Labor and Employment Litigation Update

Thursday, October 6, 2016 General Session; 4:15 – 5:30 p.m.

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Notes:

LABOR AND EMPLOYMENT LAW UPDATE FOR OCTOBER 2016 LEAGUE OF CALIFORNIA CITIES CONFERENCE

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Race Discrimination

Jumaane v. City of Los Angeles (2015) 241 Cal.App.4th 1390.

Plaintiff Jabari Jumaane, an African-American firefighter employed with the Defendant City of Los Angeles, filed suit against the City alleging racial discrimination, harassment, and retaliation under the Fair Employment and Housing Act ("FEHA"). This matter proceeded to a jury trial and the City prevailed.

Mr. Jumaane alleged that because he had a long history of publicly protesting racism in the fire department, he received two adverse employment actions. The first adverse action was a 10 day suspension in 1999 for five counts of misconduct. The misconduct alleged that Mr. Jumaane failed to report for duty at his assigned location, failed to maintain sufficient inspection records, failed to provide his supervisors requested documents, and insubordination for refusing to turn off a tape recorder during a meeting with his supervisor. The second adverse employment action was a 15 day suspension in 2001. The 2001 suspension was based on Mr. Jumaane's insubordination for intentionally violating a supervisor's directive and parking his assigned on-call vehicle in an unauthorized area in the City Hall parking structure rather than garage the vehicle at his home. Mr. Jumaane served the 2001 suspension on April 16 through April 30, 2001. On April 16, 2002, Mr. Jumaane filed his complaint with the Department of Fair Employment and Housing ("DFEH") alleging FEHA claims and filed suit against the City on April 18, 2003.

Mr. Jumaane filed for a new trial based on juror misconduct and it was granted. The retrial rendered a verdict in favor of Mr. Jumaane on the causes of action for race discrimination based on a disparate impact theory, harassment, retaliation, and failure to prevent discrimination, harassment and retaliation. The jury, however, found that the City's treatment of Mr. Jumaane was not racially motivated. The City moved for judgment notwithstanding the verdict arguing based on the one year statute of limitation that an employee has to file an administrative charge under the FEHA. Specifically, the City contended that the evidence of events that occurred before April 16, 2001, one year from Mr. Jumaane's DFEH complaint, did not fall within the continuing violation exception to the statute of limitations under FEHA because it was not part of a pattern and was thus, outside the statute of limitations. The City also argued that evidence of events on and after April 16, 2001 was insufficient to prove discrimination, harassment or retaliation. After the Trial Court denied the City's motion, the issue was taken up on appeal.

The Court of Appeal reversed the Trial Court and entered judgment for the City. The Court noted that a plaintiff cannot normally recover for acts occurring more than one year before the filing of the DFEH complaint. The Court of Appeal noted that when a defendant asserts a statute of limitations defense, it is the plaintiff's burden to prove the timeliness of his DFEH Complaint fell within the continuing violation doctrine. For the continuing violation doctrine to apply, a plaintiff must show that the conduct outside the limitations period satisfied the following three elements: (1) the conduct was similar or related to the conduct that occurred earlier; (2) the conduct was reasonably frequent; and (3) the conduct had not yet become permanent. Here,

because Mr. Jumaane's 1999 suspension was permanent and Mr. Jumaane knew that further efforts to stop the discrimination and harassment were futile, the continuing doctrine did not apply and all of the claims related to the 1999 suspension were barred by the statute of limitations.

The Court of Appeal further held that because most of Mr. Jumaane's claims were barred by the statute of limitations, the evidence of events within the limitations period were insufficient to allege a claim for race discrimination, harassment and retaliation. First, Mr. Jumaane's race discrimination claim based on a theory of disparate impact required proof that a facially neutral policy caused a protected group to suffer adverse effects. Here, Mr. Jumaane failed to show how the disciplinary policy had a disproportionate impact on African-Americans. In addition, because the jurors found that the City's individual treatment of Mr. Jumaane was not racially motivated, the Court of Appeal held that his discrimination claim under both theories of disparate impact and disparate treatment failed. Second, the only evidence of harassment within the limitations period was the 2001 suspension for insubordination. However, a disciplinary suspension is within the scope of personnel management decisions and does not constitute harassment under FEHA as a matter of law. Third, Mr. Jumaane's retaliation claim failed because the City presented a legitimate, non-retaliatory reason for the 2001 suspension and Mr. Jumaane failed to offer any evidence that the suspension was unjustified or that it was a pretext for retaliation. And finally, because a prima facie case of discrimination, harassment or retaliation was not proved at trial, Mr. Jumaane's claim for failure to prevent discrimination, harassment and retaliation under the FEHA, necessarily failed.

Although this case was largely won on a statute of limitation defense, it also demonstrates that well documented disciplinary actions are the best defense to subsequent discrimination claims.

Disability Discrimination

Mayo v. PCC Structurals, Inc., 795 F. 3d 941 (9th Cir. 2015)

Plaintiff Timothy Mayo was a welder for Defendant PCC Structurals, Inc. and had been diagnosed with a major depressive disorder in 1999. Mr. Mayo was terminated from his employment after making threatening remarks against his supervisors. Mr. Mayo sued the company under Oregon disability law and the American with Disability Act (ADA). Mr. Mayo argued the statements which formed the basis for his termination were the symptoms of and caused by his disability and as a result, the termination of his employment was discriminatory. Defendant PCC Structruals moved for summary judgment and the District Court granted the motion on the grounds that Mr. Mayo was no longer a "qualified individual" once he made his violent threats and therefore was not entitled to protection under the ADA and Oregon's disability discrimination statute.

After 11 years of employment without incident, in 2010 things changed and Mr. Mayo and other co-workers started having issues with a supervisor. Mr. Mayo and his co-workers met with the company's human resources director to discuss these issues. Following the meeting, Mr. Mayo made threatening comments to other co-workers. He told one co-worker that he felt like coming to work with a shotgun and "blowing off" the heads of the supervisor and another manager. He told another co-worker that he planned to come down to the company and "take out"

management. He told a third co-worker that he wanted to bring a gun and "start shooting people" and that all he had to do was show up at the company at 1:30 p.m. because that is when all the supervisors would have their daily walk-through.

Mr. Mayo's co-workers reported these threats to management, which prompted a senior manager to have a meeting with Mr. Mayo. When asked if he planned to carry out his threats, Mr. Mayo explained that "he couldn't guarantee he wouldn't do that." The senior manager immediately suspended Mr. Mayo's employment and barred him from company property. Mr. Mayo eventually went on a medical leave. At the end of his leave, his psychologist and nurse practitioner cleared him to return to work. Nevertheless, Mr. Mayo's employer terminated his employment.

