MESSING ADAM & JASMINE

THE LABOR BEAT

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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 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 of these developments to any particular situation.

Sacramento Office
980 9th Street, Suite 380
Sacramento, CA 95814
(916) 446-5297

San Francisco Office
235 Montgomery Street, Suite 828
San Francisco, CA 94104
(415) 266-1800

A Special Message During These Trying Times

It is May, and MAJ is finally getting out its first issue of The Labor Beat for 2020. We, like everyone, have had to reorganize and reprioritize as the COVID-19 pandemic swept through our state, our country, and our world. For this reason, we will not be printing paper copies of this issue of The Labor Beat, to help reduce the amount of shared paper in circulation and in keeping with current health guidelines. We, like everyone, hope that circumstances will improve in the near future so that this precaution is no longer necessary.

As we report on recent triumphs and news of relevance to our clients, we are cognizant of the bigger picture and how these turbulent times have affected everyone. We recognize our clients who are first responders, facing a new and invisible danger, and all the essential workers who have had to find new and inventive ways to perform their jobs. We also acknowledge those who have been or have seen persons close to them directly harmed by the virus. We hope that you and your families remain healthy and safe. We are all in this together.

On the Home Front

INTRODUCING DAVID KRUCKENBERG

David Kruckenberg, the latest attorney addition to MAJ, joined the firm in January. He has spent the last four years working exclusively in labor and employment law. For three years, David worked at a prominent Sacramento law firm representing public and private sector employees and employee associations. He has extensive experience working on behalf of peace officers, firefighters, and other employees in disciplinary investigations and appeals, contract grievances, arbitration, and litigation. He has successfully overturned multiple employee terminations and negotiated settlements at various levels of appeal. His most rewarding experiences were counseling and advocating for peace officers involved in critical incidents.

Most recently, David came to MAJ after working for a respected workplace investigations law firm. As an attorney investigator, David conducted numerous workplace investigations into claims of harassment, discrimination, and retaliation. He holds a certificate from the Association of Workplace Investigators (AWI-CH), the preeminent international association for workplace investigators.

Before becoming an attorney, David worked for three years in the State Legislature. As the Legislative Director for a State Assemblyman, David coordinated with legislators from both parties as well as committee staff and lobbyists to solve statewide problems. He successfully guided multiple pieces of legislation through the process to become law.

David met his wife while they were both working for the Legislature. Proof that it is a small world is that they grew up a block away from each other in Southern California but never met until they were in Sacramento. They now have two small children who keep them busy with teething toys, crayons, swim lessons, and silly stories.

Fighting the Good Fight

COURT INTERPRETERS ACHIEVE SIGNIFICANT WAGE INCREASES

Court interpreters perform a critical role in our judicial system. They interpret for parties who have limited English proficiency so that they can have fair access to, and representation in, court proceedings. Other states only provide court interpreters to defendants in criminal proceedings pursuant to defendants' due process rights. However, in California, the legislature recently expanded the right to interpreting assistance to include civil court matters. This change in law required the court interpreters to very quickly obtain a deep understanding of these vast areas of law—family law, tort law, real estate law, etc.—so that they could accurately interpret in those proceedings. Court interpreters worked on their own time to educate themselves in preparation to take on this enormously expanded role.

Given the new workload foisted upon court interpreters, their union, the California Federation of Interpreters ("CFI") Local 3900 TNG-CWA, AFL-CIO, was determined to make significant inroads in wages during contract negotiations. CFI's efforts to gain momentum in organizing translated into significant wins at the negotiation table. Interpreters employed in Region 4, which covers Inyo, San Bernardino, Orange, Riverside, San Diego, and Imperial Counties, completed negotiations in December. And Region 3 interpreters, who work in the Third and Fifth Appellate Districts spanning from Kern County to Siskiyou County, negotiated a new contract in just four sessions. This resulted in a $1,500 per member signing bonus and wage increases of 5%, 4%, and 3% over the next three years. Region 3 courts also agreed to provide interpreters with paid leave time to attend high schools and community colleges to encourage students to join their ranks as state court interpreters. This is a much needed effort, since many courts are experiencing shortages of certified court interpreters.

CFI Local 3900 now turns to bargaining in Region 2, which covers the First and Sixth Appellate Districts,

including San Francisco, and looks to make similar advances in their wage scale. Federal court interpreters are paid significantly more than their state counterparts, which is unjustified given the complexity of work that CFI members perform. CFI has its eyes on the target to achieve wage parity for state interpreters with their federal counterparts in the near future.

Laurie Burgess was the Chief Negotiator. **Michael Ferriera** is the President of CFI Local 3900 and led both the Region 3 and Region 4 bargaining teams. The Region 3 bargaining team included **Janet Hudec, Carmen Ramos, Joe Tobin,** and **Rosa Trevizo**. The Region 4 bargaining team included **Maria Benitez, Ana Fuller, Jackie Ruiz, Silvia San Martin,** and **LouLou Tovar**.

HANFORD POA SETTLES 3-YEAR CONTRACT

The Hanford POA has agreed to a 3-year contract with the City of Hanford. The new MOU provides for retroactive pay increases to July of 2019 based on implementation of a salary survey conducted by the parties.

The retroactive pay totals 2.25% for police officers, 7% for police sergeants, 9.5% for lieutenants, and 3.23% for captains. Corporals will be slotted at 10% above police officers.

In July 2020, all employees will receive a 2% salary increase. In 2021, a salary survey will be developed by the parties and increases will be implemented retroactive to July of that year to reflect the results of the survey. The parties have agreed to review which agencies should be utilized as comparable jurisdictions for the purposes of total compensation. The survey will be implemented for salary increases only.

In addition to the above, the parties negotiated procedures for the notification of officers subject to a Senate Bill 1421 Public Records Act Request, a guarantee of orientation time with the POA for new members, and an expansion of the types of things for which tuition reimbursement can be used.

Other benefits include allowing for a full week off work, regardless of schedule, for bereavement leave for family members. Members of the POA will be entitled to 12 hours of flex time annually for department approved volunteering in the community. Additionally, the family of an officer who passes away while actively employed will receive 6 months of health benefits paid by the City to allow for the transition to another plan and the receipt of death benefits.

Notably, the parties added to the longevity pay provision, which previously stood at 5% after 10 years of service for the City of Hanford, agreeing that longevity pay will be available to officers with 10 years cumulative qualified sworn peace officer full-time employment at any agency.

Gary Messing was the chief negotiator for the POA. The POA bargaining team was led by POA President **Christifer Barker** and included Vice President **Jeff Davis,** Member **Justin Vallin,** Secretary **Jean Bidegaray,** and Treasurer **Jared Cotta.**

MERCED DSA NEGOTIATES 2-YEAR MOUs

The Merced DSA negotiated two 2-year contracts with a 3% base wage increase across the board in the first year and a 2% base wage increase in the second year of the MOUs. The DSA completed two MOUs—one for Deputies and one for Dispatchers and Deputy Coroners. An additional 1% increase is included in the first year as a trade-off for employees not scheduling workers' compensation appointments during on-duty time.

The MOUs language changes included ensuring that the grievance procedure will cover hearings on Letters of Reprimand and the preservation of the Maintenance of Membership clause.

The increases in these MOUs come on the heels of expiring 3-year contracts providing over 10% in increases to the sworn and 7% in increases to the non-sworn bargaining units. Additionally, the sworn unit received an additional 10% in-contract adjustment which resulted in over 20% in pay increases before negotiations for the current MOU.

