

CHAPTER XIV

SCHOOL EMPLOYEES

NATURE OF EMPLOYMENT

The Education Code contains detailed provisions relating to the employment of persons by school districts. Generally, positions are designated as certificated and classified. No person has a right to obtain employment with the public schools. An employment is considered a public trust requiring an oath of office to be taken by every public officer and employee.

The oath is set forth in the California Constitution.¹ A portion of the oath was declared unconstitutional by the California Supreme Court.² In Bessard v. California Community Colleges, the federal district court held that a religious exemption must be granted to persons who have religious objections to taking an oath. The Court of Appeal found that under the Religious Freedom Restoration Act, there must be a compelling governmental interest not to grant the exemption.³ The court found that requiring the oath despite religious objections was a substantial burden upon the religious freedom of religious objectors and enjoined the defendants from requiring the religious objectors to take the oath as a precondition of employment.⁴ Following the decision in Bessard, the United States Supreme Court declared the Religious Freedom Restoration Act unconstitutional leaving the viability of the Bessard decision in question.

The relationship between a school district and its employees is contractual in nature.⁵ The statutory provisions which grant teachers tenure and classified employees permanent status are generally considered restrictions on the power of the school district to dismiss employees.⁶

The governing boards of school districts have the authority to hire employees, both certificated and classified.⁷ In the absence of statutory limitations, the governing board may employ certificated and classified employees for a term extending beyond that of the board itself and, if the contract is made in good faith, it binds the succeeding board.⁸ Except for the tenure laws and other statutory provisions granting permanence to classified employees, school district contracts with employees are subject to the same rules of law that ordinarily apply to contracts of employment.⁹

¹ Article XX, Section 3.

² See, Vogel v. County of Los Angeles, 68 Cal.2d 18 (1967). The portion of the oath which states that the oath taker is not or has never been a member of an organization that advocates the overthrow of the state or federal government was the portion that was declared unconstitutional.

³ 42 U.S.C. Section 2000(bb-1(b)).

⁴ Bessard v. California Community Colleges, 867 F.Supp. 1454 (E.D.Cal. 1994).

⁵ Richardson v. Board of Education, 6 Cal.2d 583 (1936); Fry v. Board of Education, 17 Cal.2d 753 (1941); Holbrook v. Board of Education, 37 Cal.2d 316 (1951).

⁶ Taylor v. Board of Education, 31 Cal.App.2d 734 (1939).

⁷ Education Code sections 44831, 45103.

⁸ King City Union High School District v. Waibel, 2 Cal.App.2d 65 (1934).

⁹ Taylor v. Board of Education, 31 Cal.App.2d 734 (1939); Frates v. Burnett, 9 Cal.App.3d 63 (1970); Goddard v. South Bay Union High School District, 79 Cal.App.3d 98 (1978).

Certain people may not be employed or retained in employment by school districts. These people include those convicted of sex and narcotic offenses and those found to be sexual psychopaths.¹⁰

DUE PROCESS AND PUBLIC EMPLOYMENT

Public employment is also governed by constitutional considerations. The Fourteenth Amendment to the United States Constitution states that no person may be deprived of life, liberty or property without due process of law.

A public employee has a “property interest” or “liberty interest” in their employment if the employee has a legitimate claim of entitlement to continued employment.¹¹ The employee must have more than a unilateral expectation, abstract need or desire for continued employment.¹² The United States Supreme Court, in Board of Regents v. Roth, stated:

“Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and support claims of entitlement to those benefits.”¹³

Therefore, the courts will look to state law (e.g., Education Code), state regulations, and local policies to determine if the employee has a legitimate claim of entitlement to continued employment (i.e., property interest). If it is determined that the employee has a legitimate property interest in continued employment, then certain procedural due process protections apply. In Cleveland Board of Education v. Loudermill,¹⁴ the United States Supreme Court established the standard for procedural due process which must be followed before disciplining a public employee who has a legitimate “property interest” entitlement to continued employment under state law or local policy. The court held that, at a minimum, prediscipline safeguards must include:

1. Oral or written notice of the charges.
2. An explanation of the employer’s evidence.
3. An opportunity to present his or her side of the story.¹⁵

In California, state law provides for permanency or tenure for certificated and classified employees after a certain period of time.¹⁶ Once the probationary time period has been

¹⁰ Education Code sections 44836, 44837, 45123.

¹¹ Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972).

¹² Id. at 577.

¹³ Id. at 577.

¹⁴ 105 S.Ct. 1487, 470 U.S. 532 (1985).

¹⁵ Id. at 546.

¹⁶ Education Code sections 44929.21 (generally, a two-year probation period leading to tenure), 45113 (a maximum one year probationary period leading to permanency).

completed, employees have an entitlement to continued employment and may only be dismissed by statutorily prescribed procedures.¹⁷ As a result, the state courts have developed a body of procedural due process case law interpreting state constitutional and statutory provisions which are more detailed and prescriptive than federal due process requirements that must be complied with by California educators.

In Skelly v. State Personnel Board,¹⁸ the California Supreme Court held that California's statutory schemes for civil service employment, which confer permanent status upon certain individuals, constitute a property interest and establish a legitimate claim of entitlement to continued employment.¹⁹ In Skelly, the court held that in California an employee is not constitutionally entitled to a full trial type evidentiary hearing prior to the initial taking of punitive action but held that, at a minimum, certain procedural due process rights were required before disciplinary action can be taken. These preremoval safeguards include:

1. Notice of the proposed action to be taken.
2. The reasons for the proposed action.
3. A copy of the charges and materials upon which it is based.
4. The right to respond either orally or in writing to the authority initially imposing discipline.²⁰

In Bostean v. Los Angeles Unified School District,²¹ the Court of Appeal held that, under the due process clause of the Fourteenth Amendment, Bostean was entitled to a hearing prior to being placed on involuntary sick leave. The court held that to determine whether a hearing is required, it must balance three factors:

1. The private interest that will be affected by the school district's action.
2. The risk of an erroneous deprivation of the employee's interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.
3. The school district's interest in immediate removal.²²

Due to the length of time Bostean was on involuntary sick leave and due to the significant interruption in his receipt of salary, the court held that a hearing prior to placement on

¹⁷ Education Code sections 44932, 45113.

¹⁸ 15 Cal.3d 194, 124 Cal.Rptr. 14 (1975).

¹⁹ Id., at 206-208.

²⁰ Id., at 215; see, also, Coleman v. Department of Personnel Administration, 52 Cal.3d 1102, 278 Cal.Rptr. 346 (1991); Levine v. City of Alameda, 525 F.3d 903 (9th Cir. 2000) (employee's due process rights violated when he was laid off without a pretermination hearing regarding a layoff).

²¹ 73 Cal.Rptr.2d 523, 63 Cal.App.4th 95 (1998).

²² Id., at 534.

involuntary sick leave was required.²³ The court did not address the authority of a school district to place an employee on involuntary sick leave. It is difficult to determine at this time the impact of the Bostean decision.

EMPLOYMENT OF SUPERINTENDENT AND ASSISTANT SUPERINTENDENTS

A. Employment Contracts

The governing board of any school district employing eight or more teachers may employ a district superintendent.²⁴ In order to be eligible for the position of district superintendent, deputy superintendent, associate superintendent or assistant superintendent, a person must be a holder of a valid school administration certificate except for deputy, associate or assistant superintendent, employed in a purely clerical capacity.²⁵

A district superintendent or deputy, associate or assistant superintendent may be employed for a maximum term of four years.²⁶ The governing board, with the consent of the employee, may, at any time, terminate effective on the next succeeding first day of July, the term of any contract of employment, on terms and conditions as may be mutually agreed upon and reemploy the employee for a new term to commence on the effective date of the termination of the existing employment agreement. If the governing board decides not to renew the employment agreement, the governing board must give the employee at least 45 days' notice in writing prior to the expiration of the employment agreement. If the governing board fails to give the employee the required written notice, the employment agreement is automatically renewed for the same length of time and under the same terms and conditions, including salary, as the previous employment agreement.²⁷

During the term of the employment agreement, the governing board may not unilaterally rescind the contract; however, under the general principles of contract law, if good cause for termination exists, the governing board may terminate the contract.²⁸ Unless the governing board, by contract or in its district policies, grants additional rights to the district superintendent,²⁹ the district superintendent is not protected by statutory provisions which set forth the grounds for dismissal of teachers and has no statutory right or property interest in an administrative position.³⁰

Amendments to the Government Code in 1992 specify that all contracts of employment between an employee and a local agency employer shall include a provision which provides that regardless of the term of the contract, if the contract is terminated, the maximum cash settlement that an employee may receive shall be an amount equal to the monthly salary of the employee

²³ Id. at 534-537.

²⁴ Education Code section 35026.

²⁵ Education Code section 35028.

²⁶ Education Code section 35031.

²⁷ Ibid. Jenkins v. Inglewood Unified School District, 34 Cal.App.4th (1995) (notice must be authorized by governing board).

²⁸ Titus v. Lawndale School District, 157 Cal.App.2d 822 (1958); Barthuli v. Board of Trustees, 19 Cal.3d 717 (1977).

²⁹ Jones v. Palm Springs Unified School District, 170 Cal.App.3d 518 (1985).

³⁰ Barthuli v. Board of Trustees, 19 Cal.3d 717 (1977); Loehr v. Ventura County Community College District, 743 F.2d 1310 (9th Cir. 1984); 20 Ed.Law. Rep. 70 (1984).

multiplied by the number of months left on the unexpired term of the contract. However, if the unexpired term of the contract is greater than eighteen months, the maximum cash settlement shall be an amount equal to the monthly salary of the employee multiplied by eighteen.³¹ The maximum cash settlement shall not include any other noncash items except benefits which may be continued for the same duration of time as covered in the settlement or until the employee finds other employment, whichever occurs first.³²

All contracts of employment with a superintendent, deputy superintendent, assistant superintendent, associate superintendent, community college president, community college vice-president, community college deputy vice-president, or other similar chief administrative officer or chief executive officer of a school district shall be ratified in an open session of the governing board's minutes.³³ Copies of any contracts of employment, as well as copies of settlement agreements, shall be available to the public upon request.³⁴

B. Limitations on Employment Contracts

Regardless of the provisions in a contract of employment, Government Code section 7522.40³⁵ prohibits a public employer from providing a management employee postretirement health benefits that are more advantageous than is provided to other employees. Section 7522.40 was amended in 2013³⁶ to clarify that Section 7522.40 does not apply to contractual agreements entered into prior to January 1, 2013.

Government Code section 3511.2 provides:

“On or after January 1, 2012, any contract executed or renewed between a local agency and a local agency executive shall not provide for the following:

(a) An automatic renewal of a contract that provides for an automatic increase in the level of compensation that exceeds a cost-of-living adjustment [as defined].³⁷

(b) A maximum cash settlement that exceeds the amounts determined pursuant to Article 3.5 (commencing with Section 53260) of Chapter 2 of Part 1 of Division 2 of Title 5.”

³¹ Government Code section 53260(a). Government Code section 53260 was amended, effective January 1, 2016, to limit the maximum cash settlement to the monthly salary multiplied by 12 for school district superintendents. Stats. 2015, ch. 240. It remains monthly salary multiplied by eighteen for all other positions. The amendment affects contracts entered into on or after January 1, 2016.

³² Government Code section 53261.

³³ Government Code section 53262(a).

³⁴ Government Code section 53262(b).

³⁵ Stats. 2012, ch. 296 (S.B. 340).

³⁶ Stats. 2013, ch. 528 (S.B. 13, effective October 4, 2013).

³⁷ Under Government Code section 3511.1(b), “cost-of-living” means the California Consumer Price Index for Urban Wage Earners and Clerical Workers as calculated by the Department of Industrial Relations.

Government Code section 3511.2 only comes into play when a contract is executed or renewed on or after January 1, 2012.

Government Code provides that on or after January 1, 2012, “any contract between an employee and a local agency employer shall include a provision which provides that, regardless of the term of the contract, if the contract is terminated, any cash settlement related to the termination that an employee may receive from the local agency shall be fully reimbursed to the local agency if the employee is convicted of a crime involving an abuse of his or her office or position.” This language must be included in all employment contracts executed or renewed after January 1, 2012.

C. Property Interest in Employment

A property interest in employment which would entitle an employee to the protection of the due process clause of the Fourteenth Amendment, notice of termination, and an opportunity to be heard, arise not from the United States Constitution itself but from independent sources, such as state law, district policy or contract.³⁸ In Barthuli v. Board of Trustees, the California Supreme Court held that the provisions of California law did not create a property interest to employment as a district superintendent.³⁹

In Jones v. Palm Springs Unified School District,⁴⁰ the Court of Appeal reviewed the provisions of the district superintendent’s employment agreement and policies adopted by the governing board and noted that the policy required certain procedures to be followed before demotion or termination could take place. The Court of Appeal remanded the case to the trial court for trial on the issue of the contract provisions and board policies. In essence, the Court of Appeal held that governing boards may grant additional employment rights to administrators beyond those granted by state law.⁴¹

Under the Fourteenth Amendment, administrators may be entitled to a hearing to clear their names if there has been serious damage to their reputation or standing in the community (i.e., liberty interest) so as to stigmatize the individual and make it difficult for them to obtain other employment.⁴² However, the dismissal of a superintendent in which the governing board does not state publicly any stigmatizing reasons for the dismissal does not infringe any liberty interest of the individual even where third parties, such as newspapers, have made allegations.⁴³

The district superintendent serves as the chief executive officer of the governing board of the district in addition to any other duties assigned by the governing board.⁴⁴ Subject to the approval of the governing board or pursuant to district policy, the district superintendent may assign employees to positions in the district.⁴⁵ The governing board may also delegate to the district superintendent or assistant superintendent the authority to enter into contracts subject to

³⁸ Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 2709 (1972).

³⁹ 19 Cal.3d 717 (1977).

⁴⁰ 170 Cal.App.3d 518 (1985).

⁴¹ Id., at 529.

⁴² Bollow v. Federal Reserve Bank, 650 F.2d 1093, 1100 (9th Cir. 1981).

⁴³ Loehr v. Ventura County Community College District, 743 F.2d 1310, 20 Ed.Law Rep. 70 (9th Cir. 1984).

⁴⁴ Education Code section 35035.

⁴⁵ Education Code sections 35035, 35161, 39656.

governing board approval and to delegate other powers and duties although the governing board retains ultimate responsibility over the exercise of those powers and duties.⁴⁶

The governing board may, at any time during the fiscal year, increase the salaries of the district superintendent or the deputy, associate or assistant superintendent to be effective on any date ordered by the governing board. However, the governing board may not reduce the superintendent's salary unless it is mutually agreed upon.⁴⁷

D. Contractual Disputes

In Page v. Miracosta Community College District,⁴⁸ the Court of Appeal reversed a lower court's decision in favor of the community college district and ruled in favor of the plaintiff. The Court of Appeal held as follows:

1. The agreement settling the Superintendent's potential claims violated Government Code provisions limiting the amount cash settlements in contract termination cases under Sections 53260 and 53261.
2. Genuine issues of material fact preclude summary judgment on taxpayers' claims that the board's settlement with former president and superintendent constituted a waste of public funds and violated the gift of public funds clause of the California Constitution.
3. Pending litigation exceptions to the Brown Act open meeting requirements did not apply to mediation of former Superintendent's claims against members of the Board.
4. The taxpayer stated a claim that the Board of Trustees violated the Brown Acts prohibition against using intermediaries to reach a collective decision outside a public forum.
5. The Board of Trustees did not cure its violations of the Brown Act.

It was undisputed that the community college district settlement with its former president and superintendent exceeded the maximum cash settlement formula under Government Code section 53260. The plaintiff conceded that the monetary limitations in Sections 53260 and 53261 apply only to public monies spent to settle a contested termination of employment and that nothing prevents the local agency from separately settling unrelated claims independent of the employee's continued employment as long as the settlement is within a separate agreement accompanied by claims filed under the Government Tort Claims Act.⁴⁹ The Court of Appeal concluded:

⁴⁶ Education Code section 35032.

⁴⁷ Education Code section 35031; Titus v. Lawndale School District, 157 Cal.App.2d 822 (1958).

⁴⁸ 180 Cal.App.4th 471, 102 Cal.Rptr.3d 902, 252 Ed.Law Rep. 278 (2009).

⁴⁹ Government Code section 810 et seq.

