MESSING ADAM & JASMINE

THE LABOR BEAT

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On the Home Front

LAWDRAGON MAGAZINE LISTS MAJ PARTNERS IN 2021

They did it again! Gary Messing, Gregg Adam, and Jason Jasmine were listed—again—this year in the Lawdragon listing of 500 Leading Plaintiff Employment Lawyers in the Country. This "indispensable guide to the heroic lawyers throughout the U.S. working to ensure that workers' rights are respected and fairly compensated" was recently published for the third consecutive year. Gary's name has appeared on the list since its inception. Gary (p. 273), Gregg (p. 247) and Jason (p. 265) have dedicated their careers to advocating on behalf of our clients and working persons everywhere and are honored to be recognized for their work. And we are proud to share this news with you!

Fighting the Good Fight

THE END OF THE ROAD, FOR NOW, FOR TRANSPARENT CALIFORNIA'S BID TO FORCE DISCLOSURE OF CALPERS RETIREE PENSION TYPE

The end of a three-year legal battle has finally arrived. We have reported on every step of Transparent California's (wholly unsuccessful) effort to force CalPERS to divulge the type of retirement benefits every retiree receives. Transparent California wanted to know, for each retiree, whether they are receiving a service retirement, disability retirement, or industrial disability retirement. CalPERS rightly refused to disclose this, and Transparent California sued under the California Public Records Act. Messing Adam & Jasmine LLP intervened in the lawsuit on behalf of our clients, **California Professional Firefighters, CAL FIRE Local 2881, California Association of Highway Patrolmen,** and **California Correctional Peace Officers' Association**. **Wendi Berkowitz** and **Gary Messing** were the primary attorneys in the case for the intervenors.

In November 2019, the Superior Court ruled against Transparent California and found that the requested information is not subject to disclosure under the California Public Records Act. In January 2021, the Court of Appeal rejected Transparent California's attempt to contest the Superior Court's ruling. In a surprise move, Transparent California sought review by the California Supreme Court—despite the fact that, as a legal matter, the Court of Appeal's decision was not appealable. Putting a final end to the nonsense, the Supreme Court denied review and there is no further avenue for appeal in this case. Confidential retiree information will remain private. We are privileged to have partnered with CalPERS and our clients to secure this important result.

COURTS CONTINUE TO REJECT POST-*JANUS* ATTACKS ON UNIONS

As you will recall from our previous update on this topic, after the U.S. Supreme Court's 2018 decision in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S.Ct. 2448, anti-union groups filed an onslaught of lawsuits attacking unions. Groups including the so-called Freedom Foundation have tried to exploit the *Janus* decision to force unions to pay back historical fair share fees and membership dues.

Thankfully, federal courts have consistently rejected these lawsuits. For example, the Seventh Circuit Court of Appeals rejected Mr. Janus' own attempt to recover fair share fees he historically paid to AFSCME, and the Supreme Court declined to review the case. (*Janus v. A.F.S.C.M.E., Council 31*, No. 19-1104 (U.S. Sup. Ct., Jan. 5, 2021).) Then in *Belgau v. Inslee,* 975 F.3d 940 (9th Cir. 2020), the Ninth Circuit rejected a lawsuit by former union members in the State of Washington who wanted to stop paying dues despite their having signed irrevocable one-year dues authorizations. On June 21, 2021, the Supreme Court dealt a fatal blow to this line of attack from anti-unionists, declining to take up the appeal filed by the Freedom Foundation. (*Belgau v. Inslee*, No. 20-1120 (U.S. Sup. Ct.).)

Messing Adam & Jasmine LLP is proud to have participated in the fight to protect unions from such meritless lawsuits. In late 2020, the MAJ team led by **Monique Alonso, Gary Messing,** and **Jason Jasmine** defeated the first iteration of a *Belgau*-type federal lawsuit filed against the **Fresno Deputy Sheriff's Association**. In *Campos, et al. v. Fresno Deputy Sheriff's Association, et al.,* No. 1:18-CV-1660-AWI-EPG (E.D. Cal. Nov. 12, 2020), the Eastern District Court dismissed the claims of former union members and fair share fee payers against the DSA and the County. The MAJ team is now fighting the second iteration of the lawsuit in *Chandavong, et al. v. Fresno Deputy Sheriff's Association, et al.,* No. 1:21-CV-00675-AWI-EPG (E.D. Cal.).