Mr. Mayo opposed the employer's summary judgment motion on the grounds that because his statements were the symptoms of and caused by his disability, the termination of his employment was discriminatory. The District Court granted the company's motion for summary judgment on the reasoning that Mr. Mayo was no longer a "qualified individual" once he made his violent threats and therefore was not entitled to protection under the ADA and Oregon's disability discrimination statute. The Ninth Circuit agreed.

The Ninth Circuit explained that "an essential function of almost every job is the ability to appropriately handle stress and interact with others." Therefore, the Ninth Circuit noted, even if Mr. Mayo was disabled, he could not satisfy his burden of proving that he was qualified at the time of his discharge. The Ninth Circuit further explained that "while an employee can be qualified despite adverse reactions to stress, [Mr. Mayo] is not qualified when that stress leads him to threaten to kill his co-workers in chilling detail and on multiple occasions[,]" regardless of the reasons why he made those threats. Because Mr. Mayo's threats showed that he could not perform an essential function of his job, he was not qualified and therefore not entitled to the ADA and Oregon disability law protections.

This case does not hold that all forms of employee misconduct fall outside of the ADA. The Ninth Circuit emphasized that its holding is limited to the "extreme facts" of this case. It specifically held that off-handed expressions of frustration or inappropriate jokes will not necessarily render an employee not qualified. It also stated that employees who are simply rude, gruff, or unpleasant do not automatically fall into the same category as Mr. Mayo. Even still, the decision was based on a similar analysis in the Ninth Circuit's decision in *Weaving v. City of Hillsboro* (9th Cir. 2014) 763 F. 3d 110. The *Weavering* decision was highlighted in last year's Labor and Employment Law Update. In that case, the Ninth Circuit held that a Police Sergeant's purported ADHD disability was insufficient to establish protection under the ADA when he was terminated by his employer after acting inappropriately towards other police officers under his supervision.

These decisions provide guidance to employers and support for adverse actions against employees with purported disabilities who commit serious misconduct, especially when the employee admits the misconduct and tries to excuse it on the grounds that their disability caused them to violate the employer's rules.

Age Discrimination

France v. Johnson, 795 (9th Cir. 2015) F.3d 1170

Plaintiff John France, a 54 year old border patrol agent assigned to the Tucson Sector of Border Patrol, applied for a promotion. After a selection process, he was not selected for promotion. He sued his employer for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). The District Court granted the employer's motion for summary judgment, finding that Mr. France had failed to demonstrate a genuine dispute of material fact on the employer's reasons for not selecting him for promotion. Mr. France appealed.

Twenty-three other eligible candidates applied for the same promotion and twelve were selected for a panel interview based upon their scores on a promotional assessment test. Mr. France was one of the twelve candidates selected for the panel interview and Mr. Gilbert and two other supervisors conducted the interview. Mr. France was not one of the six interviewees who were selected for final consideration. Mr. Gilbert recommended four of the final six candidates to his supervisor, David Aguilar, who, in turn, recommended the same four candidates to his supervisor. The four candidates who made up the final group were aged 44, 45, 47, and 48.

Mr. France sued, claiming the decision not to promote him was age discrimination. After discovery, the employer moved for summary judgment and asserted that Mr. France was not promoted based on legitimate nondiscriminatory reasons. In support of that contention, Mr. Gilbert said that Mr. France lacked leadership and judgment. Specifically, the employer provided evidence that Mr. France had a "big mouth" and did not know "when to turn it on or off." Mr. Aguilar cited six reasons why he did not believe Mr. France merited a promotion, including that Mr. France lacked leadership, flexibility, and innovation. Mr. France countered with evidence that these criticisms of him were merely excuses to hide the age discrimination that he suffered. He and another agent declared that in a staff meeting, Mr. Gilbert expressed his preference for "young, dynamic agents." Mr. France also explained that Mr. Gilbert had approached him repeatedly about retirement even though Mr. France stated clearly to Mr. Gilbert that he did not want to retire. There was also evidence by other border patrol agents about Mr. Aguilar's preference to promote younger and less experienced agents.

The Ninth Circuit first evaluated whether Mr. France established a *prima facie* case that the refusal to promote him was based on in age discrimination by using the well-established legal framework under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To do so, Mr. France had to produce evidence that he was: (1) at least 40 years old; (2) qualified for the position for which an application was submitted; (3) denied the position; and (4) the promotion was given to a substantially younger person. The employer claimed Mr. France could not meet his burden because the four individuals that were selected for promotion were not substantially younger than him. The difference between Mr. France's age and the average age of the four other persons was eight years. While some other circuits have adopted a bright line rule that an age difference of less than ten years is insufficient to satisfy the fourth element of an age discrimination claim, the Ninth Circuit adopted an approach established by the Seventh Circuit that an age difference of less than ten years creates a rebuttable presumption that the age difference is insubstantial.

The Ninth Circuit then proceeded to evaluate Mr. France's evidence in support of his contention that his employer considered his age to be a significant factor in the promotion decision. The Ninth Circuit pointed to the age-based comments made by Mr. Gilbert, the fact that Mr. Gilbert approached Mr. France repeatedly about retirement despite Mr. France's stated unwillingness to retire, and Mr. Aguilar's supposed preference for young agents and that was a sufficient showing to establish the elements of an age discrimination claim.

Having found that Mr. France could make out a *prima facie* case, the Ninth Circuit turned its focus to Mr. France's evidence that his employer's stated reasons for refusing to promote him were not believable. The Ninth Circuit noted that where a plaintiff opposing summary judgment presents direct evidence of a discriminatory motive, the burden-shifting analysis established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) does not apply. In this case, however, the Ninth Circuit found that Mr. France's direct evidence of discriminatory animus (i.e., Mr. Gilbert's statement that he preferred "young, dynamic agents") was "thin support" to create a genuine issue of material fact by itself. However, the totality of Mr. France's evidence of bias, including the circumstantial evidence discussed above, should be evaluated under the *McDonnell Douglas* framework. The Ninth Circuit ultimately decided, considering all of the evidence, that Mr. France had established a genuine issue of material fact concerning whether his employer's stated reasons for refusing to promote him were pretextual and reversed the District Court's grant of summary judgment.

Although the employer was not able to prevail on its summary judgment motion, this case highlights the framework under which discrimination cases for failure to promote our analyzed. During promotional processes, establishing a multilayered selection process for a defensible promotional process will only be successful if the persons on the panel themselves have not engaged in discriminatory behavior.