“We are compelled to conclude the legislature’s purpose was to set strict limits on cash and ‘noncash items’ payable in settlements upon termination of a local agency administrator’s contract, without regard for the circumstances existing at the time of termination, the reasons, if any, for termination, or the nature of the disputes between the parties. Under our construction of the statutes, it is of no consequence that an employee under contract asserts legal claims against the local agency employer prior to contract termination. If that employee and employer nevertheless elect to terminate employment in the face of those claims (or the employer unilaterally terminates the contract) the employee’s cash settlement, if any, is capped at 18 months of salary specified in Section 53620, and noncash benefits are limited to health benefits as specified in Section 53621. Other cash and noncash benefits such as car allowances, money damages, or attorney’s fees, are simply not included in the formula.”⁵⁰

The Court of Appeal went on to note that the former superintendent did not file a formal claim under the Tort Claims Act. The court said that under the circumstances the former superintendent was faced with the decision to pursue a settlement over disputes with the district within the limitations of Section 53260 and 53261 or pursue her claims for money or damages independent of any settlement in accordance with the Tort Claims Act.⁵¹

With respect to the gift of public funds argument, the Court of Appeal noted that the compromise of a wholly invalid claim is inadequate consideration and the expenditure of public funds for such a claim serves no public purpose and violates the gift of public funds clause of the California Constitution. The Court of Appeal held that there were triable issues of fact with respect to the violations of Government Code sections 53260 and 53261 and the gift of public funds clause of the California Constitution and remanded the matter back to the trial court.⁵²

The Court of Appeal also noted that there was no authority under Government Code section 54956.9 for a legislative body to meet in closed session to discuss and negotiate with an adversary and her counsel in a matter of pending litigation. The Court of Appeal held that the purpose of the litigation exception under the Brown Act is to permit the legislative body to receive legal advice and make litigation decisions only.⁵³

The Court of Appeal held that if Board members left the closed session to communicate with the mediator, such action would be in violation of Government Code section 54952.2 which prohibits a legislative body to use personal intermediaries to exchange facts so as to reach a collective concurrence outside the public forum. The plaintiff alleged that the board negotiated with the former superintendent through a mediator and reached a consensus about the settlement in its closed meeting. The Court of Appeal held that these allegations were sufficient to state a

⁵⁰ *Id.* at 492.

⁵¹ *Id.* at 492-93.

⁵² *Id.* at 494-98; citing, Jordan v. California Department of Motor Vehicles, 100 Cal.App.4th 431, 450 (2002); Orange County Foundation for Preservation of Public Property v. Irvine Company, 139 Cal.App.3d 195, 200 (1983).

⁵³ *Id.* at 498-99; citing, 62 Ops.Cal.Atty.Gen. 150 (1979).

cause of action alleging a violation of Section 54952.2 and remanded the matter back to the trial court for a factual determination.

The Court of Appeal concluded the issuance of the notice identifying the former superintendent as a litigant and minutes showing the board had reconsidered and approved her settlement agreement does not establish a cure of the board's acts in impermissibly conducting information gathering in the course of mediating and negotiating with the former superintendent in a closed meeting. The Court of Appeal held that the public is entitled to monitor and provide input on the board's collective acquisition and exchange of facts in furtherance of a mediation or resolution of former superintendent's claims.⁵⁴

The Court of Appeal reversed the trial court's actions and remanded the matter back to the trial court for further proceedings.

POLITICAL ACTIVITIES

A. Participation in Political Activities

School employees have a right to participate in political activities. However, the governing board of a school district is permitted to establish rules and regulations relating to its employees engaging in political activities during working hours and on the premises of the school district.⁵⁵ An employee of a school district is permitted to solicit and receive political funds and contributions to promote the passage or defeat of a ballot measure which would affect the rate of pay, hours of work, retirement, civil service or other working conditions of the employees of the school district. However, the school district may prohibit or limit such activities by its employees during their working hours and may prohibit or limit the entry of such employees into the buildings and grounds of the school district for such purposes during working hours.⁵⁶

In Adcock v. Board of Education,⁵⁷ the California Supreme Court stated:

“It is settled that a teacher's right to speak is constitutionally protected as long as it does not result in any disruption, or impairment of discipline, or materially interfere with school activities.”⁵⁸

In Tinker v. Des Moines Independent Community School District,⁵⁹ the United States Supreme Court stated:

“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers

⁵⁴ Id. at 500-05.

⁵⁵ Education Code sections 7052, 7055.

⁵⁶ Education Code section 7056.

⁵⁷ 10 Cal.3d 60 (1973).

⁵⁸ Id. at 65.

⁵⁹ 393 U.S. 503 (1969).

and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this court for almost 50 years.”⁶⁰

Following the Tinker decision, the California Supreme Court, in L.A. Teachers’ Union v. L.A. City Board of Education,⁶¹ held that teachers had the right to distribute a petition on a school campus during duty-free periods such as duty-free lunch. In L.A. Teachers’ Union, the board of education sought to prevent teachers from distributing a petition addressed to state officials opposing cutbacks in educational funding. The court stated:

“ . . . plaintiffs have not only the right to discuss with fellow teachers issues such as those raised in the petition, but also the more specific right to engage in such discussions in faculty rooms and lunch rooms during duty-free periods. Plaintiffs also have the right to ‘speak out freely’ on such issues . . . ”⁶²

B. Political Buttons

In California Teachers’ Association v. Governing Board,⁶³ the Court of Appeal upheld the San Diego Unified School District’s policy prohibiting the wearing of political buttons by teachers in the classroom during instructional time. The court stated:

“District’s goal in regulating the political activities of its employees is fairly straightforward. According to district’s circular, it does not wish to become involved in sponsoring or subsidizing political activities. Moreover, district has attempted to achieve its goal in a fairly uncomplicated fashion: it has banned such activities by its employees while they are working. In the end, our analysis respecting the district’s limitation is also fairly straightforward and uncomplicated: the ban may be enforced in instructional settings and it may not be enforced in noninstructional settings.”⁶⁴

Based on the above cases, it appears that a school district may prohibit employees from passing out literature, wearing political buttons, or engaging in other political activities in the classroom during working hours or when students are present. However, it does not appear that the school district may prohibit employees from passing out literature on school property outside of the classroom during nonduty hours to nonstudents. Teachers would have the right to engage in political activities in the faculty lounge, parking lot, hallways, and administrative offices and to discuss political issues with nonstudents as they please.

⁶⁰ Id. at 506.

⁶¹ 71 Cal.2d 551 (1969).

⁶² Id. at 560.

⁶³ 45 Cal.App.4th 1383 (1996).

⁶⁴ Id. at 1393.

C. Union Buttons

In contrast to the decision of the Court of Appeal, the Public Employment Relations Board (PERB) held that school districts cannot bar teachers from wearing union buttons in the classroom absent “special circumstances.” PERB drew a distinction between political activities and political buttons, and union activities and the wearing of union buttons.⁶⁵

The East Whittier School District adopted a policy prohibiting employees from wearing, in the presence of students, any signs, buttons or other objects favoring or opposing any matter that is a subject of negotiations between the district and the exclusive bargaining representative. The district adopted an administrative regulation that stated that district employees are prohibited from initiating any discussion with students in any district classroom or in other instructional areas that are related to collective bargaining negotiations between the district and the exclusive bargaining representative.

In addition, district employees were prohibited from wearing or otherwise displaying, in the classroom or in other instructional areas in the presence of students, any signs, buttons or other objects that favor or oppose any matter that is the subject of negotiations between the district and the exclusive bargaining representative. The policy was adopted in response to a previous action taken by teachers in which they wore buttons to work that stated, “It’s Double-Digit Time!” The purpose of the buttons was to put pressure on the district to grant the teachers a raise of 10% or more.

The board and the administration were concerned about the use of instructional time and were concerned that the buttons would distract students and not keep the students and the teachers focused on the curriculum. The district also wanted to protect its elementary students from the confusion and/or anxiety of not understanding the teachers’ protests or political action.

The PERB cited precedent in the private sector and noted that workers are allowed to wear buttons supporting union activity in the workplace absent “special circumstances.” The PERB held that it is the district’s burden to demonstrate that “special circumstances” exist and cited five “special circumstances” or considerations:

1. Employee Dissension;
2. Safety;
3. Property Damage;
4. Distraction; and
5. Public Image.

The PERB noted in East Whittier, that the school district raised the defense of distraction. The PERB held that the district had not presented sufficient evidence to show that classroom work had been disrupted or that any of its students were particularly susceptible to distraction.

⁶⁵ See, East Whittier Education Association v. East Whittier School District, 29 PERC 40, PERB Dec. No. 1727 (2004) (district cannot bar teacher from wearing union buttons in the classroom absent special circumstances).

The PERB held that actual disruption is not required to be shown and held the test must be objective and based on examination of the buttons at issue. The PERB did not want districts to be forced to produce students to testify at unfair labor practice proceedings. The PERB stated:

“. . . [T]he Board holds that where it is alleged that a button is distracting or disruptive, an objective examination of the button should take place. Buttons that contain profanity, incite violence, or which disparage specific individuals will always meet the special circumstances test. Otherwise, the trier of fact must examine the button in its given context to determine whether an objectively reasonable person would find it unduly distracting or disruptive. In determining whether a button is unduly distracting or disruptive, a trier of fact should consider both PERB precedent and private sector cases under the NLRA, . . . [t]he trier of fact should also compare the buttons to other distractions prohibited or allowed by the employer.”

The PERB went on to hold that allowing the wearing of the union buttons in the classroom would facilitate the flow of information between teachers and the governing board of the school district regarding matters important to achievement of harmonious employer-employee relations. The PERB ordered the school district to repeal the provisions of its policy that prohibited the wearing of union buttons or bargaining-related buttons in the classroom.

D. Political Discussions during Non-Duty Hours

A school district could not prohibit an employee from discussing the proposed initiatives or other political issues in discussions with other employees during non-duty hours nor do we believe that the district could prohibit a school employee from posting a sign (or bumper sticker) supporting or opposing the proposed initiatives in his or her car while the car is parked in the school parking lot unless it is disruptive of the educational process or somehow interferes with the flow of traffic into and out of the parking lot.

However, these rights do not extend to the classroom. The classroom is not an open forum for free speech purposes.⁶⁶ In Kuhlmeier, the court stated:

“If the facilities have . . . been reserved for other intended purposes . . . then no public forum has been created, and school officials may impose reasonable restrictions on the speech of . . . teachers and other members of the school community.”⁶⁷

⁶⁶ See, Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 103 S.Ct. 948 (1983), Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 568 (1988).

⁶⁷ Id. at 568.

In Fort v. Civil Service Commission,⁶⁸ the California Supreme Court stated:

“No one can reasonably deny the need to limit some political activities such as the use of official influence to coerce political action, the solicitation of political contributions from fellow employees, and the pursuance of political purposes during those hours that the employee should be discharging the duties of his position.”⁶⁹

Therefore, a school district could prohibit an employee from engaging in political activities in the classroom and during working hours. The wearing of a political button in the classroom, if it creates unrest or disruption or distracts the students from the educational process, could be prohibited.

The Education Code prohibits people who hold or are seeking election or appointment to any office or employment in a school district from exerting influence to either urge or discourage political action by an employee.⁷⁰ Furthermore, no person in the classified service or who was on the eligibility list may be appointed, demoted, removed or in any way discriminated against because of his political acts, opinions or affiliations.⁷¹

E. Use of Public Funds

In general, public funds may not be used for partisan election campaigning. The courts have held that public funds belong equally to the proponents and opponents of a particular candidate or ballot measure and that the use of public funds to aid one side or another in a partisan election would be manifestly unfair and unjust to the other side and would be damaging to the democratic process.⁷²

In Stanson v. Mott,⁷³ the California Supreme Court held that a state administrative official could not use public funds to promote the passage of a bond issue for the future acquisition of park land and recreational historical facilities. The court noted that Public Resources Code section 504 authorized the Department of Parks and Recreation to disseminate information regarding the Department of Parks and Recreation and its programs. The Supreme Court remanded the matter back to the lower court to determine whether the department merely disseminated information or actually was promoting the bond issue. If, on remand, the lower court found that the Department of Parks and Recreation was promoting the bond issue, then there would be a violation of law.

⁶⁸ 61 Cal.2d 331 (1964).

⁶⁹ Id. at 338.

⁷⁰ Education Code section 7053.

⁷¹ Education Code section 7057.

⁷² See, Mines v. Del Valle, 201 Cal. 273 (1927).

⁷³ 17 Cal.3d 206 (1976).

In Stanson v. Mott, the court stated:

“A fundamental precept of this nation’s democratic electoral process is that the government may not ‘take sides’ in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country’s founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office... the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.”⁷⁴

The Education Code states that no district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate.

Education Code section 7054 authorizes districts to provide information to the public about the possible effects of any bond issue or other ballot measure if both of the following conditions are met:

“(1) The informational activities are otherwise authorized by the Constitution or laws of this state.

“(2) The information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.”⁷⁵

Violation of Section 7054 may be prosecuted as either a misdemeanor or a felony, punishable by imprisonment up to three years and/or by a fine not exceeding \$1,000.⁷⁶ Additionally, a district administrator or board member may appear at the request of a citizens’ group for the purpose of discussing the reasons why the district board called a bond election, and to respond to inquiries from the citizens’ group.⁷⁷

The Education Code also prohibits all political fundraising during working hours. Employees may engage in fundraising during “nonworking time,” defined as “time outside an employee’s working hours, whether before or after school or during the employee’s luncheon period, or other scheduled work intermittency during the schoolday.”⁷⁸

F. Use of School Property

With respect to school property, a school district may allow for the “use of a forum under the control of the governing board, a school district, or community college district if the forum is

⁷⁴ Stanson v. Mott, 17 Cal.3d 206, 217 (1976).

⁷⁵ Education Code section 7054(b).

⁷⁶ Education Code section 7054(c).

⁷⁷ Education Code section 7054.1.

⁷⁸ Education Code section 7056.

made available to all sides on an equitable basis.” A political activity may also be held in a district facility under the California Civic Center Act.⁷⁹

In San Leandro Teachers’ Association v. Governing Board of the San Leandro Unified School District,⁸⁰ the California Supreme Court held that the provisions of Education Code section 7054, which prohibits the use of district equipment or services to urge the support or defeat of any candidate for election to the governing board of the district, is constitutional.⁸¹ The underlying facts were that the union and the San Leandro Unified School District sought to place two newsletters in the district mailboxes that urge members to support the union-endorsed candidates for school board and to volunteer to phone or walk-in support of the endorsed school board candidates. The newsletters were produced at union expense, but the district refused to allow the newsletters to be placed in the district mailboxes.

The union filed an unfair labor practice charge with the PERB alleging that the district violated the provisions of the Educational Employment Relations Act (EERA)⁸² by prohibiting the union from distributing union newsletters containing its political endorsements via the school mailboxes. The PERB dismissed the unfair labor practice charges. The union then filed an action in Superior Court and the Superior Court ruled in favor of the union. The school district then appealed and the Court of Appeal reversed the Superior Court’s decision. The union then appealed to the California Supreme Court.

The California Supreme Court reviewed the language of Education Code section 7054(a) which states:

“No school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including but not limited to, any candidate for election to the governing board of the district.”

The California Supreme Court reviewed the legislative intent of Section 7054 and determined that the legislature made a finding that the use of public funds in election campaigns is unjustified and inappropriate, and that no public entity should presume to use money derived from the whole of taxpayers to support or oppose ballot measures or candidates.⁸³ The legislative history indicated that the purpose of the legislation was to repeal the authorization for school board members to use for political purposes district telephones, copy machines, equipment, employees, and materials produced with taxpayer monies. The California Supreme Court concluded that the broad term “equipment” was intended to encompass mailboxes, specially constructed at taxpayer expense, to serve as a school’s internal communication channel, which one group may not use to its exclusive political advantage. The court held that there is no basis in the language of Section 7054 for concluding that Section 7054 applies to school districts

⁷⁹ Education Code sections 7058, 38130 et seq.

⁸⁰ 46 Cal.4th 822, 95 Cal.Rptr.3d 164 (2009).

⁸¹ The California Supreme Court’s decision affirms an earlier Court of Appeal decision.

⁸² Government Code sections 3540 et seq.

⁸³ See, Stats. 1995, ch. 879 (SB 82), Sect. 1; see, also, Stanson v. Mott, 17 Cal.3d 206 (1976).

but not employee organizations. The court upheld the district’s regulation prohibiting the union from placing political materials in district mailboxes.