Gary Messing was the Chief Negotiator. **Roberto Torres** is the President of the DSA and Chairman of the DSA Bargaining Team, which included Deputy **Rosalie Rios,** Deputy **Herman Prock,** Dispatcher **Leslie Houser** and Deputy Coroner **Mark Morton.**

YOLO COUNTY ATTORNEYS GET A 3-YEAR DEAL

The Yolo County Attorneys Association has entered into a 3-year MOU after protracted negotiations. **Gary Messing** served as the chief negotiator of the bargaining team that consisted of public defenders and deputy district attorneys for the County.

The agreement runs from July 1, 2019 to June 30, 2021 and provides for a nearly 10.2% pay raise, consisting of COLAs and equity increases. In January 2020, the Association will receive a 2% COLA retroactive to July 1, 2019. The raises include a 3.42% increase in 2019, a 3% increase in 2020, and 3.42% increase in 2021. This includes a .84% pay raise for a 1% swap, with the employees picking up 1% of the employer's retirement contribution. The total increase for a topped-out Level 4 attorney will rise from $139,180 per year to over $153,000 per year, not including longevity pay or expert differential. In April 2020, the County will meet with the Association to

adopt a new retirement salary survey methodology prior to bargaining for the new MOU in 2021.

The benefits package is also modified to reduce "cash in lieu" of health insurance. Cash in lieu is reduced annually by $5,454, but employees will receive a $5,000 annual contribution to deferred compensation. This modification was made necessary by litigation that was successfully pursued by the Yolo County Deputy Sheriff's Association regarding the failure of the County to include cash in lieu in the regular rate of pay for overtime computation. As a result, the County was required to make adjustments to mitigate the potential impacts on the "bona fide" nature of the County's cafeteria plan. In addition, the County increased its matching contribution from $400 to $500 per year for employees with up to 10 years of County service and from $500 to $600 per year for employees with 10 or more years of experience.

Other improvements in the MOU included the addition of language regarding military leave and on longevity pay, including allowing protection for employees with a break in service. The MOU adds an Expert Attorney Differential Pay of 2.5% for up to 6 attorneys in the bargaining unit who are deemed to be at an expert level. Also, new hires can only be hired at Step 3 or higher, although new hires will now have a slightly lower rate of vacation accrual. Employees hired after January 1, 2020 who receive their law degree within 2 years of the date of hire are eligible to receive $1,000 per year for student loan payment reimbursement.

The bargaining team worked tirelessly on this contract for over eight months. The team included the chairs of the team, **Bret Bandley** and **Peter Borruso**, as well as **Stephen Betz, Matt De Moura, Deanna Hays,** and **Frits Van Der Hoek.** The County also toiled to provide a final contract proposal that was within the range of acceptability for the Association.

RELYING UPON THE MOU'S ENTIRE AGREEMENT CLAUSE LOCAL 2881 REVERSES RRU'S CHANGE IN OVERTIME POLICY

CAL FIRE, Local 2881 is the exclusive recognized employee organization representing the bargaining unit of more than 6,000 state-employed firefighters up and down the State of California. CAL FIRE is comprised of 21 units, and the Riverside Unit is the largest, with approximately 1,000 members. The following article was originally published in CAL FIRE Local 2881's publication FIRE FRONT in the fall of 2019.

Four years ago, the former leadership of the Riverside Unit ("RRU") significantly encroached on CAL FIRE, Local 2881 (L2881) members' rights by changing the rules that govern eligibility for overtime. Since that time, L2881 has battled against the changes. The union's efforts included filing multiple grievances and a PERB Unfair Labor Practice charge, and finally bringing the matter to arbitration, which was originally scheduled to be a three-day proceeding. On October 15, 2019, the first day of the arbitration, the parties settled the dispute. Per the agreement, the change-in-policy will be rescinded in December, and RRU overtime eligibility standards will once again follow the past practice that previously existed in RRU. CAL FIRE has agreed that during the term of the MOU, no changes will be made to the RRU Overtime Staffing System (OSS) that would reduce overtime opportunities for bargaining unit members.

A combination of resolve, on the union's part, and a willingness to compromise, from both sides, brought about this important result. Spearheading the union's fight were President **Tim Edwards**, State Rank and File Director **Darren Dow**, and the union's chief legal counsel, **Gary Messing**. RRU Battalion Chief **Brian White**, Captain **Mark Garcie**, and **Shawn Williams** provided critical support.

CAL FIRE's team should be recognized for its part in resolving the matter. Unit Chief **Shawn Newman** and Deputy Chief **Robert Peterson** brought a fresh attitude to the issue—a break from the short-sightedness of RRU's former leadership, who initiated the new policy in 2014. Additionally, CalHR Labor Relations Counsel **Christopher Thomas** and **Nicole Lobre** worked with **Gary Messing** and MAJ associate **Matthew Taylor** to find a reasonable compromise.

Unilateral Change in Past Practice Regarding Overtime Eligibility

Prior to October 2, 2014, RRU employees were able to sign up for any open overtime positions for which they were qualified, including shifts in lower classifications.

On the above date, the former RRU leadership, including Assistant Chief Glenn Patterson, announced a unilateral change in policy. No RRU employee could select an overtime assignment in a lower classification if there was an open overtime assignment in his or her own classification, *anywhere in the RRU*. As explained in greater detail below, this includes overtime assignments *located hundreds of miles away* from an employee's regular assignment.

RRU implemented the new policy by changing how the digital OSS functioned. Previously, when an employee seeking overtime logged into the OSS, the program displayed the existing overtime openings *for all classifications in all locations*. The employee could therefore select an overtime assignment, regardless of classification, in a location close to home or at a time that fit relatively easily within his or her schedule.

Since the policy change, an employee logging into OSS can see only overtime opportunities *exclusively* within his or her classification, if any such overtime assignments remain unfilled. The employee is only able to view available overtime assignments *in other classifications* once overtime assignments within his or her classification are completely filled. Additionally, the change in policy also affects overtime coordinators' access to records in OSS. These supervisors cannot see the entire pool of qualified employees for open overtime assignments.

The Policy Change Negatively Affects RRU Employees

Due to these changes, RRU employees have significantly less voluntary overtime opportunities available to them. The RRU's enormous size exacerbates the extent of these negative impacts. As you know, the RRU covers the entirety of Riverside County, which has approximately 2.4 million residents and is spread over nearly 7,200 square miles. It can take hours to drive from one end of the unit's area to the other. Thus, under these changes to the OSS system, some RRU employees would have to drive long distances to work voluntary overtime shifts even if there were open shifts available in their own station.

So, under this policy, an engineer medic stationed in the town of Temecula would not be able to select a voluntary overtime shift in his station, if there are open vacancies for his classification elsewhere in the RRU. These vacancies can exist in distant towns like Palos Verdes, which is still in the RRU but is hours away. Given the time it would take to drive such distances, this might not be a viable option for the employee. He or she may have other obligations that would prevent them from making the long commute. In such cases, the employee is hindered from working voluntary overtime. Furthermore, the employee may have to pay for the mileage on certain voluntary overtime shifts.