Most recently, the MAJ team succeeded in getting the Eastern District Court to dismiss two lawsuits brought by the Freedom Foundation against the **Los Rios Classified Employees Association** (LRCEA). In *Kurk v. Los Rios Classified Employees Assn., et al.,* No. 2:19-CV-00548-KJM-DB

(E.D. Cal.) and *Woltkamp v. Los Rios Classified Employees Assn., et al.,* No. 2:20-CV-00457-KJM-DB (E.D. Cal.), the Freedom Foundation made the same kind of arguments the plaintiffs raised in *Belgau*. Once the Ninth Circuit issued its decision in *Belgau*, the writing was on the wall for the Freedom Foundation in these two cases. In May 2021, the Eastern District Court followed the reasoning in *Belgau* and dismissed both plaintiffs' claims against LRCEA, their community college district employer, and the California Attorney General. Despite these rulings and the Supreme Court's decision to allow the *Belgau* decision to stand, in June 2021, Ms. Kurk filed an appeal with the Ninth Circuit. The Freedom Foundation clearly wants another bite at the apple before the Ninth Circuit (having lost in *Belgau*), but we are confident that we will prevail.

Around the State

STATE LEGISLATION WOULD ENFORCE UNION RIGHT TO EMPLOYEE CONTACT INFORMATION

By David Kruckenberg

In the summer of 2017, as unions were awaiting the U.S. Supreme Court's landmark decision in *Janus*, the California Legislature enacted A.B. 119, creating the Public Employee Communication Chapter. The "PECC" requires public employers to provide employee contact information to unions that have been certified as the exclusive bargaining unit representative. This was an important step forward for unions, as it expressly entitled them to promptly receive contact information for new hires and regularly receive contact information for all employees in the bargaining unit. The PECC empowers the Public Employment Relations Board ("PERB") to enforce these obligations against most public employers throughout the state, while leaving it to the employee relations commissions for the City and County of Los Angeles to enforce them in their jurisdictions.

Since the enactment of A.B. 119 and the PECC, unions have asserted that some employers are blatantly disregarding their obligations by either not providing accurate information or not providing the required information at all. In response, the Legislature has considered how to make these obligations more easily enforceable. The most recent proposal, S.B. 270 by State Senator Durazo, is currently making its way through the Legislature.

S.B. 270 would give a public employer up to three chances a year to fix its violations of the PECC, such as by providing information that was overdue or by correcting inaccurate information previously provided. If the employer either did not fix a violation or committed more than three violations in a twelve-month time span, the affected union could file an unfair labor practice charge with PERB. This would create a minimum standard for employers, making it easier for unions to enforce their right to employee contact information.

Also, S.B. 270 would allow PERB to issue penalties against public employers who violate the PECC. If PERB ruled that an employer violated the PECC, S.B. 270 provides that PERB "shall" determine the size of the penalty, up to $10,000. This would be something of a radical change for California's collective bargaining statutes, which generally are not enforced through penalties but through "make whole" relief as determined by PERB.

Additionally, S.B. 270 would shift the cost of litigation on employers who violate the PECC. If a union successfully prosecuted an unfair labor practice charge against an employer for violating the PECC, they would be entitled to their attorney fees and costs. This would include the union's attorney fees and costs to prepare for and conduct a formal evidentiary hearing on the unfair labor practice charge, all the way to final resolution before PERB (unless the union was appealing the PERB General Counsel's dismissal of the charge). Next, if an employer challenged PERB's ruling by filing a lawsuit in the Court of Appeal, and PERB prevailed in the lawsuit, then PERB would be entitled to its attorney fees and costs. As with the penalty discussed above, these cost-shifting proposals would be something of a radical change for California's collective bargaining statutes. Generally, PERB does not award attorney fees and costs to prevailing unions, and PERB does not necessarily recover its attorney fees and costs when it successfully defends its rulings on appeal.

