying statutory violation, and AHS's "public agency" status exempted it from punitive damages. The Plaintiffs appealed.

The Court of Appeals addressed the following issues: 1) whether the "sovereign powers" doctrine renders the respondent liable for alleged Labor Code violations, despite the general rule exempting government agencies from such liability; 2) whether AHS is an exempt "municipal corporation" under Section 220, subdivision (b); 3) whether AHS is an exempt "governmental entity under Section 226, subdivision (i); and 4) whether AHS can be sued under PAGA.

The Court of Appeals found that AHS is not a governmental entity which would exempt it from liability because agencies "are excluded only if their inclusion would result in an infringement upon sovereign governmental powers." First, the Court asked whether there are "positive indicia" of legislative intent to exempt AHS. Finding no such intent, the Court applied

the sovereign powers doctrine to AHS. The Court explained that there is no distinction between AHS and a private institution whose authority is delegated to it by a county or state. As such, AHS did not implicate any sovereign governmental powers. Moreover, the Court found that AHS is not a "municipal corporation," but the respondent is a "governmental entity." Therefore, the Court held there are some Labor Code violations for which a PAGA suit against AHS may be sustained.

Helix Energy Solutions Group, Inc. v. Hewitt (2023) 143 S.Ct. 677

Respondent oil rig worker filed an action against his employer, Helix Energy Solutions Group ("Helix"), seeking overtime payment under the Fair Labor Standards Act ("FLSA"). Respondent earned over $200,000 annually on a daily-rate basis, working up to 84 hours per week. Helix asserted Respondent was exempt from the FLSA because he qualified as a "bona fide executive." Under the FLSA, an employee is considered a "bona fide executive" where they meet the following tests: (1) the "salary basis" test, which requires that an employee receives a salary that does not vary with the amount of time worked; (2) the "salary level" test, which requires the employee's salary to exceed a specified amount; and (3) the job "duties" test, which requires that the employee manage the enterprise, direct the employees, and exercise power to hire and fire.

Here, the case turned on whether Respondent was paid on a salary basis. The District Court ruled in favor of Helix, holding Respondent was paid on a salary basis. The Court of Appeals reversed, holding Respondent was not paid on a salary basis, and thus could claim FLSA protections. The Supreme Court affirmed, holding Respondent was not paid on a salary basis because he was paid based on days worked with no minimum payment guaranteed.

Buero, et al. v. Amazon.Com Services, Inc. (9th Cir. 2023) 61 F.4th 1031

Lindsey Buero ("Plaintiff") filed a class action lawsuit against Amazon entities alleging that employees were not compensated for time spent undergoing mandatory security screenings. Plaintiff alleged that because employees were not paid for time spent undergoing

these screenings, which occurred before and after work shifts and employee breaks, the defendants' practices violated Oregon's wage and hour laws.

The district court granted judgment on the pleadings for the defendants. Plaintiff subsequently appealed the district court's decision to the Ninth Circuit. The Ninth Circuit concluded Oregon had not yet definitively determined whether time spent undergoing mandatory security screenings is compensable so it certified the issue to the Oregon Supreme Court.

The Oregon Supreme Court held the relevant Oregon state statutes mirror their federal counterparts. Therefore, whether time spent in an activity is compensable under Oregon's statutes may be determined by looking at whether that time would be compensable under the federal Fair Labor Standards Act ("FLSA"). The leading precedent regarding whether time spent undergoing mandatory security screenings was compensable under the FLSA is *Integrity Staffing Solutions, Inc. v. Busk* (2014) 574 U.S. 27. The U.S. Supreme Court stated in that earlier case that time spent in activities before or after an employee's regular work shift is not compensable, unless those activities are either (1) an integral and indispensable part of the employees' principal activities, or (2) compensable as a matter of contract, custom or practice. Accordingly, to be compensated under Oregon law for time spent in activities before or after their regular work shifts, Oregon employees would also be required to demonstrate that the activities fell within either of these two (2) exceptions.

Upon receiving this answer from the Oregon Supreme Court, the Ninth Circuit noted that the Plaintiff had failed to allege that either of the two (2) exceptions applied in her case. The same would be true for time spent returning to work after meal or rest breaks. The Ninth Circuit affirmed the district court's decision.

Public Pensions

Casson v. Orange County Employees Retirement System (2023) 87 Cal.App.5th 1204

Casson, a retired firefighter collecting a pension from the California Public Employees' Retirement System ("CalPERS"), started a new job with a county fire department. The county fire department provided pension through a separate retirement system outside of CalPERS, called the Orange County Employees Retirement System ("OCERS"). Casson did not elect reciprocity between the two (2) pensions. About five (5) years later, Casson suffered an on-duty injury that permanently disabled him. Casson then applied for a disability pension from the county retirement system. The county retirement system imposed a disability offset pursuant to Government Code section 31838.5, which precludes a disability allowance that exceeds the amount a member would have received had he stayed in a single retirement system. Government Code section 31838.5 states:

> No provision of this chapter shall be construed to authorize any member, credited with service in more than one entity and who is eligible for a disability allowance, whether service or nonservice connected to receive an amount from one county that, when combined with any amount from other counties or the Public Employees' Retirement System, results in a disability allowance greater than the amount the member would have received had all the member's service been only with one entity.

Casson filed a petition for writ of mandate challenging the county's disability offset. The trial court denied the petition, holding that the plain language of Section 31838.5 requires a disability offset. Casson appealed the trial court's decision.

The appellate court held that because Casson did not elect reciprocity, he is not subject to the disability offset in Section 31838.5. The court reasoned that the CalPERS service retirement is not a disability allowance and thus should not be included in the calculations of Casson's total disability allowance. The appellate court instructed the trial court to grant the plaintiff's petition and to order OCERS to cancel the disability offset and to recalculate the pension benefits.

Hale v. California Public Employees' Retirement System (2022) 82 Cal.App.5th 764

Retired firefighters petitioned for writ of administrative mandamus seeking to require CalPERS to allow them to include holiday cash-outs in their pension calculations, for purposes of determining their monthly retirement allowances. The cash-outs were permitted under the collective bargaining agreements for firefighters serving full time as union officers. The trial court denied the writ, agreeing with CalPERS's determination that the payments were not "compensation earnable" as defined by the Public Employees' Retirement Law.

On appeal, the Court of Appeal first held that California Code of Regulations Title 2, section 571 did not control whether the firefighters holiday cash-outs were "compensation earnable" because the employees were "state members" rather than a local agency or school district members. Following that, the Court determined that the holiday cash-outs clearly constitute "compensation for performing normally required duties, such as holiday pay" under Government Code section 20636(g)(3)(B). The Court further held that the payments met the requirement of being available to all "similarly situated" members of the employment group or class, because, although the payments were not available to non-officers, the firefighters not elected to serve as officers were not similarly situated—unlike the officers who regularly performed union service on their holidays, non-officers had opportunities to earn overtime, different schedules and different conditions of employment. The Court found in favor of the retired firefighters.

Judgment was reversed.

Broome v. Regents of University of California (2022) 80 Cal.App.5th 375

Plaintiffs sought payment of certain retirement benefits from the University of California Board of Regents ("Regents"), alleging claims of impairment of contract, promissory estoppel, equitable estoppel, breach of fiduciary duty, breach of contract, breach of the covenant of good faith, and declaratory relief. In 1999, the Regents approved a resolution to establish a benefit plan, delegating implementation of the plan to the President, "with the concurrence of the Chair of the Board and the Chair of the Committee on Finance." The benefit plan was developed in a document

called "Appendix E," but not ultimately adopted. In 2014, retired employees sued the Regents on behalf of themselves and other Plan members who retired between January 1, 2000 and March 29, 2012.

The Court of Appeal found that Plaintiffs failed to establish that the resolution or Appendix E constituted an express contract to pay benefits. By its own terms, the resolution delegated future implementation of a plan to the President, rather than implementing specific contractual terms. Plaintiffs' claim for relief based on implied contract terms similarly failed on the grounds that the benefits were never implemented. Likewise, the promissory estoppel claim failed because the chairs never concurred in the plan pursuant to the resolution, and the plan was never adopted.

Imperial County Sheriff's Assn. v. County of Imperial (2023) 87 Cal.App.5th 898

Six (6) workers employed by the County of Imperial ("County") and their exclusive representatives (collectively "Plaintiffs"), brought a class action lawsuit against the County, the County Employees' Retirement System ("System"), and the System's Board ("Board") (collectively "Defendants") alleging that the Defendants were systematically miscalculating employee pension contributions.

Plaintiffs filed a motion for class certification under Code of Civil Procedure section 382. The trial court denied the motion based on a finding that a community of interest among the proposed class members required for certification could not be met. The trial court reasoned that workers hired before the effective date of the Public Employees' Pension Reform Act ("PEPRA") were entitled to an enhanced pension benefit unavailable to those hired after. (Government Code section 7522, et seq.) The trial court also concluded the proposed class representatives failed to show they could adequately represent the class. Plaintiffs appealed.

On appeal, Plaintiffs asserted that insufficient evidence supports the trial court's finding that there was an inherent conflict among the class members that precluded class certification and that the court's legal reasoning on this factor was flawed as it focused on "hypothetical conflict" among class members. Additionally, Plaintiffs argued that they should have been afforded an opportunity to show they can adequately represent the interests of the class.

The Court of Appeal disagreed with the trial court's reasoning concerning the community of interest among the proposed class. Specifically, the Court of Appeal concluded that the trial court's determination was not supported by the evidence and was based on improper criteria because it failed to consider the use of subclasses to address the potential conflict it identified. Further, the Court of Appeal agreed with Plaintiffs that they should be provided an opportunity to demonstrate their adequacy.

Accordingly, the Court of Appeal reversed the order denying class certification and the matter was remanded to the trial court with directions to allow the proposed class representatives to file supplemental declarations addressing their adequacy to serve in this role.

Blaser et al. v. California State Teachers' Retirement System (2022) 86 Cal.App.5th 507

The California State Teachers' Retirement System ("CalSTRS") reduced retired teachers' monthly retirement benefits after determining that their former employer, the Salinas Unified High School District, incorrectly reported the retired teachers' earnings to CalSTRS, which resulted in the retired teachers receiving a higher monthly retirement allowance when they retired. Thirty-one (31) retired teachers filed a writ of mandate to protect their monthly retirement benefits.

The trial court granted the petition, concluding CalSTRS's claims to reduce the retired teachers' retirement benefits and collect overpayments were time-barred. CalSTRS appealed.

In 2019, in a decision called *Blaser I*, the Court of Appeal held the "the continuous accrual theory" was applicable. It also held the trial court wrongly found that CalSTRS's efforts to recoup overpayments were time-barred in relation to both past and future monthly retirement payments. Lastly, the Court of Appeal held CalSTRS was not prevented from adjusting the teachers' monthly benefit allowances accruing on or after February 1, 2013; nor was it prevented from asserting claims for prior overpayments for periodic benefits accruing on or after that date. The Court of Appeal returned the case to the trial court for further proceedings to decide the issues of whether the retired teachers forfeited the defenses of equitable estoppel and laches by

failing to assert them and whether such defenses barred CalSTRS's adjustment of benefits and its claims for overpayments of prior benefits.