Thus, this new system has led to more forced overtime! Moreover, as mentioned above, the OSS does not provide a complete picture to overtime coordinators. The program does not show all the employees who are available for voluntary overtime shifts. Accordingly, the coordinators often fail to offer overtime opportunities to the employees who most desire them, leading to more forced overtime.

Consequently, these factors add to some RRU employees' unwanted workload, already excessive from fire assignments and forced overtime, and aggravate physical and emotional health problems. These negative impacts do nothing to boost flagging morale.

The changes to the OSS system caused yet another unfair result. In the RRU, the engineer/medic position has more vacancies than other positions. This means that an engineer/medic gets fewer chances to work voluntary overtime in a lower classification. Comparatively, the captain/medic rank has fewer vacancies in the RRU; thus, overtime assignments for captain/medic tend to get filled by volunteers. Since it is unlikely that there will be an open overtime slot for captain/medic, the OSS will allow captain/medics to readily see and fill overtime as it occurs. Captains, in comparison to engineer/medics, are able to volunteer more often for overtime as FFIIs/medics.

The Procedural History of the Grievance

The change was made initially by RRU Management in 2014, and the unilateral change was challenged by L2881 with a grievance and a PERB Unfair Labor Practice charge. The PERB case was settled a year later with assurances from CalHR that the RRU would not repeat its conduct. However, 30 days after the settlement was completed, the RRU re-implemented this change. A new grievance was immediately filed.

RRU's Policy Change Violates the MOU

As L2881's legal counsel has made clear in the multiple grievances and during the arbitration, these policy changes violated various sections of the MOU, including Section 8.23, Rotation of Overtime and Section 16.1, Entire Agreement, which contains the "no diminution clause" (in Section 16.1.2.3). It also violates Side Letter Agreement 25 and the New Leaf Agreement, which became a part of the MOU.

1. *Violation of Rotation of Overtime Provision*

Section 8.23.1 requires CAL FIRE to administer the rotation of voluntary overtime assignments "in a fair and equitable manner." One of the consequences of the change in the voluntary overtime policy at RRU is that, as discussed above, a captain/medic is far more likely to be able to work overtime in a FFII medic shift in his or her normal work station or other nearby stations, in comparison to an individual who is an engineer/medic. This disparity is in direct violation of the fair rotation of overtime clause in the MOU.

2. *Violation of the Entire Agreement Provision's "No Diminution" Clause*

Section 16.1.2.3 of the MOU provides that there shall be "no diminution," or reduction, of employees' "existing wage rates and substantial monetary employee benefits" during the term of the MOU. The RRU policy change implicates the "no diminution" clause by interfering with the ability of employees to earn wages through overtime and requiring them to perform uncompensated and financially burdensome commutes. Importantly, the monetary loss here is not de minimis; rather, we are

looking at a situation where massive amounts of overtime opportunities have been denied to RRU unit members.

A number of prior decisions, including L2881's previous win in the Alma Helitack overtime arbitration case, established that this kind of policy change violates the "no diminution" clause. In the May 4, 2016 Helitack arbitration decision, the arbitrator emphasized the importance of the "no diminution" clause," determining that CAL FIRE is prohibited, during the term of the agreement, from causing any reduction in employees' "substantial monetary benefits," which specifically includes the opportunity for overtime compensation. The Helitack arbitration decision was confirmed as a Sacramento Superior Court judgment in 2017.

3. *Violation of the Entire Agreement Provision's Requirements That CAL FIRE Provide Notice and Opportunity to Bargain*

Even if the policy change did not violate MOU sections 8.23, Rotation of Overtime and 16.1.2.3, which includes the "no diminution" clause, CAL FIRE still has an obligation to meet and confer with L2881 under MOU Sections 16.1 and 16.2, the Entire Agreement provisions. These MOU sections require CAL FIRE to notice the union and provide an opportunity to meet and confer, regarding any changes within the scope of bargaining. Thus, the parties are obligated to negotiate regarding the impact of such changes on CAL FIRE employees.

The former leadership of the RRU had a lengthy history of disregarding the requirements of the MOU Section 16.1, the Entire Agreement provision. This gave rise to Side Letter Agreement 25 and the New Leaf Agreement, both of which require the RRU to meet and confer in good faith with L2881, if it wishes to change terms and conditions of employment not otherwise referenced in the MOU. Additionally, the New Leaf Agreement also reaffirmed the RRU's obligation to meet and confer whenever a change to the terms of and conditions of employment takes place, *even where the change may not require meet and confer*.

4. *CAL FIRE's Management's Rights Do Not Trump Its Obligation to Meet and Confer*

The position of the RRU's former leadership, throughout this grievance process, has been that it has the right, under MOU Section 4.1, Employer Rights, to impose this change because it has the "normal and inherent rights with respect to management of [its] affairs." However, this interpretation of the MOU is short-sighted. Section 4.1 expressly limits the *employer* rights as follows: CAL FIRE may impose changes under the employer rights provision only if those changes are not "expressly abridged" by any other part of the MOU. Thus, this language makes MOU Section 4.1 subservient to the "no diminution" clause. Again, the Alma Helitack arbitration decision, which emphasized that a substantial reduction in overtime compensation violates the Entire Agreement Clause including the "no diminution" clause, is relevant here. The decision specifically holds that the Employer Rights section is abridged by the Entire Agreement Clause. Therefore, CAL FIRE cannot make this unilateral change without first negotiating with L2881.

Moving Forward

Messing Adam & Jasmine, in coordination with L2881, will verify that the terms of this settlement agreement are enforced. This will ensure that the OSS operates according to the past practice, which existed before October 2014, and that RRU employees' right to work voluntary overtime in lower classifications is not impeded. However, the biggest takeaway from this case is a reminder to all members that the MOU protects past practices and benefits, including those not specifically set forth in the MOU.

SACRAMENTO COURT DRAWS THE LINE AND REFUSES TO ALLOW PUBLIC ACCESS TO CALPERS RETIREES' DISABILITY INFORMATION

We've all watched the feeding frenzy that has occurred since Senate Bill 1421 took effect in January. Much of the mainstream press seems to believe that breaking stories about peace officer misconduct from 5, 10 or 15 years ago will somehow turn around the death spiral of print media. Whether it is the Investigative Reporting Program at UC Berkeley or the Washington Post's discovery that yes, peace officers, given a fair dose of due process, often successfully persuade neutral arbitrators that terminations were unjustified, journalists are convinced that police misconduct sells papers.

It was reassuring, therefore, when on November 6, 2019, the Sacramento County Superior Court ruled that CalPERS was not required by the California Public Records Act ("CPRA") to disclose information regarding the disability status of retired public employees.

This decision resulted from a writ petition filed in August 2018 by the Nevada Policy and Research Institute ("NPRI"), a private organization which promotes limited-government policies. The group posts salaries and pension payments for California public employees on the website of its California arm, Transparent California. It is often the source for the annual unveiling (on slow news weeks) of which public employee made the most in overtime for the previous 12 months.

Stories about retired public safety employees abusing

disability retirement benefits have also provided media fodder, with the Los Angeles Times running an investigative report in 2018 on officers' disability claims. NPRI presumably wanted to further its narrative that disability retirement benefits are abused and should be rolled back.

NPRI made its initial CPRA request in 2016, seeking a wide array of information on individuals who receive retirement benefits from CalPERS. Although CalPERS released almost all the information requested, it refused to identify whether individuals' retirement benefits were received from a service retirement, a disability retirement, or an industrial disability retirement. CalPERS based its refusal to publicly disclose the records on statutory exemptions protecting the confidentiality of CalPERS members' records and safeguarding against "an unwarranted invasion of personal privacy." (Government Code §§ 20230, 6254(c).)