The court also held that under Education Code section 7058, a school district may make district mailboxes available to all parties to place political materials in the mailboxes. Section 7058 states, “Nothing in this article shall prohibit the use of a forum under the control of the governing board of a school district or a community college district if the forum is made available to all sides on an equitable basis.” However, most districts do not allow their mailboxes to be used for political purposes and the court upheld such a prohibition.

The California Supreme Court also upheld the constitutionality of Section 7054. The court held that under the First Amendment, school mailboxes would be considered non-public forums subject to regulation by the district so long as those regulations were viewpoint neutral with respect to the content of what is placed in those mailboxes. The California Supreme Court also held that Section 7054 was constitutional under the California Constitution. The court held that a district may constitutionally determine, under the California Constitution, that internal school mailboxes should be kept free of literature containing endorsements of political candidates.

This decision clarifies the law with respect to the use of district mailboxes for political purposes.

G. Permissible Informational and Lobbying Activities

Education Code section 35172(c) states that the governing boards of school districts may inform and make known to the citizens of the district the educational programs and activities of the schools. This provision provides a statutory basis for the governing board of the school district to keep the citizens of the district informed with respect to the proposed initiative’s referendums which affect educational programs and activities of the district. A district may provide the public with objective data and factual information with respect to school finance and changes in school finance likely to result from a proposed initiative or referendum but may not use public funds to promote the passage or urge the defeat of the proposed initiative or referendum.

District governing boards may adopt resolutions supporting or opposing ballot measures. However, district funds, staff time, supplies, and equipment should not be used for the purpose of disseminating such resolutions to parents and others.⁸⁴

In Stanson v. Mott, the Court held that there was no distinction to be drawn between candidates and ballot measures. However, the court did note that there were various statutory provisions permitting legislative lobbying and stated:

“Moreover, the suggested analogy between election campaigning and legislative lobbying ignores important distinctions between the two activities. To begin with, California

⁸⁴ Choice-in-Education League v. Los Angeles Unified School District, 17 Cal.App.4th 415 (1993).

statutes draw a clear distinction between the two matters; while various provisions authorize public expenditure for appropriate legislative lobbying activities . . . no similar provision sanctions the use of public funds in election campaigns. . . .”⁸⁵

The court noted that one of the primary functions of elected and appointed officials is to devise legislative proposals to benefit their agencies. The court stated:

“Since the legislative process contemplates that interested parties will attend legislative hearings to explain the potential benefits or detriments of proposed legislation, public agency lobbying, within the limits authorized by statute in no way undermines or distorts the legislative process. By contrast, the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leave to the ‘free election’ of the people . . . does present a serious threat to the integrity of the electoral process.”⁸⁶

H. Distinguishing Impermissible Activities from Permissible Activities

In Miller v. Miller,⁸⁷ the Court of Appeal was faced with the issue of whether the California Commission on the Status of Women had the power to campaign in California and elsewhere for the ratification of the Equal Rights Amendment. The Commission’s activities included lobbying the California Legislature and urging the general public to contact their legislators to support the ratification of the Equal Rights Amendment. The Court of Appeal in Miller held that courts must look at the audience to which the promotional activities are directed and noted that it is one thing for a public agency to present its view to the Legislature and quite another for it to use the public treasury to finance and appeal to the voters to lobby their Legislature in support of the agency’s point of view.

The Court of Appeal held that using public funds to appeal to voters to lobby their Legislature in support of the agency’s point of view, undermines and distorts the legislative

⁸⁵ Id. at 221. See, also, Government Code sections 50023, 53060.5, 82039, 86300. Section 50023 states: “The legislative body of a local agency, directly or through a representative, may attend the Legislature and Congress, and any committees thereof, and present information to aid the passage of legislation which the legislative body deems beneficial to the local agency or to prevent the passage of legislation which the legislative body deems detrimental to the local agency. The legislative body of a local agency, directly or through a representative, may meet with representatives of executive or administrative agencies of state, federal, or local government to present information requesting action which the legislative body deems beneficial to, or opposing action deemed detrimental to, such local agency. The cost and expense incident thereto are proper charges against the local agency.” Section 53060.5 states in part: “Any district, directly or through a representative, may attend the Legislature or any other legislative body, including Congress, and any committees thereof and present information to aid the passage of legislation which the district deems beneficial to the district or to prevent the passage of legislation which the governing board of the district deems detrimental to the district. The cost and expense incident thereto are proper charges against the district. Such districts may enter into and provide for participation in the business of associations and through a representative of the associations attend the Legislature, or any other legislative body, including Congress, and any committees thereof, and present information to aid the passage of legislation which the association deems beneficial to the districts in the association, or to prevent the passage of legislation which the association deems detrimental to the districts in the association. The cost and expense incident thereto are proper charges against the districts comprising the association.”

⁸⁶ Id. at 218.

⁸⁷ 87 Cal.App.3d 762 (1978).

process in the same way that the use of public funds for an election campaign distorts the integrity of the electoral process.⁸⁸ The Court of Appeal concluded that any expenditure of public funds to marshal public support for the ratification of the Equal Rights Amendment is unauthorized.⁸⁹

In League of Women Voters v. Countywide Criminal Justice Coordinating Commission,⁹⁰ the Court of Appeal reviewed the legality of activities taken by the County of Los Angeles to:

1. Draft a proposed state initiative measure to provide for certain procedural changes in the criminal justice system relating to juries in criminal cases.
2. Find a sponsor or sponsors for such statewide initiative.
3. Indicate support for such measure through speeches and otherwise.

The Court of Appeal held that the county's activities in drafting the proposed statewide initiative and finding sponsors was permissible due to the legitimate county interest in the subject matter, the broad autonomous legislative and fiscal powers possessed by the county, and the fact that the drafting stage would not involve partisan campaign activity. The Court of Appeal drew a distinction between drafting a proposed initiative, which it found did not fall within the prohibited category of partisan campaigning, and urging a particular vote in a matter which has already qualified for the ballot. The Court of Appeal stated:

“Clearly, prior to and through the drafting stage of a proposed initiative, the action is not taken to attempt to influence voters either to qualify or to pass an initiative measure; there is as yet nothing to proceed to either of those stages. The audience at which these activities are directed is not the electorate per se, but only potentially interested private citizens; there is no attempt to persuade or influence any vote. . . . It follows those activities cannot reasonably be construed as partisan campaigning. Accordingly, we hold the development and drafting of a proposed initiative was not akin to partisan campaign activity, but was more closely akin to the proper exercise of legislative authority.”⁹¹

The Court of Appeal held that when the public agency, using public funds, begins promoting a single view in an effort to influence the electorate, then public funds may not be used.⁹² For example, securing signatures at public expense for a proposed initiative would cross the line of improper advocacy or promotion of a single point of view in an effort to influence the electorate. Once a proposed initiative or referendum is filed, either at the state or local level, it is

⁸⁸ Id. at 768-769.

⁸⁹ Id. at 772.

⁹⁰ 203 Cal.App.3d 529 (1988).

⁹¹ Id. at 550.

⁹² Id. at 554.

the proponents' task to qualify the measure for the ballot by obtaining the requisite number of signatures in filing the petition. The use of public funds to obtain signatures would aid the proponents by essentially financing their partisan task. Therefore, the Attorney General concluded that public funds of a public agency may not be used to gather signatures for an initiative or referendum measure.⁹³

As discussed above, a public agency may not use public funds to promote a ballot measure but may disseminate objective information. In Stanson v. Mott, the California Supreme Court noted that the line between unauthorized campaign expenditures and authorized information activities is not always clear. The court stated:

“Thus, while past cases indicate that public agencies may generally publish a ‘fair presentation of facts’ relevant to an election matter, in a number of instances publicly financed brochures or newspaper advertisements which are purported to contain only relevant factual information, and which are refrained from exhorting voters to ‘Vote Yes’ have nevertheless been found to constitute improper campaign literature. . . . In such cases, the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tender and timing of the publication; no hard and fast rule governs every case.”⁹⁴

Public officials have the right to speak out on partisan matters as long as there is no improper expenditure of public funds by such officials. In addition, a local legislative body may go on record at a public meeting as being in favor of or opposed to a particular measure.⁹⁵

In summary, public funds of the district may not be used for partisan political campaigning, including such activities as promoting a state or local ballot measure, promoting a political candidate, or promoting an initiative or referendum that has qualified for the ballot. Public funds may be used to provide objective information to the public about a ballot measure. Circumstances such as the style, tenor or timing of the publication will determine whether the information is objective or whether it is prohibited promotional material. Public funds may also be used for the purpose of lobbying activities that are directed toward members of the California Legislature or Congress.

In Santa Barbara Coalition Against Automobile Subsidies v. Santa Barbara County Association of Governments,⁹⁶ the Court of Appeal held that the opponents of a county ballot measure that would impose a sales tax had standing to sue the local transportation authority for declaratory and injunctive relief alleging that the authority unlawfully advocated and spent public funds for passage of the ballot measure. The Court of Appeal held that the government agencies and their representatives have First Amendment rights protected by statute, the authority's expenditures were authorized by statute, the authority's expenditures did not occur in

⁹³ 73 Ops.Cal.Atty.Gen. 255, 266 (1990).

⁹⁴ Id. at 222; see, also, 35 Ops.Cal.Atty.Gen. 112 (1960); 51 Ops.Cal.Atty.Gen. 190 (1968); 42 Ops.Cal.Atty.Gen. 25, 27 (1964).

⁹⁵ League of Women Voters v. Countywide Criminal Justice Commission, 203 Cal.App.3d 529 (1988).

⁹⁶ 167 Cal.App.4th 1229, 84 Cal.Rptr.3d 714 (2008).

an election contest or campaign, the authority did not violate the statute prohibiting expenditures to support or oppose the ballot measure, and the authority's expenditures did not violate the Hatch Act.

The Santa Barbara County Association of Governments (SBCAG) formulated a plan outlining the county's transportation needs and proposed a ballot measure that would impose a one-half cent sales tax to pay for the projects set forth in its plan. The plaintiffs filed a complaint for injunctive and declaratory relief alleging that the authority unlawfully advocated and spent public funds for passage of the ballot measure.

The authority filed a special motion to strike under Code of Civil Procedures section 425.16, asserting that the complaint constituted a strategic litigation against public participation commonly referred to as a SLAPP suit. The trial court granted the authority's motion and the plaintiffs appealed. The Court of Appeal affirmed.

The Court of Appeal held that although a government agency cannot spend funds in a partisan campaign for the passage or defeat of a ballot measure, the authority's activity was not electoral advocacy because it was in furtherance of its express statutory duties and occurred before Measure A was qualified for placement on the ballot. The Court of Appeal held that the case of Stanson v. Mott⁹⁷ did not apply. The Court of Appeal noted that the authority was authorized by statute to formulate and sponsor ballot measures.⁹⁸ These statutory provisions include a comprehensive statutory scheme to raise additional local revenues to provide highway capital improvements and maintenance, and to meet local transportation needs in a timely manner. The Act directs local governments to designate a local transportation authority to develop and implement local funding programs that go significantly beyond current federal and state funding which is inadequate to resolve local transportation needs.⁹⁹

A local transportation authority is specifically empowered to impose a retail transaction and use tax of up to 1% to fund transportation improvements and services in its county.¹⁰⁰ Before a sales tax may be imposed, the authority must adopt a transportation expenditure plan for revenues expected to be derived from the tax, approve an ordinance imposing the tax, and obtain approval of the ordinance by a majority of electors voting on the measure at a special election called for that purpose by the Board of Supervisors at the request of the authority.¹⁰¹ In essence, the authority was performing its statutory duties under the Act.

The Court of Appeal held that the drafting of a proposed ballot measure before its qualification for the ballot does not constitute partisan campaigning for the ballot measure. There is no attempt to persuade or influence any vote, therefore, the drafting and sponsorship of a ballot measure is a necessary prerequisite to the election campaign and cannot reasonably be construed as partisan campaigning.¹⁰²

⁹⁷ 17 Cal.3d 206, 130 Cal.Rptr. 697 (1976).

⁹⁸ See, Public Utilities Code section 180,000 et seq.

⁹⁹ Public Utility Code section 180001(c).

¹⁰⁰ Public Utility Code section 180202.

¹⁰¹ Public Utility Code section 180201, 180206.

¹⁰² See, Government Code section 54964.

In DiQuisto v. County of Santa Clara,¹⁰³ the Court of Appeal held that the County of Santa Clara did not violate laws prohibiting the use of public funds for political campaigning. The taxpayer lawsuit alleged the county improperly spent public funds for partisan electoral purposes by bargaining for the union's non-support of an initiative measure to mandate binding arbitration as a means of resolving labor disputes with the County of Santa Clara.

Last year, the California Supreme Court reaffirmed that in the absence of clear and unmistakable language specifically authorizing a public entity to expend funds for campaign activities or materials, the public entity lacks the authority to make such expenditures.¹⁰⁴ This limitation on the expenditure of public funds for campaigning has been recognized in a long line of California Supreme Court decisions.¹⁰⁵

The underlying facts that were in early 2004, three Santa Clara County public sector labor unions agreed to sponsor a local initiative measure on the November 2004 ballot that would amend the county's charter by adding a provision for binding interest arbitration as a means of resolving labor disputes between the unions and the County of Santa Clara. On April 2, 2004, a notice of intent to circulate a petition to qualify the measure for the ballot was filed by one of the unions. The unions began gathering signatures on April 23, 2004. On June 4, 2004, representatives of the three sponsoring unions met with county representatives to discuss the initiative. No agreement was reached. On June 23, 2004, the initiative qualified for the November ballot identified as Measure C. On August 3, 2004, the county's board of supervisors adopted a resolution to submit Measure C to the voters.¹⁰⁶

The board of supervisors opposed Measure C and placed two countermeasures on the ballot, identified as Measures A and B. In October 2004, County Supervisor Blanca Alvarado directed the dissemination of an e-mail to approximately 1,500 individuals, encouraging the recipients to educate themselves about the three initiative measures and attached a copy of a newspaper editorial urging a "No" vote on Measure C and a "Yes" vote on Measures A and B. In November 2004, Measure C, as well as Measures A and B, were defeated at the polls.¹⁰⁷

In determining whether information distributed at public expense is informational, and therefore, authorized, or partisan campaign material, and therefore, unauthorized, such factors as the style, tenor and timing of the publication must be reviewed. In determining whether partisan campaigning is implicated, the audience to which the communication is directed must also be considered. Where the electorate is not the audience, there is no attempt to persuade or influence any vote.¹⁰⁸

A fundamental concept of the nation's democratic electoral process is that the government may not take sides in election contests or bestow an unfair advantage on one of

¹⁰³ 181 Cal.App.4th 236, 104 Cal.Rptr.3d 93 (2010).

¹⁰⁴ Vargas v. City of Salinas, 46 Cal.4th 1, 24, 92 Cal.Rptr.3d 286 (2009).

¹⁰⁵ Stanson v. Mott, 17 Cal.3d 206, 217, 130 Cal.Rptr. 697 (1976).

¹⁰⁶ Id. at 244-45.

¹⁰⁷ Id. at 245.

¹⁰⁸ Id. at 252-53; citing, League of Women Voters v. Countywide Criminal Justice Coordination Commission, 203 Cal.App.3d 529, 550, 250 Cal.Rptr. 161 (1988); Santa Barbara County Coalition Against Auto Subsidies v. Santa Barbara County Association of Governments, 167 Cal.App.4th 1229, 84 Cal.Rptr.3d 714 (2008); Yes on Measure A v. City of Lake Forest, 60 Cal.App.4th 620, 626, 70 Cal.Rptr.2d 517 (1997); Miller v. Miller, 87 Cal.App.3d 762, 768-769, 775, 151 Cal.Rptr. 197 (1978).

several competing factions.¹⁰⁹ As the California Supreme Court explained in Vargas, a public entity is not precluded from analytically evaluating a proposed ballot measure and publicly expressing an opinion as to its merits.¹¹⁰ In Vargas, the court held that Stanson does not preclude a government entity from publicly expressing an opinion with regard to the merits of a proposed ballot measure, so long as it does not expend public funds to mount a campaign on the measure.¹¹¹ The mere circumstance that a public entity may be understood to have an opinion or position regarding the merits of a ballot measure is not improper.¹¹²

The Court of Appeal went on to find that based on the style, tenor and timing of the proposals, and the fact that the proposals were directed to the union rather than the general public, no violation of the law occurred. With respect to the e-mail that Supervisor Alvarado sent out, the Court of Appeal found that the e-mail was neutral, served an educational purpose and the attachment of the editorial opposing Measure C, while clearly advocacy, was a minimal violation, and a minimal use of public resources.¹¹³

EMPLOYEE’S RIGHT TO REPORT IMPROPER GOVERNMENTAL ACTIVITIES

The California Legislature has enacted legislation to protect district employees who report improper governmental activities.¹¹⁴ Education Code section 44111 establishes the Legislature’s intent that school district and community college district employees and other persons should disclose improper governmental activities. Section 44112 defines “improper governmental activity” as an activity by a public school agency or community college or by an employee that meets either of the following descriptions: (1) violates a state or federal law or regulation; or (2) is economically wasteful or involves gross misconduct, incompetency, or inefficiency.

