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The Labor Beat is prepared for the general information of our clients and friends. The summaries of recent court opinions and other legal developments may be pertinent to you or your association. However, please be aware that The Labor Beat is not necessarily inclusive of all the recent legal authority of which you should be aware when making your legal decisions. Thus, while every effort has been made to ensure accuracy, you should not act on the information contained herein without seeking more specific legal advice on the application and interpretation of these developments to any particular situation..

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THE CALIFORNIA ATTORNEY GENERAL APPROVES THE SAN JOSE POLICE OFFICERS' ASSOCIATION'S APPLICATION TO SUE THE CITY OVER FAILURE TO BARGAIN OVER PENSION MEASURE

On Monday, April 15, 2013, the San Jose POA's application to sue the City of San Jose for failure to meet and confer in good faith before submitting a so-called pension reform measure (Measure B) to the San Jose voters was GRANTED by the California Attorney General, Kamala Harris. Under principles dating back to medieval England, whenever a party wishes to sue a charter city for failing to follow proper procedures before amending its charter, the party must receive the permission of the attorney general to file suit. The obligation of a charter city to meet and confer before seeking to amend its charter on a matter within the scope of representation is treated as a procedural prerequisite to submitting such a proposed change to voters. While non-peace officer associations may file an unfair labor practice charge with the California Public Employment Relations Board ("PERB") for failure to meet and confer over such changes, PERB does not have jurisdiction over unfair labor practice claims involving bargaining units comprised solely of peace officers (Gov. Code § 3511), so those claims are directly litigated in superior court.

The Attorney General agreed that the San Jose POA's allegations that the City failed to negotiate between October 31, 2011 and March 6, 2012 over Measure B, despite the City itself revising the Measure and SJPOA making multiple concessionary proposals, warranted the filing of a complaint in Santa Clara County Superior Court. While the Attorney General's granting of the POA's application is not, in itself, a ruling or comment on the underlying merits of the case, it is nonetheless a significant favorable development for the POA in light of the strong opposition filed by the City to the application.

CB&M San Francisco Labor Partners **Gregg Adam** and **Jonathan Yank** are assisting San Jose POA on its claim. If a court ultimately rules that the City did not meet and confer in good faith, Measure B would be invalidated.

COLUSA COUNTY DEPUTY SHERIFFS ASSOCIATION SETTLES AN MOU EXTENDING TO 2015

The Colusa County DSA, represented at the bargaining table by Sacramento Labor Partner **Gary Messing**, has settled on a 3-year MOU to expire in December of 2015. There are numerous changes regarding how vacation is accrued, how it is utilized, definitions of immediate family, expansion of shift trades, and the like.

Significant matters that were addressed included a reduction in the formula for new safety and miscellaneous employees and a change to the retirement pickup, resulting in employees having to pick up the entirety of the safety and miscellaneous employee contributions as well as FICA. The bargaining unit employees end up paying 8% of the normal cost of retirement for miscellaneous employees and 12% for safety, phased in until 2015 by dedicating half of the salary increases provided by the County (discussed below), in the out year, until the caps of 8% and 12% are reached. The impact of this change is mitigated by implementation of the 414(h)(2), the Internal Revenue Code section that permits the employee contribution to count as income from the employer for computation of final compensation for retirement purposes, but not for tax purposes.

In addition to implementing the 414(h)(2), the bargaining unit will receive a 14% pay raise effective January 1, 2013, an additional 1% in January of 2014, and 3% in July of 2015. While a lower step was added for new employees, a 5% step was added at the top of the pay ranges for employees with 23 years of longevity. The contract will include other slight increases in the County's contribution to the Internal Revenue Code 125 Plan to $150 in 2014 up to $175 for 2015, increases in health insurance of $32 per month, among others.

The MOU results in an approximately 24% increase in total compensation for retirement purposes for members who retire at the top step.

CB&M APPELLATE PARTNER LAURIE HEPLER NAMED "ATTORNEY OF THE YEAR"

CB&M Appellate Partner **Laurie Hepler** was named an "Attorney of the Year" by California Lawyer magazine. Hepler received the designation and award as a result of her successful briefing and oral argument before the California Supreme Court.