The trial court ruled in the retired teachers' favor on both issues. The trial court held that the doctrine of forfeiture did not bar the retired teachers from asserting equitable estoppel and laches defenses, and that both defenses were applicable in this case. The trial court ordered CalSTRS to stop reducing the monthly pension benefits and seeking recovery of claimed overpayments. CalSTRS appealed again.

In *Blaser II*, the Court of Appeal reversed, holding the retired teachers could not invoke the doctrine of equitable estoppel to directly contravene statutory limitations. To apply the doctrine in this case would have required CalSTRS to continue miscalculating the monthly pension benefit of the retired teachers in a way that contravened the Education Code. The defense of laches was also inapplicable. A plaintiff could not assert a laches defense to negate the Court of Appeals decision in *Blaser I* that CalSTRS was not barred from adjusting benefits or from asserting overpayment claims for benefits accruing on or after February 1, 2013.

Public Sector Retiree Health Care

Bullock, et al. v. City of Antioch (2022) 78 Cal.App.5th 407

Retired city employees filed suit against the City of Antioch ("City") alleging that the City has and continues to misappropriate a portion of their medical after retirement ("MAR") benefits by deducting the minimum employer contribution from their MAR reimbursement contrary to operative documents and the statute governing public employees' health benefits. The City filed a demurrer and the Contra Costa County Superior Court issued an order sustaining the City's demurrer to the second amended complaint without leave to amend. The retired employees appealed.

The Court of Appeal reversed and remanded after determining that the trial court erred in sustaining the demurred based on collateral estoppel. In 2017, a union filed a grievance asserting that the City was violating the MOU by deducting the minimum employer contribution from

retirees' MAR check. The City Manager denied the grievance asserting the City was correctly paying retirees. The union appealed to the City's Board of Administrative Appeals ("Board"), which determined the City was properly paying its minimum employer contribution. The Board's decision was referred to the City Council which upheld the Board's determination. Here, the City argued that issue preclusion bars the current claim because the union raised the identical issue in the 2017 grievance proceeding, the issue was actually litigated with a final judgment on the merits and the Plaintiffs are in privity with the union.

The Court of Appeal analyzed issue preclusion, writing: "The threshold requirements for issue preclusion to apply are: (1) the issue sought to be precluded from re-litigation is identical to that decided in a prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding is final and on the merits; and (5) the party against whom preclusion is sought is the same as, or in privity with, the party to the former proceeding."

The Court of Appeal agreed with the trial court's determination that the first four threshold requirements were met. Regarding the last requirement, the Court of Appeal found that twelve (12) out of the seventeen (17) Plaintiffs were never members of the union that filed the 2017 grievance and none of the Plaintiffs were current members in 2017. However, the Court of Appeal did not resolve the privity issue because it determined that the due process requirements necessary to apply issue preclusion was not met as the record provided no basis for concluding that the Plaintiffs should reasonably have expected to be bound by the union's grievance proceeding.

Rose v. County of San Benito (2022) 77 Cal.App.5th 688, review denied (July 13, 2022)

For over two (2) decades, the County of San Benito ("County") provided health insurance benefits for its employees under the Public Employees' Medical Hospital Care Act ("PEMHCA"), which requires a participating county to pay retiree health insurance benefits at the same contribution rate it pays to active employees. In January 2017, the County ceased providing benefits under PEMHCA and at the same time reduced the health insurance benefit

contribution for Medicare-eligible retirees. Retired County employees filed an action asserting that the County's actions violated an implied promise made by the County that, upon their retirement, Plaintiffs would receive "fully paid" lifetime retiree health insurance benefits, with premium contributions equal to those paid for active employees.

After a bench trial, the trial court found the County's adoption and continued renewal of healthcare benefits under PEMHCA's equal contribution framework showed a legislative intent to confer a vested right to lifetime, nonmodifiable, retiree health insurance premiums equal to those paid to active employees. In making its decision, the trial court admitted and considered evidence beyond the legislative record. The trial court entered judgment in favor of Plaintiffs. The County appealed.

The Court of Appeal determined that "California law contains a strong presumption against a finding of implied contractual rights for public employees. To overcome that presumption here, plaintiffs must establish that the board acted with the 'requisite clear manifestation of intent' (*Cal Fire Local 2881 v. California Public Employees' Retirement System* (2019) 6 Cal.5th 965, 981) to create an implied, vested, contractual right to nonmodifiable retiree health benefits. Under *Retired Employees*, such intent may be proven by 'the statutory language or circumstances accompanying its passage.'" (*Rose v. County of San Benito* (2022) 77 Cal.App.5th 688, 713, *review denied (July 13, 2022)* citing *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1187.)

The Court of Appeal reversed, concluding that the trial court erred in relying upon inadmissible evidence to ascertain legislative intent and in failing to apply the presumption against finding an implied vested right in the absence of a clear manifestation of legislative intent to contractually bind the County.

POBRA

Garcia v. State Department of Developmental Services (2023) 88 Cal.App.5th 460

Under the Public Safety Officers Procedural Bill of Rights Act ("POBRA"), a peace officer cannot be disciplined for any misconduct unless the public agency completes its investigation and notifies the peace officer of its proposed discipline within one (1) year of the public agency's discovery of the misconduct. The Court addressed the issue where there are multiple instances of misconduct and the public agency initiates an investigation into one (1) allegation of misconduct. The Court held that where there are unrelated instances of misconduct, the statute of limitations runs separately for each act of misconduct.

Shouse v. County of Riverside (2022) 84 Cal.App.5th 1080

The County of Riverside ("County") terminated Andrew Shouse ("Petitioner") for engaging in improper sexual relationships with subordinates under his command, misappropriating County equipment and electronic mail for his personal use, being insubordinate by violating a direct order prohibiting from contacting any person with whom he had a personal relationship during the pendency of the investigation, and engaging in unbecoming conduct discrediting the Sheriff's Department. He appealed his termination. His appeal was adjudicated before a hearing officer. The hearing officer upheld his termination. Petitioner filed a petition for writ of mandate. The trial court denied the petition. Petitioner appealed.

The sole legal issue presented was whether Petitioner's rights pursuant to the POBRA (Government Code section 3304(d)(1)) were violated where the investigation into his improper conduct was not completed within one (1) year of discovery.

The Court of Appeal concluded there was no violation of the one-year limitations period amounting to a breach of the Petitioner's POBRA rights since all allegations against the Petitioner were timely investigated within a year (by April 2017).

The department's chief, who was the officer authorized to initiate an investigation, testified that he only learned in May 2016 that the deputy with whom the Petitioner had a

rumored intimate relationship was in Petitioner's chain of command. Because the woman was in Petitioner's chain of command, the relationship would violate department policies.

The Court of Appeal expressed the public policy behind its decision. The department's chief should not have been required to initiate an investigation, which could have devastating effects on one's career, based on mere unsubstantiated rumors and should only have been expected to initiate it when they knew or had reason to know the alleged conduct involved actionable misconduct.

Collective Bargaining Statutes: Court Decisions

County of San Joaquin v. Public Employment Relations Bd. (2022) 82 Cal.App.5th 1053

The California Nurses Association ("CNA")-represented nurses employed by the County of San Joaquin ("County") announced a two (2)-day, post-impasse strike. The County subsequently announced that any nurses who participate in the strike will not be allowed to return to work until a full five (5) days after the strike due to the contract it made with the strike replacement company, which included a five (5)-day minimum shift guarantee. After the strike, the County barred most of the striking employees from returning to work. Some employees requested to use accrued paid vacation and similar leave accruals. The County refused to allow the use of accrued time and recorded these additional days "unauthorized leave." CNA filed an unfair practice charge with the Public Employment Relations Board ("PERB") alleging that the County's conduct constituted unlawful interference with, and discrimination against, the nurses' protected striking activity. PERB concluded that the County's refusal to allow strikers to return to work was conduct inherently destructive to protected activity, and applied a three-part test to determine whether the County could make out an affirmative defense to the claim of unlawful interference. The test asks whether the County:

> (1) made a good faith effort to negotiate a strike replacement contract that would eliminate any minimum shift guarantee or shorten it to the greatest degree possible;
>
> (2) barred employees from work *only* because such a contractual commitment temporarily reduced available work opportunities,

> and it filled all remaining opportunities without discriminating against employees based on whether they worked during the strike or engaged in any other actual or perceived protected activity; and
>
> (3) provided the employees' union with timely notice regarding any decision to guarantee replacement workers a minimum work period, and if requested, bargained in good faith over the potential effects on bargaining unit employees.

PERB issued a decision finding that the County failed to satisfy these factors and that the County engaged in unlawful interference and discrimination. The County filed a petition for writ of extraordinary relief with the Court of Appeal.

The Third District Court of Appeal held that PERB's determination that the County's refusal to permit nurses to return to work was inherently destructive to protected activity, was not clearly erroneous. Additionally, PERB's test three (3)-part test to assess the County's affirmative defense is not clearly erroneous. PERB's determination that the County's refusal to allow nurses to use paid leave after the strike constituted discrimination and interference, was not clearly erroneous. Substantial evidence supported PERB's factual findings that the County did not make a good faith effort to negotiate a shorter minimum shift guarantee with the strike replacement company, and that the County discriminated against strikers when offering available work after the strike. PERB's remedial order requiring the County to pay nurses with leave accruals for the days after the strike before they returned to work was not an abuse of discretion.

The Court of Appeal affirmed the Board's decision.

County of Sonoma v. Public Employment Relations Board (2022) 80 Cal.App.5th, review denied September 14, 2022

Two exclusive representatives ("Associations") filed unfair practice charges against the County of Sonoma ("County") alleging it violated the Meyers-Milias-Brown Act ("MMBA") when its board of supervisors placed Measure P on the November 2020 ballot without first bargaining in good faith with the Associations. Measure P, which was approved by the voters, amended the County Code to enhance the investigative and oversight authority of the County's Independent Office of Law Enforcement Review and Outreach over the County's Sheriff-

Coroner Office. The Public Employment Relations Board ("PERB") concluded that before placing the measure on the ballot, the County was required to bargain with the Associations regarding provisions relating to the investigation and discipline of employees. PERB declared these provisions void and unenforceable against any employees represented by the Associations.

The County filed a petition for writ of extraordinary relief seeking review of PERB's decision.

The Court of Appeal granted the County's writ and found that "PERB failed to consider whether the decision to place certain Measure P provisions on the ballot significantly and adversely affected the working conditions of the Associations' members." By omitting such analysis, the Court of Appeal concluded that PERB erred in determining the decision was a matter within the scope of representation under the MMBA and thereby subject to collective bargaining. The Court of Appeal also found that PERB exceeded its authority by issuing a remedial order declaring voter-approved Measure P provisions void and unenforceable. However, the Court of Appeal affirmed PERB's conclusion that the County violated its duty to bargain regarding the effects of Measure P and determined that PERB did not exceed its jurisdiction by issuing a remedial order that applied to the Associations' peace officer members.