Section 44113 prohibits a district employee, such as a school administrator, from using his or her official authority or influence for the purpose of interfering with the right of a person to report improper governmental activities. “Use of official authority or influence” is defined to include “promising to confer or conferring any benefits; affecting [sic] or threatening to affect [sic] any reprisal; or taking, directing others to take, recommending, processing, or approving any personnel action, including, but not limited to appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.” An employee who violates this prohibition may be liable in an action for civil damages brought against him or her by the injured party.

Additionally, an employee or applicant for employment who files a written complaint with his or her supervisor, an administrator, or the governing board alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or for refusing to obey an illegal order, may also file a copy of

¹⁰⁹ Stanson v. Mott, 17 Cal.3d 206, 217, 130 Cal.Rptr. 697 (1976).

¹¹⁰ Vargas v. City of Salinas, 46 Cal.4th 1, 24, 92 Cal.Rptr.3d 286 (2009).

¹¹¹ Id. at 36.

¹¹² Id. at 36.

¹¹³ DiQuisto v. County of Santa Clara, 181 Cal.App.4th 236, 256-58, 104 Cal.Rptr.3d 93 (2010).

¹¹⁴ Education Code sections 44111-44113.

the written complaint with the local law enforcement agency. “Illegal order” is defined as any directive to violate or assist in violating the law, or an order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public. A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment for having made a protected disclosure is subject to a fine not to exceed \$10,000 and imprisonment in the county jail for a period not to exceed one year.

In Patten v. Grant Joint Union High School District,¹¹⁵ a California Court of Appeal held that the standard for “adverse employment action” that applies to an employment retaliation lawsuit under the Fair Employment and Housing Act (FEHA), also applies to a lawsuit under Labor Code section 1102.5(b), which prohibits retaliation for “whistleblowing” regarding reasonably believed legal violations. The court held that the plaintiff raised a triable issue of material fact regarding whether her transfer from one principal position to another constituted an adverse employment action and held that the retaliation issue should go to trial.

The plaintiff, Colleen Patten, was the principal of a junior high school that was designated as an underperforming school. This made the school eligible for additional funding under the Immediate Intervention/Underperforming Schools Program (II/USP). Patten contended that she disclosed four legal violations for which the district retaliated against her.¹¹⁶

The first disclosure arose from a year-end financial audit in which the district discovered surplus in the school’s II/USP budget. The district wanted to reassign expenditures already incurred for at least one other educational program to part of the surplus, allowing the district to retain this amount of unspent II/USP funds rather than return the amount to the state. To effectuate this reassignment of expenditures, the district requested that Patten sign blank “transfer of funds” forms.¹¹⁷

She refused, explaining that there was no way to ensure that the reassigned expenditures were legitimate based on II/USP guidelines. She met with a state assembly member and a representative of a state senator regarding this matter. Later, at a district board meeting, she provided information related to the II/USP funding issue that contradicted what the superintendent had previously told the board.¹¹⁸

The second disclosure arose from complaints that a male physical education teacher was peering into the girls’ locker room. Patten disclosed this information to her district superiors for personnel action. The third disclosure involved an off-color remark that a male science teacher had made to a female student. Again, Patten disclosed this information to her superiors for personnel action. The fourth disclosure arose from an assault against a student on the school campus. Patten requested additional staff to keep the campus safe.¹¹⁹

¹¹⁵ 134 Cal.App.4th 1378 (2005).

¹¹⁶ Id. at 1381.

¹¹⁷ Id. at 1382.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

At the end of the school year, the district notified Patten that she was being transferred to another principal position at a much smaller “magnet” junior high school comprised of high-achieving students. Due to health problems, Patten never began her new assignment. Eventually, she sued the district for whistleblower retaliation under Labor Code section 1102.5(b), based on the four disclosures described above.¹²⁰

Labor Code section 1102.5(b) prohibits an employer from retaliating against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation. The first element of a Section 1102.5(b) retaliation cause of action requires that the plaintiff establish a “prima facie” case of retaliation. To establish a prima facie case, a plaintiff must show that (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two.¹²¹

The court first considered whether Patten’s disclosures regarding the P.E. teacher, the science teacher, and the safety of the school, presented a triable issue of material fact as constituting protected activities. The court concluded that these disclosures were made in an exclusively internal personnel and administrative context, and did not constitute whistleblowing as a matter of law. In contrast, the court held that Patten’s disclosures to the district and to legislative personnel regarding the transfer of expenditures to the II/USP surplus presented a whistleblowing “archetype” – disclosing the allegedly unauthorized use of public assets.¹²²

The court then addressed whether the district subjected Patten to an “adverse employment action” by transferring her to the magnet school. The court relied on the recent decision in Yanowitz v. L’Oreal U.S.A., Inc.,¹²³ in which the California Supreme Court defined an adverse employment action for FEHA retaliation purposes, as requiring that the adverse action “materially affect the terms and conditions of employment.” In view of the similarity between an employee retaliation lawsuit under the FEHA and one under Labor Code section 1102.5(b), the court held that the “materiality” test also applies to Section 1102.5(b) claims. Under the “materiality” test, an “adverse employment action” is defined as requiring that the adverse action materially affect the terms and conditions of employment.¹²⁴

The district contended that Patten’s lateral transfer did not amount to an adverse employment action as a matter of law, because her wages, benefits, and duties remained the same. The court observed that, at first glance, the transfer from an underperforming school to a magnet school did not resemble an “adverse” action. However, the court went on to note that Patten was a relatively young principal with her administrative career ahead of her, and that the magnet school “does not present the kinds of administrative challenges an up-and-coming principal wanting to make her mark would relish.” In other words, the lateral transfer could adversely and “materially” affect her opportunity for advancement in her career.¹²⁵

¹²⁰ Ibid.

¹²¹ Id. at 1384.

¹²² Id. at 1384-85.

¹²³ 36 Cal.4th 128 (2005).

¹²⁴ Id. at 1386-87.

¹²⁵ Id. at 1388-89.

The court listed other actions taken by the district, including inadequate administrative support regarding the issues of the P.E. teacher, the science teacher, and school safety, as well as budgetary, computer and student schedule matters. Although many of these actions and problems did not rise to material adverse actions on their own, the court noted that collectively, they might constitute adverse employment actions. In conclusion, the court held that Patten raised a triable issue of material fact regarding adverse employment action.¹²⁶

Finally, the court held that the serious acts on the district's part – proceeding in “linear” fashion from Patten's II/USP disclosures and culminating in her transfer – presented a triable issue of material fact as to a causal link between the protected activity and the adverse employment action.¹²⁷

EMPLOYEE PRIVACY RIGHTS

A. Computer Provided by Employer

In TBG Insurance Services Corporation v. Superior Court,¹²⁸ the Court of Appeal held that where an employee consents to his employer's monitoring of an employer-provided computer, the employee has no reasonable expectation of privacy with respect to the use of the computer.

In TBG Insurance Services Corporation, the employer provided two computers to the employee for the employee's use. One computer was provided for the office, and the other computer was provided to the employee to permit the employee to work at home. The employee signed the employer's “electronic and telephone equipment policy statement” and agreed in writing that his computers could be monitored by his employer. The employer terminated the employee for misuse of the office computer. The employee then sued the employer for wrongful termination and the employer demanded the return of the home computer. The employee refused to return the computer.¹²⁹

The trial court refused to compel the production of the computer. On appeal, the Court of Appeal granted the employer's petition and ordered the employee to return the computer to the employer on the basis that the employee had consented to the employer's monitoring of both computers and that the employee had no reasonable expectation of privacy when he used the home computer for personal matters.¹³⁰

For approximately twelve years, the employee worked as a senior executive for TBG Insurance Services Corporation. In the course of his employment, the employee used two computers owned by TBG, one at the office and the other at his residence. The employee signed a policy statement in which he agreed, among other things, that he would use the computers for business purposes only and not for personal benefit or non-company purposes unless such use was expressly approved. The policy statement also stated that under no circumstances would the

¹²⁶ Id. at 1390.

¹²⁷ Id. at 1390-91.

¹²⁸ 96 Cal.App.4th 443 (2002).

¹²⁹ Id. at 445-446.

¹³⁰ Id. at 446-447.

computer equipment or systems be used for improper, derogatory, defamatory, obscene or other inappropriate uses. The employee consented to have his computer use monitored by authorized company personnel on an as-needed basis and agreed that communications transmitted by computer were not private. The employee acknowledged that his improper use of the computers could result in disciplinary action including discharge.¹³¹

On November 28, 2000, the employee's employment was terminated when the employer discovered that the employee had violated the company's computer use policies by accessing pornographic sites on the Internet while he was at work. The employee filed suit and the employer filed an answer in court asking the employee to return the home computer and asking the employee not to delete any information stored on the computer's hard drive. In response, the employee acknowledged that the computer was purchased by the company and said he would either return it or purchase it, but said it would be necessary to delete, alter or destroy some of the information on the computer's hard drive since it contained personal information which is subject to a right of privacy. The company refused to sell the computer to the employee and demanded its return without any deletions or alterations and served a demand for the production of the computer on the employee. The employee objected claiming an invasion of his constitutional right of privacy.¹³²

The employer moved to compel the production of the home computer contending that it had the right to discover whether information on the hard drive shows that the employee violated the employer's computer use policy. The Court of Appeal held that the company was entitled to inspect the employee's home computer. The Court of Appeal held that the key to a privacy claim is the reasonable expectation that a person has with respect to privacy. The Court of Appeal noted that the American Management Association reported that more than three-quarters of the country's major firms monitor, record, and review employee communications and activities, including their telephone calls, e-mails, Internet connections and computer files.¹³³ The Court of Appeal noted:

“Companies that engage in these practices do so for several reasons, including legal compliance . . . legal liability . . . performance review, productivity measures and security concerns. . . .”¹³⁴

The Court of Appeal noted that employers can diminish an individual employee's expectation of privacy by clearly stating in the policy that electronic communications are to be used solely for company business and that the company reserves the right to monitor or access all employee Internet or e-mail usage. The policy should further emphasize that the company will keep copies of Internet or e-mail passwords, and that existence of such passwords is not an assurance of confidentiality of the communications. The policy should include a statement prohibiting the transmission of any discriminatory, offensive or unprofessional messages and employers should inform employees that access to any Internet sites that are discriminatory or offensive is not allowed and no employee should be permitted to post personal opinions on the

¹³¹ Id. at 445-446.

¹³² Id. at 446-448.

¹³³ Id. at 449-451.

¹³⁴ Id. at 451.

Internet using the company's access particularly if the opinion is of a political or discriminatory nature.¹³⁵ The Court of Appeal concluded:

“For these reasons, the use of computers in the employment context carries with it social norms that effectively diminish the employee's reasonable expectation of privacy with regard to his use of his employer's computers.”¹³⁶

In 2004, the California Legislature amended Penal Code sections 647 and 647.7¹³⁷ to expand the definition of “disorderly conduct” and made it a misdemeanor to use a concealed camcorder, motion picture camera, or photographic camera of any type to secretly record any person for the purpose of viewing their body or undergarments, in a bathroom, changing room, or any other area in which the person has reasonable expectation of privacy. Penal Code section 647.7, as amended, states that a violation of this provision in Section 647 of the Penal Code is a misdemeanor and is punishable by imprisonment in a county jail not exceeding one year, by a fine not exceeding \$5,000, or both.

There is no similar provision in the Education Code with respect to student discipline or employee discipline. Certainly with respect to employees, employees who engage in such conduct would be committing unprofessional acts which would justify discipline.

With respect to students, students could be suspended under Education Code section 48900(k) (Disruption of School Activities), or if the school district has sent notice of Penal Code section 647 in its annual notice to parents or included it in its student handbook as part of the student code of conduct, students could be charged with defying the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties also under Education Code section 48900(k).

On October 8, 2015, Governor Brown signed Senate Bill 178¹³⁸, adding Penal Code sections 1546 through 1546.4 effective January 1, 2016.

SB 178 establishes the Electronic Communications Privacy Act, commencing with Penal Code section 1546. Section 1546.1 states that a government entity shall not do any of the following:

1. Compel the production of or access to electronic communication information from a service provider.
2. Compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device.

¹³⁵ Id. at 451-452.

¹³⁶ Id. at 452.

¹³⁷ Senate Bill 1484, Stats. 2004, Ch. 666.

¹³⁸ Stats. 2015, Ch. 651.

3. Access electronic device information by means of physical interaction or electronic communication with the electronic device. This section does not prohibit the intended recipient of an electronic communication from voluntarily disclosing electronic communication information concerning that communication to a government entity.

Penal Code section 1546.1(b) states that a government entity may compel the production of or access to electronic communication information from a service provider, or compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device only under the following circumstances:

1. Pursuant to a search warrant.
2. Pursuant to a wiretap order.
3. Pursuant to an order for electronic reader records.
4. Pursuant to a subpoena issued pursuant to existing law, provided that the information is not sought for the purpose of investigating or prosecuting a criminal offense, and compelling the production of or access to the information via the subpoena is not otherwise prohibited by state or federal law. Nothing in this paragraph shall be construed to expand any authority under state law to compel the production of or access to electronic information.

B. Videotaping Employee

In Richardson-Tunnell v. School Insurance Program for Employees (SIPE),¹³⁹ the Court of Appeal held that a school district and its workers' compensation insurer were immune from liability under Government Code section 821.6. The Court of Appeal held that the school district's workers' compensation insurance carrier hired a private investigator to videotape the employee at her wedding and honeymoon as part of an investigation of her workers' compensation claim. The court held that the investigation or videotaping fell within the provisions of section 821.6, since the videotaping was performed for the benefit of the school district.

In addition, the Court of Appeal held that Civil Code section 1708.8(g) did not apply to government investigations. The court held that Government Code section 821.6 is a specific statute that provides immunity to public employees that are engaged in investigatory activities.

C. Polygraph Tests

California Labor Code section 432.2 provides in part, "No employer shall demand or require an applicant for employment or prospective employment or any employee to submit to a

¹³⁹ 157 Cal.App.4th 1056, 69 Cal.Rptr.3d 176, 227 Ed.Law Rep. 241 (2007).

polygraph, lie detector, or similar test or examination as a condition of employment or continued employment.” The section goes on to state, however, that it does not apply to public employers. Nevertheless, the California Supreme Court has held that polygraph testing is unconstitutional with regard to individuals who are employed by public agencies.¹⁴⁰

In Long Beach City Employees Association, the court held that involuntary polygraph examinations impinge on an employee’s right of privacy under the California Constitution.¹⁴¹ The court stated:

“If there is a quintessential zone of human privacy, it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality. . . . A polygraph examination is specifically designed to overcome this privacy by compelling communication of ‘thoughts, sentiments, and emotions’ which the examinee may have chosen not to communicate.”¹⁴²

The court concluded that the “coercive collection of mental thoughts, conditions and emotions must be justified by a compelling governing interest.”¹⁴³

D. GPS Tracking Equipment

The development of new technologies, such as personal computers, cell phones, electronic mail, and global positioning systems (GPS) create new challenges for school districts and school lawyers advising school districts. Balancing the rights of school district employers to maintain an efficient operation against the employees’ right of privacy requires careful judgment and respect for the rights of both employers and employees.

At the end of the nineteenth century, when Louis Brandeis and Samuel Warren wrote the seminal article that laid the ground work for the development of the law of privacy in the United States, they could not have possibly envisioned the possibility that mail could be sent electronically, information could be obtained from cyberspace, or that satellites would be orbiting the earth, and those satellites could be used to track vehicles and individuals on the ground.¹⁴⁴ Later, in the early 20th Century, Justice Brandeis, in a dissenting opinion, eloquently described the right of individuals to be left alone as one of the most comprehensive of rights and the right most valued by civilized society.¹⁴⁵ Justice Brandeis stated that in interpreting the Constitution, the Supreme Court must adapt to a changing world where discovery and invention were providing government with new tools to intrude into the privacy of individuals.