Reasonable Accommodation

Castro-Ramirez v. Dependable Hwy. Express (2016) 246 Cal.App.4th 180

Luis Castro-Ramirez was employed by Dependable Highway Express ("DHE") as a truck driver. At the time of hire, he had advised his supervisor that he could not work nights because his son required daily dialysis, and he was responsible for administering treatment and attending to his son's needs. For approximately three years, DHE limited Mr. Castro-Ramirez's schedule so that he worked day shifts only, and he performed satisfactorily. However, when a new supervisor took over, that supervisor changed Mr. Castro-Ramirez's schedule to require him to work a later shift. Mr. Castro-Ramirez objected to the change and explained that he could not care for his son while working the later shift, but the supervisor did not change the assignment, and did not grant Mr. Castro-Ramirez's request to take a day off instead. When DHE customers requested that Mr. Castro-Ramirez resume making deliveries to them on the earlier shift, the supervisor provided false information in response. Ultimately, DHE terminated Mr. Castro-Ramirez when he did not report to work on an even later shift that his supervisor had assigned, even though he had attempted to return to work the next day, and DHE policy allowed for discipline less than termination in similar situations.

Mr. Castro-Ramirez filed suit against DHE claiming failure to provide reasonable accommodation, failure to engage in good faith interactive process, hostile work environment, failure to prevent harassment, associational disability discrimination, failure to prevent discrimination, and retaliation under the FEHA, as well as wrongful termination in violation of public policy. The Trial Court ruled that none of the claims could be heard by a jury, and specifically found that there was no evidence that Mr. Castro-Ramirez's termination was due to his association with his disabled child or his request for accommodation. Mr. Castro-Ramirez abandoned his reasonable accommodation, interactive process, and harassment-related claims, but he appealed the Trial Court's dismissal of the remaining four claims.

In its initial decision, the Court of Appeal overturned the Trial Court's ruling, noting that association with a disabled person is written directly into the definition of "disability" under the FEHA. Under the Court of Appeal's reasoning, a person associated with a disabled person is also "disabled" for that reason and so entitled to reasonable accommodation for that reason. The Court of Appeal recognized that this interpretation of the FEHA was contrary to federal case law interpreting the ADA. Noting that the FEHA expressly declares that it provides protections to disabled persons that are independent of those provided by the ADA, the Court of Appeal reasoned that this is one of the situations where the FEHA provides for a greater protection. Further, the Court of Appeal observed that, unlike the FEHA, the ADA does not include associational disability in its definition of disability. As such, the Court of Appeal determined that the federal cases relied upon by DHE were not relevant to the analysis under the FEHA. On rehearing, the Court of Appeal retained this analysis, but emphasized that it did so due to the "significantly intertwined" discrimination issue, and was not deciding whether the FEHA imposes a separate duty to provide reasonable accommodation to an employee who associates with a disabled person.

Based on the evidence regarding the supervisor's conduct, the Court of Appeal ruled both initially, and on rehearing, that a jury should decide whether DHE had terminated Mr. Castro-Ramirez's employment for discriminatory reasons or for legitimate business reasons. Specifically, the Court of Appeal noted in both opinions that both Mr. Castro-Ramirez's new and former supervisors were aware that he needed to work an early shift to return home in time to administer his son's dialysis, the new supervisor had changed the shift despite that knowledge, had lied to customers about doing so, and otherwise had no legitimate business reasons for his conduct. The Court of Appeal further observed on rehearing that a jury could reasonably infer that the supervisor "wanted to avoid the inconvenience and distraction plaintiff's disabled son posed . . . . and engineered a situation which plaintiff would refuse to work the shift, giving [the supervisor] reason to terminate [plaintiff.]"

Regarding Mr. Castro-Ramirez's retaliation claim, the trial court had relied upon a prior appellate decision ruling in *Rope v. Auto-Chlor Sys. Of Washington*i in ruling that requesting reasonable accommodation is not a protected activity. In its initial opinion, the Court of Appeal had determined that the California Legislature had overruled Rope on that point in enacting A.B. 987, which expressly identifies a request for accommodation as a protected activity, even if that request is not granted. On rehearing, however, the Court of Appeal expressly declined to rule on the applicability of A.B. 987 to Mr. Castro-Ramirez's retaliation claim, but retained its disagreement with the reasoning in Rope. Supplementing its initial opinion, the Court of Appeal determined that Mr. Castro-Ramirez had not "merely" requested reasonable accommodation but

had voiced-' complaints and concerns about the changed shifts, which a jury could find was based on a good faith belief that the supervisor was acting unlawfully. Accordingly, the Court of Appeal reasoned, a jury could consider Mr. Castro-Ramirez's conduct a form of protected activity that would support a retaliation claim. For similar reasons, the Court also ruled that a jury could also find that Mr. Castro-Ramirez could state a claim for wrongful termination in violation of public policy.

As noted above, even as modified on rehearing, the Court of Appeal's rulings are unprecedented, and with a strong prospect for review by the California Supreme Court, or direct Legislative action, the future validity of the rulings is uncertain. For now, as in all accommodation issues, employers would be well-advised to take a careful, case-by-case approach when faced with an employee's request for accommodation based on association with a disabled person. Employers should not reject outright an employee's request for accommodation due to association with a disabled person. Employers should ensure that supervisors notify Human Resources regarding any requests or comments by employees raising such issues, and refrain from taking any other action.

Equal Employment Opportunity Commission (EEOC) Charges

EEOC v. McLane Co. Inc. (9th. Cir. 2015) 804 F. 3d 1051

Prior to returning to work after a maternity leave, Damiana Ochoa was required by her employer, Defendant McLane Company, to pass a physical strength test. McLane had a company-wide policy of requiring strength tests for all positions classified as physically demanding. This policy applied to all new employees, and any employee returning from a leave of absence of 30 days or longer. Ms. Ochoa failed the strength test three times, and McLane terminated her employment as a result. Ms. Ochoa thereafter filed a charge with the EEOC, alleging sex discrimination under Title VII.

The EEOC initiated an investigation of the employer in response to Mr. Ochoa's charge. In the course of the EEOC's investigation, McLane voluntarily provided information regarding the individuals who had been required to take the test at the Arizona subsidiary where Ms. Ochoa worked. This information included each test taker's job classification, reason for taking the test, score (pass or fail), and gender. Each test taker was identified by an "employee ID number" generated specifically for the purpose of the EEOC investigation. However, McLane refused to provide certain personal identifying information, or "pedigree information." Specifically, the pedigree information included each test taker's name, social security number, telephone number, and last known address. McLane also refused to voluntarily disclose the rationales for termination, for employees who were terminated after taking the strength test.

The EEOC then issued an administrative subpoena seeking information from McLane facilities nationwide. The District Court refused to enforce the subpoena to the extent it required production of pedigree information, stating that it was not relevant to the EEOC's investigation. The District Court also refused to enforce the subpoena to the extent it required information on the reasons any employee was terminated after they took the strength test. The District Court found this was unduly burdensome.

On appeal, the Ninth Circuit addressed whether the pedigree information, including each test taker's name, address, and social security number, was relevant to the EEOC's investigation. The Ninth Circuit stated that, with administrative investigations, something is "relevant" if it helps the EEOC determine whether there is "reasonable cause" to believe the underlying discrimination charge is true. This is a lower standard than in the trial setting, as the EEOC was not required to show that the evidence in question would tend to prove a charge of unlawful discrimination.