The Court of Appeal remanded the matter to "PERB to determine whether to declare void the Board's *resolution* placing on the ballot the Measure P provisions subject to effects bargaining, or to impose any other remedy such as ordering the County to cease and desist from implementing the Measure P amendments on Association-represented employees until the County fulfills its effects bargaining obligation."

Wu v. Public Employment Relations Board (2022) 87 Cal.App.5th 715

A substitute teacher filed a writ of mandate challenging PERB's refusal to file an unfair practice complaint against the teachers' union. The substitute teacher alleged the teachers' union breached its duty of representation when it refused to represent her in proceedings against the school district. The Court held (1) under the Educational Employment Relations Act ("EERA"), teachers' unions are not required to represent substitute teachers; and (2) the teacher's union was

not required to represent the substitute teacher because its collective bargaining agreement with the school district specifically excluded substitute teachers from the bargaining unit.

Association of Deputy District Attorneys for Los Angeles County v. Gascon (2022) 79 Cal.App.5th 503, petition for review granted August 31, 2022, judicial appeal pending

In November 2020, the voters of Los Angeles County elected George Gascón as their district attorney. In December 2020, the new district attorney adopted several "Special Directives" regarding sentencing, sentence enhancements, and resentencing that made significant changes to the policies of his predecessor, including prohibiting deputy district attorneys in most cases from alleging prior serious or violent felony convictions (commonly referred to as "strikes") under the three strikes law or sentence enhancements and requiring deputy district attorneys in pending cases to move to dismiss or seek leave to remove from the charging document allegations of strikes and sentence enhancements.

In response, the bargaining representative of the County deputy district attorneys filed a petition for writ of mandate and a preliminary injunction to prevent the district attorney from enforcing these Special Directives. The trial court issued a preliminary injunction enjoining the district attorney from enforcing certain aspects of the Special Directives.

The district attorney appealed arguing: (1) that the bargaining representative lacked standing to seek mandamus relief on behalf of its members; (2) that he does not have a ministerial duty to comply with the legal duties the bargaining representative alleges he violated; (3) that the trial court's preliminary injunction violates the doctrine of separation of powers; and (4) that the balance of the harms does not support preliminary injunctive relief.

Under Code of Civil Procedure section 1086, a writ of mandate "must be issued upon the verified petition of the party beneficially interested." "Under the doctrine of associational standing, an association that does not have standing in its own right may nevertheless have standing to bring a lawsuit on behalf of its members . . . Associational standing exists when: (a) [the association's] members would otherwise have standing to sue in their own right; (b) the interests [the association] seeks to protect are germane to the organization's purpose; and (c)

neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Association of Deputy District Attorneys for Los Angeles County v. Gascon* (2022) 79 Cal.App.5th 503, 524 (internal citations and quotations omitted). Here, the district attorney contends that the Special Directives are "quintessential 'managerial policy decisions'" outside the scope of the bargaining representative's representation under the Meyers-Milias-Brown Act ("MMBA"), and that therefore, its representation of its members in this action is not "germane to the organization's purpose."

The Court of Appeal concluded that the bargaining representative has associational standing to seek relief on behalf of its members as the "MMBA does not foreclose the commonsense conclusion that the Special Directives affect [the bargaining representative's] members' working conditions, making the interests [it] seeks to protect germane to its purpose."

The Court of Appeal also affirmed in part and reversed in part the trial court's order granting a preliminary injunction. The Court of Appeal also found that "mandamus is available to compel the district attorney to plead qualifying prior felony convictions 'in every case' in which the district attorney has probable cause to believe a defendant has suffered a prior strike." The Court of Appeals found that this duty does not violate the separation of powers doctrine as it "affirms the voters' and the Legislature's authority to prescribe more severe punishment for certain recidivists." However, mandamus is not available to compel a prosecutor to prove a prior strike allegation.

Los Angeles College Faculty Guild Local 1521 v. Los Angeles Community College District (2022) 83 Cal.App.5th 660

In 2018, the California Legislature passed AB 705 in response to concerns that too many students were being referred to remedial courses upon entering the community college system. The Legislature found that the placement in such remedial courses discouraged students from pursuing a college education and made them less likely to achieve their educational goals and to complete a degree, certificate or transfer outcome within a six (6) year period. In response to the legislation, the Los Angeles Community College District ("District") removed from the Fall

2019 schedule all remedial for-credit English and mathematics courses, which were two levels below transfer level.

The Los Angeles College Faculty Guild Local 1521 ("Guild") filed grievances alleging that cancellation of the courses violated several provisions of the collective bargaining agreement ("CBA") between the Guild and the District. The District refused to arbitrate contending the claims in the grievances were outside the scope of representation under the Educational Employment Relations Act ("EERA"), and also outside the scope of the CBA. The Guild filed a petition to compel arbitration in superior court.

The trial court denied the petition to compel, finding that the CBA did not delegate the arbitrability decision to the arbitrator, so it was for the court to decide. The trial court further found the claims were outside the scope of representation under the EERA and so were not arbitrable. The court also found the Guild failed to raise arbitrable issues under three (3) different provisions of the CBA; in other words, the court found the cancellation of the courses did not violate those provisions. The Guild appealed.

The Court of Appeal affirmed the denial of the petition to compel. The Guild claimed that, in the past, the arbitrator has decided the question of arbitrability and that the parties have operated a well-established arbitration process for many years. The Court of Appeal rejected this argument based on the Guild's failure to provide citations supporting this claim and details of the previous arbitrations.

CPRA

Freedom Foundation v. Superior Court (2022) 87 Cal.App.5th 47

The Third District Court of Appeal heard this case on a petition for extraordinary writ of relief filed by the Freedom Foundation. The petition sought to overturn a trial court's decision declining to compel the California Department of Human Resources ("CalHR") to disclose records regarding collective bargaining units and state employees.

Pursuant to the CPRA, the Freedom Foundation requested from CalHR the name of the labor organization representing each bargaining unit that represents State employees; the agencies/departments with represented employees; the number of represented employees paid by the State; the total amount of union dues/fees withheld by the State; and personally identifiable information related to each represented State employee. CalHR declined to provide the requested information on the basis that such information is protected by the exemption codified at Government Code section 7928.405, which exempts from disclosure state agencies' records related to activities governed by the Dills Act (the collective bargaining statute applicable to the state) "that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy."[2] In addition, CalHR asserted that certain data requested belonged to the State Controller's Office, and therefore, CalHR has no authority to provide such information. On appeal, the Freedom Foundation again argued the exemption is inapplicable to its request because the exemption applies strictly to information falling under the general penumbra of "deliberative processes." The Court of Appeal disagreed, finding no ambiguity in the plain language of the statute, and therefore, applied the ordinary meaning of each term used in the exemption. Thus, "deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strateg[ies]," related to activities covered by the Dills Act are distinct categories that result in an exemption from disclosure. The Court further upheld the trial court's determination that the documents requested were not reasonably segregable into nonprivileged portions, and that CalHR did not have actual or constructive possession of the information belonging to the State Controller's Office. CalHR properly denied the request.

This decision is viewed by organized labor as a victory for labor unions in California that represent State workers. Following the U.S. Supreme Court's decision in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31* (2018) 138 S. Ct. 2448, the Freedom Foundation has

[2] This exemption was formerly codified at Gov. Code, § 6254(p)(1)).

sought to contact represented employees throughout California's public sector to encourage them to drop their membership and stop paying dues to their union. This decision will likely hinder those efforts that are directed at State employees.

Essick v. County of Sonoma (2022) 80 Cal.App.5th 562

The County of Sonoma Board of Supervisors performed an independent investigative inquiry into a complaint of harassment by a member of the public against the elected County Sheriff. A local newspaper requested release of the complaint and investigation report pursuant to the CPRA. The Sheriff moved for preliminary injunction to bar the County's release of the documents based on arguments that the documents were "personnel records" protected from disclosure under the CPRA. The trial court denied the motion. The Sheriff appealed.

The Court of Appeal agreed that the documents were not personnel records because the County was not the Sheriff's employing agency, as the County lacked the ability to hire, fire, discipline or direct the Sheriff in his duties. The Court further held that the County's agreement to conduct the investigation in compliance with POBRA did not estop the County from disclosing the documents, as required by state law. The Court of Appeal affirmed the trial court's decision.

Anti-SLAAP Motions

Bonni v. St. Joseph Health System (2022) 83 Cal.App.5th 288

A surgeon (Plaintiff) brought an action against his employer St. Joseph Health System (the "Hospitals"), affiliated entities, and physicians involved in the disciplinary processes, alleging that peer review proceedings were initiated, and his medical staff privileges were suspended and ultimately terminated in retaliation for making whistleblower complaints concerning patient safety. The Hospitals filed an anti-SLAPP motion under the Code of Civil Procedure section 425.16 alleging the retaliation cause of action arose from the peer review proceedings, which were protected activity, and that Plaintiff's claims had no merit. The trial court agreed and granted the motion in its entirety. The Court of Appeal reversed. The Supreme

Court reversed in part holding that the Hospitals demonstrated that some of the Plaintiff's claims arose from protected speech.

The Court of Appeal explained that anti-SLAPP motions are reviewed through a two (2)-step process. First, the court must determine whether the defendant has shown that the cause of action arises from an act involving the right of free speech in connection with a public issue. Second, the court must determine whether the plaintiff has demonstrated a probability of prevailing on the claim. In this case, the narrow issue before the Court of Appeal was whether the surgeon has demonstrated a probability of prevailing on these claims. To that effect, the Court of Appeal analysis was based on whether the remaining retaliation claims at issue were barred as a matter of law by the litigation privilege. The key question in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature.

In applying this analysis, the Court of Appeal concluded the Plaintiff's remaining claims arose from protected activity and are covered by the litigation privilege, and thus, barred by the anti-SLAPP statute.

International Union of Operating Engineers, Local 39 v. Macy's Inc. (2022) 83 Cal.App.5th 985

Stationary Engineers Local 39 ("Local 39") represents a group of employees who fix mechanical issues at Macy's, Inc. ("Macy's") department store in San Francisco. The collective bargaining agreement between Local 39 and Macy's expired and the parties were unable to reach a new agreement. Local 39 called a strike and started picketing at the store. One month later, Macy's filed a lawsuit in superior court alleging Local 39 authorized, directed, and ratified unlawful misconduct so Macy's would submit to its demands. The alleged pattern of unlawful conduct included: mass picketing at Macy's five entrances; blocking ingress and egress at two (2) entrances; disturbing the public through loud and boisterous conduct; creating an unsafe and threatening environment in the community; and damaging property by clogging a drainpipe. Macy's asked the court for a temporary restraining order, preliminary and permanent injunctions, and compensatory and punitive damages. Macy's later filed a motion seeking leave to amend its

complaint. The trial court allowed Macy's to pursue its claims based on obstructing ingress and egress, making unreasonable noise, damaging property through backing up the sewer, damaging restrooms, throwing rocks at doors, and banging on a piece of metal on a planter, and blasting a bullhorn directly into an employee's ears.