NPRI's writ petition against CalPERS asserted that CalPERS' refusal to release information identifying, by name, which retirees were receiving which type of pension was in violation of the CPRA. **Gary Messing** and **Wendi Berkowitz**, represented a coalition of public safety unions that intervened, asserting the rights of their members, to assist CalPERS in fighting the petition.

At stake, from the unions' perspective, was the individual retirees' right to privacy. The unions argued that disclosure of the status of a retiree's pension is essentially equivalent to disclosure of the retiree's most private medical information, upon which the determination that the individual is disabled is based.

The Court ruled that the retirees' status as disabled or non-disabled is not properly subject to disclosure under the CPRA because it is "data filed with [CalPERS] by any member, retired member, beneficiary or annuitant" and is an "individual record." In its order denying NPRI's writ petition, the Court agreed with the unions that a retiree's status as disabled is "private information concerning a person's medical and/or psychological profile" and that "disclosing which retirees are receiving disability retirement benefits will disclose private medical information."

In the lawsuit, the NPRI justified its desire to seek the records with its claim that making this information public would help fight disability fraud. The unions argued in response that the end (forced disclosure of private information) did not justify the means, as it would give neighbors or acquaintances of retirees the tools to unfairly accuse and scapegoat retirees who are legitimately collecting disability retirements for "hidden disabilities," such as Post Traumatic Stress Injury (PTSI). Although someone suffering from PTSI, or a physical disability that is not obvious to the casual observer, may appear to be non-disabled (and thus, fair game for identification as a malingerer), the bona fides of the hidden disability are rightfully held in a close circle, limited to the individual, the treating doctor, and the retirement board. The unions also argued that knowledge that an individual retiree is disabled is useless in identifying disability fraud without access to the undeniably confidential medical information supporting the disability finding. Although the Court did not ultimately rule that the individuals' right to privacy alone justified withholding the records if they were otherwise public, the Court concluded that disability status is not public because of the "individual record" exemption and thus, CalPERS retirees' disability status is not subject to disclosure.

Though this is a significant victory for public employees, this lawsuit is but one more skirmish in the continuing attack on public employees' right to privacy. NPRI has publicly stated that it will continue its fight to obtain CalPERS records by appealing the Superior Court's decision. And, as readers are aware, SB 1421 came into effect on January 1, 2019, allowing the public release of personnel "records" relating to the following: (1) the report, investigation, or findings of **an incident involving the discharge of a firearm** at a person by a peace officer; (2) the report, investigation, or findings of an incident in which the **use of force by a peace officer against a person resulted in death, or in great bodily injury;** (3) a sustained finding that a peace officer **engaged in sexual assault involving a member of the public**; or (4) any record relating to **a sustained finding of dishonesty** by a peace officer relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

As a result of SB 1421, cities have released to the media, pursuant to CPRA requests, discipline related records in police officers' personnel files. These disclosures will continue to occur, given the public's appetite for stories about officer misconduct.

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In the News

PUBLIC EMPLOYERS HAVE ADDITIONAL LABOR RELATIONS POWERS IN AN EMERGENCY—EXPECT TO SEE POSITIVE AND NEGATIVE USES OF THEM

By Gregg Adam

We live in extraordinary times. None more so than our

first responders, who bravely battle on the front lines of this global pandemic. Dramatic changes are likely to pervade all of our lives even when, to whatever degree, state and local emergency orders are lifted.

One change likely to impact everything from bargaining rights to pensions will be public entities exercising emergency powers in their employment relationship with employees. Public entities' emergency powers are reflected in collective bargaining laws, which permit them to act first and bargain later during an emergency. They are also recognized in constitutional law, which suggests there are limited circumstances that permit public entities to violate contractual obligations in an emergency. Fortunately, both sets of laws significantly restrict public agencies' ability to act unilaterally to affect long-term change. But that will not stop some from aggressively pursuing unilateral action as this public emergency deepens and lengthens.

Collective Bargaining During Emergencies

Most California-based peace officers' collective bargaining rights arise under the Meyers-Milias-Brown Act, which can be found in Government Code section 3500 and subsequent provisions. Section 3504.5 provides that generally public agencies must provide advance notice to employee organizations of changes to matters within the scope of representation—typically changes to wages, hours or other working conditions. Subsection 3504.5(b), however, provides: "In cases of emergency when the governing body or the designated boards and commissions determine that an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or the boards and commissions shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution, or regulation." In other words, in an emergency, a local public employer may act first and bargain later. This right is restricted. The agency must establish that the need for unilateral action is tied directly to the emergency at hand and cannot await normal bargaining processes. And even if it satisfies this standard, and acts unilaterally, the agency must then bargain "at the earliest practicable time." Not some far off time in the future, but as soon as it is capable of bargaining. Typically, that should be a matter of days, not weeks.

Five weeks into California's statewide Shelter in Place Order (at the time of writing), the reaction of public entities to this crisis and their use of section 3504.5(b) rights has been interesting. Many are acting unilaterally to help and support employees. For example, agencies have awarded first responders and other employees performing disaster relief work additional paid leave, or have suspended vacation accrual caps to prevent employees from losing vacation accruals. Some are engaging with employee unions—remotely, of course, by telephone or video-conference, our new way of bargaining—on safety issues, like quarantining or notice if positive COVID-19 cases occur, or benefits issues, like worker's compensation presumptions or paid leave for employees sent home or ordered quarantined. Notably, however, employers' actions carry an air of noblesse oblige about them since few have reduced these additional benefits to written agreements, even though they are negotiable items.

One suspects that public entities worry that entering into written agreements on such matters now will undermine their right to act unilaterally in the future. Presumably, such reservations are motivated by genuine fear that public employers may, if the economic consequences of the emergency become as severe as many are projecting, have to consider layoffs, furloughs and takeaways. The latest unemployment figures show more than 22 million Americans unemployed. Public employers seem to prefer to leave their option to take unilateral action as open as possible.

Unilateral Impairment of Contract Rights

Aside from collective bargaining, perhaps the bigger threat is presented by those who will encourage public entities to overreach and try to impair existing contractual obligations. That could mean attempts to change benefits under an existing MOU; more likely, it will produce another round of pension attacks.

Attacks on public employee pensions come, predictably, with every economic downturn. In 2018, your author argued *Cal Fire Local 2881 v. Public Employees Retirement System* (known as the "air time" case), which involved Jerry Brown's Public Employee Pension Reform Act. Those "reforms" were premised on the "fiscal emergency" created by the 2008 Great Recession. Governor Brown argued that the legislature could act unilaterally to reduce certain existing pension benefits (in addition to creating new lower tiers of benefits) because of how severely the economic downturn, and the concurrent increase in pension contributions, impacted public finances. But because a booming economy had returned by the time the case was argued, those arguments seemed dated. The Supreme Court ultimately avoided the question of the State's exercise of its emergency powers by ruling that the right to purchase pension credits at issue in the case was not a pension benefit and therefore was not protected by vested pension protections.

The economic impacts of the COVID-19 emergency appear more severe than even the 2008 Great Recession.