If the Legislature enacts (and the Governor approves) S.B. 270, it would represent a significant shift in the state's approach to public sector collective bargaining. While its scope is limited to enforcing an employer's obligations under the PECC, S.B. 270 would create the strictest set of incentives yet for an employer to comply with a union's collective bargaining rights. Employee organizations at cities, counties, school districts, fire districts, and other public agencies would be empowered with effective tools to obtain employee contact information.

NINTH CIRCUIT DENIES TRUCKING COMPANIES A FEDERAL-LAW EXEMPTION FROM A.B. 5

By Steven Kaiser

As you know from our previous articles on the subject, A.B. 5 is California's legislative make-over of the law regu-

lating how businesses employ people, and makes a sweeping change to the classification of workers as employees or independent contractors. In 2019, the California Legislature codified the new three-part "ABC" test adopted by the California Supreme Court in its 2018 decision in *Dynamex*. This departed from the prior test that had been used for many years. A.B. 5 amended Labor Code section 2775, under which a worker is presumed to be an employee (and thereby protected by state wage and hour laws) unless:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(B) The person performs work that is outside the usual course of the hiring entity's business; and

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

In *California Trucking Association v. Bonta*, 996 F.3d 644 (9th Cir. 2021), the Ninth Circuit Court of Appeals ruled that California trucking companies could not claim a federal-law exemption from the ABC test. This was a surprising result for those of us closely watching how courts respond to this quickly-evolving legal situation.

The case was originally decided by the federal District Court for Southern California, where the California Trucking Association sued the State on behalf of trucking companies that use driver-owned-and-operated trucks to haul freight in California. The trucking companies asserted that their drivers were independent contractors under their business model.

The Trucking Association argued that this new California law was preempted by the Federal Aviation Administration Authorization Act ("FAAAA"). The FAAAA extensively regulates operations between the trucking companies and their clients. The Trucking Association argued that the higher cost of paying drivers as employees rather than as independent contractors would affect the prices charged to consumers and thereby substantially interfere with operations. It argued that this would undermine the intent of the FAAAA. The District Court agreed and issued an injunction that prohibited the State from enforcing the new law against trucking companies.

The State appealed the case to the Ninth Circuit. In a surprise and divided opinion, the Circuit Court ruled that the injunction was improper. First, it held that a state law is preempted by the FAAAA to the extent it relates to the price, route, or service of a motor carrier in its operations involving the transportation of property. Next, the Court examined Labor Code section 2775 and held that it is a statute of general applicability—that is, it is not focused only on the trucking industry but rather on all employers. The effect that the new law has on employers is so widespread that its particular effect on the trucking companies is a side-effect of the statute. Stated another way, although the application of Labor Code section 2775 to the trucking companies might cause them to have to adjust their prices, routes, or services, those effects are only incidental, and do not form a basis for a federal-law preemption.

The trucking companies argued that applying the ABC test to them would substantially raise their costs for things like purchasing new fleets of trucks and equipment, and providing meal breaks and workers' compensation insurance for newly-made-employee drivers. The Court was not persuaded because these and the other examples trucking companies provided related only to the price of conducting business and "were not the sort of law Congress intended to preempt." Therefore, the majority on the Ninth Circuit panel concluded that the trucking companies could not escape the fate of other California businesses but must comply with the new law.

Notably, the dissenting judge argued that the majority's opinion did not fit the pattern of prior Ninth Circuit cases that had found other California laws were preempted by federal law, even when those laws had only a tenuous effect on prices, routes, and services. According to the dissenting judge, even regulations in an area of traditional state power, such as employment, would not escape preemption. The dissenting judge also argued that allowing the new California law to apply to the trucking industry would likely result in its demise, which was contrary to Congress' intent in enacting the FAAAA. But the dissenting judge's opinion failed to convince enough judges on the Ninth Circuit to grant the Trucking Association's request for a full en banc rehearing of the case.