The trial court partly granted and partly denied Local 39's anti-SLAPP motion. Certain parts of Macy's complaint were ordered stricken, including its allegation that Local 39 engaged in misconduct through mass picketing and its request for an injunction to prevent Local 39 from allowing picketing at the store. The complaint's other parts were allowed to proceed based on minimal merit. The trial court also granted Macy's leave to amend its complaint.

Local 39 appealed the trial court's decision relating to the anti-SLAPP issue. Local 39 also filed a second anti-SLAPP motion, which was directed at Macy's amended complaint. The trial court denied Local 39's second anti-SLAPP motion and its motion for reconsideration. Local 39 again appealed. It argued that the trial court should have fully granted its anti-SLAPP motions because Macy's claims were based on conduct protected by the law.

The Court of Appeal ordered the trial court to fully grant Local 39's first anti-SLAPP motion and to strike Macy's original complaint. The Court of Appeal found no evidence proving Local 39's actual involvement in the alleged activity. Macy's submitted no evidence that union leaders actually participated in the alleged unlawful actions or that they were aware of such actions or present when they occurred. Local 39 could not be held responsible for the alleged actions of its members on the picket line unless there was proof that it actually authorized those actions. Given that members of other unions and the public allegedly joined Local 39 members on the picket line to show solidarity, the Court of Appeal found it essential for Macy's to tie the alleged misconduct to Local 39 itself to prove that its claims had minimal merit. Lastly, the Court of Appeal determined it was unnecessary to address Local 39's second anti-SLAPP motion, which was directed at Macy's amended complaint, since the trial court should have fully granted the first anti-SLAPP motion and should have stricken the entire original complaint. The

Court of Appeal directed the trial court to enter a new order granting Local 39's motion in its entirety and striking Macy's original complaint.

Individual Arbitration Agreements

Department of Fair Employment & Housing v. Superior Ct. of Santa Clara County (2022) 82 Cal.App.5th 105

John Doe employee filed a Department of Fair Employment and Housing ("DFEH," now Civil Rights Department) complaint against Cisco Systems, alleging discrimination based on ancestry and race. The DFEH investigated, found merit, and attempted to resolve the matter but was not successful. The DFEH filed suit against Cisco, and Cisco moved to compel arbitration, based on its arbitration agreement with employee. The employee was not a party to the action. The trial court denied Cisco's petition to compel. Cisco appealed.

The Court of Appeal held that DFEH could not be compelled to arbitrate a claim based on a voluntary arbitration agreement to which it was not a party. The Court of Appeal affirmed the trial court's ruling.

Also in this case, the DFEH requested that the trial court allow the real party in interest (the affected employee) to remain anonymous because revealing his identity could jeopardize the safety of his family members in India. The trial court denied the request, deciding that the interests of family members outside California cannot be considered when weighing the public's interest in access to court records. The Court of Appeal held that the danger to family members anywhere is a legitimate consideration when determining an application to proceed with anonymity. The Court ordered the trial court to reconsider the issue, taking into account evidence of actual danger presented.

Murrey v. Superior Court of Orange County (2023) 87 Cal.App.5th 1223

Plaintiff, a 46-year-old female, brought an action against her employer, General Electric Company ("Defendant"), alleging unlawful sexual harassment, failure to prevent harassment, and retaliation. Eight (8) months after filing of the complaint, Defendant filed a motion to compel arbitration. In support, the Defendant submitted its new hire welcome emails, which

Plaintiff received, containing a link to Defendant's onboarding portal and several employment-related agreements. Defendant asserts that Plaintiff's electronic signature on a document titled "An Alternative Dispute Resolution Procedure" ("Agreement") indicates she assented to arbitration. The trial court granted the Defendant's motion to compel arbitration.

The Court of Appeal reversed, finding the arbitration agreement in this case contained a high degree of procedural unconscionability.

Notably, the Court of Appeal discussed the applicability of Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Act) (9 U.S.C.A. sections 401, 402), which amended the Federal Arbitration Act ("FAA") (9 U.S.C.A. § 1 et seq.). It concluded that the Act is only applicable to cases filed after its enactment, and thus, does not apply to Plaintiff's claims filed approximately one year prior.

The Court of Appeals found the arbitration agreement to be procedurally unconscionable for several reasons. Specifically, it was offered on a take-it-or-leave-it basis and the Defendant did not provide Plaintiff with a copy of the arbitration rules or information regarding the arbitration provider. The Court also noted that the Agreement's unclear, incomplete, and contradictory language would fail to inform any reasonable person of the contract's consequences. The Court issued a writ of mandate on the trial court to vacate the order compelling arbitration, and to enter a new order denying the motion.

Chamber of Commerce of the United States v. Bonta (9th Cir. 2023) 62 F.4th 473

California Assembly Bill 51 ("AB 51"), which added Section 432.6 to the California Labor Code, ensures that individuals are not retaliated against for refusing to consent to the waiver of rights and procedures established in the California Fair Employment and Housing Act ("FEHA") and the Labor Code and to ensure that any contract relating to those rights be entered into voluntarily.

A collection of trade associations and business groups filed a lawsuit seeking to enjoin the legislation from taking effect. The district court granted the petitioners' request for a preliminary injunction. The district court concluded that AB 51 placed arbitration agreements on

unequal footing with other contracts and also inhibited the Federal Arbitration Act ("FAA"). Specifically, the district court found that the civil and criminal penalties associated with AB 51 stood as an obstacle to the purposes of the FAA and were therefore preempted.

The Ninth Circuit Court of Appeals disagreed. After reviewing relevant legislative history and Supreme Court precedent, the Court of Appeals found that FAA does not preempt the field of arbitration, and further, FAA was enacted under the presumption that agreements to arbitrate must be voluntary and consensual. It explained that preemption manifests as "impossibility" preemption – when it is impossible to comply with both state and federal requirements – or "obstacle" preemption – state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

First, the Court of Appeal analyzed the text of both FAA and Section 432.6, and concluded that they do not conflict because California law does not create a contract defense that allows for the invalidation or nonenforcement of an agreement to arbitrate, nor does it undermine the enforcement of arbitration agreements. Importantly, Section 432.6 does not make invalid or unenforceable any agreement to arbitrate, even if such an agreement were not entered into consensually. Rather, effects are aimed entirely at conduct that takes place prior to the existence of any such agreement. Thus, the Court of Appeal concludes that under the "impossibility" preemption framework, Section 432.6 is not preempted by the FAA.

Second, in addressing obstacle preemption, the Court of Appeal found that legislative history and caselaw support the conclusion that the purpose of the FAA is to ensure that written, consensual agreements to arbitrate disputes are valid and enforceable as a matter of contract. Therefore, Section 432.6, does not impact the validity and enforceability of arbitration agreements, and this does not stand as an obstacle to the FAA.

However, despite finding that the regulation of pre-agreement employer behavior in Section 432.6 does undermine the FAA, the Court found that the civil and criminal sanctions attached to a violation of that section do. Section 433 of the California Labor Code makes any violation of that article, including Section 432.6, a misdemeanor offense, which may be

punishable by imprisonment. Therefore, the Court holds that Government Code section 12953 and Labor Code section 433 are preempted to the extent that they apply to executed arbitration agreements covered by the FAA.

Workplace Violence Restraining Order

Technology Credit Union v. Rafat (2022) 82 Cal.App.5th 314

A credit union filed a petition for a workplace violence restraining order ("WVRO") under Code of Civil Procedure section 527.8 against a credit union member to protect its employee, asserting that member made a credible threat of violence against employee. The statute supports the granting of such restraining orders only where the evidence demonstrates by clear and convincing evidence that the respondent made a credible threat of violence. The trial court issued a WVRO that included both a personal conduct order and a stay away order. The credit union member appealed.

Taking into account the "clear and convincing" evidentiary standard, the Court of Appeal concluded that there was insufficient evidence for the trial court to conclude that it was highly probable that member made a credible threat of violence against employee. Although the member's conduct was aggressive, rude, impatient, and sarcastic, and he posted a video of his interaction with the employee, he threatened only litigation and not violence. The Court of Appeal reversed the trial court's order and dismissed the petition for WPVO.

CSV Hospitality Management LLC v. Lucas (2022) 84 Cal.App.5th 117

The Court of Appeal concluded the trial court's refusal to allow the respondent (a hotel resident) to cross-examine a hotel employee who accused the resident of harassment and violence at a hearing on the petitioner's (a hotel) request for a WPVO violated the hotel resident's right to due process and statutory right to present relevant evidence. The violation of the right to cross-examine a witness was not harmless because it was not possible to know what the hotel employee would have said on cross-examination or what effect such testimony might have had on the trial court's decision.

998 Offer

Trujillo v. City of Los Angeles (2022) 84 Cal.App.5th 908

A plaintiff sued the City of Los Angeles ("City") for negligence. The City moved for summary judgment and made a settlement offer pursuant to Code of Civil Procedure section 998 days before the hearing on its summary judgment motion. Mere minutes after the trial court orally granted summary judgment, Plaintiff sent an email to the City attorney purporting to accept the 998 offer.

The trial court entered a judgment for the City, implicitly ruling the Plaintiff's acceptance was inoperative. The Court of Appeal affirmed.

First Amendment of U.S. Constitution

Dodge v. Evergreen School District #114 (9th Cir. 2022) 56 F.4th 767

A middle school teacher brought a Make America Great Again ("MAGA") hat to two days of a cultural sensitivity and racial bias training seminar, which took place in front of approximately sixty (60) attendees a week before the school session began. On day one, upon receiving complaints from the seminar's trainer and several teachers, and after consulting with the District's Human Resource Officer, the principal advised the teacher to exercise "better judgment." Appellant alleged that, when the principal learned that the teacher brought his hat with him again on the second day, she called him a racist and a homophobe, and said that he would need to have his union representative present if she had to talk to him about the hat again. The exact substance of the latter conversation is disputed.

The teacher sued the principal, HR Officer, and the District under 42 U.S.C. § 1983 for retaliating against him for engaging in protected political speech in violation of the First Amendment. The district court held that the individual defendants were entitled to qualified immunity and granted summary judgment in all defendants' favor. The teacher appealed.

The Court of Appeals examined whether the Appellant was speaking on a matter of public concern; whether he was speaking as a private citizen or a public employee; and whether the individual defendants were entitled to qualified immunity.

As to the former, the Court found that Appellant's hat, which displayed Donald Trump's presidential slogan, involved a matter of public concern. The Court stated that the messages of candidates for public offices are "not only newsworthy, they inherently relate to the political, social, or other concerns of the community." The Court noted that the principal and other parties, who viewed the hat as a comment on issues such as racism and bigotry, were also speaking on matters of public concern when they objected to Appellant's conduct.