POLICE DEPARTMENT ALLOWED TO LIMIT ASSIGNMENTS TO SWORN ADMINISTRATIVE POSITIONS TO OFFICERS CAPABLE OF RESPONDING TO EMERGENCIES AND OTHER STRENUOUS ACTIVITIES

By Amber West

An appellate court determined that a police department was not prohibited from excluding an officer from sworn administrative positions after he was diagnosed with a disability, in *City and County of San Francisco v. Lui* (2012) 211 Cal.App.4th 962. After 24 years of service, Officer Lui suffered a heart attack requiring surgery, including insertion of 5 stents and a year of rehabilitation. At that point, Lui's physician issued a report stating Lui could not perform physically strenuous duties. The police department denied the request to return to work in an administrative position, because all such jobs required occasional, strenuous functions exceeding Lui's capabilities, including responding to emergencies, chasing fleeing suspects, and making forcible arrests. Notably, administrative sworn officers are required to perform these physical activities occasionally. Although the duties of the department's administrative positions largely included non-strenuous tasks, the department had designed all administrative jobs around the idea that, to deal with staffing issues, all sworn administrative positions would include the requirement to work in situations involving mass mobilization or emergencies, when needed.

Lui filed suit under the Fair Employment and Housing Act with claims of disability discrimination, failure to engage in the interactive process, and failure to provide a reasonable accommodation in response to his disability. To prevail on the discrimination and reasonable accommodation claims, Lui would have had to demonstrate the ability to perform the essential functions of the administrative position he sought. Primarily at issue in this case, however, was whether the employer could require that essential functions in all sworn administrative jobs include physically strenuous tasks, even though such requirements would only be occasional.

The trial court ruled that the department was allowed to include such duties as essential tasks for the administrative duty assignments. On appeal, Lui challenged the department's determination that it was necessary to maintain readiness to respond to emergencies by including emergency response in the job duties of administrative roles. Lui argued the department's determination was unsupported by any studies or formal analyses. The Court of Appeal held no such requirement exists, and found compelling the department's statistics showing historically the consequences of not requiring that officers in administrative positions be able to perform emergency duties—a significantly diminished pool of officers available for deployment in emergency situations and other situations requiring mass mobilization. Other evidence that was at least moderately convincing to the court included: anecdotal evidence from those in the position in question, who reported being required to work in emergent situations and even walk beats; and language in the MOU between the POA and the City concerning special events and use of off duty officers. The latter related not to emergencies but to statements regarding the staffing capabilities of the department (resulting in use of off-duty officers for the special events).

The court found that the department's exclusion of Lui from the position was permitted because, although those officers who hold administrative jobs are not frequently required to engage in strenuous activities, the department designed the administrative role due to a legitimate, valid deployment need. Citing several cases outside the realm public safety, the Court of Appeal stated that courts are not allowed to "second guess" legitimate, valid reasons for designing the administrative positions to encompass occasional non-administrative tasks. The court went on to say that

"second guessing" is all the more inappropriate in the realm of public safety, because the staffing needs of police departments are inherently unpredictable.

PEACE OFFICER WHO RESIGNED IN LIEU OF TERMINATION AND THEN RETIRED A YEAR LATER WAS NOT AN "HONORABLY RETIRED" PEACE OFFICER FOR PURPOSES OF CCW PERMIT APPLICATION

By Jasine Jasmine

Former Yolo County District Attorney Investigator Rick Gore resigned pursuant to a settlement agreement following his appeal of the District Attorney's decision to terminate him for off-duty misconduct and insubordination. The next year, Gore began collecting his CalPERS retirement.

The DA's office denied Gore's request for a CCW (Carry Concealed Weapons) permit on the basis that he was not "honorably retired" within the meaning of Penal Code section 12027. In *Gore v. Yolo County District Attorney's Office* (2013) 213 Cal.App.4th 1487, the Court of Appeal punted on the issue of whether Gore's status was "honorable," and instead focused on whether Gore was a retired peace officer under the statute, since he did not retire from active duty when he left the DA's office (he was not yet eligible for retirement due to his age). Specifically, the court agreed that there is a difference between being a former peace officer and later qualifying for a pension, and being a peace officer who has qualified for and accepted a service retirement at the time of separation.