Using this broader standard of relevance, the Ninth Circuit found that the pedigree information was relevant because it would allow the EEOC to contact *other* McLane employees and applicants regarding their experience with the strength test.

The Ninth Circuit noted, McLane could have routinely excused male employees' failure to pass the test, but granted no such exemptions to similarly situated female employees. As this could be useful in determining the existence of a "pattern or practice" of discrimination, the court deemed it relevant.

The lower standard for relevance adopted by the Ninth Circuit should be considered when an employer is responding to EEOC charges especially when the employer objects to providing specific information that was requested by the EEOC.

First Amendment

Heffernan v. City of Patterson (2016) 136 S. Ct. 1412

In 2005, Jeffrey Heffernan was a police officer in Paterson, New Jersey. He worked in the office of the Chief of Police, James Wittig. At that time, the Mayor of Paterson, Jose Torres, was running for reelection against Lawrence Spagnola. Mr. Torres had appointed to their current positions both Chief Wittig and a subordinate who directly supervised Officer Heffernan. Officer Heffernan was a good friend of Mr. Spagnola.

During the campaign, Officer Heffernan's mother, who was bedridden, asked Officer Heffernan to pick up a large sign supporting Mr. Spagnola. Officer Heffernan went to a Spagnola distribution point and picked up the sign. While there, he spoke to Mr. Spagnola's campaign manager and staff. Members of the Patterson police department saw him, sign in hand, talking to campaign workers. Word quickly spread throughout the department. The next day, Officer Heffernan's supervisors demoted him from detective to patrol officer. In this way, they punished Officer Heffernan for what they thought was his "overt involvement" in Mr. Spagnola's campaign. In fact, Officer Heffernan was not involved in the campaign but had picked up the sign simply to help his mother.

Officer Heffernan subsequently filed a lawsuit under 42 U.S.C. § 1983, claiming that Chief Wittig and the other supervisors had demoted him because he had engaged in conduct that (on their mistaken view of the facts) constituted protected speech under the First Amendment.

The District Court found that Officer Heffernan had not engaged in any First Amendment conduct, and, for that reason, he had not been deprived of any constitutionally protected right.

The Third Circuit Court of Appeals affirmed. It wrote that "a free-speech retaliation claim is actionable under § 1983 only where the adverse employment action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights." Officer Heffernan filed a petition for certiorari and the U.S. Supreme Court agreed to decide whether the Third Circuit was correct.

With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate. In order to answer the question presented, the Supreme Court assumed that the exceptions do not apply here. The Supreme Court presumed that the activities that Officer Heffernan's supervisors thought he had engaged in are of a kind that they cannot constitutionally prohibit or punish, but that the supervisors were mistaken about the facts. Officer Heffernan had not engaged in those protected activities.

The Supreme Court concluded that the employer's reason for demoting Officer Heffernan is the determining factor when deciding liability for violation of the First Amendment. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.

This case demonstrates the need for a careful investigation of the facts before disciplining an employee who has engaged in apparent misconduct. In particular, even though the employee did not engage in protected activity, the employee was nevertheless able to state a claim when he alleged that his employer took the discipline against him because of the mistaken belief that he engaged in it.

Fair Labor Standards Act

Flores v. City of San Gabriel (9th Circuit 2016) 824 F.3d 890

The City of San Gabriel offered a flexible benefits plan under which employees received a set amount of "cafeteria dollars." Under the plan, employees were required to apply a certain amount of dollars towards dental and vision coverage and with the remaining dollars could choose from several options, including applying them to medical premium costs directly, with any unused portion paid to them as taxable cash each pay period. Employees providing proof of other medical coverage could opt out of City medical coverage altogether and also receive a cash payment each pay period. The City did not include either type of cash payment in the regular rate of pay used to calculate employees' overtime compensation.

A group of fifteen police officers sued the City, claiming that the City had violated the FLSA by excluding the cash payments from their regular rate of pay. In defense, the City made a number of arguments, including that the exclusions were appropriate under Section 207(e)(2) as a form of "other similar payment." The City argued that Section 207(e)(2) applied because the amount of cash paid was fixed, regardless of the number of an employee's hours worked. However, the District Court ruled that "[s]ince the employees receive these payments periodically and the

payments are subject to taxes, they are remuneration for work performed and therefore must be included in the regular rate of pay used in calculating overtime."

The City had also pointed out that requiring cash payments such as theirs to be included in the regular rate of pay would discourage employers from providing such an option. For that reason, the City argued, interpreting the FLSA to exclude those payments from the regular rate of pay would ultimately benefit the employees and should be adopted on that basis. Although the District Court considered the City's point "compelling," it ultimately concluded that the employer was the true beneficiary of the lower overtime costs that would result and that "an increase in costs cannot be the basis for exclusion of cash payments from regular rate calculation." Overall, the District Court found that the City had not met its burden to demonstrate that it had lawfully excluded the cash payments under Section 207(e)(2).

On appeal to the Ninth Circuit, the City again argued that the cash payments were excluded lawfully under Section 207(e)(2) because they were "not compensation for hours worked" by the police officer plaintiffs. While noting that the legality of excluding such cash payments was "a question of first impression in this and other circuits" and characterizing it as a "close question," the Ninth Circuit affirmed the District Court's ruling that the cash payments could not be excluded under Section 207(e)(2). The Ninth Circuit similarly rejected the City's policy-based argument regarding the likely resulting elimination of cash payments by employers, commenting, "The potential effect of our ruling on municipal decision-making does not give us license to alter the terms of the FLSA."

In addition to contending that the cash payments they had received could not be excluded from their regular rate of pay, the employees went a step further and argued that the City's flexible benefits plan was not "bona fide" within the meaning of Section 207(e)(4) due to the comparative amounts of available plan benefits that had been paid out to City employees and the amounts that had been applied directly to payment of medical or other premiums. The District Court had ruled against the employees after first noting that the term "bona fide' was not defined in Section 207(e)(4) and that the interpretative bulletin in Section 778.215 and the 2003 Opinion Letter were entitled to "respect" but not deference. The District Court found the bulletin sufficiently persuasive in terms of setting forth factors affecting what could be considered "bona fide." However, the District Court reached the opposite conclusion regarding the 2003 Opinion Letter, to which, the District Court emphasized, it did "not resort to for guidance." Notably, the District Court did not find, as the City had argued, that the 2003 Opinion Letter was inconsistent with the interpretative bulletin; however, the District Court did find that the 2003 Opinion Letter had not sufficiently explained the basis for adopting a 20 percent standard in that opinion, or in the prior opinions. Moreover, the district court found that the prior opinions in which the DOL had applied the 20 percent standard on an individual employee basis rather than on a plan basis expressly conflicted with the interpretative bulletin, under which a plan could be bona fide "even if an employee receives all or a portion of the contribution as payment."