In examining whether Appellant was speaking as a private citizen or a public employee, the Court noted that Appellant had no official duty to wear the hat, nor did he wear it in school in the presence of students. The Court reasoned that these facts distinguish this case from other cases involving speech in schools where the speech was reasonably viewed by students and parents as officially promoted by the school. Because Appellant was acting as a private citizen in expressing that message, the Court concluded his display of the MAGA hat was First Amendment-protected speech.

The Court subsequently held that the principle was not entitled to qualified immunity against the First Amendment claims because the First Amendment right at issue was so "clearly established" at the time that it was patently unreasonable for the principal "to believe that she could lawfully threaten [Plaintiff's] employment" because he brought the MAGA hat to the training. However, the claims against other defendants were dismissed because Appellant failed to establish that they engaged in any adverse action against him.

Lathus v. City of Huntington Beach (9th Cir. 2023) 56 F.4th 1238

The City of Huntington Beach's Citizen's Participation Advisory Board ("CPAB") was comprised of seven (7) members, each appointed to the volunteer position by a councilperson who had authority to remove their appointees without cause. After her CPAB appointment, Plaintiff was photographed at an immigrants' rights rally standing near individuals deemed by the City Councilperson, to be Antifa. Plaintiff was instructed to issue a public statement via social media, denouncing Antifa. Plaintiff complied, believing her position with the CPAB was dependent on it. The councilperson deemed the apology insufficient and removed Plaintiff from

the CPAB, stating that "[t]hose that do not immediately denounce hateful, violent groups do not share my values and will not be a part of my team."

Plaintiff filed a complaint in the United States District Court for the Central District of California claiming retaliation for exercising her First Amendment rights to free speech, association, and assembly, and alleged that the demand for a public statement amounted to unconstitutionally compelled speech. The district court dismissed the complaint, holding that under *Blair v. Bethel School District*, 608 F.3d 540, 543 (9th Cir. 2010), the councilperson "was not politically powerless to disassociate herself from Plaintiff's public actions through a process that authorized appointment and removal." The district court held that the councilperson "was permitted to consider the political ramifications not only when she decided to appoint Plaintiff but also when she later elected to remove her from the public position." Plaintiff appealed.

The Ninth Circuit affirmed the dismissal and ruled that the First Amendment does not protect a volunteer member of a municipal advisory board from dismissal by the city councilperson who appointed her and who is authorized under a city ordinance to remove her. Because the volunteer was the "public face" of the appointing councilmember, the public could infer that the volunteer's speech reflected the views of the appointing councilmember and therefore she could be dismissed for lack of political compatibility.

Kennedy v. Bremerton School District (2022) 142 S.Ct. 2407

Joseph Kennedy ("Kennedy"), a high school football coach, prayed with a number of students after school football games. His employer, the Bremerton School District ("District"), asked him to discontinue the practice to protect the school from a lawsuit based on violation of the Establishment Clause. Kennedy refused, was later placed on administrative leave, and did not return for the next season.

Kennedy sued the District for violating his rights under the First Amendment and moved for a preliminary injunction requiring the District to reinstate him. The district court denied the motion. Kennedy appealed and the Ninth Circuit affirmed. Following the Ninth Circuit's ruling, Kennedy sought certiorari which was denied. After the case returned to the district court, the

court found that the "sole reason" for the District's decision to suspend Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after three football games. The Ninth Circuit affirmed also finding that Kennedy's speech qualified as government rather than private speech because "his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee." Following this, certiorari was granted.

Under U.S. Supreme Court precedent, "a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law." Here, the Supreme Court determined that Kennedy met his burdens to demonstrate his rights were infringed and that the District's policies were neither neutral nor generally applicable. Additionally, the Supreme Court determined that his speech was private speech, not government speech as his prayers were not "ordinarily within the scope" of his duties as a coach.

As such, the Supreme Court reversed and found that Kennedy was entitled to summary judgment on his First Amendment claims.

Agency Fees/Dues

Wright v. SEIU Local 503 (2022) 48 F.4th 1112

A retired state employee brought a Section 1983 action against her former labor union and the State of Oregon alleging that her First and Fourteenth Amendment rights were violated by garnishment of union dues from her paychecks without authorization. She sought declaratory and injunctive relief and damages. Her action was dismissed. The retired employe appealed.

Because jurisdiction is a threshold issue, the Court of Appeal first considered Plaintiff's claims for prospective relief for violation of her First Amendment rights and concluded that Plaintiff's fear of future harm is based on a series of inferences that are too speculative to establish

a "case or controversy" for the prospective relief she seeks. Similarly, as to Plaintiff's claims for prospective relief for violation of her Fourteenth Amendment procedural due process rights, the Court of Appeal concluded she lacks any concrete interest in future wages or her right to be free from compelled union speech that are threatened by the alleged lack of procedural safeguards. The Court of Appeal affirmed the district court's dismissal of these claims for lack of jurisdiction.

Plaintiff's First Amendment claim for declaratory and injunctive relief was based on the threat of future injury. Plaintiff cannot rely on Defendant's possible actions in the future. Concrete evidence should be presented to substantiate the fear of future injury. Past wrongs are insufficient by themselves to grant standing. Plaintiff's fear of future unauthorized dues deduction was too speculative to confer standing for her First Amendment claim. Plaintiff's allegations of past injury alone were also insufficient to establish standing. Past exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects. Plaintiff did not allege any continuing "adverse effects" from the past unauthorized dues deductions, so the Court could not provide her with standing to seek prospective relief.

Plaintiff's theory that potential future unauthorized dues deductions chill her exercise of her First Amendment rights was also too speculative to establish standing. Fear of the potential chilling effect of her First Amendment rights failed for the same reason as her fear of future unauthorized dues deduction does not support standing: her reliance on a series of inferences unsupported by the record.

Plaintiff similarly lacked standing to assert her Fourteenth Amendment procedural due process claim seeking prospective relief. Plaintiff was retired and thus, no longer received wages from the State. Accordingly, she no longer had a concrete interest in her future wages or in freedom from compelled speech that would be threatened by the alleged lack of procedural safeguards. The threat of future unauthorized dues deductions from her wages was entirely imaginary; therefore, she lacked standing to assert her procedural due process claim.

As to Plaintiff's remaining claims against her former labor union for retrospective relief, Plaintiff must prove that the union "deprived [her] of a right secured by the Constitution," and "acted under color of state law." Although Plaintiff made repeated references to the "*forgery* of [her] authorization agreement," she framed her threatened injury as "the deduction of [her] money without her consent" pursuant to state law. As Plaintiff acknowledged, it is the State, not the labor union, which deducted union dues from employees' wages. Oregon law does not create a "right or privilege" in the union to direct the State's deductions of union dues. At its core, the right to authorize dues deductions is vested in the state employee. The union's role is to transmit the employee's authorization to the State so that it may be implemented as provided in the collective bargaining agreement and related statutes.

The union is not a state actor that could be liable under Section 1983 for alleged violation of an employee's Fourteenth Amendment right to due process and First Amendment right to be free from compelled speech. Under state statute, the right to authorize dues deductions was vested in employee, not the union, and any forgery by union of employee's authorization of dues deductions would be an express violation of existing state law (that does not relate to state action).

The union's conduct of obtaining state employees' authorizations for union membership and dues deductions and certifying such authorizations to the state did not render the union an agent or instrumentality of state. The use of a certification to process authorized dues deductions was merely a day-to-day administrative task.

The Court of Appeal affirmed the dismissal of the complaint.

Allen v. Santa Clara County Correctional Peace Officers Association (9th Cir. 2022) 38 F.4th 68

Several public-sector employees filed a class action lawsuit, under 42 U.S.C. § 1983, against a union and County of Santa Clara ("County") to retroactively recover agency fees taken from their salaries prior to *Janus*. The union moved to dismiss the action, which was joined by the County, claiming that it was entitled to a good faith defense against Section 1983 liability because its actions were expressly authorized by *Abood* and state law. The district court

dismissed the action against both respondents, holding that their "good faith" reliance on pre-*Janus* law meant that they need not return the agency fees.

After this case was dismissed by the district court, the Ninth Circuit determined in *Danielson* that unions are entitled to a good faith defense for the pre-*Janus* compulsory collection of agency fees. *Danielson v. Inslee* (9th Cir. 2019) 945 F.3d 1096, 1097.

Here, the Ninth Circuit determined that, following the rule announced in *Danielson,* municipalities, like the County, are also entitled to a good faith defense to a suit for the refund of mandatory pre-*Janus* agency fees under Section 1983.

Workers' Compensation

Kaur v. Foster Poultry Farms LLC (2022) 83 Cal.App.5th 320

Kaur was terminated after she sustained an industrial injury. The sole reason for her termination was that she chose not to accept the one accommodation offered by the company.

She filed a petition against the employer with the Workers' Compensation Appeals Board ("WCAB") asserting claims under Labor Code section 132a and subsequently filed a complaint against the employer alleging discrimination based on disability and race/national origin, and retaliation, under the Fair Employment and Housing Act ("FEHA") and Labor Code. The WCAB claims were litigated before a workers' compensation administrative law judge ("ALJ"). The ALJ issued a ruling denying the employee's petition.

She filed suit in court on the FEHA and Labor Code claims. The employer moved for summary judgment and sought adjudication of the employee's disability-related and other claims based on *res judicata* and/or collateral estoppel, considering the WCAB's adjudication of employees WCAB petition. The employer also sought summary adjudication of employee's cause of action for discrimination based on race/national origin on the grounds it was barred by the applicable statute of limitations. The trial court ruled that the employee's disability-related discrimination and other claims under FEHA, and retaliation claims under FEHA and Labor

Code section 1102.5, were barred by application of the doctrine of collateral estoppel based on the workers' compensation ALJ's decision. The employee appealed.

The Court of Appeal reversed, holding that the WCAB's decision denying her discrimination claim did not have collateral estoppel effect on disability-related claims under FEHA. A prior decision precludes re-litigation of issues under the doctrine of collateral estoppel only if five (5) threshold requirements are satisfied: 1) it must be identical to that decided in a former proceeding, 2) the issue must have been actually litigated in the former proceeding, 3) it must have been necessarily decided in the former proceeding, 4) the decision in the former proceeding must be final and on the merits, and 5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. The issues decided in the Labor Code section 132a proceeding are not "identical" to the issues implicated in employee's FEHA claims for disability discrimination, failure to provide reasonable accommodation, and failure to engage in an interactive process, and therefore, the doctrine of issue preclusion is not applicable. The issues adjudicated by the workers' compensation ALJ are not dispositive of these FEHA claims as these issues did not constitute a required element of any of the FEHA claims and therefore did not negate an element of any of the FEHA claims.

The Court of Appeal also held that while Plaintiff timely exhausted her administrative remedies as to her race/national origin claims with respect to her direct supervisor, she failed to do so with respect to conduct by two (2) other supervisors.