The court determined that when an employee leaves employment, he or she is in one of three categories—a resigned employee, a terminated employee, or a retired employee. The only persons entitled under the statute to carry a concealed weapon are retired employees—those employees who are no longer employed because they reached retirement age working as peace officers, and accepted retirement upon leaving employment.

According to the court: "A peace officer who quits or is fired before retirement age is not an honorably retired peace officer, even when they later reach retirement age and are entitled to collect their pension."

THE PUBLIC EMPLOYMENT RELATIONS BOARD TAKES THE POSITION THAT NEW STATUTORY IMPASSE PROCEDURES APPLY TO "IMPACT" BARGAINING

By Jonathan Yank

In our April 2012 issue of the Labor Beat, we wrote about new bargaining impasse procedures available to public employee organizations subject to the Meyers-Milias-Brown Act, Government Code section 3500 et seq. ("MMBA"), as a result of the passage of AB 646. In a nutshell, following a bargaining impasse, those procedures permit a labor organization to demand that the parties present their respective bargaining proposals (and evidence supporting those proposals) to a neutral fact-finder, who would be required to "make inquiries and investigations, hold hearings, and take any other steps it deems appropriate" and, if settlement does not occur, to "make findings of fact and recommend terms of settlement …." While the findings and recommendation are not binding, "[t]he public agency shall make these findings and recommendations publicly available within 10 days after their receipt." Thus, fact-finding can be an excellent tool in the broader bargaining process, both in regard to providing bargaining leverage and in educating the public with a neutral assessment of the parties' bargaining positions.

As we indicated in our April 2012 article, one question left unanswered by the text of AB 646 was whether the statutory fact-finding requirements would apply to "impact" bargaining or just bargaining for a master contract. But recently, in a case in the San Diego Superior Court, the California Public Employment Relations Board ("PERB") weighed in, opining that the statutory impasse procedures apply to all negotiations, including "impact" bargaining. (See *San Diego Housing Commission v. Public Employment Relations Board*, San Diego Superior Court Case No. 37-2012-

00087278.) While PERB's statement of opinion in the case is not precedential, it is clearly indicative of how PERB will rule on the issue when an appropriate case is before it. And while PERB does not have jurisdiction over MMBA bargaining units comprised solely of peace officers (Gov. Code § 3511), California courts general defer to its construction and application of the State's bargaining statutes.

MAKE-WHOLE REMEDY ON TAXES FOR EMPLOYEES REINSTATED WITH BACK PAY

By Gary Messing

In *Latino Express, Inc*. (2012) 359 NLRB No. 44, the National Labor Relations Board decided a case requiring employers to make employees whole for adverse tax consequences that result from a lump sum back pay award. Also, employers are required to file a report with the Social Security Administration attributing back pay awards to the years in which the back pay was earned, in order to counter adverse effects on Social Security earnings. This case arose in a situation where the back pay award covered more than one calendar year but the payments were made in a shorter tax period, so the tax impacts were unduly burdensome.

California courts and the California Public Employment Relations Board look to the National Relations Labor Board for guidance in interpreting State and local bargaining laws in California.

BENEFITS FOR PUBLIC SAFETY EMPLOYEES UNDER LABOR CODE SECTION 4850 COUNT TOWARD 104-WEEK LIMIT ON PAYMENTS FOR AN INJURY CAUSING TEMPORARY DISABILITY

By Jason Jasmine

Brian Knittel injured his knee while working as an Alameda County Deputy Sheriff, and was classified as temporarily-disabled for over two years. For the first year, Knittel received Labor Code section 4850 benefits (leave without loss of salary). After the first year, the County paid Knittel "regular" temporary disability indemnity benefits for another year (generally calculated at two-thirds of the average weekly earnings during the period of disability), and then ceased paying disability indemnity, based on the 104-week limit on aggregate disability payments for an injury causing temporary disability (Labor Code section 4656(c)(2)).