Much will depend on how quickly the economy bounces back and whether the pandemic causes wholesale societal changes, as some predict. So expect anti-pension advocates to dust off what is called the "necessity" defense to justify impairing public employee pension rights. Fortunately, constitutional law sets a high bar on these efforts. All previous attempts to impair public employee pensions as a necessity in an emergency have failed.

The primary sources of the necessity defense are two United States Supreme Court cases some 40 years apart: the depression-era decision in *Home Building & Loan Assn. v. Blaisdell* in 1934 *and U.S. Trust Co. of New York v. New York* in 1977. Those cases recognized that in an emergency the federal Contract Clause was not an absolute bar to subsequent modification of a public entity's own financial obligations.

This body of law was applied in California in 1979 in *Sonoma County Org. of Public Employees v. County of Sonoma*. There, after Proposition 13 was passed and dramatically reduced property tax revenues for public entities, the Legislature passed a law which nullified any local agency agreement to pay employees cost-of-living adjustments greater than those received by state employees. Drawing from both *Blaisdell* and *U.S. Trust Co.*, the California Supreme Court crafted a four-part test which provides that a legislative enactment that impairs a private contract right is permissible only if it: (1) protects basic interests of society; (2) is justified by an emergency; (3) is appropriate for the emergency; and (4) is temporary and defers, but does not destroy, the vested contract rights. The California Supreme Court ruled that the legislation before it caused substantial impairment because a contractual salary increase would be "irretrievably lost." Despite legislative analysis of a projected $7 billion loss in local property tax revenues at that time (about $25 billion in today's money), the Court rejected the government's claims of a fiscal emergency and that the legislation was necessary to "maintain essential services." Impairment of contract is permitted due to fiscal exigencies only when "legislation was temporary and limited to the exigency which provoked the legislative response."

Thus, while a public entity may in a *bona fide* emergency have a right to impair contract rights, courts use strict scrutiny to guard against it—the highest constitutional bar to clear. As Justice Harry Blackmun warned in *U.S. Trust Co.*, even during an emergency, "[a] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives."

Thus, while Governors and others have frequently attempted to use "emergency" justifications to impair pension rights in the past. None have succeeded. Stay tuned for the next round of battles.

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INSIGHT: WILL APPLE INNOVATION CARRY INTO CALIFORNIA WAGE & HOUR LAW RULING?

By Gregg Adam

Apple has (with some justification) portrayed itself as one of the great innovators of this (or any) age. What is one to make, then, of its legal arguments in a case called *Frlekin v. Apple*, which was argued in the California Supreme Court on Dec. 4.

Frlekin concerns whether Apple has an obligation to compensate its employees when it stops and searches them as they exit Apple stores after completing their work shift. Notably, Apple only stops employees who carry Apple products or bags.

California generally requires that an employer must compensate its employees whenever they are subject to the employer's control, or are suffered or permitted to work. And in a series of cases beginning in the early 2000s, the California Supreme Court, in interpreting the California Labor Code and Wage Orders promulgated by the now-defunct Industrial Welfare Commission, has repeatedly determined that California law extends significantly greater protections to California workers than does federal law or the laws of most other states.

For example, in 2000, in *Morillion v. Royal Packaging Company*, the court determined that fruit pickers were entitled to receive compensation from the point at which they were required to board a company bus to begin the journey to the work site, as opposed to when they disembarked at the place where the fruit picking would occur.

Similarly, in 2018, in *Troester v. Starbucks*, the court declined to extend, to California wage and hour laws, the federal *de minimis* rule (which allows employers to disregard and not compensate for small amounts of work time).

In *Frlekin*, the Ninth Circuit Court of Appeals asked the California Supreme Court to address the following question: "Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience, by employees compensable as 'hours worked' within the meaning of California Industrial Welfare Commission Wage Order No. 7?"

Apple argues that *Morillion* is dispositive. The key in *Morillion*, according to Apple, is that the employees were required to board the employer's bus. Apple employees, in contrast, are not required to bring Apple products or

bags to work. If they choose to do so, and are subject to search as a result, Apple argues that the employer is neither controlling them nor suffering or permitting them to work.

Times Have Changed

But does *Morillion*—a case decided almost two decades ago, and some seven years before the first iPhone was unveiled—provide the best standard to address compensability in the modern workplace?

Apple and other tech innovators have not only changed our lives but also our workplaces. We all have smart phones and a host of other devices because tech companies have convinced us that these products are important and improve our lives. And often these products do improve our lives by saving us time. We shop, we bank, we track our health and a whole host of other things in a fraction of the time these tasks took 20 years ago.

Apple itself recognizes how omnipresent its product have become. For example, in *Carpenter v. United States*, in an amicus brief filed in a criminal case in the U.S. Supreme Court involving police tracking individuals through cell phone usage, Apple highlighted how smart phones are an ubiquitous and essential part of an individual's ability to fully participate in modern life.

Technology can affect legal decisions, too. One only need to look at the *Troester* ruling to see how. One underpinning of the federal *de minimis* rule is that small amounts of time are difficult, and costly, for employers to track.

Tech Advances Could Affect Ruling

However, the California Supreme Court noted how technological innovations make it much easier and cost-effective for employers to accurately track smaller increments of employee work time than in the past. In declining to extend the federal rule to California law, the court balanced these burdens on the employer against California's strong policy favoring compensability of all work time—ultimately favoring the latter.

During oral argument in *Frlekin*, the justices jostled with these same issues: compensability versus burdens on the employer versus innovation in the workplace. They also seemed to prod the litigants for what a practical rule would look like.

Ultimately, the modern Apple workplace seems likely to produce a different rule than the *Morillion* bus circa 2000 did. How readily applicable to other workplaces the rule will be remains to be seen. However, it seems likely that, as we and our workplaces continue to evolve, this will not be the last such evolution in how we apply our wage and hour laws.

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Recent Decisions

EMPLOYERS MAY BE ON THE HOOK FOR ATTORNEY FEES AT PERB

By Jason Jasmine

It has long been understood that the California Public Employment Relations Board (PERB) would only award attorney fees to impose sanctions on litigants in limited circumstances. Only when a claim, defense, motion or other action or tactic was "without arguable merit" and pursued in "bad faith" would PERB consider awarding attorney fees. This standard led most litigants—especially on the union/employee side—to assume that recovering attorney fees is essentially impossible. However, a recent decision by PERB appears to open the door on this.

In *Bellflower Unified School District* (2019) PERB Decision No. A475-Ea (2019), the Board found that the employer school district's request for reconsideration of a decision resolving an administrative appeal was indicative of bad faith and without arguable merit. The Board noted that, in multiple recent decisions, the Board held that PERB regulations do not permit reconsideration of such decisions. The Board also determined that the employer previously engaged in other delaying tactics. Thus, according to PERB, it was clear that the employer filed the request for reconsideration for "no discernible purpose other than to delay" compliance, and an award of attorney fees was appropriate to reimburse the union for the time spent in preparing and filing its response to the request.

While the basis of the decision was not remarkable, the award of attorney fees against an employer is incredibly rare (if not unheard of). This decision puts employers on notice that they too must act in good faith and not solely for the purpose of delay and obstruction.

NLRB GIVES EMPLOYERS THE RIGHT TO RESTRICT USE OF THEIR EMAIL SYSTEMS

By David Kruckenberg

The ability of employees to communicate with one another about workplace issues is a foundational element of the right to engage in concerted activity. With email systems now in almost every workplace, employees frequently use email to send union-related communications. However, in a recent decision, the NLRB granted private sector employers the ability to restrict employee communication on employer email systems.