Castellanos, et al. v. State of California, et al. (2023) 89 Cal.App.5th 131

In this decision, the Court of Appeal upheld most of Proposition 22 ("Prop 22") including its designation of app-based drivers as independent contractors and not employees. However, it removed two provisions of Prop 22, which limited future legislation imposing regulatory burdens on app-based drivers and legislation related to representation of app-based drivers, including for collective bargaining.

Notably, Prop 22 added a provision to the Code stating that the Legislature can amend Prop 22 only with a 7/8 majority in both houses and as long as the amendment is "consistent

with, and furthers the purpose of" the initiative. Section 7465, subdivisions (c)(3) and (c)(4) further define what constitutes an "amendment." Section 7465, subdivision (c)(3) states that "[a]ny statute that prohibits app-based drivers from performing a particular rideshare service or delivery service while allowing other individuals or entities to perform the same rideshare service or delivery service, or otherwise imposes unequal regulatory burdens upon app-based drivers based on their classification status" is considered an amendment. Section 7465, subdivision (c)(4) states that "[a]ny statute that authorizes any entity or organization to represent the interests of app-based drivers in connection with drivers' contractual relationships with network companies, or drivers' compensation, benefits, or working conditions" also constitutes an amendment.

Previously, Plaintiffs filed a petition for a writ of mandate seeking a declaration that Prop 22 is invalid because it violates the California Constitution. In September 2021, the Alameda County Superior Court granted the petition and ruled that (1) Prop 22 is invalid in its entirety because (1) it intrudes on the Legislature's exclusive authority under the Constitution to create workers' compensation laws; (2) it is invalid in its entirety because it violates the single-subject rule under the Constitution, which requires initiative measures to be limited to one subject; and (3) it is invalid to the extent that it limits the Legislature's authority to enact Legislation that would not constitute an amendment. Prop 22's proponents and the State appealed the decision.

The Court of Appeal overturned a portion of the trial court's decision, finding that Prop 22 does not interfere with the Legislature's authority to set up a workers' compensation system and does not violate the constitutional rule limiting initiatives to a single subject. On this first point, the Court stated that the Legislature's power to establish workers' compensation laws is not exclusive. The California Constitution does not require all workers to be covered by workers' compensation and either the Legislature or the electorate may exclude app-based drivers from such benefits. Second, the Court decided that Prop 22 does not violate the single-subject rule because the proposition's common theme or purpose is "the creation of a new balance of benefits and obligations for app-based drivers in lieu of either traditional employment or traditional

independent contractor status" and Section 7465, subdivision (c)(4) is reasonably related to drivers' ability to change this balance by limiting the Legislature's ability to authorize collective bargaining over drivers' benefits. Thus, Prop 22 as a whole is not unconstitutional.

However, the Court did affirm part of the trial court's decision, finding Prop 22's definition of what constitutes an amendment to violate the separation of powers doctrine. The Court determined that Section 7465, subdivisions (c)(3) and (c)(4)'s attempts to define "amendment" intrudes on an exclusive power of the courts. Additionally, the Court found that Section 7465, subdivision (c)(4) also fails because it intrudes on the Legislature's authority to enact laws addressing the general subject matter of an initiative. While the Legislature is prohibited from amending initiative statutes, it is free to address related but distinct matters that the initiative does not specifically authorize or prohibit. Here, Prop 22 does not directly regulate collective bargaining, so collective bargaining legislation would not necessarily "amend" Prop 22. Thus, the Court decided that Section 7465, subdivisions (c)(3) and (c)(4) are invalid and should be severed.

Teacher Credentialing

Little, et al. v. Commission on Teacher Credentialing, et al. (2022) 84 Cal.App.5th 322

A special education teacher, John Villani ("Villani") employed by the Palm Springs Unified School District ("District") sued the District alleging the District retaliated against him after he reported that a teacher-aide, David Yoder ("Yoder"), was "grooming" and paying inappropriate attention to some of the minor students in his care. Yoder was subsequently charged and convicted of several felony sex offenses against minors, including an offense against one of the aforementioned students. Relevant in this case is that Villani's lawsuit also alleged the administrators of the District ignored his concerns about Yoder.

The Commission on Teacher Credentialing ("Commission") read a newspaper article about Villani's lawsuit. The Commission's investigator contacted Villani to request an interview. The investigator asked Villani to provide copies of his complaint and other court filings, and

declarations describing the administrators' alleged failure to investigate Yoder. Villani met with the investigator and provided the requested materials.

The Commission thereafter informed the administrators that their credentials were under investigation because they allegedly failed to act on Villani's concerns about Yoder. The administrators filed a writ of mandate and request for temporary restraining order. The trial court concluded the Commission exceeded its jurisdiction by requesting records from Villani. It entered a peremptory writ barring the Commission from proceeding with any investigation or review based on records obtained directly from Villani. The Commission appealed.

The Court of Appeal interpreted the statute that gives the Commission the authority to investigate, Education Code section 44242.5, and concluded it was not authorized to reach out to Villani as part of its pre-jurisdictional investigation because it was only authorized to make contact with a "complainant" prior to opening an investigation. Villani was not a "complainant." Additionally, the Commission was only authorized to make inquiries and requests for production of information to enumerated agencies for purposes of determining whether it had jurisdiction. Villani was not among the enumerated agencies. The contact was therefore, unauthorized.

The Court of Appeal understood that public policy likely favors a finding that the Commission has broad investigatory powers, especially where, like here, the well-being of children is at issue. However, the Court of Appeal is confined to interpreting existing statute. If the Commission wishes to expand its investigatory powers, it should seek a legislative amendment.

Whistleblower Protection

Killgore v. SpecPro Professional Services, LLC (9th Cir. 2022) 51 F.4th 973

While consulting for an environmental project for the United States Army Reserve Command, Aaron Killgore ("Killgore") believed his supervisor, the Army Reserve's project leader Chief Laura Caballero ("Caballero") required him to prepare an environmental assessment in a manner that violated federal law. Killgore was fired shortly after he reported

the suspected illegality to his supervisor and Caballero, who Killgore alleged gave him the unlawful directives.

Killgore filed a whistleblower action in district court. The district court granted SpecPro's partial motion for summary judgment. Killgore appealed.

The Ninth Circuit reversed, holding that Killgore's disclosure to his supervisor was actionable even though the supervisor to whom Killgore made the disclosure did not have "authority to investigate, discover, or correct the violation" within the meaning of Labor Code section 1102.5(b). The Court also held that Killgore's disclosure to Caballero was an actionable disclosure to a "government agency" within the meaning of the statute even though the disclosure was part of Killgore's normal duties and Caballero may have been a "wrongdoer" who was the subject of the disclosure. However, the Ninth Circuit affirmed the dismissal of Killgore's retaliation claim, finding that Killgore failed to present evidence that he refused to participate in illegal activity within the meaning of Section 1102.5(c).

Vatalaro v. County of Sacramento (2022) 79 Cal.App.5th 367

A former County of Sacramento ("County") employee brought an action for unlawful whistleblower retaliation, under Labor Code section 1102.5, alleging that the County retaliated against her after she reported that she was working below her service classification. The Sacramento County Superior Court granted the County's motion for summary judgment and the former employee appealed.

According to both parties in their initial briefing (and the trial court), courts evaluate a plaintiff's Labor Code section 1102.5 claim using a three (3)-part burden-shifting framework. However, as the California Supreme Court explained in *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, courts should no longer apply the three (3)-part test that was outlined by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*. Instead, courts should apply the test in Labor Code section 1102.6.

The Court of Appeal explained; "To sum up [Labor Code section 1102.6's] requirements: 'First, it places the burden on the plaintiff to establish, by a preponderance of the evidence, that

retaliation for an employee's protected activities was a contributing factor in a contested employment action .... Once the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity.'" (*Vatalaro v. County of Sacramento* (2022) 79 Cal.App.5th 367, 379-380 citing *Lawson*, *supra*, 12 Cal.5th 703, 718.)

The Court of Appeal nevertheless affirmed the trial court's ruling finding that the County met its burden under Labor Code section 1102.6 to show that it would have released the employee from probation for legitimate, independent reasons even if she never complained about her assignments, and because she failed to raise any triable issue of material fact on this issue.

Retaliation/Discipline

Rodgers v. State Personnel Board (2022) 83 Cal.App.5th 1

Upon investigating an incident, the Department of Corrections and Rehabilitation ("CDCR") issued its employee, a sergeant, a Notice of Adverse Action ("NOAA") notifying him of allegations that he refused to perform a restraint check on an inmate under surveillance and directed his officers to falsify the surveillance form. CDCR also alleged that the sergeant angrily confronted the officers when they reported his misconduct to another sergeant. The NOAA stated that CDCR planned to reduce the sergeant's salary for two (2) years because of the allegations.

The sergeant appealed his discipline to the State Personnel Board ("SPB"). The administrative law judge ("ALJ") issued his ruling with detailed credibility determination and finding facts. The ALJ concluded CDCR failed to prove that sergeant refused to perform the restraint check or that he directed his officers to falsify their watch forms. However, the ALJ concluded that the salary reduction was nonetheless an appropriate penalty because the sergeant acted discourteously toward the officers when they reported the conduct to another sergeant. The

ALJ specified that the sergeant's motive was not anger at the officers for accurately reporting his misconduct, but for inaccurately reporting him for neglect of duty.

The SPB adopted the ALJ's decision, and the sergeant filed a petition for writ of mandamus in the superior court arguing that the penalty was not supported by substantial evidence and was excessive based on the facts the ALJ found to be true. The superior court denied the sergeant's petition, and the sergeant appealed.

The sergeant argued the SPB's decision "violates due process [because he] was not notified that he was to be disciplined with a ten percent reduction in salary for two years based on a single allegation of misconduct." The Court of Appeal agreed with the sergeant. It held that due process requires that the employee receive adequate notice both of "the claimed legal standard and the events which are alleged to contravene it and an opportunity to challenge them."

The Court described that the issue was not whether the sergeant engaged in any misconduct, but rather whether the sergeant was on notice of the specific actions that could subject him to the proposed penalty. The ALJ findings were a significant departure from the conduct that was alleged to support the penalty. Accordingly, the Court found that the sergeant lacked appropriate notice that the actions could subject him to the imposed penalty. The Court reversed the judgment and directed the trial court to issue a peremptory writ of mandate directing SPB to set aside its decision.

Francis v. City of Los Angeles (2022) 81 Cal.App.5th 532

A Los Angeles City Police Department criminalist, Francis, brought whistleblower retaliation claims against the City of Los Angeles arising from her disclosures about a cold case murder investigation. The trial court entered judgment on jury verdict for the City, and Francis appealed.

The Court of Appeal affirmed, holding that (1) Francis presented insufficient evidence to establish that the requirement that she attend behavioral science therapy sessions materially affected her terms, conditions, or privileges of employment; (2) the fact that a county prosecutor did not want Francis working on her cases did not constitute substantial evidence that the City or

any of its employees subjected criminalist to an adverse employment action as the prosecutor was a county employee; (3) the fact that a supervisor alleged Francis was being dishonest did not constitute an adverse employment action as no disciplinary action resulted; and (4) the fact that Francis testified in court less frequently after her disclosures did not support a retaliation claim as there was no evidence that the change was attributable to any City employee.