The trucking industry likely bought itself a short extension of time by asking the Ninth Circuit to stay its ruling while the Trucking Association petitioned the U.S. Supreme Court to review the case. Although the Ninth Circuit granted the stay, it is unlikely the Supreme Court will take the case, considering how few cases it takes each year.

California Trucking Association v. Bonta displays the full force and effect of A.B. 5 in California. This major reworking of who is an employee under the ABC test will

continue to overturn many years of understandings formed under prior law. And as the Ninth Circuit decision in this case discussed, it will affect employers throughout California, not just trucking companies. Businesses and organizations that have historically used independent contractors in roles such as music teachers, professors, bartenders, and part-time security officers must now carefully examine whether these workers should be treated as employees.

COURT OF APPEAL SIDES WITH PEACE OFFICER IN CONFIDENTIAL PERSONNEL RECORDS CASE

By Lina Balciunas Cockrell

The confidentiality of peace officer personnel records has taken a hit in recent years, particularly with the passage of S.B. 1421, but also because of courts' general reluctance to penalize public employers for violations of the Public Safety Officers Procedural Bill of Rights Act ("POBR").

However, in the recent case of *Towner v. County of Ventura*, 63 Cal.App.5th 761 (2021), the Court of Appeal reminded everyone that protections still exist for peace officers, and that it pays to make thoughtful legal arguments.

After Ventura County terminated a District Attorney investigator, the County filed a writ petition in Superior Court seeking to prohibit its civil service commission from hearing the investigator's administrative appeal. In its attachments to the writ petition, the County publicly filed the investigator's confidential personnel documents. The investigator then filed his own lawsuit alleging, among other claims, violations of the POBR and of Penal Code section 832.7 based on the County's disclosure of his confidential personnel records. Penal Code section 832.7 declares peace officer personnel records to be confidential and subject to disclosure only under very specific conditions and procedures.

Seeking to nip the investigator's lawsuit in the bud, the County filed a special motion to strike portions of his complaint under Code of Civil Procedure section 425.16 (called an "anti-SLAPP" motion). The County claimed its disclosure of his confidential personnel records arose from protected activity because the disclosure was made in a judicial proceeding. The investigator countered that the disclosure could not be protected because it was illegal. He argued that the County did not follow the mandatory procedures for disclosure, and therefore, the disclosure was not covered by anti-SLAPP protection.

The trial court granted the County's motion, but the Second District Court of Appeal based in Los Angeles reversed. The Court reasoned that although filing documents in a judicial proceeding is generally protected under the anti-SLAPP statute, this protection does not extend to conduct that is illegal. But the illegal conduct must be criminal, not just a violation of some state law. While Penal Code section 832.7 makes peace officer personnel records confidential, violation of the statute is not expressly a crime. Nevertheless, the Court ruled that the County's failure to comply with Section 832.7 was illegal pursuant to Government Code section 1222, a catch-all statute that makes a public officer's "willful omission to perform any duty enjoined by law" a misdemeanor.

Here, the County willfully refused to protect the confidentiality of the investigator's personnel records when it publicly filed these documents in a judicial proceeding. It made no attempt to follow the disclosure procedures prescribed by Section 832.7, nor did it attempt to show that the special conditions described by Section 832.7 justified the disclosure. Thus, filing the investigator's personnel documents with the writ petition was illegal and not protected activity under the anti-SLAPP statute.

The investigator was allowed to proceed with his lawsuit against the County, coincidentally after the civil service commission granted his administrative appeal and ordered him to be reinstated. This was an unusual string of victories for a law enforcement officer facing unjust discipline.

However, more hurdles await the investigator back at the trial court, since cases like *Rosales v. City of Los Angeles*, 82 Cal.App.4th 419 (2000) have ruled that a peace officer cannot sue for damages for violations of Penal Code section 832.7. Although the Court of Appeal in the investigator's case ruled that Ventura County's violation of Penal Code section 832.7 was illegal, the Court did not expressly overrule the *Rosales* decision. So, the trial court may still dismiss the investigator's damages claim against the County for violation of Penal Code section 832.7.