Having declined to apply a 20% test on either an individual employee, or plan basis, the District Court focused instead on the purpose of the City's plan. Specifically, the District Court found relevant that the plan was for the purpose of providing insurance benefits to employees, that the employees had options as to which benefits to select under the plan, and that an employee could not opt out without providing proof of other medical coverage. In addition, the District Court

noted the undisputed fact that in the three years prior to litigation "the majority of contributions into the Plan were used for the purchase of benefits rather than dispensed as direct cash payments." For those reasons, the District Court ruled that the contributions made by the City to third parties under the plan could lawfully be excluded from the regular rate of pay.

Although the Ninth Circuit agreed with the District Court that the 2003 Opinion Letter and the 20% thresholds that the Department of Labor (DOL) had adopted there were not persuasive, and characterized the issue as a "closer question" than exclusion of the cash payments, it ultimately did not find that the City's plan was "bona fide." Of the factors that the District Court had found relevant, the Ninth Circuit focused particularly on the percentage of available contributions under the plan that was paid out as cash. Where the District Court had found acceptable that the payments taken as cash represented less than a majority of total plan payments, the Ninth Circuit found that the cash payments, which represented "[f]orty percent or more" of the payments made under the plan, were not "incidental," as required in the interpretative bulletin for the plan to be "bona fide." Accordingly, the Ninth Circuit agreed with the employees and, overruling the District Court in that regard, directed that the City include the value of the full plan benefit in calculating the regular rate of pay for each employee.

For both the District Court and the Ninth Circuit, having found the City liable for failing to include the cash payments in calculating employees' overtime rates, the final issue for consideration was the applicable statute of limitations and availability of "liquidated damages. A plaintiff seeking to recover damages under the FLSA for unlawful overtime practices, such as incorrect determination of the regular rate of pay, may recover payments owed under a two year statute of limitations. However, when a violation is "willful," the statute of limitations extends to three years. The United States Supreme Court has interpreted the term "willful," as that term is used in the FLSA, to mean "that the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."

The District Court determined that the City's violation was not willful because the there was no published decision analyzing whether cash payments made in lieu of benefits must be included in regular rate of pay. In support of its ruling, the District Court cited to a decision from the Third Circuit Court of Appeal, which had previously been cited with approval by the Ninth Circuit, in which the Third Circuit ruled that an employer's violation was not willful because the case involved "close questions of law and fact" and "a case of first impression with respect to one of the governing exemptions."

Despite citing most of the same authority as the District Court, the Ninth Circuit determined that the City's conduct had been willful. In reaching its contrary ruling the Ninth Circuit cited primarily to its 2003 decision in *IBP v. Alvarez* and its statement there that an employer's conduct is willful "when it is on notice of its FLSA requirements yet [takes] no affirmative action to assure compliance with them." *IBP v. Alvarez* decision had involved an employer who had been involved in prior litigation with the DOL and had taken steps that the Ninth Circuit had characterized as intended to evade its obligations under the FLSA. By contrast, in *Flores,* the Ninth Circuit noted that the City had provided no evidence of affirmative action by the City to ensure that its exclusion of the cash payments complied with the FLSA. Unlike the District Court, the Ninth Circuit did not find the circumstances mitigated by the lack of case law addressing exclusion of the cash payments. In a strongly worded concurrence, two of the three

judges on the Ninth Circuit panel expressed their opinion that the Ninth Circuit had gone "off track" in its line of decisions regarding willfulness.

In addition to actual damages, whether under a two-year or three-year statute of limitations, successful employees may also double their recovery due to recovery of additional "liquidated damages" equal in amount to actual damages. However, if the court finds that the employer showed that it acted in "good faith" and had "reasonable grounds" to believe that its practice complied with the FLSA, then the court may exercise its discretion to deny liquidated damages or to reduce the amount awarded. Applying this standard, the District Court and Ninth Circuit again reached opposite rulings consistent with their opposing "willfulness" determinations. The District Court had denied liquidated damages, finding sufficient evidence of "good faith" due to the lack of settled case law regarding excludability of cash payments; however, the Ninth Circuit described the City's efforts as "paltry" and "grasping at straws." The Ninth Circuit found that evidence of consultation between human resources and payroll in determining how to categorize a payment was insufficient without an explanation as to why the City had determined that the cash payments were properly excluded from the regular rate of pay. In addition, the Ninth Circuit considered irrelevant the City's evidence that it had appropriately included other types of payments in the regular rate of pay and had often provided greater compensation for overtime than the law required.

The City's petition's petition for rehearing and *en banc* review was denied by the Ninth Circuit. It is believed that the City will seek to appeal this matter further to the Supreme Court. In light of this decision, employers who offer cafeteria plans that allow any amount back as taxable income should engage in internal fact-finding to evaluate the potential dollar amounts involved in employees' regular rates of pay. For the non-exempt employees who received a cash payment, the employer should review the City's records for two or three years to identify the employees who worked overtime in a given pay period. Recalculate the regular rate of pay for each affected employee in each pay period, and then calculate the difference in overtime payment already received by him or her, and the additional overtime payment due.

In addition, to help to determine whether the City's plan would be considered "bona fide" under the *Flores* standard, for each calendar year in which employees, both exempt and non-exempt, received cash payments from the optional benefits plan, determine the total amount of cash paid out, and the total amount of money that the City paid into the plan. Then calculate the percentage of total money in the plan that was paid out as cash. Finally, because the analytical framework in *Flores* and the other published decisions in the Ninth Circuit currently applies to <u>all</u> forms of compensation not expressly excluded under Section 207(e), not just the cash payments directly at issue, employers should review its practices and identify any other monetary items that the employer provides to its non-exempt employees and that may also be considered a form of "compensation," that is not included in the regular rate of pay. As a related consideration, because an employee's entitlement to overtime pay depends solely on his or her non-exempt status, employers will want to ensure that it has recently undertaken an analysis of the positions that are considered exempt, particularly in light of the recent changes and additional scheduled changes under both California wage and hour law and the FLSA that alter the criteria for employees to continue to qualify as exempt.