In *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino* (December 16, 2019), the NLRB ruled that employees have no right to use employer email systems for union activity. In doing so, the NLRB overturned five years of its own precedent. In 2014, the NLRB ruled in *Purple Communications* that the National Labor Relations Act gave employees such a right because email served as a natural gathering place similar to a breakroom or cafeteria. From 2014 to 2019, private sector employees and associations enjoyed the ease of communicating by email without having to obtain each employee's private email address.

Moving forward, however, private sector employers will be allowed to restrict employee use of their email systems. The NLRB ruled that employers have a property right to control the use of their equipment and that this includes their IT systems. Employers may now prohibit employees from sending non-work-related emails using employer email systems, even during non-work time. The NLRB indicated that the only exception to this would be when the employer's email system provides the only reasonable way for employees to communicate. Since most workplaces do not fit into such an exception, employees should be careful not to assume that they can continue to use employer email systems for union communications.

One final thing to note is that this creates different rules for private and public sector employees in California. Pursuant to *Napa Valley Community College District* (2018) PERB Decision No. 2563, public sector employees have the right to use employer email systems for union communications. Rest assured that our office will fight to preserve that right for public sector employees.

SOMETIMES, YOU CAN BELIEVE WHAT YOU SEE

By Wendi Berkowitz

The recent case of *Schmidt v. Superior Court* (January 22, 2020) by the Second District Court of Appeal demonstrates how video evidence can still decide the outcome of a case, even—or perhaps especially—in the trial of a politically explosive issue. This case involved allegations that a male court security guard sexually harassed female court employees. A number of the plaintiffs' claims centered on how the security guard used the metal detecting wand. This included the body parts he allegedly focused on and for how long, as well as his physical proximity to the plaintiffs as he performed his job.

Many witnesses testified at the trial, including "me too" witnesses who partially corroborated the plaintiffs' claims. However, the security guard's actions, at least when he was at his post using the metal detecting wand and otherwise interacting with the plaintiffs, were captured on video. This enabled the judge (who tried the case rather than a jury) to determine whether the physical evidence corroborated the plaintiffs' allegations.

Sexual harassment cases involve a subjective as well as an objective element. According to the trial judge, the plaintiffs were sincere in that they appeared to truly believe that the security guard subjected them to unlawful conduct. This satisfied the subjective element. However, when the judge considered the evidence, he ruled that objectively, no sexual harassment was proven. The judge reviewed the events depicted on the video, which did not appear to confirm the plaintiffs' claims at all, and took into account the testimony of other witnesses who stated that they had searched diligently but unsuccessfully for video verification of the plaintiffs' claims. He also considered the plaintiffs' apparent belief that conduct depicted on the video as routine, standard, and inoffensive was, instead, deeply offensive to the plaintiffs.

The video evidence, while not entirely dispositive of the plaintiffs' claims, was a critical part in the court's decision-making. This illustrates that a form of recording—whether it is video, audio, or even contemporaneous documentation—can be a more reliable storyteller than unaided witness recollection. Consequently, when a recording exists, a judge or jury will often afford it great weight. In short, always remember that physical evidence can exonerate just as easily as it can incriminate.

RECENT DECISIONS FIND PRE- AND POST-WORK ACTIVITY COMPENSABLE

By Gregg Adam

Long-time readers will recall during the mid-to-late 2000s, when "donning and doffing" cases under the federal Fair Labor Standards Act ("FLSA") were all the rage. These actions were filed after the United States Supreme Court (commonly known as "SCOTUS" to practitioners) ruled in *IBP, Inc. v. Alvarez* (2005) 546 U.S. 21 that meat plant workers, who "donned" safety equipment immediately prior to their shifts at the worksite, must be compensated from when they put the equipment on until when they took it off. Lawyers for public safety employees saw a parallel, and sued to make time spent putting on and taking off uniforms and equipment compensable.

Under the FLSA, time spent by employees performing their principal work activities, plus activities that are "integral and indispensable" to the principal activities, are compensable. Some donning and doffing claims succeeded, but peace officer claims often ran aground on the rationale that peace officers could don and doff work uniforms and safety equipment outside of the work site (e.g., at home), and this made the time non-compensable. (See, e.g., *Bamonte v. City of Mesa* (2010) 598 F.3d 1217.)

Three recent decisions may, however, revive compensation claims for peace officer pre and post work activity, particularly in controlled environments.

First, came the 2019 decision of the Missouri court of appeals in *Hootselle v. Missouri Department of Corrections* (2019 WL 4935933). In *Hootselle*, a large class of Missouri state correctional officers successfully sued for compensation under the FLSA for pre and post work activities ("PPWA") they undertook, within the prison institution, before reaching and after leaving their posts, at the beginning and end of their work shifts. The unpaid PPWA included: scanning cards to access the facility; being subject to entry and exit search; presenting themselves to superiors; picking up safety equipment; and briefing replacement officers. These activities cumulatively took an additional 10 to 20 minutes each day. A trial court found these tasks compensable and a jury awarded the class almost $114,000,000 in damages.

On appeal, the Missouri court of appeal agreed that the entire time the employees spent within the prisons performing these duties was compensable under the FLSA. "[I]t is undisputed that the officers are 'on duty and expected to respond' if incidents of 'offenders confronting staff and becoming physical' occur at any time after they go into the facility." Officers utilized their training to guard against prisoner fights and escape attempts during shift changes and were basically "'waiting for work' at all times from the moment they arrive at the premises, which is, as such, 'integral and indispensable to [their] principal activities.'"

A few days before this article was submitted, the Missouri Supreme Court agreed to review the ruling. We will provide an update once that decision issues.

The second case was *Aguilar v. Management & Training Corporation,* No. 17-2198 (10th Cir. 2020), where 122 detention officers at a New Mexico county prison also alleged that their employer failed to pay them for pre and post work activities as required by the FLSA. Like in *Hootselle*, the employees went through security screening when entering the prison facility; engaged in a pre-briefing; picked up tools and safety equipment; walked to their assigned posts; and conducted a briefing with the officer they were replacing – all of which was "off the clock." Similarly, after their shift, during their egress out of the facility, the employees performed the same tasks in reverse without compensation.

The employees, whose shifts were eight hours, were required to record the time precisely as they cleared the initial security screening on the way into the facility, and the time when they dropped off their tools on the way out. But generally, the employees were only paid for the time they spent at their actual posts. The exception to this general rule was if an employee cleared security screening more than 10 minutes before their shift started or dropped their tools off more than 10 minutes after their shift finished. In those circumstances, employees would be paid for the actual time they recorded. Curiously, however, if an employee clocked in less than 10 minutes before their assigned start time and clocked out less than 10 minutes after their assigned stop time, the employee would not be paid for any additional time and received only eight hours of pay. After a federal district court rejected most of the officers' claims, the officers appealed.

On appeal, the 10th Circuit Court of Appeals found that all of the officers' time spent within the institutions engaged in PPWA was compensable under the FLSA. The court began by recognizing that the officers' principal activities included maintaining custody and discipline of inmates, supervising detainees, searching for contraband, and general security. The officers' day began with a security screening that was designed by the employer to ensure the overall security of the prison.