In *County of Alameda v. Workers' Compensation Appeals Board* (2013) 213 Cal.App.4th 278, the court of Appeal held that "4850" benefits do count toward the two-year limitation under Labor Code section 4656 because "4850" benefits are workers' compensation benefits—not salary—and therefore part of the "aggregate" of disability payments that are limited to 104 weeks pursuant to Labor Code section 4656.

The court—attempting to interpret the intent of the Legislature—indicated that it appeared the Legislature "tried to reach a compromise" by providing a year of enhanced benefits for public safety officers under section 4850, followed by a year of temporary disability indemnity. The court also invited the parties to "bring their concerns to the attention of the Legislature" to the extent the law is not working or the compromise is unfair.

LEAVE OF ABSENCE CAN BE A REASONABLE ACCOMMODATION FOR A PUBLIC SAFETY OFFICER UNDER THE ADA

By Jason Jasmine

In December of 2005, Officer Kesecker slipped and broke his arm at work. He was provided light duty for a period of time and then returned to full duty. In September of 2006, Kesecker began to experience dizzy spells, headaches, nausea, and shortness of breath. Although he began receiving treatment, symptoms worsened and Kesecker took a leave from work to address his conditions, and filed a workers' compensation claim. Ultimately, he was cleared to return to full duty, but the employer required Kesecker to submit to a fitness for duty evaluation—which he passed. Kesecker returned to work and performed all of his duties for approximately 2½ years.

After 2½ years back at work, Kesecker settled his workers compensation action in September of 2009, with a finding of a permanent disability of 38.5%.

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Kesecker was subsequently order to undergo a second fitness for duty evaluation. This time, it was determined that Kesecker was not psychologically fit for duty as a police officer. Based on this report, the Police Chief determined that Kesecker could not return to work and carry a firearm.

Although this case presented a number of interesting issues, the focus here is on the fact that the Federal District Court, in *Kesecker v. Marin Community College Dist.*, 2012 WL 673759 (N.D.Cal. 2012), determined that a leave of absence and a new fitness for duty evaluation could be a "reasonable accommodation" under the ADA. Specifically, the court noted that Kesecker utilized accrued sick and vacation leave for almost a year, after which time it was no longer clear whether he was still unfit for duty. By granting this period of time as a leave of absence and having Kesecker participate in another fitness for duty evaluation, the employer could have reasonably determined whether Kesecker was still unfit for duty. Because this case only dealt with cross motions for summary judgment, the ruling was that the question of whether this would have been a reasonable accommodation under the ADA is a question of fact and therefore not appropriate for summary judgment.

COURT OF APPEAL RULES THAT STANDBY PAY IS NOT PENSIONABLE

By Amber West

A court of appeal reversed a judgment in favor of a retired division chief for the Livermore–Pleasanton Fire Department and the City of Pleasanton (Pleasanton), which had ordered the California Public Employees' Retirement System (CalPERS) to increase the retiree's monthly retirement allowance in *City of Pleasanton v. Bd. of Admin. of Cal. Public Employees' Ret. Sys.* (2012) 211 Cal.App.4th 522. Petitioners (Pleasanton and retiree James Linhart) had filed suit based on the argument that the CalPERS erred in determining a portion of compensation was not pensionable.

The central issue was whether a portion of Linhart's compensation as division chief, denominated "standby pay" in his labor agreement, was part of his pensionable earnings for purposes of calculating his monthly CalPERS retirement allowance. Linhart argued that the compensation at issue was not, as it had been labeled, standby pay. The appellate court ruled that the pay was not pensionable because services were not rendered during normal working hours, and the compensation did not meet the additional requirement that it be of a kind affirmatively determined to be special compensation in Regulation 571.

Specifically, although Linhart conceded that "standby pay" is not one of the "extra pays" on which final compensation is to be based for retirement benefit purposes, he argued that the 7.5 percent compensation he received was not actually standby pay regardless of it being labeled as such. The court of appeal concluded that none of the compensation in question— for remaining on call for emergency responses in three 24-hour periods every nine days—occurred during normal hours. Nor was it one of the five distinct "extra pay" categories authorized (in Regulation 571): holiday pay; shift differential pay; training premium pay; management incentive pay; and off salary schedule pay.