Griego v. City of Barstow (2023) 87 Cal.App.5th 133

Griego, a terminated fire captain of the City of Barstow Fire Protection District, appealed his termination through nonbinding advisory arbitration. The arbitrator sustained six (6) of the eighteen (18) allegations against Griego and proposed a 30-day suspension. Pursuant to the MOU between the City and the Fire District, the City Manager modified the arbitrator's award to include one additional allegation and ultimately terminated Griego.

Griego filed a writ of administrative mandamus challenging his termination. The trial court found there was sufficient evidence to sustain only three (3) of the allegations against Griego and remanded the matter to the City for reconsideration of discipline. The City appealed the trial court's decision.

The Court of Appeal held that based on the three (3) sustained allegations, the City did not abuse its discretion when it decided to terminate the fire captain. The Court of Appeal held that due to the severity and ongoing nature of the sustained misconduct, there is no reason to remand the matter back to the City.

Collective Bargaining Statutes: PERB Board Decisions

Orange County Superior Court & Region 4 Court Interpreter Employment Relations Committee (2022) PERB Decision No. 2818-I (5/5/22)

An administrative law judge ("ALJ") dismissed an unfair practice charge brought by the California Federation of Interpreters ("CFI") alleging that the Orange County Superior Court and/or the Region 4 Court Interpreter Employment Relations Committee ("Region 4") violated the Trial Court Interpreter Employment and Labor Relations Act ("Court Interpreter Act") by disciplining bargaining unit members based on the accuracy of their interpretation, without

affording CFI an opportunity to meet and confer over the decision to implement the new discipline criterion or procedure and/or the effects of that decision. The ALJ dismissed the unfair practice charge and complaint, finding CFI failed to demonstrate a change in policy based on the narrow facts of the case, which included that the reprimand was based on conduct the bargaining unit employee admitted to in an investigatory interview. CFI filed exceptions to the Board.

According to the Board, the main issue in this case was whether the Court changed the status quo when it issued discipline to an employee for mistakes in the employee's interpretation. PERB affirmed that disciplinary criteria and procedures, and procedures for evaluating employee performance, are within the scope of representation and subject to notice and meet-and-confer requirements. However, PERB agreed with the ALJ that there was no evidence of any criteria or procedures being established to evaluate interpreter accuracy. The Board also agreed with the ALJ that there was no evidence the Court or Region 4 intended to establish a new policy. Instead, the Court merely acted on a complaint about an interpreter and issued a reprimand after an investigation. Accordingly, the Board affirmed the ALJ's dismissal.

Victor Valley Union High School District (2022) PERB Decision No. 2822 (6/14/22) (Judicial Appeal Pending – Court of Appeal Case No. E079318)

The Victor Valley Teachers Association ("Association") filed an unfair practice charge against the Victor Valley Union High School District ("District") alleging that the District violated the Educational Employment Relations Act ("EERA") when, during a deposition, the District's attorney asked the Association President questions about: (1) confidential communications she had with a bargaining unit member concerning a disciplinary matter in which she advised that member; and (2) confidential communications she had with other bargaining unit members and union personnel about that member. The administrative law judge ("ALJ") issued a proposed decision finding the District violated EERA. On exceptions by both parties, the Board affirmed the proposed decision's legal conclusions and granted one of the Association's cross-exceptions related to the ALJ's factual findings.

The unfair practice charged stemmed from the District's dismissal of employee A.B. (the Board only used the employee's initials) for a variety of alleged misconduct including rude and discourteous behavior, making death threats, mishandling dangerous chemicals, vaping on campus, and profanity. A.B. appealed the dismissal which resulted in a hearing before the Office of Administrative Hearings. A.B. listed the Association President as a witness because the President represented A.B. on some of the allegations. The District then deposed the Association President as part of its statutory dismissal proceeding against A.B.

During the deposition, the District's attorney began asking questions about the Association President's communications with Association bargaining unit members about A.B. The union attorney objected based on the questions calling for communications that are protected by associational privacy rights. However, the District's attorney continued with the same lines of questioning.

In evaluating whether the District's conduct constituted unlawful interference, the Board applied the principles articulated in *Bill Johnson's Restaurants, Inc. v. NLRB* (1983) 461 U.S. 731. Under *Bill Johnson's*, where litigation conduct is alleged to interfere with protected rights, "the charging party faces an extra hurdle that is not present in other interference cases: the charging party must establish that the respondent acted without any reasonable basis and for an unlawful purpose." The Board noted that applying *Bill Johnson's* principles, the National Labor Relations Board ("NLRB") held that when an interference claim is based on the employer's conduct during litigation discovery, the employer's interest in acquiring the information sought must be balanced against the impact disclosing the information would have on statutorily-protected rights. In *Guess?, Inc.* (2003) 339 NLRB 432 ("*Guess?, Inc*."), the NLRB adopted a three-part test to determine if deposition questioning unlawfully interferes with protected rights:

> First, the questioning must be relevant. Second, if the questioning is relevant, it must not have an illegal objective. Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining this information must outweigh the employees' [protected rights]. (*Id*. at p. 434.)

Noting that the Agricultural Labor Relations Board has already adopted the *Guess?, Inc.* framework, PERB likewise adopted the *Guess?, Inc.* framework as the legal standard for determining whether deposition questions interfere with protected rights under the PERB-administered statutes.

The Board then applied the *Guess?, Inc.* test to the facts. The Board found that the District's questioning was arguably relevant to the issues in the dismissal proceeding. The Board did not reach the issue of whether the District had an illegal objective. This is because the Board held that the District's interest in obtaining the information sought does not outweigh the harm to protected rights from disclosure of the information. Specifically, the Board noted that the District asked the Association President about conversations with A.B., other Association bargaining unit members, and union staff, all of which concerned protected activities. According to the Board, "Questions like these that are designed to uncover protected activities have a chilling effect on the exercise of employee rights."

As a remedy, the ALJ ordered the District to pay the Association four (4) hours in attorney fees to make the Association whole for the time it spent defending EERA-protected rights during the deposition. The Board affirmed the remedy, "[b]ecause the deposition would have been much shorter without the questioning into [the Association President's] representational communications with A.B., other bargaining unit members, and CTA staff… We, therefore, affirm the ALJ's order to pay the Association four (4) hours in attorney fees as a reasonable approximation of what was necessary to defend the District's unlawful deposition questioning."

Tahoe-Truckee Sanitation Agency (2022) PERB Decision No. 2826 (7/7/22)

The administrative law judge ("ALJ") concluded that the Tahoe-Truckee Sanitation Agency ("Agency") violated the Meyers-Milias-Brown Act ("MMBA") when it issued an employee a disciplinary memorandum and terminated his employment in retaliation for his protected activities.

The case then went before the Board on exceptions and cross-exceptions. The Agency excepted to the ALJ's conclusions on several bases, including that the ALJ improperly rejected its affirmative defenses that the employee failed to exhaust judicial remedies, his claims were barred by collateral estoppel, and the Agency terminated the employee for legitimate business reasons. The employee urged the Board to affirm the ALJ's legal conclusions. The employee also sought additional remedies not ordered by the ALJ, including daily compound interest on monetary damages consistent with the National Labor Relations Board ("NLRB") practice adopted in *Kentucky River Medical Center* (2010) 356 NLRB 6 ("*Kentucky River*").

The matter settled and the parties requested that the Board dismiss the case with prejudice. The Board granted the request. However, in an unusual move, the Board stated that:

> We therefore express no opinion on the merits of any of the parties' exceptions. We note, however, that [the employee's] cross-exceptions raised the issue of whether PERB should adopt the practice of augmenting monetary damages by compound, rather than by simple, interest. PERB recently observed that in 2010 the NLRB began including daily compound interest in all monetary relief. (*Bellflower Unified School District* (2022) PERB Decision No. 2544a, p. 41, fn. 23 [judicial appeal pending] (*Bellflower*), citing *Kentucky River*, supra, 356 NLRB 6, 6.) The Board declined to reach that issue in *Bellflower* due to an agreement between the parties to apply simple annual interest. (*Ibid.)* Although we similarly do not reach the issue here, in light of the parties' request to withdraw, we do not foreclose the possibility of considering whether PERB should adopt that method of calculating interest in a future case.

Thus, it appears that the Board is prepared to award compound instead of simple interest on monetary damages awards at the request of a party.

Butte-Glenn Community College District (2022) PERB Decision No. 2834-E (10/7/22)

The University Professional and Technical Employees, CWA Local 9119 ("UPTE") filed an unfair practice charge against the Butte-Glenn Community College District ("District") alleging various claims. The ALJ dismissed all the claims except the allegation that the District failed to respond adequately to a request for information ("RFI"). Specifically, the ALJ found

that the District assessed and answered the RFI as if it arose under the California Public Records Act ("CPRA"), and consequently failed to explore means of obtaining requested information that was not in its class enrollment database, as required under EERA. The ALJ ordered the District to provide, upon UPTE's request, all outstanding information responsive to the RFI. The Board affirmed.

At issue was UPTE's belief that an employee was being disparately treated in having her courses cancelled due to low enrolment. In response, UPTE submitted an RFI seeking, among other categories of information, the number of faculty whose entire course loads were cancelled due to low enrollment; a list of all classes cancelled for the Fall 2019 semester; and District communications regarding the cancellation of the employee's Fall 2019 course sections.

The District responded by providing some of the categories of information but not all of them. In its defense, the District argued that some of the information did not exist in its data systems. The District also argued that UPTE's failure to follow-up on its requests after the District's partial response was fatal to its unfair practice charge claims.

In rejecting the District's defenses, the Board held that there is no need for a union to follow-up on a RFI if the request is clear in the first instance. According to the Board, "[A]n exclusive representative need not reassert or clarify its information request upon receiving a partial response from the employer where it is sufficiently clear that the response did not fully satisfy the request." In reaching this holding the Board overturned its prior decision in *Trustees of the CSU* (2004) PERB Dec. No. 1732-H, to the extent it suggested otherwise.

The Board also held that the District could not deny an RFI merely because compiling the requested information would require consulting employee memories in combination with records. According to the Board, "[W]hen the requested information does exist in some form, the fact that the employer may have to compile it from various sources does not excuse the employer from producing it unless the employer can prove doing so would be unduly burdensome." The Board emphasized that where an employer believes an RFI is unduly burdensome, it must make that claim contemporaneously so parties can negotiate over the burden.

Regents of the University of California (2022) PERB Decision 2835-H (10/7/22)

Teamsters Local 2010 ("Teamsters") alleged that the Regents of the University of California ("University") violated HEERA and the PECC by distributing a communication to newly accreted employees in the bargaining unit concerning their choice whether to join or support Teamsters. The communication contained a set of FAQ's which included the following:

- Q2: Must I join the Union?
- A: The decision to join a union or not is personal. The University does not take a position on this issue. "
- Q3: Will I have to pay monthly union dues?
- A: You may contact the union for information about union membership and financial contributions.