In this changing world, where modern technology has been developed to meet the challenges of the 21st century, GPS tracking systems offer school districts a tool which allows

¹⁴⁰ Long Beach City Employees Association v. City of Long Beach, 41 Cal.3d 937 (1986).

¹⁴¹ Article I, Section 1 of the California Constitution provides, “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

¹⁴² Id. at 945.

¹⁴³ Id. at 948.

¹⁴⁴ See, Samuel Warren and Louis D. Brandeis, The Right to Privacy, 4 Harv.L.Rev. 193 (1890).

¹⁴⁵ See, Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion of J. Brandeis).

them to address a concern common to all districts – the misuse of their vehicles by school employees. GPS tracking systems allow school administrators to determine where district vehicles are, where they are going and at what speed they are traveling.

GPS were designed to track the movement of vehicles and people. The military developed the technology after the Vietnam War to track troops on the ground in remote locations. The GPS system consists of 24 primary satellites that circle the earth every 12 hours. At any given time, five satellites are visible from a given point on earth. By measuring the length of radio signals emitted by these satellites, a receiver on earth can calculate a location within ten to one hundred meters by triangulating the signals. The GPS receiver may also calculate the speed and direction of travel.¹⁴⁶

The GPS industry has grown rapidly and commercial services using GPS technology are prevalent throughout our society. From systems that provide emergency assistance to GPS systems that give directions, many companies use the GPS tracking systems to prevent theft of company assets, verify employee productivity, and reduce insurance premiums by providing carriers with evidence that drivers comply with traffic laws. Thus, there are two principal concerns: (1) limiting employer liability, and (2) maintaining efficient business operations.

First, employers are concerned about liability for their employees' negligent acts and omissions and work-related injuries. Employers can be held liable for their employees' acts or omissions under the doctrine of respondeat superior. GPS systems can alert employers to reckless driving by employees and, in turn, employers can then take steps to significantly reduce accidents, traffic violations and potential liability. Also, if an employee is injured while driving a district vehicle, the district can quickly locate the employee and provide medical assistance.

Second, GPS systems can significantly improve school district efficiency by identifying unproductive employees, eliminating wasteful routes, and locating stolen property. Fuel costs can be lowered by helping the districts control idling and speeding which uses fuel inefficiently. Employees who deviate from appropriate routes or who engage in personal business during work time can be identified and disciplined, if necessary.¹⁴⁷

The development of GPS technology is a relatively new event. Consequently, there are very few reported cases involving GPS technology.

However, there are a number of cases relating to an individual's reasonable expectation of privacy which would be applicable to the placing of GPS tracking devices on district vehicles being driven by school district employees.

In Katz v. United States,¹⁴⁸ the U.S. Supreme Court held that individuals have a reasonable expectation of privacy in the use of public telephones. The court held that the government may not place an electronic listening device on a public telephone booth without a warrant.

¹⁴⁶ See, J. Yung, "Big Brother is Watching: How Employee Monitoring in 2004 Brought Oil Wells 1984 to Life and What the Law Should Do About It," 36 Seton Hall Law Review 163, 170 (2005).

¹⁴⁷ Id. at 172-177.

¹⁴⁸ 389 U.S. 347, 88 S.Ct. 507 (1967).

However, in Smith v. Maryland,¹⁴⁹ the U.S. Supreme Court held the government's use of a pen register, a device that records the phone numbers that an individual dials, does not violate the Fourth Amendment. The court reasoned that people are aware that when they dial a phone number in a public telephone booth they are conveying the telephone number to the telephone company since it goes to the telephone company's switching equipment. Therefore, there is a diminished expectation of privacy and it is not a violation of the Fourth Amendment to use a pen register.

The courts have applied similar principles to written communications. In United States v. Choate,¹⁵⁰ the Ninth Circuit Court of Appeals held that individuals have a reasonable expectation of privacy in their sealed letters and that the Fourth Amendment protects the warrantless opening of sealed letters and packages addressed to an individual. However, a person does not have a reasonable expectation of privacy with respect to what is written on the outside of the envelope.¹⁵¹

The courts have ruled in a similar manner with respect to electronic mail or e-mail. Individuals have a reasonable expectation of privacy with respect to the content of their e-mails but not in the "To/From" line of e-mails.¹⁵² An individual may also have a reasonable expectation of privacy in the content of their text messages.¹⁵³

Whether an employee has a reasonable expectation of privacy with respect to e-mail, text messages, the contents of their school district provided computer, or their school district provided vehicle, largely depends upon the written policies of the school district. In O'Connor v. Ortega,¹⁵⁴ the Supreme Court held that whether a public employee has a reasonable expectation of privacy must be determined on a case-by-case basis. The court held that an expectation of privacy in one's place of work is based upon societal expectations and the operational realities of the workplace. The court noted that some government offices may be so open to fellow employees or to the public that no expectation of privacy is reasonable. Given the variety of workplace environments in the public sector, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.

In contrast, where an employer has consistently stated that they may inspect the laptops that it has provided to employees, the employees' reasonable expectation of privacy is diminished.¹⁵⁵ In Muick, the Court of Appeals held that Muick had no right of privacy in the computer that the employer had provided him for use in the workplace because the employer had warned employees that it could inspect the laptops without prior notification. The court held that the employer's clear warning defeated any reasonable expectation of privacy that Muick might have. The court noted that the laptops were the employer's property and that the employer could attach whatever conditions to their use it wished. The court noted that abuse of workplace computers is so common that an employer reserving the right to inspect employer provided

¹⁴⁹ 442 U.S. 735, 742 99 S.Ct. 25, 77 (1979).

¹⁵⁰ 576 F.2d 165, 174 (9th Cir. 1978); United States v. Jacobsen, 466 U.S. 109, 114, 104 S.Ct. 1652 (1984).

¹⁵¹ See, United States v. Hernandez, 313 F.3d 1206, 1209-10 (9th Cir. 2002).

¹⁵² See, United States v. Forrester, 512 F.3d 500, 510 (9th Cir. 2008).

¹⁵³ See, Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 905 (9th Cir. 2008).

¹⁵⁴ 480 U.S. 709, 719, 107 S.Ct. 1492 (1987).

¹⁵⁵ Muick v. Glenayre Electronics, 280 F.3d 741, 743 (7th Cir. 2002).

computers was reasonable.¹⁵⁶ However, where an employee is given exclusive use of an office area, the employee may have a reasonable expectation of privacy unless the employer puts the employee on notice that the employer reserves the right to inspect the office.¹⁵⁷

Whether school districts will be required to negotiate with employee unions regarding the placing of GPS tracking devices on district vehicles largely will be dependent on state law. In most states, salaries, wages, benefits and issues that impact salaries, wages and benefits are negotiable. For example, an employer's unilateral change in the use of district vehicles rescinding the past practice of allowing school district employees to take district vehicles home was found to be negotiable. The California Public Employment Relations Board found that the additional cost to employees of driving their own vehicles to and from work, rather than district vehicles, had an impact on their salary and wages.¹⁵⁸

A strong argument can be made by a school district that the placement of a GPS tracking device on a district vehicle has no impact on a school district employee's wages, salary or benefits and therefore is not negotiable. The unions may argue that any information that is derived from the GPS tracking device and used to discipline or discharge an employee does impact the working conditions of the employee and must be negotiated.

The answer to these questions will be largely dependent on state law and will be determined by the courts or state administrative agencies that oversee labor relations in many states.

From the above case law, it appears that school districts may place GPS tracking devices on school district owned vehicles that are provided to district employees for business purposes. The district should have a written policy that puts employees on notice that a GPS tracking device will be placed on the vehicle so that the school district can track the whereabouts of the district owned vehicle at all times. The district policy should also set forth the district's policy with respect to personal use of the vehicle (e.g., whether employees may take the vehicles home before and after work hours) and the rules regarding the use of the vehicles during work hours for personal business.

The district policy should also place the employees on notice as to how the electronic monitoring works, how it will be used, the hours and days that the monitoring will occur and how the GPS data will be used.

There is a California statute relating to electronic tracking devices that resolves some issues, while creating others. Penal Code Section 637.7 states:

“(a) No person or entity in this state shall use an electronic tracking device to determine the location or movement of a person.

¹⁵⁶ Id. at 743.

¹⁵⁷ Schowengerdt v. General Dynamics Corporation, 823 F.2d 1328, 1335 (9th Cir. 1987).

¹⁵⁸ Los Angeles School Peace Officers Association v. Los Angeles Unified School District, PERB Case No. LA-CE 4181-E (October 31, 2002).

- “(b) This section shall not apply when the registered owner, lessor, or lessee of a vehicle has consented to the use of the electronic tracking device with respect to that vehicle.
- “(c) This section shall not apply to the lawful use of an electronic tracking device by a law enforcement agency.
- “(d) As used in this section, “electronic tracking device” means any device attached to a vehicle or other movable thing that reveals its location or movement by the transmission of electronic signals.
- “(e) A violation of this section is a misdemeanor.
- “(f) A violation of this section by a person, business, firm, company, association, partnership, or corporation licensed under Division 3 (commencing with Section 5000) of the Business and Professions Code shall constitute grounds for revocation of the license issued to that person, business, firm, company, association, partnership, or corporation, pursuant to the provisions that provide for the revocation of the license as set forth in Division 3 (commencing with Section 5000) of the Business and Professions Code.”

This Penal Code Section provides mixed signals as to whether a government employee has a reasonable expectation of privacy in his/her whereabouts while using a district vehicle. On the one hand, an uncodified portion of the statute provides:

“The Legislature finds and declares that the right to privacy is fundamental in a free and civilized society and that the increasing use of electronic surveillance devices is eroding personal liberty. The Legislature declares that electronic tracking of a person's location without that person's knowledge violates that person's reasonable expectation of privacy.”

On the other hand, Section 637.7 weighs against the “expectation of privacy” argument in that it does not require a law enforcement agency to obtain a warrant before placing the device on a vehicle. A predecessor to Section 637.7¹⁵⁹ was vetoed by Governor Pete Wilson because it contained a warrant requirement; Governor Wilson did not believe the placement of an electronic tracking device constituted a seizure. Section 637.7 adopts Governor Wilson’s position since it contains no warrant requirement and does not consider the use of an electronic tracking device to be a search or seizure.

The second issue raised by Section 637.7 is under what circumstances consent is required. Subdivision (b) of Section 637.7 focuses on who owns the vehicle and suggests that

¹⁵⁹ Senate Bill 443 (Burton), 1997.

when a vehicle is district-owned, there is no need to seek the employee's permission before placing an electronic tracking device on the vehicle. Yet, it should be noted that there are no cases interpreting this Penal Code section, and again, the clear intent of the statute is to preserve the privacy of individuals. Nevertheless, according to the author of this legislation, while it is intended to prohibit the placement of an electronic tracking device on someone else's vehicle, "[i]t does not prohibit in any way, the use of electronic tracking devices by persons or companies who choose to place them on their own vehicle."¹⁶⁰

There are is no binding precedent as to whether the placement of electronic tracking devices is a mandatory subject of bargaining under the EERA.

E. Text Messages

In City of Ontario vs. Quon,¹⁶¹ the United States Supreme Court held that the city's review of a police officer's text messages on a city-issued pager was reasonable and did not violate the Fourth Amendment. The Supreme Court held the search was for a work-related purpose and was reasonable in scope.

In 2001 and 2002, Quon was employed by the Ontario Police Department as a police sergeant and member of the Special Weapons and Tactics (SWAT) Team. In October 2001, the city acquired 20 pagers capable of sending and receiving text messages. Arch Wireless Operating Company provided wireless service for the pagers. Under the city's service contract with Arch Wireless, each pager was allotted a limited number of characters sent or received each month. Usage in excess of that amount would result in an additional fee. The city issued pagers to Quon and other SWAT Team members in order to help the SWAT Team mobilize and respond to emergency situations.¹⁶²

Before acquiring the pagers, the city announced a "Computer Usage, Internet and E-Mail Policy" that applied to all employees. Among other provisions, it specified that the city reserved the right to monitor and log all network activity, including e-mail and Internet use, with or without notice. The policy also stated that users should have no expectation of privacy or confidentiality when using these resources. Quon signed a statement acknowledging that he had read and understood the Computer Policy. Although the Computer Policy did not cover text messages by its explicit terms, the city made clear to employees, including Quon, that the city would treat text messages the same way it treated e-mails.¹⁶³

Within the first or second billing cycle after the pagers were distributed, Quon exceeded his monthly text message character allotment. Quon was reminded that messages sent on the pagers were considered e-mail and could be audited. Quon was advised to reimburse the city for the overage fee rather than having his supervisor audit the messages. Quon wrote a check to the city for the overage.¹⁶⁴

¹⁶⁰ Assembly Committee on Public Safety Bill Analysis (June 23, 1998).

¹⁶¹ 130 S.Ct 2619 (2010).

¹⁶² Id. at 2624-25.

¹⁶³ Id. at 2625.

¹⁶⁴ Ibid.

Over the next few months, Quon exceeded his character limit three or four times. Each time he reimbursed the city. The police chief then decided to determine whether the existing character limit was too low and whether officers, such as Quon, were having to pay fees for sending work-related messages or if the overages were for personal messages. The police chief requested transcripts of text messages sent in August and September by Quon and the other employee who had exceeded the character allowance.¹⁶⁵

Quon's supervisor reviewed the transcripts and discovered that many of the messages sent and received on Quon's pager were not work-related and some were sexually explicit. Quon's supervisor reported his findings to the police chief to review the transcripts. Quon sent or received 456 messages during work hours in the month of August 2002, of which no more than 57 were work related. He sent as many as 80 messages during a single day at work, and on an average workday, Quon sent or received 28 messages, of which only three were related to police business.¹⁶⁶

The court determined, regardless of whether Quon had a reasonable expectation of privacy in the text messages, the search was reasonable under the circumstances. The court held that the search was justified at its inception because there were reasonable grounds for suspecting that the search was necessary for a non-investigatory work related purpose. The police chief had ordered the search in order to determine whether the character limit on the city's contract with Arch Wireless was sufficient to meet the city's needs. The court ruled that this was a legitimate work-related rationale for the search.¹⁶⁷ The court stated:

“The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications.”¹⁶⁸

The Court of Appeal held that the scope of the search, in reviewing the transcripts, was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use. The court held that the fact that the search did reveal intimate details of Quon's life does not make it unreasonable. The court held that under the circumstances, a reasonable employer would not expect that such a review would intrude on such matters and held that the search was permissible in its scope.¹⁶⁹ The court concluded:

“Because the search was reasonable, petitioners did not violate respondents' Fourth Amendment rights, and the court below erred by concluding otherwise.”¹⁷⁰

¹⁶⁵ Id. at 2625-26.

¹⁶⁶ Ibid.

¹⁶⁷ Id. at 2628-31.

¹⁶⁸ Id. at 2631.

¹⁶⁹ Id. at 2631-33.

¹⁷⁰ Id. at 2633.

While the court did not clearly rule on the city's policy and the employee's expectation of privacy, the court did rely on the fact that much information was given to Quon about the use of city equipment, and that the city reserved the right to review text messages and e-mails. Our office will continue to recommend that districts maintain clear policies with respect to the use of district technology and clearly indicate to employees that the district may review e-mail, text messages, and other messages sent by employees using district equipment, and that employees should have no reasonable expectation of privacy with respect to the e-mails, text messages and other messages the employee sends using district equipment. Employees should understand that if they wish to send personal messages which are inappropriate for the work place, those messages should be sent on the employee's personal communication devices.

F. Use of Social Media

Labor Code section 980¹⁷¹ applies to all public and private employers in California.

Labor Code section 980(b) states that an employer shall not require or request an employee or applicant for employment to do any of the following:

1. Disclose a username or password for the purpose of accessing personal social media.
2. Access personal social media in the presence of the employer.
3. Divulge any personal social media, except as provided in Labor Code section 980(c).

Labor Code section 980(a) defines "social media" as an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, e-mail, online services or accounts, or Internet website profiles or locations. Labor Code section 980(c) states that nothing in Labor Code section 980 shall affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.

Labor Code section 980(d) states that nothing in Section 980 precludes an employer from requiring or requesting an employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device. Section 980(e) states that an employer shall not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for not complying with a request or demand by the employer that violates Labor Code section 980. However, Section 980(e) does not prohibit an employer from terminating or otherwise taking an adverse action against an employee or applicant if otherwise permitted by law. Section 2 of Assembly Bill 1844 states that, notwithstanding any other provision of law, the Labor Commissioner, who is the Chief of the Division of Labor Standards and Enforcement, is not required to investigate or determine any violation of Labor Code section 980.