The court of appeal also reversed the trial court's finding that due process was violated when the prosecutor submitted to CalPERS' Board a written "staff recommendation" to approve the ALJ's decision, because: (1) no ex parte communication occurred; (2) the same opportunity to submit a written statement was given to Linhart; and (3) the prosecutor had no authority over the Board's decision making.

COURT OF APPEAL FINDS THAT RETIREES ADEQUATELY ALLEGED AN IMPLIED CONTRACT CREATING VESTED RETIREE MEDICAL BENEFITS

By Amber West

A California appellate court recently published a decision, *Requa v. University of California Board of*

Regents (2012) 213 Cal.App.4th 213 ("*Requa*"), interpreting the California Supreme Court's earlier decision addressing how public employees may acquire vested rights to continuing healthcare benefits, *Retired Employees Association of Orange County v. County of Orange* (2011) 52 Cal.4th 1171 ("*Orange County*"). In *Orange County,* the Supreme Court determined that, absent a legislative prohibition on conferring such rights, a public employer can be bound by an implied contract creating vested retiree medical benefits. Under the *Orange County* decision, courts must determine on a case-by-case basis whether implied vested rights have been created.

In *Requa,* the appellate court applied *Orange County* and reversed the trial court's dismissal of the retirees' claims, holding that the retirees had pled an adequate cause of action for breach of implied, vested contractual rights. The retirees from the Lawrence Livermore National Laboratory filed suit after they lost medical benefits provided by the University of California after a new, privately-held operator took over the Lab's contract from the University. The new operator provided the retirees with a much-diminished medical benefit.

The retirees argued that the UC Board of Regents had promised certain retiree medical benefits throughout the entirety of retirement. Specifically, the retirees claimed the Regents and their "authorized agents" (who produced retiree handbooks describing benefits) made implied promises to provide the same level of retiree medical benefits on an ongoing basis. The retirees claimed that the promises were to be found in the following: (1) a 1961 Resolution by the Regents providing for lifetime health benefits for retirees, followed by the uninterrupted provision of retirement medical benefits for more than fifty years; and (2) evidence from the University's publications assuring employees of the benefits. The court in *Requa* held that the trial court erred because it granted the Regents' demurrer based on the retirees' failure to identify a formal resolution or a standing order from the Regents conferring the benefits in perpetuity. The court also discussed language within myriad benefit and retirement handbooks for the trial court to consider as part of the body of alleged promises by the Regents concerning retiree medical coverage.

Requa joins a body of cases espousing differing interpretations of *Orange County*, particularly regarding the evidence that may be used to show implied, vested promises and which entity has authority to make such promises. For example, in *City of San Diego v. Hass* (2012) 207 Cal.App.4th 472 ("*Hass*"), the court found the language and circumstances of the ratified MOUs (and last, best, and final offer) showed an implied intent to eliminate the benefits in question, which was adequate notwithstanding that the implementing ordinance was not created until after the plaintiffs—new employees—had accepted employment. The *Hass* court found that statements by the Retirement System to those employees as well as language in the Municipal Code referencing the eliminated benefits were trumped by City Council's ratification of MOUs (and LBFO).

More similar to *Requa*—with its discussion of potential implied promises contained in benefit and retirement handbooks—is the holding in *International Brotherhood of Electrical Workers Local 1245 v. City of Redding* (2012) 210 Cal.App.4th 1114 ("*Redding*"). In *Redding*, the appellate court analyzed promises made in job postings, internal documents, and communications, which it found could potentially imply a vested benefit was conferred (in promises made to recruit and retain employees). However, the court did not reach a conclusion on that point, because it found the MOUs validly enacted and clear on the benefits in question.

Thus, *Requa* and other courts' interpretations of post-*Orange County* cases vary regarding what actions or statements—and by whom—may constitute implied promises intended as vested benefits. Eventually, the Supreme Court may need to provide further guidance on the matter of implied promises of vested contract rights.