Teamsters asserted that the University's FAQ's violated Government Code section 3550's prohibition on deterring or discouraging union membership. In analyzing this claim, the Board affirmed that it interprets "deter or discourage" as to tend to influence an employee's free choice regarding whether or not to authorize representation, become or remain a union member, or commence or continue paying union dues or fees. The test for whether an employer's communication "tends to influence" is objective.

Here, the Board found that FAQ's tended to influence employee free choice on several fronts. For example, the University's selection and phrasing of the FAQ questions was problematic. By asking "Must I join the Union?" in FAQ No. 2, couches union membership in a negative light as a potential compulsory obligation that an employee might wish to avoid. The Board held that FAQ No. 3 suffers from a similar pitfall. The question, "Will I have to pay monthly union dues?" treats the choice to join a union as a financial burden an employee may wish to avoid, thereby emphasizing the cost of union membership without any mention of the benefits. Because the Board also found that the University did not establish a business necessity defense, it found that the University violated Government Code section 3550 and also HEERA.

City & County of San Francisco (2022) PERB Decision No. 2846-M (11/17/22)

The Service Employees International Union, Local 1021 ("SEIU") filed an unfair practice charge against the City and County of San Francisco ("City") over the City's adoption of a mandatory COVID-19 vaccination policy. The Office of the General Counsel ("OGC") dismissed the charge on the ground that adopting such a policy is a management right. SEIU appealed the dismissal. The Board reversed.

The dismissal of the charge relied heavily on *Regents of the University of California* (2021) PERB Decision No. 2783-H (Regents), where the Board held that a mandatory influenza vaccination policy issued before a COVID-19 vaccine was available was not within the scope of representation. The OGC found this "same reasoning applies with equal, if not greater, force in the present case over a COVID-19 vaccine mandate."

However, the Board held that *Regents* did not impose a categorical rule that all vaccination policies are either negotiable or non-negotiable. The Board noted that SEIU alleged that *Regents* can be distinguished because: 1) the global pandemic has eased; 2) the City's vaccine policy is aimed only at employees; and 3) COVID-19 vaccines are now widely available. The Board held that at this stage, there is enough of a factual dispute to warrant a hearing. Accordingly, the Board reversed the dismissal and ordered that a complaint be issued.

Barstow Community College District (2022) PERB Decision No. Ad-498-E (12/13/22)

The union filed exceptions to an ALJ's proposed decision on October 18, 2022. The District's response to the exceptions was due on November 7, 2022. However, the District's exceptions were not actually filed until 12:01 a.m. on November 8, 2022. The PERB Appeal's Office notified the District that its exceptions were untimely. This administrative appeal followed.

In its appeal, the District's counsel submitted a declaration stating that on the evening of November 7, he completed drafting the response and was preparing to file when he discovered that the battery in his digital pen was depleted. He therefore could not sign the pleading. He

spent 10-15 minutes locating a new battery and filed the response as soon as possible. The District asserted that there was good cause to excuse the untimely filing.

The Board rejected the appeal. The Board conceded that the 2-minute delay was non-prejudicial. However, the Board noted that under PERB Regulations, the customary practice of signing a pleading is not necessary as any document filed electronically is deemed to be signed by the person filing the pleading. Further, the Board held that, "A party who files very near to the filing deadline without reviewing the applicable filing requirements or establishing its tools work does so at its own peril."

Member Krantz dissented. He would have found this case as falling more in line with cases excusing reasonable, honest missteps that the erring party thoroughly and credibly explained, and which caused no prejudice to the other party.

Pasadena Area Community College District (2023) PERB Dec. No. Ad-500-E (1/11/23)

This case involved a decertification petition filed by the California Federation of Teachers ("CFT") seeking to decertify and replace the Pasadena City College Faculty Association ("PCCFA"). In an administrative decision, the Board agent concluded that CFT filed sufficient proof of support consisting of both electronically and physically signed authorization cards. On appeal, PCCFA asserted that PERB Regulation 32700 bars the use of electronic proof of support for decertification. The Board agreed with PCCFA.

For most of PERB's history, the agency's regulations have disallowed electronically signed proof of support. This partially changed on February 15, 2021, when revisions to PERB Regulation 32700 took effect together with newly promulgated PERB Regulations 32092 and 32110. According to the Board, the key language at issue is Regulation 32700(d)(4), which adds an electronic signature option for "employees who are not exclusively represented by an employee organization." Given this language, the Board found that, "The plain language of the revised regulation thus left PERB's longstanding requirement of original signatures unchanged for exclusively represented employees who wish to change or decertify their representative or sever themselves from a represented unit."

Regents of the University of California (2023) PERB Decision No. 2852 (2/9/23)

The University Council – American Federation of Teachers ("UC-AFT") filed an unfair practice charge alleging that University of California - Santa Cruz ("University") committed an unlawful unilateral change by no longer permitting employees to concurrently hold a non-exempt staff and exempt academic instructional positions. After a hearing conducted by an administrative law judge ("ALJ"), the Board directly decided this case.

The primary issue addressed by the Board was whether the University's actions were within the scope of representation. The University asserted that its actions were necessary for compliance with the Fair Labor Standards Act ("FLSA") because of the significant difficulties tracking and maintaining overtime records in its systems. The Board rejected this argument, finding that these issues are amenable to collective bargaining. According to the Board, "… the parties could explore ways to record lecturers' hours. They could discuss ways to implement quarter-by-quarter determination of primary duties." According to the Board, "Administrative convenience is not a matter of fundamental policy essential to the achievement of the University's mission such that the University would be exempt from HEERA's mandate to attempt to resolve compensation issues through the collective bargaining process." Accordingly, the Board held that the University violated HEERA with its actions.

The Accelerated Schools (2023) PERB Decision No. 2855 (3/17/23)

The Service Employees International Union, Local 99 ("SEIU") filed several unfair practice charges against The Accelerated Schools ("TAS") alleging interference with, and retaliation for, protected activities. The administrative law judge ("ALJ") found in favor of SEIU on two charges alleging interference. The ALJ dismissed portions of the third and fourth charges, but also found in favor of SEIU on an allegation that TAS did not provide SEIU notice and the opportunity to meet and negotiate before an employee was laid off. The ALJ directed TAS to bargain and to pay the employee monetary compensation until bargaining is complete, but the ALJ did not direct TAS to reinstate her.

The Board affirmed the ALJ's proposed decision. With respect to the layoff, the Board found that a preponderance of the evidence shows that TAS would have reached the same decisions regarding the employee at issue even absent any protected activity. On the bargaining violation, the Board found, given the facts, that the decision to layoff the employee was a managerial decision not subject to bargaining; however, TAS still had an obligation to bargain over any negotiable effects. Because TAS did not bargain over effects, it conceded that it owed backpay to the employee from the date of the layoff to the time its bargaining obligations were satisfied. The only issue before the Board was whether the ALJ erred by not ordering reinstatement.

The Board affirmed that backpay and reinstatement is the standard remedy where an employee does not fulfill its decisional bargaining obligation. The Board then spent a great deal of time discussing the appropriateness of a *Transmarine* remedy utilized by the NLRB where backpay is only ordered from the time the parties start effects negotiations and continues for the length of those negotiations. After reviewing the caselaw in this area—and overturning several precedential PERB cases—the Board held that:

> In sum, for most effects bargaining violations, back pay runs from the date any impacted employee began to experience harm until earliest of: (1) the date the parties reach an agreement, typically as part of complying with PERB's effects bargaining order; (2) the date the parties reach a good faith final impasse, including exhaustion of any required or agreed upon post-impasse procedures; or (3) the date the union fails to pursue effects negotiations in good faith. In contrast, a *Transmarine* remedy is proper where an employer has violated its duty to bargain over the effects of closing a facility or ceasing a service. For the above reasons, TAS need not reinstate [the employee], but it owes her back compensation from the date of her separation in 2019 until TAS has satisfied its effects bargaining obligations.

Alameda Health System (2023) PERB Decision No. 2856-M (3/23/22)

The Service Employees International Union, Local 1021 ("SEIU") filed an unfair practice charge against the Alameda Health System ("AHS") alleging that AHS violated the Meyers-Milias-Brown Act ("MMBA") by releasing an employee from probation in retaliation for his

protected activity and by sending several communications in April 2020. The allegedly interfering communications included verbal comments by an AHS Board of Trustees member at a public meeting on April 7, a written statement issued by AHS and posted on Twitter by another AHS Board of Trustees member on or about April 14 (April 14 statement), and a memorandum to employees issued by the AHS Chief Executive Officer (CEO) on April 22 (April 22 memo).

The allegations involving the verbal comments occurred on April 7, 2020, during a joint public meeting between the AHS Board of Trustees and the County Board of Supervisors. The group discussed media reports of the nurse who wore a garbage bag as PPE. A Board member asked the AHS CEO whether staff were being denied necessary PPE, and the CEO responded that they were not. The Board member then asked, "for the purpose of political theater, have you required staff to wear garbage bags?" The CEO responded, "no," and said that he happened to be visiting that unit when the nurse reported wearing a garbage bag. The CEO characterized the incident as an "unfortunate episode" and said that isolation gowns were made available later in the day. The Board member then responded, "that kind of political theater is not acceptable [in] a time of crisis and we need to keep our heads level and . . . our eyes on the . . . real problem."

The proposed decision dismissed the complaint and underlying unfair practice charge in its entirety. SEIU timely filed exceptions, urging the Board to overturn the ALJ's dismissal of each interference allegation. The Board affirmed the proposed decision except with respect to the Board members statement at the April 7 meeting.

In analyzing the interference allegation, the Board affirmed that generally, an employer does not commit an interference violation if it expresses or disseminates its views, arguments, or opinions on employment matters, unless such expression contains a threat of reprisal or force or promise of benefit. The Board noted, however, that this "safe harbor" for employer speech does not apply "to advocacy on matters of employee choice such as urging employees to participate or refrain from participation in protected conduct, statements that disparage the collective bargaining process itself, implied threats, brinkmanship, or deliberate exaggerations."

In the proposed decision, the ALJ found that the Board Member's statements at the April 7 meeting were permissible expressions of opinion on a controversial topic debated by the employer and the union, and that his statements contained no direct or indirect threats or promises. In overturning this finding, the Board held that when viewed in context the Board Member's statement fell outside the range of permissible employer speech. Specifically, the Board found that the term "political theater," in context, referred to protected activities. Moreover, the Board found that the statements were more than opinions but ventured into the realm of threats of reprisal because the Board Member stated that "political theater" was "not acceptable [in] a time of crisis." The Board concluded that an employee listening to the Board Member's comments at the public meeting could reasonably infer that he or she would be punished for engaging in the types of actions which were labeled "not acceptable."