¹⁷¹ Stats. 2012, ch. 618 (A.B. 1844).

G. Taping Conversations of Employees

Penal Code section 632 makes tape recording a private conversation without permission a crime punishable by a fine not exceeding \$10,000, by imprisonment in the county jail not exceeding one year, or in a state prison, or both. Penal Code section 632(a) states:

“Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Sections 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars (\$10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.”

Therefore, a parent or any individual may not lawfully tape record a conversation between a school district employee and another individual without the permission and consent of all of the individual school district employees involved. The main exception to this rule that applies to school districts is the audiotaping of IEP meetings. Education Code section 56341.1(f) states that notwithstanding Section 632 of the Penal Code, the parent or guardian, district, SELPA, or county office shall have the right to audiotape an IEP meeting.

PRIVACY OF SOCIAL SECURITY NUMBERS

The California Public Records Act, Government Code section 6250 et seq., generally make all records in the possession of a public agency a public record unless there is a statutory exception. Section 6254.1(a) states that the home addresses and home telephone numbers of employees of the school district or county office of education shall not be deemed to be public records and shall not be open to public inspection except to an employee organization. Under Section 6254.3(b), an employee may request that the school district or county office of education not disclose the employee's home address or home telephone number to an employee organization. Government Code section 6254 exempts personnel files from the requirements of the Public Records Act if their disclosure would constitute an unwarranted invasion of personal privacy.

The Federal Privacy Act of 1974,¹⁷² states as follows:

“Any federal, state or local agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.”

There does not appear to be any general statutory authority requiring the disclosure of individual social security numbers.

A school district may request a copy of an employee’s social security card to verify the employee’s authorization to work. A school district may not ask for a copy of the social security card but may ask an employee who presents a social security card to establish employment eligibility to provide an original social security card to verify whether the employee is authorized to work in the United States. However, an employee may present other documents to verify authorization to work.

EMPLOYEE AUTHORIZATION TO WORK IN THE UNITED STATES

In 1996, changes were made in federal immigration law which made it unlawful for an employer to knowingly hire for employment an alien who is not authorized to work in the United States.¹⁷³ The federal immigration law established an employment verification system,¹⁷⁴ which requires the employer hiring an individual for employment in the United States to state, under penalty of perjury, on a form designated or established by the Attorney General that the individual is not an unauthorized alien. Compliance is accomplished by examining appropriate documents and the employer has complied with the requirement of Section 1324a(b) if the documents reasonably appear on their face to be genuine.

The federal law¹⁷⁵ set forth the documents establishing both employment authorization and identity. An individual may present either an original document which establishes both employment authorization and identity or an original document which establishes employment authorization and a separate original document which establishes identity. An employer must use the Form I-9 to document examination of the documentation. The following documents (List A), so long as they appear to relate to the individual presenting the document, are acceptable as evidence of both identity and employment eligibility:

1. United States Passport (unexpired or expired);
2. Alien Registration Receipt Card or Permanent Resident Card, Form I-551;

¹⁷² 5 U.S.C. Section 552(a).

¹⁷³ 8 U.S.C. Section 1324a.

¹⁷⁴ 8 U.S.C. Section 1324a(b).

¹⁷⁵ 8 U.S.C. Section 1324a(b)(1)(B) and the federal regulations, 8 C.F.R. Section 274(a)(2).

3. An unexpired foreign passport that contains a temporary I-551 stamp;
4. An unexpired Employment Authorization Document issued by the Immigration and Naturalization Service which contains a photograph, Form I-766, Form I-688, Form I-688A, or Form I-688B;
5. In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, an unexpired foreign passport with an Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, so long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on Form I-94.

The federal regulations,¹⁷⁶ state that the following documents (List B) are acceptable to establish identity only:

1. A driver's license or identification card containing a photograph issued by a state or an outlying possession of the United States. If the driver's license or identification card does not contain a photograph, identifying information shall be included, such as name, date of birth, sex, height, color of eyes, and address;
2. School identification card with a photograph;
3. Voter's registration card;
4. U.S. military card or draft record;
5. Identification card issued by federal, state, or local government agencies or entities. If the identification card does not contain a photograph, identifying information shall be included, such as name, date of birth, sex, height, color of eyes, and address;
6. Military dependent's identification card;
7. Native American tribal documents;
8. United States Coast Guard Merchant Mariner Card;
9. Driver's license issued by a Canadian government authority.

¹⁷⁶ 8 C.F.R. Section 274a.2(b)(2)(B).

The Federal Regulations,¹⁷⁷ state that the following documents (List C) may establish employment authorization only:

1. A social security number card other than one which has printed on its face “not valid for employment purposes;”
2. A Certification of Birth Abroad issued by the Department of State, Form FS-545;
3. A Certification of Birth Abroad issued by the Department of State, Form DS-1350;
4. An original or certified copy of a birth certificate issued by a State, county, municipal authority or outlying possession of the United States bearing an official seal;
5. Native American tribal document;
6. United States Citizen Identification Card, INS Form I-197;
7. Identification card for use of resident citizen in the United States, INS Form I-179;
8. An unexpired employment authorization document issued by the Immigration and Naturalization Service.

A Handbook for Employers, Instructions for Completing Form I-9, has been published by the Department of Justice, Immigration and Naturalization Service (revised November 21, 1991). The handbook states that the employer may not specify which documents an employee must present and provides instructions on how to complete the I-9 Form. The handbook also provides a list of acceptable documents which is similar to the list specified in the federal regulations and discussed above. Therefore, an employer may not require an employee to provide their social security card but may only require an acceptable document from the list(s) above.

An employer may require the employee to provide the employer with their social security number for tax reporting purposes. This number is then reported to the Social Security Administration which verifies the name and social security number. The Social Security Administration may generate “no match” letters when they receive a social security number for an employee that does not match the agency’s records. The typical social security “no match” letter entitled “Employer Correction Request,” generally sets forth the discrepancies between the Social Security Administration’s information and the employee information provided by the employer on the W-2 form and requests that employers respond to the letter with corrections within 60 days.

¹⁷⁷ 8 C.F.R. Section 274a.2(b)(C).

The Immigration and Naturalization Service does not as a general matter believe that a “no match” letter from the Social Security Administration, in and of itself, places an employer on notice that the employee is ineligible to work or require the employer to conduct re-verification of documents since there may be many legitimate reasons for a discrepancy between the name and social security number reported by the employee on the W-2 and Social Security Administration records. Discrepancies can arise in a “no match” letter from typographical errors, changed names or use of compound last names. However, in certain situations the employer must re-verify the documents if the Social Security Administration informs the employer that the following social security numbers are invalid for the following reasons:

1. Numbers with more or less than nine digits:
2. Numbers whose first digits are 000 or are in the 800 or 900 series;
3. Numbers whose middle two digits are 00 and number whose last four digits are 0000.

In such cases, the employer must re-verify the worker’s work eligibility. The failure to conduct re-verification in these circumstances could lead to a finding that the employer knowingly continued to employ an unauthorized alien if it turns out that the employee is undocumented.

It should be noted that the Social Security Administration does not share mismatch information with the Immigration and Naturalization Services except in limited circumstances. However, the Social Security Administration does provide the Internal Revenue Service with information on “no match” W-2 forms and the IRS may penalize an employer when the name and social security number do not match Social Security Administration records.

Employers should apply a uniform policy in dealing with “no match” letters to avoid claims of discrimination. The employer should first attempt to reconcile its own records with those of the Social Security Administration by determining whether an administrative error could have resulted when the information was transmitted from the school district to the social security agency. The employer may also contact the employee and request verification of their social security number for purposes of correcting any errors. A copy of the Social Security Administration letter should be provided to the employee. Information regarding alternative name spellings or name changes should also be solicited from the employee.

If the school district’s follow up activity reveals that the information on the I-9 form was recorded erroneously or relates to a name change, the discrepancy should be corrected with the Social Security Administration and the employee’s Form I-9 should be updated as well. If, in the course of the district’s follow-up activity, the employee in question reveals that they provided a false social security number to secure employment but since that time have secured work authorization and can now provide a valid number, the employer should confer with legal counsel to determine what action, if any, should be taken with regard to the employee (i.e., termination or other discipline).

In summary, the school district may request further information from an employee when a “no match” letter is received from the Social Security Administration but cannot require the employee to produce a social security card. The employee may voluntarily produce a social security card. In such cases, the district may send a copy to the Social Security Administration as a means of resolving discrepancies.

Upon notification of a name change, an employer may request appropriate information but may not request a social security card. As mentioned above, however, for tax purposes, the school districts certainly may request a social security number from the employee.

On October 9, 2015, Governor Brown signed Assembly Bill 622¹⁷⁸, which adds Labor Code section 2814 effective January 1, 2016.

Labor Code section 2814(a) states that except as required by federal law, or as a condition of receiving federal funds, it shall be unlawful for an employer, or any other person or entity to use the federal electronic employment verification system known as E-Verify to check the employment authorization status of an existing employee or an applicant who has not been offered employment at a time or in the manner not required under by 8 U.S.C. § 1324a(b) or not authorized under any memorandum of understanding governing the use of a federal electronic employment verification system. Nothing in section 2814 shall prohibit an employer from utilizing an employment verification system, in accordance with federal law, to check the employment authorization status of a person who has been offered employment.

Labor Code section 2814(b) states that upon using the federal E-Verify system to check the employment authorization status of a person, if the employer receives a tentative nonconfirmation issued by the Social Security Administration or the United States Department of Homeland Security, which indicates the information entered in E-Verify did not match federal records, the employer shall comply with the required employee notification procedures under any memorandum of understanding governing the use of the federal E-Verify system. The employer shall furnish to the employee any notification issued by the Social Security Administration or the United States Department of Homeland Security containing information specific to the employee’s E-Verify case or any tentative nonconfirmation notice. The notification shall be furnished as soon as practicable.

Labor Code section 2814(c) states that in addition to other remedies available, an employer who violates section 2814 is liable for a civil penalty not to exceed ten thousand dollars (\$10,000) for each violation of section 2814. Each unlawful use of the E-Verify system on an employee or applicant constitutes a separate violation. Section 2814(d) states this section is intended to prevent discrimination in employment rather than to sanction the potential hiring and employment of persons who are not authorized for employment under federal law.

JUDICIAL APPEARANCES AND JURY DUTY

The Education Code authorizes the governing boards of school districts to grant leaves of absence to employees, with pay, to appear as witnesses in court, other than as a litigant, or to

¹⁷⁸ Stats. 2015, Ch. 696.

respond to an official order from another governmental jurisdiction for reasons not brought about through the connivance or misconduct of the employee.¹⁷⁹ The governing board of the school district may also grant leaves of absence with pay to employees called for jury duty up to the amount of the difference between the employee's regular earnings and any amount the employee receives for jury duty or witness fees.¹⁸⁰

No governing board of a school district may adopt or maintain any rule, regulation or policy which has, as its purpose or effect, a tendency to encourage employees to seek exemption from jury duty or to discriminate against any employee in any other manner because of his or her service on any jury panel. However, the governing board or a personnel commission may provide by rule that only a percentage of its staff (which percentage shall not be less than 2%) shall be granted leave with pay to serve on a jury at any one time.¹⁸¹

REIMBURSEMENT OF TRAVEL EXPENSES

The governing board of a school district must provide for the payment of actual and necessary expenses, including travel expenses, of any employee of the district incurred in the course of performing services for the district, whether within or outside the district, under the direction of the governing board.¹⁸² The Court of Appeal has ruled that even employees who volunteer for overtime duty must be reimbursed for meals taken during trips made for the school district.¹⁸³

The governing board may provide for the reimbursement of an employee of the district for the use of his or her automobile in the performance of regularly assigned duties by establishing an automobile allowance for such use on a mileage or monthly basis.¹⁸⁴ The governing board of a school district may also reimburse candidates who are being interviewed for employment for travel to the district headquarters for the purpose of being interviewed prior to possible employment.¹⁸⁵

However, actual and necessary expenses incurred by employees do not include reimbursement to the employees for the cost of meals purchased for community leaders, including public officials, irrespective of whether such acts are deemed to be in the best interests of the school district.¹⁸⁶

PERSONNEL FILES

A. Employee Rights

The Education Code regulates the contents and the procedures by which materials may be placed in an employee's personnel file. Materials in employee personnel files that may serve as

¹⁷⁹ Education Code section 44036.

¹⁸⁰ Ibid.

¹⁸¹ Education Code section 44037.

¹⁸² Education Code section 44032.

¹⁸³ California School Employees Association v. Travis Unified School District, 156 Cal.App.3d 242 (1984).

¹⁸⁴ Education Code section 44033.

¹⁸⁵ Education Code section 44016.

¹⁸⁶ 61 Ops.Cal.Atty.Gen. 303 (1978).

a basis for affecting the status of a person's employment must be made available for the inspection of the person involved. The material that may be inspected does not include ratings, reports or records that were obtained prior to the employment of the person involved, were prepared by identifiable examination committee members, or were obtained in connection with a promotional examination.¹⁸⁷

Every employee has the right to inspect materials in his or her personnel file provided that the request is made at a time when the person is not actually required to render services to the school district. Information of a derogatory nature cannot be entered or filed unless and until the employee has been given notice and an opportunity to review and comment upon the derogatory material. Each employee has the right to enter and have attached to any derogatory statement his or her own comments. Review of the derogatory materials must take place during normal business hours, and the employee has the right to be released from duty for the purpose of reviewing derogatory materials without salary deduction.¹⁸⁸

These statutory provisions presuppose that there will be only one personnel file for each public school employee. Therefore, school districts or school employees who retain separate files containing materials, notes, reports or other background materials which are not in the personnel file regarding an employee they supervise may not be able to use the material in these separate files when seeking to dismiss employees.¹⁸⁹

Education Code section 44031 grants school district employees the right to inspect personnel records pursuant to Labor Code section 1198.5. Section 1198.5(d) makes it clear that an employee's right of inspection does not extend to records relating to the investigation of a possible criminal offense, nor to letters of reference. Additionally, Section 1198.5(c) provides that an employer has the following options for making personnel records available to employees:

“(1) Keep a copy of each employee's personnel records at the place where the employee reports to work.

“(2) Make the employee's personnel records available at the place where the employee reports to work within a reasonable period of time following an employee's request.

“(3) Permit the employee to inspect the personnel records at the location where the employer stores the personnel records, with no loss of compensation to the employee” (i.e., at the district office).”

In Miller v. Chico Unified School District,¹⁹⁰ the California Supreme Court held that a school district may not base its decision to demote a school employee on derogatory written materials unless the employee had an opportunity to review and comment on the materials. The court held that the requirements of the Education Code could not be avoided by placing material

¹⁸⁷ Education Code section 44031.

¹⁸⁸ Education Code section 44031.

¹⁸⁹ Miller v. Chico Unified School District, 24 Cal.3d 703 (1979).

¹⁹⁰ 24 Cal.3d 703 (1979).

in another file. The maintenance of a single personnel file in the district's personnel office, together with appropriate notice procedures to the employee, will ensure compliance with the statutory requirements and the requirements of Miller v. Chico Unified School District.

Personnel records are permanent records and must be retained indefinitely. Derogatory information becomes a part of the permanent record if the time for filing the grievance has lapsed or the document has been sustained by the grievance procedure. There is no authority to remove material that was initially placed in the personnel file properly.¹⁹¹

B. Contents of Personnel Files

The following are examples of documents that generally should be included within a personnel file. It is not an exhaustive list as certain documents will vary by district.

Documents that should be Included within a Personnel File:

- Benefits/retirement/beneficiary forms
- Pre-employment references
- Credential/licensing documents
- Transcripts
- New hire forms
- Job application/resume
- Offer letter and acceptance
- Performance evaluations
- Attendance records
- Disciplinary/derogatory information that has been issued in accordance with Education Code section 44031
- Acknowledgements signed by the employee (e.g., child abuse reporting requirement, oath or affirmation of allegiance, Hepatitis B vaccine declination, drug and alcohol testing policy, STRS notice, sexual harassment policy, acceptable use policy, etc.)
- Notices issued pursuant to law (e.g., notice of layoff, notice of release from position requiring an administrative or supervisory credential, etc.)
- Documentation affecting the employee's employment and terms and conditions of employment, such as rate of pay, schedule, and work location
- Record of district property issued to employee
- Requests for transfer
- Wage attachment/garnishment notices
- W-4 forms
- Verification of employment/salary

¹⁹¹ Title 5, C.C.R. section 16023.