Nevertheless, this case protects peace officers who are suing to enforce the confidentiality of their personnel records. Following the requirements of the anti-SLAPP statute, the trial court ordered the investigator to pay Ventura County's attorney fees and costs related to the anti-SLAPP motion. If the Court of Appeal had not reversed this order, it would have significantly deterred the investigator and other peace officers from suing to protect their confidentiality rights. Now, public employers are on notice that they will not have such a strong advantage in these lawsuits.

IN A BLOW TO EMPLOYEES, COURT RULES THE UNIVERSITY OF CALIFORNIA IS EXEMPT FROM STATEWIDE WAGE ORDERS

By Steven Kaiser

Guiviani Gomez was an employee of the University of California ("UC") who claimed that she had been paid less than the minimum wage for the hours that she had worked, in violation of Wage Order No. 4. She filed a lawsuit against the UC, on her own and on behalf of similarly situated employees of the UC, asserting that her actual time worked had been improperly "rounded down," and that her time worked had been reduced by a 30-minute meal period which had not been consistently provided.

In *Gomez v. Regents of the University of California*, 63 Cal.App.5th 386 (2021), in a very limited holding, the Court of Appeal dismissed Ms. Gomez's complaint because the UC is a "public trust" established under the California Constitution, and therefore immune to Ms. Gomez's claims. The Court carefully examined the boundaries of the UC's constitutional immunity, noting that in this area of law—governance of wages—immunity is broad, but not complete. There are three areas where the UC's immunity to regulation does not apply:

(1) Appropriations, under which the Legislature, not the UC, retains the power to designate state funds for payment of employee salaries;

(2) The so-called "police power," which allows the Legislature to apply laws like workers' compensation protections for employees to the UC; and

(3) Matters of statewide concern not involving internal university affairs.

Threading an analytical needle, the Court examined cases applying these principles to overtime and prevailing wage laws, and to laws providing for indemnification of employees for expenses and losses incurred in the discharge of job duties. In those cases, courts ruled the UC had immunity because the laws in dispute concerned matters of internal governance, and not matters of statewide concern.

The Court then noted that no prior case had specifically addressed the applicability of Wage Order No. 4 to the UC. In particular, the Wage Order expressly only applies to "political subdivisions of the state," and no cases had held that the UC was one. This was, then, a case of first impression.

Ultimately, the Court held that the UC is neither a political subdivision of the state (for purposes of Wage Order No. 4) nor a private corporation; instead, the UC is a constitutionally established public trust administered by the Regents. Since Wage Order No. 4 does not specifically identify the UC or the Regents as being subject to the Wage Order, they are not. The Court noted that Ms. Gomez had not alleged that her wage had been set below the minimum wage, but instead alleged a violation of timekeeping procedures prescribed by the Wage Order. As a result, the Court upheld the trial court's ruling in the UC's favor and ordered the case dismissed, including Ms. Gomez's claim for attorney fees and costs under PAGA (the Private Attorneys General Act, Labor Code section 2698 et seq.).

This case illustrates the broad immunity the UC enjoys, stemming from its unique place in the California Constitution as a "public trust." However, the UC's immunity is not complete, as illustrated by the Court's refusal to endorse the UC's claim to a universal exemption from California wage and hour laws. Thus, employees of the UC must be careful not to assume that they have the same protections most California employees enjoy.

Across the Country

CIRCUIT COURT RULES THAT PENTAGON POLICE DON'T HAVE TO BE PAID OVERTIME FOR LIMITED WORK PERFORMED DURING SECOND MEAL BREAK

By Wendi Berkowitz

In a February 2021 decision, the U.S. Court of Appeals for the Federal Circuit ruled that Pentagon police officers who receive two meal breaks per shift (one of which is unpaid) are not entitled to overtime for work they perform during the unpaid meal break. The officers filed a lawsuit under the Fair Labor Standards Act ("FLSA"), arguing that the federal government should pay them for their unpaid meal break. The officers asserted that during their unpaid meal break they: (1) had ongoing security duties; (2) performed administrative tasks; (3) were subject to uniform and location restrictions; and (4) were subject to personal activity restrictions. At the trial court level, the Court of Federal Claims ruled against the officers and granted summary judgment to the federal government.