The employer argued that a 2018 SCOTUS decision, *Integral Staffing Solutions v. Busk* (2014) 574 U.S. 27, which held that time during which Amazon workers were subject to a security screening was not compensable under the FLSA, resolved the employees' claims against them. However, the *Aguilar* court disagreed, pointing out that while security screening was not integral to the Amazon workers' principal activity of filling customers' orders, it was integral to correctional officers' job of keeping prisons secure. Security screening was therefore found to be indispensable to the employees' principal activity and, under what is known as the "continuous workday" rule, all time from that point forward was found compensable.

With respect to employees' egress after their shift, the court looked at the employees' final task before exiting the prison – returning work keys. It noted that unless employees did this, inmates could get possession of keys or equipment, which would make the prisons less safe. Because of this close connection between the keys and the employees' underlying security job, the court had little trouble finding that the return of these keys was integral and indispensable to the performance of the employees' principal activities. Accordingly, all time from security screening to key drop off was ruled compensable under the FLSA.

Finally, on February 13, 2020, in *Frlekin v. Apple* (Feb. 13, 2020, S243805), the California Supreme Court ruled that time spent by Apple employees waiting for, and being subject to, search before leaving Apple stores at the conclusion of their shifts was compensable under California

law. Apple employees are subject to mandatory searches of their bags, packages, purses, backpacks, briefcases, and personal Apple technology devices, such as iPhones, upon exiting the store for any reason (e.g., break, lunch, end of shift). The policy is designed to prevent theft.

Under California law, "hours worked" is defined differently than under the FLSA as: "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so" – a standard, often called "the control standard", that is generally more favorable to employees.

Apple conceded that it was controlling its employees when it required them to wait for and submit to searches but it nevertheless argued that an employee's activity must be "required" and "unavoidable" in order to be compensable, and that the time spent waiting for and undergoing search was not compensable because employees made voluntary decisions to bring personal effects to the workplace. The Court gave short shrift to such arguments.

First, it pointed out that the terms "required" and "unavoidable" do not appear in the definition of hours worked. Second, it noted that unlike the FLSA, which generally excludes time spent traveling to and from work from compensability, California law finds travel time compensable if the employer controls it. Accordingly, the Supreme Court found *Integrity Staffing* "neither dispositive nor persuasive." Third, it pointed out that the time at issue occurred at the work site, where the employer's interest – for Apple, deterring theft – and control is greater. Finally, the Court recognized two realities of modern workplaces: (1) most employees have little choice, due to all kinds of personal circumstances (think medicine, lunch, etc.) but to bring bags to their place of work; and (2) "modern cell phones … are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." Accordingly, all the time was found to be compensable under California law.

While the *Frlekin* ruling will not assist FLSA claims, it will be useful for employees pursing claims for uncompensated time under California law. And the three cases signify a new opportunity for employees to pursue claims for work-related activities that are currently uncompensated.

A final note: Elections matter. I have spoken with practitioners who historically represented federal prison employees in arbitrations with considerable success for pre and post work activity claims. But recently the Federal Labor Relations Authority began issuing decisions in favor of employers, so they stopped taking those cases.

Moreover, in December 2019, at the beckoning of management-side labor lawyers, the United States Department of Labor issued new regulations that purport to exclude numerous premiums (e.g., Holiday in Lieu Pay) from inclusion in federal overtime protections—which will directly, and adversely, impact overtime payments for peace officers.

Aguilar and *Hootselle* may give new hope to those claims and other pre and post activity claims. However, before they do, both decisions will have to survive potential review: *Hootselle*, as noted by the Missouri Supreme Court and, potentially, SCOTUS; and *Aguilar* by SCOTUS.

It is worth remembering that the FLSA itself was first applied to state and local employees by a 5-4 decision in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority* (1985) 105 S.Ct. 1005. With Justices Gorsuch and Kavanagh now on SCOTUS, many of us believe there may be 5 votes to overturn *Garcia*. If that happens, peace officers and other public employees would no longer enjoy FLSA overtime protections. Because some states—for example, California—have no state law requiring overtime payments for public employees, many will be limited to whatever overtime protections they can preserve under their labor agreements, which will come under renewed attack from employers.

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COURT OKS UNION TO REPRESENT MEMBERS IN CLASS COMPLAINT BECAUSE EXHAUSTION OF GRIEVANCE PROCESS WOULD BE UNMANAGEABLE

By Steven Kaiser

In a multi-faceted ruling, the Association for Los Angeles Deputy Sheriffs (ALADS) won a victory in its pursuit of wage and benefit increases for its sworn members. ALADS represents non-management peace officers. In the Complaint, it alleged that the County of Los Angeles had failed to abide by two provisions in the MOU, both of which required the County to match across-the-board salary increases and economic enhancements given to other safety bargaining units within the County (such as uniform allowance, and step increases). The County did not have a procedure for handling class grievances and refused to process a grievance filed by ALADS on a unit-wide basis. Instead, ALADS filed suit to enforce the MOU by requesting declaratory relief, asking for a declaration by the Court that the County illegally refused to respond to the request for arbitration, for damages for breach of contract, and a writ of mandate compelling the County to permit representative class grievances.

The Court held that ALADS was not required to exhaust administrative remedies (i.e., the grievance process) be-

cause the MOU did not contain a provision for resolution of class grievances where the compensation of each employee is at issue If each employee was required to file a grievance, LA County could contest each of the potential 7,800 grievances separately and without regard to rulings in other cases, inviting inconsistent rulings. Therefore, the Court upheld ALADS argument that the grievance procedure could be futile.

But the Court also held that ALADS was required to exhaust the grievance process by filing a grievance asserting violation of the MMBA initially with the County. Because the County refused to honor ALADS's class grievance, the Court allowed ALADS to amend the complaint to challenge those County officers who were responsible for processing the grievance. But the exhaustion requirement applies even if the process through the Los Angeles County Employee Relations Commission ("ERCOM," the local agency with responsibility for enforcing the MMBA) would be unable to provide complete relief to the represented employees. The Court ruled that the causes of action applicable to this relief should be dismissed but with the opportunity to amend after ALADS sought relief through ERCOM.

This case is a significant victory, providing unions with access both to internal administrative processes and to courts where the cost of individual representation of members could be prohibitively expensive, thereby hobbling employees' rights to bring class action. Collective representation has always been the hallmark of a union's job, and this case buttresses that critical task against attack by the employer.

Association for Los Angeles Deputy Sheriffs v. County of Los Angeles (2019) 42 Cal.App.5th 918

COURT OF APPEAL EXPANDS DISCLOSURE OF PEACE OFFICER PERSONNEL RECORDS UNDER S.B. 1421

By Scott Burns

Until 2019, peace officer personnel files were considered strictly confidential. A party could obtain them in litigation, but only in limited circumstances and only through a legal process known as a *Pitchess* motion. That changed on January 1, 2019. Senate Bill 1421 amended California Penal Code section 832.7 to allow for public disclosure of certain peace officer personnel records pursuant to a California Public Records Act request. This includes agency investigations into allegations of excessive force, discharge of firearms, sexual assault, and dishonesty in the reporting, investigation, or prosecution of a crime. There are still circumstances in which an agency can deny or delay disclosure. But, such records are no longer categorically exempt from disclosure.