Note: The following documents should be contained in the personnel file, but the employee has no right of access to the documents: letters of reference, records that were obtained prior to the employee's employment, ratings or reports prepared by identifiable examination committee members, and records obtained in connection with a promotional examination.¹⁹²

There are a variety of documents that **may** be included in a personnel file, but some districts may choose not to include them for a variety of reasons. Examples include:

- Awards
- Letters complimenting the employee's performance

The following are examples of the types of documents that should not be included within a personnel file. These documents must be maintained in accordance with the district's records retention and destruction schedule, but should be kept in a location separate from the personnel file.

Documents that should be kept in a Separate File in HR (Not in the Personnel File):

- I-9 Forms
- EEOC/DFEH charge of discrimination and related documents
- Grievances filed by the employee and related documents
- Workers' compensation claims and related documents
- Medical information (including leave forms that contain medical information concerning an employee or an employee's family member)¹⁹³
- Genetic information
- Survey of ethnic status or disabled or veteran status
- Records relating to the investigation of a possible criminal offense
- Unsubstantiated complaints made against an employee by a student, parent or employee
- Derogatory information that has not been issued in accordance with Education Code section 44031

Note: It is a common practice for administrators to keep notes in a "desk file" regarding employees. This file may include unsubstantiated complaints made against the employee, derogatory information that has not been issued in accordance with Education Code section 44031, and documents that are in draft form. This is an acceptable practice; however, administrators should be aware that unless and until employees are given proper notice of the information contained in a "desk file," that information cannot be used for disciplinary purposes.

¹⁹² Labor Code section 1198.5; Education Code section 44031.

¹⁹³ Civil Code section 56.20. "Medical information" is defined as "any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient's medical history, mental or physical condition, or treatment."

C. Retention of Records

A variety of timelines come into play in maintaining employment-related documents. Districts should check their records retention policies to determine if a particular retention schedule has been adopted for the record at issue. Pursuant to the Title 5 regulations, prior to each January 1, the Superintendent or designee is required to review the prior year's records and classify them as a Class 1 (Permanent), Class 2 (Optional), or Class 3 (Disposable) record.¹⁹⁴

Records of a continuing nature (active and useful for administrative, legal, fiscal, or other purposes over a period of years) shall not be classified until such usefulness has ceased.¹⁹⁵

When an electronic or photographed copy of a Class 1 (Permanent) record has been made, the copy may be classified as Class 1 (Permanent) and the original classified as either Class 2 (Optional) or Class 3 (Disposable). However, no original record that is basic to any required audit may be destroyed prior to the second July 1st succeeding the completion of the audit.¹⁹⁶

Class 1 (Permanent) Records include all detail records relating to employment; assignment; amounts and dates of service rendered; termination or dismissal of an employee in any position; sick leave record; rate of compensation; salaries, or wages paid; and deductions or withholdings made and the person or agency to whom such amounts were paid. In lieu of the detail records, a complete proven summary payroll record for each employee containing the same data may be classified as Class 1 (Permanent) and the detail records may then be classified as Class 3 (Disposable).¹⁹⁷ A Class 1 (Permanent) record shall be retained indefinitely unless microfilmed in accordance with 5 CCR 16022.¹⁹⁸ All Class 3 (Disposable) records shall be destroyed during the third school year after the school year in which the records originated, except that Class 3 (Disposable) records shall not be destroyed until after the third school year following the completion of any legally required audit or the retention period required by any agency other than the State of California, whichever is later.

Various state and federal laws provide retention requirements as well. For example, FEHA requires employers to retain records, including applications, personnel records, and employment referral records for at least two years following the date they are created or received, or the date the personnel action occurs, whichever is later.¹⁹⁹ The Age Discrimination in Employment Act requires that employers retain personnel and pay records for three years.²⁰⁰ Wage and hour records generally must be retained for at least three years.²⁰¹

Finally, there is an argument that personnel records may not be classified as Class 1 (Permanent), and microfilmed, as long as they are records of a “continuing nature.” Since most

¹⁹⁴ 5 C.C.R. Section 16022.

¹⁹⁵ Id.

¹⁹⁶ Education Code section 35254.

¹⁹⁷ Information of a derogatory nature as defined in Education Code section 44031 that is not sustained by the grievance process is a Class 3 (Disposable) record.

¹⁹⁸ 5 C.C.R. Section 16023.

¹⁹⁹ 22 C.C.R. Sections 7287.0(b)(3) and 7287.0(c).

²⁰⁰ 29 C.F.R. Section 1627.3

²⁰¹ 29 C.F.R. Sections 516.1-516.5.

personnel records of current employees may have a continuing usefulness to the District, we recommend that the original permanent records of active employees be maintained until the employee is no longer employed, even documents that have already been imaged. In addition, we recommend that districts retain original permanent records of former employees for four years after the document is imaged. These recommendations should ensure that districts are in compliance with the retention requirements of state and federal law.

Education Code section 35254²⁰² provides:

“The governing board of any school district may make photographic, microfilm, or electronic copies of any records of the district. The original of any records of which a photographic, microfilm, or electronic copy has been made may be destroyed when provision is made for permanently maintaining the photographic, microfilm or electronic copies in the files of the district, except that no original record that is basic to any required audit shall be destroyed prior to the second July 1st succeeding the completion of the audit.” [Emphasis added.]

Civil Code Section 1633.12²⁰³ also providing in part:

“(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record, if the electronic record reflects accurately the information set forth in the record at the time it was first generated in its final form as an electronic record or otherwise, and the electronic record remains accessible for later reference.” [Emphasis added.]

Although Section 1633.12 is in a Civil Code article governing “electronic transactions,” Section 1633.2(o) defines “transaction” as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.” We believe that this definition is sufficiently broad to encompass permanent school district personnel records.

In summary, Education Code section 35254 and Civil Code section 1633.12 authorize making electronic copies of permanent personnel records.

With regard to the destruction of original permanent personnel records that have been electronically copied, the State Board of Education has adopted regulations implementing Education Code sections 35250, et seq. These regulations are set forth in Title 5, California Code of Regulations (C.C.R.) sections 16020 et seq. Section 16022 provides in part:

²⁰² Stats.1999, ch. 646.

²⁰³ Stats.1999, ch. 428.

“(c) Microfilm Copy. Whenever an original record is photographed, microphotographed, or otherwise reproduced on film, the copy thus made is hereby classified as Class 1-Permanent. The original record, unless classified as Class 2-Optional, may be classified as Class 3-Disposable and then may be destroyed in accordance with this chapter...”

With regard to the destruction of Class 3-Disposable records, Title 5, C.C.R. sections 16026 and 16027 provide:

“16026. Retention.

“A Class 3-Disposable record shall not be destroyed until after the third July 1 succeeding the completion of the audit required by Education Code section 41020 or of any other legally required audit, or after the ending date of any retention period required by any agency other than the State of California, whichever date is later. A continuing record shall not be destroyed until the fourth year after it has been classified as Class 3-Disposable.”

“16027. Destruction of Records.

“Unless otherwise specified in this chapter, all Class 3-Disposable records shall be destroyed during the third school year after the school year in which they originated (e.g., 1976-77 records may be destroyed after July 1, 1980).”

Section 16022(c) has not yet been amended to reflect the new authority to make electronic copies, as provided in Education Code section 35254. However, there has been no revision of Section 35254’s provisions concerning destruction of original permanent records that have been copied. Thus, there is no doubt that the provisions of Title 5, C.C.R. Sections 16022(c), 1626 and 1627, concerning destruction of permanent records that have been copied, remain valid legal requirements.

In view of the somewhat confusing interrelationship of Education Code section 35254 and Title 5, C.C.R. Sections 16022(c), 1626 and 1627, the California Association of School Business Officials (CASBO) has conservatively recommended a four-year retention period for original permanent records that have been copied. (See, Records Retention Manual, 4th ed., 2001.) We concur with this recommendation.

FINGERPRINTS OF EMPLOYEES

On September 30, 1997, the Governor signed legislation imposing new requirements on school districts and county offices of education with regard to criminal record checks of agency

employees and employees of contractors.²⁰⁴ The bills took effect immediately as urgency legislation. The legislation was a response to the tragic rape and murder of a Sacramento area high school senior allegedly by a substitute custodian with a history of convictions for violent crimes.

The legislation added Section 44830.1 to the Education Code, providing that a school district may not employ a person convicted of a violent or serious felony in a certificated position, including a certificated administrative position. A school district may not retain in employment a current certificated employee who has been convicted of a violent or serious felony and who is a temporary employee, a substitute employee, or a probationary employee serving before March 15 of the employee's second probationary year.

When the Department of Justice notifies a school district by telephone that a current temporary employee, substitute employee or probationary employee serving before March 15 of the employee's second probationary year has been convicted of a violent or serious felony, the district must immediately place that employee on leave without pay. When the district receives written confirmation of the conviction from the Department of Justice, the employee must be terminated automatically without hearing, unless the employee challenges the record of the Department of Justice and the Department withdraws in writing its notification to the district. Upon receipt of this written withdrawal of notification, the district must immediately reinstate the employee with full restoration of salary and benefits for the period of time from the suspension without pay to the reinstatement.

The legislation amended Education Code section 45125 to require a completed criminal record check on applicants for classified positions before work may begin. There is an exception for secondary school students employed in temporary or part-time positions by their own districts. Previously, the fingerprinting could be done within ten working days of the date of employment, and employees could work pending completion of the criminal record check. The requirement now extends to substitute and temporary employees who previously could be exempted at a district's discretion.

For employees hired after September 30, 1997, the Department of Justice is now required to complete the criminal record check and notify districts of the Department's findings no more than fifteen working days after receiving the fingerprint cards. This period should be reduced to three working days upon implementation of an electronic fingerprinting system by the Department of Justice. If a school district is notified by the Department of Justice that the Department cannot ascertain the required information about a person, the district may not employ that person until the Department ascertains the information.

For employees hired before October 1, 1997, the Education Code requires districts to forward a request to the Department of Justice indicating the number of current employees who have not yet completed fingerprinting requirements.²⁰⁵ We believe that this requirement applies to substitute and temporary employees, even for districts who had exempted these employees from fingerprinting prior to enactment the legislation. The Department of Justice is required to

²⁰⁴ Stats.1997, ch.. 588 (A.B. 1610); Stats.1997, ch. 598 (A.B. 1612).

²⁰⁵ Education Code section 45125.

direct districts when the cards are to be forwarded to it for processing, but not later than 30 working days after the effective date of the legislation. The Department is required to process these cards within 30 working days of their receipt. Districts that have previously submitted cards for current employees are not required to do anything further.²⁰⁶

The Education Code provides that a school district may not employ a person convicted of a violent or serious felony in a classified position. A school district may not retain in employment a current classified employee who has been convicted of a violent or serious felony and who is a temporary, substitute, or probationary employee.²⁰⁷

When the Department of Justice notifies a school district by telephone that a current temporary, substitute, or probationary employee has been convicted of a violent or serious felony, the district must immediately place that employee on leave without pay. When the district receives written confirmation of the conviction from the Department of Justice, the employee must be terminated automatically without hearing, unless the employee challenges the record of the Department of Justice and the Department withdraws in writing its notification to the district. Upon receipt of this written withdrawal of notification, the district must immediately reinstate the employee with full restoration of salary and benefits for the period of time from the suspension without pay to the reinstatement.²⁰⁸

The definitions of “violent” and “serious” felonies apply to both certificated and classified employees. The Penal Code lists the following “violent” felonies: murder; voluntary manslaughter; mayhem; rape; sodomy by force; oral copulation by force; lewd acts on a child under the age of 14 years; any felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant inflicts great bodily injury on another; any robbery perpetrated in an inhabited dwelling; arson; penetration of a person’s genital or anal openings by foreign or unknown objects against the victim’s will; attempted murder; explosion or attempt to explode or ignite a destructive device or explosive with the intent to commit murder; kidnapping; continuous sexual abuse of a child; and carjacking.²⁰⁹

The Penal Code lists the following “serious” felonies: murder; voluntary manslaughter; mayhem; rape; sodomy by force; oral copulation by force; a lewd or lascivious act on a child under the age of 14 years; any felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant personally inflicts great bodily injury on another, or in which the defendant personally uses a firearm; attempted murder; assault with intent to commit rape or robbery; assault with a deadly weapon on a peace officer; assault by a life prisoner on a noninmate; assault with a deadly weapon by an inmate; arson; exploding a destructive device with intent to injure or to murder, or explosion causing great bodily injury or mayhem; burglary of an inhabited dwelling; robbery or bank robbery; kidnapping; holding of a hostage by a person confined in a state prison; attempt to commit a felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant personally uses a dangerous or deadly weapon; selling or furnishing specified controlled substances to a minor; penetration of genital or

²⁰⁶ Ibid.

²⁰⁷ Education Code section 45122.1.

²⁰⁸ Ibid.

²⁰⁹ Penal Code section 667.5(c).

anal openings by foreign objects against the victim's will; grand theft involving a firearm; carjacking; and a conspiracy to commit specified controlled substances offenses.²¹⁰

For both certificated and classified employment, a person may not be denied employment or dismissed solely on the basis of a conviction, if the person has obtained a certification of rehabilitation and pardon or can prove to the sentencing court that he or she has been rehabilitated for the purposes of school employment for at least one year.²¹¹ The 1997 legislation also added provisions to the Education Code requiring criminal record checks of persons who may have any contact with students while employed by an entity that has a contract with a school district to provide any of the following or similar services: school and classroom janitorial, school site administrative, pupil transportation, or school site food-related.²¹²

If the school district determines that the employees of the independent contractor will have limited contact with pupils, the fingerprinting is not necessary. The school district, in making this determination, must consider the length of time contractors will be on school grounds, whether pupils will be in close proximity to the site where the contractor is working and whether the contractor will be by themselves or with others.²¹³

EMPLOYEE CRIMINAL HISTORY RECORD INFORMATION

Assembly Bill 2343²¹⁴ amended Penal Code sections 11105 and 11105.2 relating to criminal history record information, effective January 1, 2013.

Penal Code section 11105(t) states that whenever state or federal summary criminal information is furnished by the Department of Justice as a result of an application by an authorized agency and the information is to be used for employment, licensing, or certification purposes, the authorized agency shall expeditiously furnish a copy of the information to the person to whom the information relates if the information is a basis for an adverse employment, licensing, or certification decision. When furnished other than in person, the copy shall be delivered to the last contact information provided by the applicant.

Penal Code section 11105.2(a) was amended to state that when the Department of Justice supplies subsequent arrest or disposition notification to a receiving entity, the entity shall, at the same time, expeditiously furnish a copy of the information to the person to whom it relates if the information is a basis for an adverse employment, licensing, or certification decision. When furnished other than in person, the copy shall be delivered to the last contact information provided by the applicant.

The legislation does not define what is meant by “expeditiously” or what is meant by an “adverse employment, licensing, or certification decision.”

²¹⁰ Penal Code section 1192.7.

²¹¹ Education Code sections 44830.1, 45122.1.

²¹² Education Code section 45125.1.

²¹³ Ibid.

²¹⁴ Stats. 2012, ch. 256.

Generally, the courts have used the term “adverse employment action” rather than “adverse employment decision.” In Yanowitz v. L’Oreal USA, Inc.,²¹⁵ the California Supreme Court defined the term “adverse employment action” as an action that affects the terms, conditions, and privileges of employment and is reasonably likely to impair a reasonable employee’s job performance or prospects for advancement or promotion. The court pointed out that adverse employment actions would include termination, demotion, and the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career.²¹⁶ The court further stated that minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable.²¹⁷

An adverse employment action includes a refusal or failure to hire an applicant for employment.²¹⁸ Therefore, we would recommend that OCDE provide a copy of the criminal history record information to the individual if any adverse employment decision or action was taken, including refusal to hire or promote, discharge, dismissal, or demotion. We would recommend providing this information within ten days. We believe that a 10-day time period would meet the requirement to provide the information “expeditiously.”

VOLUNTEER AIDES

The Education Code permits the governing boards of school districts to allow volunteers to perform the services of nonteaching volunteer aides under the immediate supervision and direction of the certificated personnel of the district to perform noninstructional work. The Education Code states that any person, except a person required to register as a sex offender, pursuant to Section 290 of the Penal Code, may serve as a volunteer aide.²¹⁹ Therefore, school districts must screen all aides in the classroom to ensure that none of the volunteers are registered sex offenders.