Firefighters Procedural Bill of Rights (FFBOR) and Public Safety Officers Procedural Bill of Rights (POBR)

Poole v. Orange County Fire Authority (2015) 61 Cal.4th 1378

Plaintiff Steve Poole was employed as a firefighter with Defendant Orange County Fire Authority (OCFA). Mr. Poole received an annual performance review from his supervisor which stated that he needed improvement. Mr. Poole requested his personnel file, was allowed to review it and make copies of his performance evaluation. After learning that his supervisor maintained and used a daily log with notes to draft the performance evaluation, Mr. Poole requested a copy of the notes. His request was denied. Mr. Poole filed a petition and complaint in Superior Court seeking, among other things, a writ of mandate to obtain the notes in his supervisor's daily log and directing the OCFA to comply with Government Code Section 3255 before including adverse comments in his personnel file. The Superior Court denied relief, concluding that Mr. Poole's supervisor's daily log was not subject to Section 3255 because "[if the supervisor] made a negative note about [Plaintiff] in his notes, but did not address it in the yearly evaluation, it does not exist, at least for personnel purposes." The Court of Appeal reversed, reasoning that the daily log constituted a "file used for ... personnel purposes" pursuant to Section 3255 because a substandard performance evaluation was based on adverse comments contained in the daily log, and because Mr. Poole's supervisor orally revealed some of the contents of the daily log to a battalion chief. The matter was ultimately decided by the California Supreme Court.

When Mr. Poole initially obtained a copy of his performance evaluation, he showed a copy of it to his union representative. The level of detail in the performance review caused the union representative to wonder whether Mr. Poole's supervisor may have been maintaining a separate file outside of Mr. Poole's official personnel file. The union representative demanded that OCFA provide a copy of any separate file.

As it turns out, Mr. Poole's supervisor maintained what he called a "daily log" regarding each of the employees that he supervised. He created the log using both a computer and handwritten notes. He had a separate file for each employee, and he stored them on a flash drive and also in hard copy, which he kept in his desk with the employee's name on it. He included in the log "[a]ny factual occurrence or occurrences that would aid [him] in writing a thorough and fair annual review." In practice, Mr. Poole's supervisor would address with the employee behavior recorded in the daily log about which he had concerns, and if the behavior nevertheless continued there was a chance it might be mentioned in the employee's performance review. However, many incidents recorded in the daily log were never included in a performance review.

After learning of the daily log, Mr. Poole also wrote to OCFA claiming the inclusion of negative comments in the daily log without providing Mr. Poole an opportunity to review those comments violated Government Code Section 3255. This section of the FFBOR requires the employer to inform the firefighter of any comment adverse to his interest in a personnel file "or any other file used by the employer for personnel purposes." It also allows the firefighter the opportunity to place a rebuttal in his personnel file on any adverse comments within it.

The California Supreme Court disagreed with the Court Appeal and reversed the appellate court's decision. In doing so, the Supreme Court first analyzed the phrase "used for any personnel purposes by his or her employer" as set forth in Government Code Section 3255. It agreed that the phrase "should be interpreted to encompass any written or computerized record that, although not designated a personnel file, can be used for the same purposes as a file of the sort described in Section 3256.5; [specifically] a record that may be used by the employer to make decisions about promotion, discipline, compensation, and the like."

Next, the Supreme Court found that a supervisor's log that is used solely to help its creator remember past events does not fall within the scope of that definition. The Supreme Court held that "Even if a supervisor uses his or her notes to help draft performance evaluations and other documents that ultimately are placed in a personnel file, the notes themselves are not a file preserved by the employer for use in making decisions about the firefighter's employment status."

As a caveat, the court made several notable observations on which it based its holding, including: (1) Mr. Poole's supervisor was not the appointing authority for Mr. Poole, and his comments could adversely affect Mr. Poole only if and when they were placed in a personnel file; (2) the documents Mr. Poole's supervisor prepared with the assistance of the log, including performance evaluations and improvement plans, were disclosed to Mr. Poole before they were entered into his personnel file; and (3) there was no evidence that Mr. Poole's supervisor's daily log would be available to anyone making personnel decisions in the future.

Employers should note the above caveats provided by the Supreme Court when determining whether any adverse comments maintained by a supervisor must be disclosed to firefighter and produced upon request. Additionally, because the POBR has an identical provision to this section of the FFBOR , this Supreme Court decision also applies to covered police officers.

Ellins v. City of Sierra Madre (2016) 214 Cal. App. 4th 445.

Plaintiff John Ellins was employed as a peace officer for the Defendant City of Sierra Madre's Police Department. The Department terminated Mr. Ellins in February 2011. Mr. Ellins appealed to a hearing officer, who affirmed the Department's the dismissal. In January 2013, the City of Sierra Madre adopted the hearing officer's decision. Mr. Ellins then petitioned the Superior Court for a writ of mandate to overturn his dismissal. The trial court denied the petition and Mr. Ellins appealed. The sole issue on appeal was whether Mr. Ellins's termination for insubordination was invalid because he had a valid reason for refusing to submit to an interrogation based on his contention that the Department violated POBRA by not properly advising Ellins of the nature of the investigation prior to his interrogation.

As a peace officer, Mr. Ellins had access to the California Law Enforcement Telecommunications System ("CLETS") database, which is a confidential law enforcement database that allows police officers to access several integrated databases containing an individual's criminal history, driver's license and vehicle registration. When he joined the Department, Mr. Ellins was informed that the use of the CLETS database for any reason other than for official business was improper and grounds for immediate dismissal.

In May 2010, Ellins made 12 inquiries using the CLETS database regarding his ex-girlfriend and members of her family with no official reason to do so. In the summer of 2010, the Department received a letter from Mr. Ellins's ex-girlfriend informing the Department that Mr. Ellins had located her in New York by using the CLETS database. The Department hired an outside consultant to investigate. In September 2010, the Department formally notified Ellins an investigation had been opened "regarding alleged abuse of [Ellins'] peace officer powers and duties." Mr. Ellins agreed to be interviewed on October 13, 2010. Minutes before the interview was to begin, the consultant notified Mr. Ellins – orally and in writing – of the allegations that he improperly accessed the CLETS database regarding his ex-girlfriend and her family. Mr. Ellins' representative requested one hour to discuss in private with Mr. Ellins the nature of the investigation and the consultant agreed. Twenty five minutes later, Mr. Ellins stated that on the advice of his representative he would not participate in the interview. Mr. Ellins' commanding officer ordered him to sit for the interview and Mr. Ellins refused. The interview was re-scheduled three more times and Mr. Ellins did not appear for the interviews based on alleged medical reasons.

In December 2010, the Department issued a notice of disciplinary action to terminate on the following grounds: (1) Mr. Ellins made unauthorized searches into the CLETS database, and (2) Mr. Ellins was insubordinate for disobeying a commanding officer's direct orders to submit to interrogation. The Department terminated Ellins in February 2011.

The sole issue on appeal was whether Mr. Ellins' termination for insubordination on October 13, 2010, was invalid because he had a valid reason for refusing to submit, namely that the Department violated POBR by not properly advising Mr. Ellins of the nature of the investigation prior to his interrogation. The Court of Appeal first looked to determine the meaning of the requirement in Section 3303(c) that an employing department inform a public safety officer of the nature of the investigation "prior to" any interrogation. The Court of Appeal noted that the POBR was silent on the issue of how much notice of the nature of the investigation is needed prior to the interview. The Court of Appeal determined that Section 3303(c) requires an officer to be informed "reasonably prior" to the interrogation, meaning "with enough time for the officer to meaningfully consult with any representative he elects to have present." The time required depends on whether the officer is already represented, and the nature, complexity and number of the allegations. The Court of Appeal noted, however, that if an employing department had reason to believe that providing the information would risk the safety of interested parties or the integrity of evidence in the officer's control, the employing department may delay notice until the time scheduled for the interrogation as long as thereafter it grants sufficient time for consultation.