Shortly after S.B. 1421 became law, the First Amendment Coalition, a California nonprofit advocacy group, and KQED television began making requests for reports and investigations of officer misconduct. In addition to seeking records from local law enforcement agencies, they also directed a request to the California Department of Justice (DOJ). The DOJ often receives copies of complaints and local agency investigations to conduct independent reviews. If the DOJ complied with the public records requests, this one-stop shopping approach would not only allow the requestors to reduce the time and expense of filing requests with hundreds of local agencies. It would also give them a means to determine how local agencies were complying with the new law.

Attorney General Becerra denied the requests, arguing that the new law applies only to the personnel records an agency possesses about its own employees. The Attorney General argued that the law did not apply to the records the DOJ obtains or creates about non-DOJ peace officers. He also argued that local agencies were in a better position to analyze the personnel files to determine whether they might be exempt from disclosure, or require redaction, for privacy or other reasons.

After a year-long court battle, on January 29, 2020, the First District Court of Appeal in San Francisco rejected all of the Attorney General's arguments. The court held that S.B. 1421 generally requires disclosure of all responsive records in the possession of the DOJ. This applies regardless of whether the records relate to officers employed by the DOJ or another agency and regardless of whether the DOJ or another agency created the records.

The court did not completely reject the possibility that the DOJ could reject a request as unduly costly or burdensome to produce. But, it held that the DOJ had not supported its claim in this particular case. The court indicated that, in the future, the DOJ and other law enforcement agencies must make a case-by-case argument based upon quantifiable data.

Additionally, although the court's ruling went against the DOJ, the release of the requested records is not necessarily imminent. The DOJ can still challenge disclosure of individual records based on various exemptions in the Public Records Act. Also, the Attorney General is still considering an appeal to the California Supreme Court.

NLRB MAKES IT EASIER FOR PRIVATE SECTOR EMPLOYEES TO BE DISCIPLINED FOR VIOLATING CONFIDENTIALITY ADMONITIONS

By Wendi Berkowitz

The Trump-appointed majority on the NLRB has changed it up on the legality of investigation confidentiality rules in the private sector. In *Apogee Retail LLC* (Dec. 16, 2019),

the NLRB determined that an employer's facially neutral investigation confidentiality rules are lawful when they apply only for the duration of the investigation. The NLRB also determined that confidentiality rules may extend beyond the investigation on two conditions. First, the employer must have a legitimate justification for the rules. Second, the justification must outweigh the effect on employees' right to engage in concerted activities under Section 7 of the National Labor Relations Act.

In reaching its decision, the Board overruled its five-year-old precedent in *Banner Estrella Medical Center* (2015), which favored employees. The *Banner* decision placed the burden on the employer to demonstrate that its interests in preserving the integrity of the investigation outweighed employees' presumptive Section 7 rights. The employer had to provide specific evidence that investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover-up. If the employer could not provide this evidence, the NLRB would find the employer's investigation confidentiality rules unlawful. In *Apogee*, the NLRB concluded that the *Banner* decision failed to balance employer and employee interests.

The NLRB will now examine whether an employer's investigation confidentiality rules, when "reasonably interpreted," would potentially interfere with Section 7 rights. If so, the Board will balance any potential interference with Section 7 rights against the employer's legitimate business interests. And, if these two things are evenly matched, the Board will then scrutinize the specific rules and their context. Under this test, it will be significantly harder to show that an employer's investigation confidentiality rules violate employees' right to engage in concerted activity.

However, the NLRB gave employees one thing to cheer about. Turning to the specifics of the case in *Apogee*, the Board concluded that the employer's investigation confidentiality rules did not prohibit employees from discussing either discipline or incidents that could result in discipline. Rather, "they narrowly require that employees not discuss *investigations* of such incidents or *interviews* conducted in the course of an investigation." The Board reasoned that employees not involved in an investigation "are free to discuss such incidents without limitation, and employees who are involved may also discuss them, provided they do not disclose information they either learned or provided in the course of the investigation." Therefore, "a rule that merely requires employees not to discuss what they say or hear during an investigative interview concerning an incident leaves employees free to discuss the incident itself."

Although the decision in *Apogee* represents an unsurprising retrenchment of employee rights in the private sector, employees and unions still have room to operate under the new rule. Employees can still have a union representative assist them throughout an investigation. Also, employees can still discuss the incidents under investigation and any discipline that follows an investigation. However, employees need to be wary as the NLRB shifts the paradigm in favor of employers.

NEW DEPARTMENT OF LABOR REGULATION WILL AFFECT HOLIDAY IN LIEU PAY AND OVERTIME

By James Henderson

Because of the nature of their jobs, many fire and police department personnel are required to work on publicly observed holidays, such as Christmas Day and New Year's Day. Pursuant to the terms of the applicable memorandum of understanding (MOU), these employees often receive holiday in lieu pay—compensation for being required to work on days otherwise designated as paid holidays by the public agency. These employees are either required to work on the holiday as part of their assigned schedule, or the holiday falls on a day when they are not scheduled to work.

Holiday in lieu pay is therefore an additional payment for having to work holidays and miss the opportunity to spend that time with friends and family. Since it is an additional payment for work performed, it should be included in the compensation used to determine the "regular rate of pay." This is the rate used to calculate the amount owed for overtime worked under the federal Fair Labor Standards Act (FLSA).

Over the last several years, we discovered that many public employers are not including holiday in lieu pay in the regular rate, resulting in many employees being underpaid for their overtime. We have filed lawsuits alleging that these failures violate the FLSA. Two of the key lawsuits handled by Messing Adam and Jasmine were *McKinnon v. City of Merced* and *Lewis v. County of Colusa*, both in the United States Eastern District Court of California. The courts in those cases ruled that holiday in lieu pay should be included in the regular rate. We successfully negotiated settlements of these two lawsuits, resulting in the affected employees receiving payments for their earned overtime wages. In addition, many public employers have voluntarily changed their practices and are now including holiday in lieu pay in the regular rate for overtime calculations.

However, a recent action by the U.S. Department of Labor may result in some employers reverting to the prior practice of excluding holiday in lieu pay from overtime

pay calculations. In December 2019, the Department amended one of its regulations interpreting the FLSA to provide that holiday in lieu pay should be excluded from the regular rate. This interpretation is erroneous and is not supported by either the prior language of the regulation or, more importantly, the statutory language of the FLSA. This demonstrates that agency interpretations of regulations and statutes are dependent on the administration currently in power. For example, in 1999, under the Clinton administration, the Department issued an opinion letter that stated that holiday in lieu pay for firefighters should be included in the regular rate for overtime pay calculations.

It is unclear at this point what effect this recent amendment may have. The courts are not required to accept the Department's interpretation of the FLSA, and we are confident that they will not do so. However, this change may cause some public employers to rethink their position on holiday in lieu pay and once again exclude it from overtime calculations. Employees need to monitor whether their employer attempts to change how it calculates overtime wages by excluding holiday in lieu pay. If you note a change in how your overtime pay is calculated, you should find out what is going on. If you are not sure or have any questions, please feel free to contact MAJ for assistance.

MESSING ADAM & JASMINE
Messing Adam & Jasmine LLP
235 Montgomery St., Ste 828, San Francisco, CA 94949
980 9th St., Ste 380, Sacramento, CA 95814

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Please send any inquiries, changes, requests, or comment to janine@majlabor.com, or

Messing Adam & Jasmine LLP
235 Montgomery St., Suite 828
San Francisco, CA 94104
Attn: Janine Oliker