In *Akpeneye v. United States*, 990 F.3d 1373 (Fed. Cir. 2021), the Court of Appeals affirmed the ruling against the officers. First, the Court defined what constitutes "work" under the FLSA. Quoting from a 1944 U.S. Supreme Court opinion, the Court stated that for purposes of the FLSA, work means "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

The Court then considered the two competing legal standards it could apply to the "central issue" in a meal break case of whether the plaintiffs were "required to 'work' within the meaning of the FLSA." Under the "predominant benefit" standard, the question is "whether the employer or the employee is the **primary beneficiary** of the meal break, even if the meal period is subject to interruptions, duties, or restrictions." This is the standard the Court ultimately endorsed, after lawyers for the plaintiffs conceded that this was the appropriate standard. (Note: The other standard follows the U.S. Department of Labor's interpretation of the FLSA. Called the "complete relief" test, it requires that during an unpaid bona fide meal period, the employee must be "**completely relieved from duty** for the purpose of eating regular meals." 29 C.F.R. § 785.19(a). If the employee is "required to perform any duties, whether active or inactive, while eating," the employee is not completely relieved of duty under this test. The Ninth Circuit, which covers California, follows the "complete relief" test.)

Next, the Court examined the "most important factor," that is, "whether an employee is required to perform any 'substantial duties' or give up a 'substantial measure' of time and effort during a meal break." The Court engaged in a fact-intensive, totality-of-the-circumstances analysis and concluded that:

- Ongoing security-related duties performed during breaks—being "required to remain vigilant, carry a radio, remain in a state or readiness, and respond to emergencies and contingencies as necessary," as well as "to answer radio checks"—were not compensable time under the FLSA. Because the officers "were not required to take their breaks in public," "their breaks were not interrupted on a daily basis," and there was no evidence that any officer had a "shift during which both breaks were interrupted." If an officer was interrupted during one break period, they could use the other break period as a meal period, and policy allowed officers to obtain overtime pay if both meal breaks were interrupted.

- Administrative duties did not intrude significantly into meal breaks. The officers "spent only a short time writing reports, filling out personnel documents, checking their e-mails, reviewing training materials, and refueling vehicles." Some of these duties could be completed on duty, and the officers had the option to perform the administrative tasks during the compensated meal break. Answering questions from the public while on break also was not compensable, since officers had the option to take their breaks in a break room that was not open to the public.

- Restrictions on being uniformed, location, and activities also did not make the meal break compensable. Because even though officers had to remain in uniform during the break, could not leave the worksite, and could not engage in certain activities in public, they could move freely within the worksite and were always able to go to the non-public break room to engage in leisure activities without any restrictions.

At the end of the opinion, the Court concluded that considering all the facts, the "primary beneficiary" of the uncompensated meal period was still the plaintiff officer, not his/her employer. "Plaintiffs were not so burdened by their ongoing responsibilities and restrictions as to be unable to take at least one uninterrupted meal break per shift. That is, even if Plaintiffs were required to use some break time to respond to an emergency, complete their administrative tasks, or respond to public questions, and even if they were subject to some restrictions while on break, … they were generally able to enjoy the primary benefit of at least one thirty-minute break period during a given shift."

Therefore, the Court of Appeals ruled that the Pentagon police officers were not entitled to overtime for the limited work they performed during their unpaid meal breaks. This ruling is consistent with the current law of the land in most other circuits across the country, except the Ninth Circuit.

It bears repeating that although the Ninth Circuit uses the "complete relief" test, which is more employee-friendly, court decisions are not immutable and new judges can make new law. Additionally, the U.S. Supreme Court—the ultimate decision-maker on issues like this—has not weighed in yet. "Complete relief" is the law of *this* land, for now, but maybe not forever. We will continue to monitor cases like this that may one day end up in front of the Supreme Court, where it will be decided once and for all.

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