In reaching its determination, the Court of Appeal also noted the fact that a requirement of reasonable advance notice is contemplated in other subdivisions of Section 3303, that the requirement of reasonable advance notice is consistent with the legislative purpose behind POBR, that it tracks the two models the legislature used in fashioning POBR, specifically the National Labor Relations Act and the rights accorded to suspects under criminal investigation, and that it is consistent with precedent that had infused a reasonableness requirement into Section 3303(i) which grants an officer the right to request a representative.

The Court of Appeal then addressed whether the Department had complied with this standard. The Court of Appeal determined that the Department had provided Mr. Ellins with notice of the nature of the investigation "reasonably prior" to his interrogation. The Court of Appeal noted that good cause existed for delaying informing Mr. Ellins until just prior to the interrogation, as it was necessary to avoid any possibility of retaliation against Ms. Ellins's ex-girlfriend. Further, the consultant provided Mr. Ellins and his representative the time they had requested to confer. Accordingly, the Court of Appeal affirmed the Trial Court's denial of Ellins's petition for writ of mandate.

Unless there are special circumstances similar to the ones outlined by this decision, police departments should provide notice of the nature of an investigation on a date before the initial investigative interview. Additionally, because the FFBOR has an identical provision to this section of the POBR, this Court of Appeal decision also applies to covered firefighters.

Meyers-Milias-Brown Act (MMBA)

Friedrichs v. California Teachers Association (2016) 136 S Ct. 1083.

On March 29, 2016, the United States Supreme Court issued a brief order affirming the decision of the Court of Appeals in the closely watched fair share fee case of *Friedrichs v. California Teachers Association*. Based on the January 2016 oral argument in the case, most watching the case expected the US Supreme Court to overrule prior US Supreme Court precedent and prohibit public agencies from requiring all employees to either join the union or pay a "fair share" service fee ("agency fee") to cover the cost of the union's obligatory representation of all unit members. Unions and local agencies across the state were preparing for the ruling that could have had a major impact on the coffers and strength of public employee unions.

The one sentence per curium decision stated in its entirety, "The judgment is affirmed by an equally divided court." The recent death of Justice Anton Scalia is widely believed to have changed the outcome in this case from a 5-4 majority to overturn the lower court decision to the 4-4 vote that leaves the lower court decision upholding fair share fees for public employee unions in place.

California, along with 23 other states across the nation, authorize non-union members to be required to pay fair share fees to cover collective bargaining and related costs of unions' representation of all employees in the bargaining units they represent. The Supreme Court previously approved of such fair share fees in *Abood v. Detroit Board of Education* (1977) 431 U.S. 209 finding that the fees are necessary to avoid non-members from acting as "free loaders," by securing the benefits of union representation without paying their "fair share."

The *Friedrich's* plaintiffs argued that their free speech and associational rights are violated by being required to support public sector unions that engage in activities that are inherently political. The plaintiffs in the case have suggested that they will return to efforts to overturn the long-standing precedent when a new Justice is appointed to the Court. The success of these efforts will depend in large part of who is appointed to fill the vacancy in the US Supreme Court. Although this case involved a school district, the constitutional analysis in it applies equally to cities governed by the MMBA.

San Diego Housing Commission v. Public Employment Relations Board (2016) 246 Cal.App.4th 1.

The Fourth Appellate District of the Court of Appeal decided two cases on March 30, 2016 concluding that MMBA factfinding applies to so-called "single issue" bargaining disputes, and not just to impasses arising in MOU bargaining. The Court of Appeal also rejected constitutional challenges to the MMBA factfinding provisions.

The San Diego Housing Commission ("Commission") challenged the Public Employment Relations Board's ("PERB") granting of an employee organization's request for factfinding under the MMBA for an impasse in negotiations over the effects of the Commission's decision to layoff off two employees represented by the Service Employees International Union, Local 221 ("SEIU"). The Commission argued that the MMBA's factfinding provision applied only to an impasse arising during negotiation of a comprehensive MOU, not to an impasse arising from a discrete bargainable issue. The Superior Court agreed with the Commission's interpretation of the MMBA and issued a judgement declaring that the MMBA's factfinding provisions only apply to an impasse in negotiations over a new or successor MOU and not from other negotiations. The Superior Court also issued a writ of mandate commanding PERB to dismiss the factfinding proceeding, rescind any requirement that the Commission participate in factfinding for impasses not involving MOU negotiations, and reject requests for the Commission to participate in factfinding for impasses not involving negotiation of an MOU. PERB appealed the Superior Court's decision.

The Court of Appeal agreed with PERB and overruled the Superior Court's decision that concluded factfinding did not apply to an impasse in negotiations regarding the impacts of the layoff decision. The Court of Appeal concluded that factfinding applies to "any bargainable matter," and not just to impasses arising during comprehensive MOU bargaining. The Court of Appeal also ordered that the appeal considered with the appeal in *County of Riverside v. Public Employment Relations Board* (Mar. 30, 2016, D069065) 246 Cal.App.4th 20.

The Court of Appeal also rejected all of the arguments made by the Commission as well as those made by the League of California Cities and the California State Association of Counties who submitted arguments in the case as Amici Curiae. After an overview of the meet and confer obligations under the MMBA and a discussion of the legislation adding factfinding requirements to the MMBA, the Court of Appeal discussed PERB's 2014 decisions concluding that factfinding applies "'to any bargaining impasse over negotiable terms and conditions of employment, and not only to impasses over new or successor [MOUs].'" (*San Diego Housing Commission* at p. 10, quoting PERB decisions in *County of Contra Costa* (2014) PERB Dec. No. Ad-410-M, pp. 2-3, and citing *City & County of San Francisco* (2014) PERB Dec. No. Ad-419-M.)

The Court of Appeal explained that PERB's interpretations of the public sector labor relations statutes are entitled to deference, unless it is clearly erroneous, because it is an agency with specialized knowledge of these laws. The Court of Appeal went on to agree with PERB's decision on the following:

1. The MMBA does not contain any language expressly limiting the factfinding provisions to impasses occurring during comprehensive MOU negotiations.

2. PERB has consistently applied analogous factfinding provisions under EERA and HEERA to all types of bargaining disputes.
3. Applying the factfinding requirements to all bargaining disputes is consistent with the legislative history of AB 646 .
4. Applying factfinding to all bargaining disputes is consistent with the MMBA-established duty to bargain on any bargainable issue, and furthers the purposes of the MMBA.