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FEDERAL APPELLATE COURT UPHOLDS RIGHTS-STRIPPING PROVISIONS IMPAIRING PUBLIC EMPLOYEES' RIGHTS EXCEPT AS TO THOSE IN CATEGORY OF "PUBLIC SAFETY WORKERS" WHO SUPPORTED THE GOVERNOR'S CAMPAIGN

By Gary Messing and Amber West

In January, the U.S. Court of Appeals for the Seventh Circuit upheld Wisconsin's legislation impairing rights of all public employees except for those categorized as "public safety workers"—a categorization that without explanation did not include prison correctional officers and probation officers as working in public safety. As the court conceded in *Wisconsin Education Association Council v. Walker* (2013) 705 F.3d 640, the method of categorization appears to have been politically motivated: all of the associations representing public employees categorized as "public safety workers" had supported Governor Walker's election; all that had supported his election were not subject to the Act's rights-stripping provisions.

The court upheld the Act's elimination of the following rights as to all not subject to the public safety carve-out: a ban on mandatory dues and fair share fees; a bar on collective bargaining rights (except with respect to "total base wages" under the consumer price index); a blanket prohibition on withholding dues; and a new annual recertification requirement (all covered workers, not just those casting ballots, must approve the union by an absolute majority of the bargaining unit for the union to remain certified as the bargaining representative).

Defendants justified the public safety employee exemption as designed to limit the risk of strikes or other orchestrated work stoppages among public safety employees in response to the Act's passage. But, again, this was belied by the fact that all labor organizations that endorsed Governor Walker's election fell into the classification of "public safety employees" and all who had not supported the Governor fell within the "general employee unions" classification. (One would think that the Governor would have included correctional officers and probation officers in the exemption from the Act, given that a strike by those individuals would certainly impact public safety.)

In the decision, the Seventh Circuit admitted that the political favoritism of differing treatment of public safety employees and general employees was obvious, but favoritism is commonly a part of legislative action. The court went on to say that, because only a rational basis for the legislation is required, the court does not consider the actual motives of those involved to determine whether constitutional rights are violated—only what their reasonable motives might have been. The court concluded that a reasonable motive for carving out public safety would be to prevent strikes and work stoppages.

For the same reason, the court also found constitutional the Act's annual recertification requirement, rejecting the trial court's description of the requirement as burdensome. Similarly, the court decided that the bar on payroll deductions as to general employee unions and not public safety unions was allowed, even as it also conceded some evidence exists that the Act was politically motivated. Specifically, the court found evidence existed of discrimination in statements by Wisconsin's then-Senate Majority Leader who expressed a hope that the Act, if passed, would make it harder for President Obama to win reelection in Wisconsin because unions' fundraising activity would be limited. The court noted the discrimination was not of the sort that would invalidate the law because the law itself was "viewpoint neutral" (that is, nothing in its provisions targeted a specific political point of view). The court also stated the bar on payroll deductions is permitted because such deductions were simply removing a logistic obstacle that was "not created" by the state, so the state was under no obligation to continue to remove that obstacle.

SANTA CLARA COUNTY TRIAL COURT HOLDS THAT CITY MUST DISCLOSE OFFICIALS' TEXTS AND E-MAILS FROM PERSONAL ACCOUNTS

By Amber West

In *Smith v. City of San Jose, et al.* (Mar. 19, 2013, 1-09-CV-150427), the Santa Clara County Superior Court found that when public duties are executed by officers and agents through communications on their private accounts and devices, those communications by city officers reasonably fall within the definition of a record "prepared, owned, used, or retained" under the California Public Records Act.

The court concluded the City's argument that the location of the records on private devices excluded them from that definition was improper. The court stated a public agency could easily shield information from public disclosure simply by storing it on equipment it does not technically own.

THE LABOR BEAT

IMPORTANT NOTICE TO ASSOCIATION BOARD MEMBERS

CBM updates its Association Board Member list quarterly. To assist us in keeping accurate, up-to-date names of members and their positions on Association Boards, we would ask you kindly to fill out the form and mail it to our San Francisco office to:

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CBM thanks all of you for your help.

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