County of Riverside v. Public Employment Relations Board (2016) 246 Cal.App.4th 20.

The Court of Appeal ordered the *San Diego Housing Commission* case discussed above to be considered along with the case of the *County of Riverside v. Public Employment Relations Board.* The latter case involved an impasse in bargaining over the effects of the County's decision to implement a new background check policy for information technology employees represented by SEIU, Local 721. The Trial Court ruled that the County was not required to comply with the factfinding requirements of the MMBA when the parties reached impasse over the effects bargaining, and issued an injunction precluding PERB from processing factfinding requests under the MMBA for matters other than those involving new or successor MOU negotiations. The County and Union filed cross appeals, and the Court of Appeal reversed the Trial Court's decision.

The Court of Appeal referenced the conclusions in the *San Diego Housing Commission* case discussed above, and also rejected the County's arguments that the MMBA's factfinding provisions violate the City and County "home rule" powers protected by the State Constitution (the Trial Court had also rejected these home rule arguments). Noting that factfinding panels make only advisory recommendations, the Court explained, "The factfinding provisions do not delegate to factfinding panels any power to make any binding decisions affecting public agency operations . . . [and] [t]he public agency still retains the ultimate power to refuse an agreement and make its own decisions." The Court of Appeal distinguished the State Supreme Court's decision invalidating binding interest arbitration provisions, based on the binding nature of arbitration decisions. (*County of Riverside v. Superior Court* [2003] 30 Cal.4th 278.)

The Court of Appeal went on to find that the Trial Court should have granted PERB's anti-SLAPP motion dismissing the case, and consequently found that PERB is entitled to an award of attorney fees and costs in the case.

This decision reaffirms PERB's administrative determination that factfinding is required when timely requested by unions during impasse procedures for any mandatory subjects of bargaining and not merely limited to MOU negotiations. As a result, cities should prepare and plan its bargaining strategy to take into account the MMBA's factfinding criteria and timelines to be successful in negotiations especially when it is anticipating difficult negotiations.

NEW LAWS EFFECTIVE IN 2016

Fair Employment And Housing Act (FEHA)

AB No. 987

Effective January 1, 2016, this amendment to the FEHA prohibits an employer from retaliating or otherwise discriminating against a person for requesting an accommodation of his or her disability or religious belief regardless whether the accommodation was granted. This amendment overrules the contrary holding in *Rope v. Auto-Chor System of Washington* (2013) Cal.App.4th 635.

FAIR PAY ACT

SB No. 358

Effective January 1, 2016, this amendment to Labor Code Section 1197.5 was enacted to address the gender wage gap in California. California has prohibited gender based wage discrimination since 1949 and enacted Section 1197.5 of the Labor Code to redress the segregation of women into historically undervalued occupations. It evolved over the years to substantially mirror the Federal Equal Pay Act. The 2015 amendment sought to improve the existing legislation and to make it easier for employees to bring gender-based wage claims, as the standards have been lowered. The Act generally prohibits employers from paying any employee at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility.

The Act changes the comparative analysis from "equal work" to "substantially similar work" and eliminates the "same establishment" requirement. Substantially similar work is determined by reviewing a composite of skill, effort and responsibility when performed under similar working conditions. The Act requires that an employer affirmatively demonstrate that wage differentials are based on lawful, nondiscriminatory factors including: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than sex. The new law also includes an anti-retaliation provision which prohibits employers from taking adverse action against any employee who invokes or assists in the enforcement of the Act.

Employers will want to review compensation practices and recordkeeping to ensure compliance with the Act. Among other things, employers will want to ensure that job descriptions are current, compensation for substantial similar work is provided, and employees with responsibilities for setting salaries are aware of these standards.

Healthy Workplaces, Healthy Families Act of 2014

AB No. 304

Effective July 1, 2015, this amendment provides some clarification to the Paid Sick Leave Law that took effect July 1, 2015. On July 13, 2015, Governor Brown signed into law AB 304, which

is intended to amend the Paid Sick Leave Law in multiple aspects, including the permissible accrual methods an employer may use in calculating sick leave pay. The new amendments are effective immediately. These changes include, among other things, requiring the employee to work for the same employer for more than 30 days within the previous 12 months in order to qualify for sick leave.

It remains an open question whether the Act is unconstitutional as applied to charter cities who have exclusive authority to provide for employee compensation. See *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278.

Labor Code

AB No. 1509

Effective July 1, 2015, this amendment to the Labor Code expands the whistleblower and anti-retaliation protections to prohibit employers from retaliating against an employee when his/her family member engages in whistleblowing (Section 1102.5) or other described protected activity, such as complaining of unsafe working conditions (Section 6310). For example, if a married couple is working for the same employer and the husband complains of discrimination, that is not a legal basis to take action against the wife. The amendment also expands joint employer liability by changing definition of employer under anti-retaliation law to include "client employers" – a specific definition related to companies who contract for labor.

"An employer, or person acting on behalf of the employer, shall not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any conduct delineated in this chapter." This language was added to Labor Code sections 98.6(e), 1102.5(g); and 6310(c).

"For purposes of this section, "employer" or "person acting on behalf of the employer" includes, but is not limited to, a client employer as defined in paragraph (1) of subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400." Labor Code Sections 98.6(g), 1102.5(h), and 6310(d). Section 2810.3 defines "client employer" as a business entity, regardless of its form, that obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

Employers will want to update their employment policies and training to address this new law.

EEOC Regulations

Federal Register, Vol. 81, No. 95 (May 17, 2016).

On May 17, 2016, the EEOC issued final rules on how employer-provided wellness programs can comply with the ADA and the Genetic Information Nondiscrimination Act (GINA). These new regulations will go into effect on January 1, 2017 under 29 CFR Parts 1630 and 1635.

Although the ADA and GINA generally prohibit employers from obtaining and using health care information about an employee or an employee's family members, both statutes contain an

exception that permits health-related questions and medical examinations in connection with a voluntary wellness program. The regulations address the impact that financial incentives have on the voluntary nature of such programs. The final ADA regulations provide that wellness programs that are part of a group health plan and that ask questions about employees' health or include medical examinations may offer incentives of up to 30 percent of the total cost of self-only coverage. The final GINA regulations provide that the value of the maximum incentive attributable to a spouse's participation may not exceed 30 percent of the total cost of self-only coverage, the same incentive allowed for the employee. No incentives are allowed in exchange for the current or past health status information of employees' children or in exchange for specified genetic information (such as family medical history or the results of genetic tests) of an employee, an employee's spouse, and an employee's children.

In addition, the regulations require that any wellness program offered by an employer be reasonably designed to promote health and prevent disease in order to ensure that the programs are not used for an improper purpose.

Finally, the regulations include requirements to protect the confidentiality of any medical information collected as part of a wellness program.