Failure to screen volunteers to determine whether individuals are registered sex offenders could result in liability to the district should a registered sex offender injure a student. Since the statute prohibits school districts from allowing registered sex offenders to volunteer, districts have a legal duty to take all reasonable steps to make sure that registered sex offenders do not volunteer as aides in the school districts’ classrooms.

²¹⁵ 36 Cal.4th 1028, 32 Cal.Rptr.3d 436 (2005). See, also, Patten v. Grant Joint Union High School District, 134 Cal.App.4th 1378 (2005) (the standard for “adverse employment action” applies to “whistleblower” lawsuits under Labor Code section 1102.5(b)).

²¹⁶ Id. at 1054-1055.

²¹⁷ Ibid.

²¹⁸ See, Nilsson v. City of Mesa, 503 F.3d 947 (9th Cir. 2007); Lukovsky v. City and County of San Francisco, 535 F.3d 1044 (9th Cir. 2008); Sada v. Robert F. Kennedy Medical Center, 56 Cal.App.4th 138, 65 Cal.Rptr.2d 112 (1997); DeJung v. Superior Court, 169 Cal.App.4th 533, 87 Cal.Rptr.3d 99 (2008); Veronese v. Lucasfilm Ltd., ___ Cal.Rptr.3d ___ (2012); and, Lamb v. City and County of San Francisco, 868 F.Supp.2d 928 (N.D. Cal. 2012).

²¹⁹ Education Code section 35021.

MEDICAL REQUIREMENTS AND PHYSICAL EXAMINATIONS

A. Tuberculosis Risk Assessment

The Education Code requires that all persons initially employed by a school district must be examined to determine whether they are free of active tuberculosis if a risk factor is identified in the risk assessment. Thereafter, every four years, employees must undergo a tuberculosis risk assessment unless directed to do so more often by the governing board of the school district upon the recommendation of the local health officer. After each risk assessment, the employee must submit a certificate from the examining physician to the district superintendent of schools showing that the employee was examined and found free from active tuberculosis.²²⁰

If the governing board of a school district determines by resolution, after a hearing, that the health of the pupils in the district would not be jeopardized, an exemption can be made for employees with religious objections. In lieu of the medical certificate, an employee, who adheres to the faith of a well-recognized religious organization and in accordance with its tenets depends upon prayer for healing, may file with the county superintendent of schools an affidavit stating that, to the best of his knowledge and belief, he is free from active tuberculosis. However, if at any time, there should be probable cause to believe that the affiant is afflicted with active tuberculosis, he may be excluded from serving until the governing board of the school district is satisfied that he is no longer afflicted with tuberculosis.²²¹

The courts have held that such an examination requirement is not an invasion of the employee's privacy.²²² The district superintendent may exempt a pregnant employee from the x-ray requirement following a positive tuberculin test for a period not to exceed 60 days following the termination of the pregnancy.²²³

In addition, school districts may require school employees to submit to complete physical examinations. The governing board of a school district may require an applicant for a classified position to take a preemployment physical examination at their own expense and may provide for reasonable reimbursement if the applicant is subsequently employed. For current classified employees, the school district is required to pay for the examination. With respect to certificated employees, the Attorney General has stated that it is reasonable for a school district to require teachers to have a complete physical examination and the school district may pay for the cost of such an examination.²²⁴

B. Fitness For Duty Examinations

In Yin v. State of California, the Court of Appeals ruled that when health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability

²²⁰ Education Code section 49406.

²²¹ Education Code section 49406.

²²² Garrett v. Los Angeles City Unified School District, 116 Cal.App.3d 472 (1981).

²²³ Education Code section 49406.

²²⁴ Education Code section 45122.

to work, even if the examination might disclose whether the employee is disabled or the extent of any disability.²²⁵

The plaintiff in Yin worked as a tax auditor for the California Employment Development Department. From 1989 to 1993, she displayed a pattern of excessive absenteeism, missing nearly four full months of work in 1993. In February 1994, after several more absences, including one stretch during which she missed almost 30 days in a row, the state demanded that Yin submit to a medical examination. Yin sued the state, among other defendants, rather than submit to the examination.²²⁶

First, the court addressed whether the examination was prohibited by the Americans with Disabilities Act (“ADA”), which provides that an employer may not require a medical examination and may not make medical inquiries as to whether an employee is an individual with a disability or as to the nature or severity of the disability unless the examination or inquiry is shown to be “job-related and consistent with business necessity.”²²⁷ Although the court assumed that the goal of the state’s proposed medical examination was to determine whether Yin was disabled and the extent of any disability, the court concluded that the examination was permitted under the business necessity exception.

The court found that the proposed medical examination was job-related since Yin’s pattern of excessive absenteeism constituted good cause for the state to try to determine whether she was able to perform her job. Additionally, the court found that the purpose of the request for the examination was to determine whether Yin was capable of doing her job, not simply to discover whether she had a disability or because of any bias toward persons with disabilities.²²⁸ The court held as follows:

“We conclude that when health problems have had a substantial and injurious impact on an employee’s job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability.”²²⁹

Second, the court addressed whether the examination violated the Fourth Amendment of the United States Constitution which protects citizens from unreasonable searches and seizures. The court applied a balancing test to determine whether the search was reasonable, weighing Yin’s privacy interests against the state’s interest in the search. The court found that Yin’s legitimate expectation of privacy was reduced by the following factors:

1. The lessened privacy expectations of employees generally;

²²⁵ 95 F.3d 864 (9th Cir. 1996).

²²⁶ Id. at 867.

²²⁷ 42 U.S.C. Section 12112(d)(4)(A).

²²⁸ Id. at 868.

²²⁹ Id. at 868.

2. California Government Code section 19253.5, which allows fitness for duty medical examinations of state civil service employees (unfortunately, there is no similar provision in the Education Code);
3. Collective bargaining agreement language which reflected the provisions of Section 19253.5; and
4. Yin's own absenteeism and repeated episodes of on-the-job illness.

The court concluded that Yin's expectation of privacy was outweighed by the state's interest in maintaining a productive and stable workforce.²³⁰

Districts with helpful language in their policies or collective bargaining agreements or with a past practice of requiring medical examinations should be able to require fitness for duty medical examinations based on the holding in Yin. Districts without express policy language in their collective bargaining agreements or a consistent past practice should consult with legal counsel since there is no specific provision in the Education Code authorizing fitness for duty medical examinations.

In Brownfield v. City of Yakima,²³¹ the Ninth Circuit Court of Appeals held that the City of Yakima did not violate the ADA by requiring a fitness for duty examination for a police officer after the police officer repeatedly exhibited emotionally volatile behavior.

Brownfield began as a police officer for the City of Yakima Police Department in November 1999. Approximately one year later, Brownfield suffered a head injury in an off-duty car accident. After recovering from symptoms, including reduced self-awareness, Brownfield returned to full duty in July 2001. He received positive performance evaluations and was awarded several accommodations over the next three years.²³²

In June 2004, Brownfield complained to his superiors about another police officer, claiming that police officer neglected his duties, forcing Brownfield to complete tasks assigned to the other police officer. In May 2005, Brownfield was reprimanded for failing to schedule an event. On May 11, 2005, Brownfield used an expletive midway through a meeting. Despite an order from his superior to remain in the room, Brownfield stood up and left the room in the middle of the meeting. When another police officer found Brownfield, Brownfield swore at him and demanded he leave the room. Brownfield was temporarily suspended for insubordination as a result of this incident.²³³

In September 2005, four incidents occurred. First, Brownfield engaged in a disruptive argument with another officer. Second, Brownfield reported that he felt himself losing control during a traffic stop. According to a police sergeant, Brownfield reported that a young child riding in a vehicle he pulled over began taunting him during the stop. Brownfield became upset,

²³⁰ Id. at 871-872.

²³¹ 612 F.3d 1140 (9th Cir. 2010).

²³² Id. at 1142.

²³³ Ibid.

his legs began shaking, and he was not sure what he was going to do. Brownfield calmed down when a back-up officer arrived.²³⁴

Third, the police department received a domestic violence call from Brownfield's estranged wife. Brownfield's wife reported that she and Brownfield began arguing when she stopped at his apartment to see his children. As she was backing out of a doorway, Brownfield allegedly struck her by slamming the door. Brownfield disputed this version of events and no charges were filed.²³⁵

Fourth, a police officer reported that Brownfield made several statements that caused him concern about things not mattering as to how they end. Brownfield was placed on administrative leave and ordered to undergo a fitness for duty examination.²³⁶

The fitness for duty examination was conducted on October 19, 2005. Dr. Decker diagnosed Brownfield as suffering from mood disorder due to a general medical condition which manifested itself in poor judgment, emotional volatility and irritability, and which could be related to Brownfield's 2000 head injury. The physician concluded that Brownfield was unfit for police duty and that his disability was permanent.²³⁷

In May 2006, the city informed Brownfield that it would hold a pre-termination hearing with respect to his employment with the police department. Prior to the hearing, Brownfield obtained a second opinion from Dr. Mar stating that Brownfield was unfit for duty due to his emotional, cognitive, behavioral, and physical problems, but that Brownfield's problems might be amenable to treatment. The city continued Brownfield's pre-termination hearing pending treatment and further evaluation.²³⁸

In December 2006, Dr. Mar reported that Brownfield was progressing well and would be able to return to duty at an unspecified date with continued treatment. The police department sent Brownfield to Dr. Ekemo after he refused to return to Dr. Decker. Brownfield attended an initial exam in February 2007, and Dr. Ekemo scheduled a second visit with Brownfield to complete his evaluation. However, Brownfield refused to attend the follow-up session.²³⁹

The city informed Brownfield that he would likely be terminated unless he cooperated in the fitness for duty examination, but Brownfield again refused. A pre-termination hearing was held on March 19, 2007. The city manager determined that Brownfield was insubordinate and unfit for duty. Brownfield was terminated on April 10, 2007.²⁴⁰

On January 8, 2008, Brownfield filed suit in federal court alleging violations of the ADA, the Family Medical Leave Act, and First Amendment retaliation.²⁴¹

²³⁴ *Id.* at 1143.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Id.* at 1144.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

Brownfield alleges that the city violated the ADA by requiring him to submit to a fitness for duty examination. Under 42 U.S.C. Section 12112(d)(4)(A), an employer may not require a medical examination to determine whether an employee is disabled unless such examination or inquiry is shown to be job-related and consistent with business necessity.²⁴²

The Court of Appeals held that “business necessity” should not be confused with mere expediency.²⁴³ However, the Court of Appeals held that when an employer is faced with an employee who has repeatedly acted erratically, the employer may require a fitness for duty examination. The Court of Appeals held that an employer may preemptively require a medical examination when there is evidence of irrational behavior.²⁴⁴

The Court of Appeals noted that prophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employer is engaged in dangerous work. The court held that the business necessity standard may be met even before an employee’s work performance declines if the employer is faced with significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. There must be genuine reasons to doubt whether that employee can perform job-related functions.²⁴⁵

The Court of Appeals found that the undisputed facts showed that Brownfield exhibited highly emotional responses on numerous occasions in 2005. He swore at his superior after abruptly leaving a meeting despite a direct order to the contrary, he engaged in a loud argument with a coworker and became extremely angry when he learned the incident would be investigated, he reported that his legs began shaking and he felt himself losing control during a traffic stop, his wife called police to report a domestic altercation with Brownfield, and he made several comments to a coworker that it does not matter how things end.²⁴⁶ The Court of Appeals stated:

“When a police department has good reason to doubt an officer’s ability to respond to these situations in an appropriate manner, an FFDE (fitness for duty examination) is consistent with the ADA. Reasonable cause to question Brownfield’s ability to serve as a police officer was present here.”²⁴⁷

In summary, the Court of Appeals held that if a public employer has significant evidence that could cause a reasonable person to question whether an employee is still capable of performing his or her job, the public employer may require the employee to undergo a fitness for duty examination. If there is genuine doubt as to whether the employee can perform job-related

²⁴² Id. at 1145.

²⁴³ Ibid. See, Cripe v. City of San Jose, 261 F.3d 877, 890 (9th Cir. 2001).

²⁴⁴ Id. at 1145; see, also, Watson v. City of Miami Beach, 177 F.3d 932 (11th Cir. 1999); Cody v. CIGNA Healthcare of St. Louis, Inc., 139 F.3d 595, 599 (8th Cir. 1998); Mickens v. Polk County School Board, 430 F.Supp.2d 1265 (M.D. Fla. 2006); Miller v. Champagne Community Unit School District No. 4, 983 F.Supp. 1201 (C.D. Ill. 1997).

²⁴⁵ Id. at 1146; citing, Sullivan v. River Valley School District, 197 F.3d 804, 811 (6th Cir. 1999); see, also, Conroy v. New York State Department of Corrective Services, 333 F.3d 88, 98 (2nd Cir. 2003).

²⁴⁶ Id. at 1146-47.

²⁴⁷ Id. at 1147.

functions, even before an employee's work performance actually declines, then the employer may require a fitness for duty examination.

In Kao v. University of San Francisco,²⁴⁸ the Court of Appeal held that the university was not required to engage in an interactive process with a professor before conditioning his continued employment on a psychiatric fitness-for-duty examination. The Court of Appeal held that conditioning the professor's continued employment upon a fitness-for-duty evaluation was job-related and consistent with business necessity under the Fair Employment and Housing Act.²⁴⁹ The Court of Appeal further held that banning the professor from the university campus for refusing to participate in the fitness-for-duty evaluation was not disability discrimination under the Unruh Civil Rights Act,²⁵⁰ and the university did not violate the professor's right to refuse to release medical information under state law.²⁵¹

Dr. Kao was a tenured professor at the University of San Francisco (USF) in the math and computer science department. He began teaching at USF in 1991 and became a tenured professor in 1997.²⁵²

In May 2006, Kao submitted a 485 page complaint to the school alleging race-based discrimination and harassment. In August 2007, he added a 41 page addendum to the complaint. The university responded in September 2007 and Kao was not satisfied with the response.

On January 3, 2008, Kao met with another math professor and associate dean for sciences when Kao suddenly was unable to control his emotions and started yelling and screaming. The testimony at trial was that Kao was completely irrational and was in an uncontrollable rage.

The associate dean testified at trial that Kao confronted him with clenched fists, and was very tense and angry. He began shouting about the mathematics job search and was agitated, enraged, and angry. Both the mathematics professor and associate dean as well as other university employees testified at trial that they were frightened by Kao's behavior.

In February 2008 at a faculty search committee meeting, Kao went into an uncontrollable rant according to testimony at trial. Kao's erratic behavior continued through the spring semester and Kao became physically confrontational with other employees.

Based on the numerous incidents during the spring of 2008, USF began investigating Kao's conduct. Based on its investigation, USF sent Kao a consent form to complete to authorize a fitness-for-duty examination. Kao refused to sign the consent form.

USF met with Kao and his attorney on June 18, 2008 and on June 20, 2008 sent Kao and his attorney an e-mail asking if Kao had any information to provide to USF. On June 23, 2008, Kao's attorney objected to the fitness-for-duty examination. On June 24, 2008, USF put Kao on

²⁴⁸ 229 Cal.App.4th 437 (2014).

²⁴⁹ Government Code section 12940 et seq.

²⁵⁰ Civil Code section 51.

²⁵¹ Civil Code section 56.20.

²⁵² 229 Cal.App.4th 437, 440 (2014).

a leave of absence without duties, prohibiting him from being on campus while on leave. The letter listed the behaviors that were of concern.

At trial, Kao testified that he never intentionally tried to frighten, threaten, or bump into anyone while he worked at USF. Kao said that he did not raise his voice on most occasions, although he may have gotten a little louder than usual on January 3, 2008 and at the February, 2008 faculty meeting. Kao testified that he began taking Prozac for depression in January 2002 and that the drug caused him to suffer hallucinations.²⁵³

The Court of Appeal noted that Kao's main contention on appeal was that USF had to engage in an interactive process before it could refer him for a fitness-for-duty examination. However, the Court of Appeal held that in the circumstances presented, the interactive process was not required.²⁵⁴

The Court of Appeal noted that an employer may require a medical or psychological examination of an employee if it can show that the examination is job-related and consistent with business necessity.²⁵⁵ The Fair Employment and Housing Commission regulations provide that an employer may make disability-related inquiries, including fitness-for-duty exams, and require medical examinations of employees that are both job-related and consistent with business necessity.²⁵⁶

The Court of Appeal noted that an employer must reasonably accommodate an employee's disability unless doing so would produce undue hardship to its operation.²⁵⁷ An employer has an additional duty to engage in a timely good faith interactive process with the employee to determine effective reasonable accommodations.²⁵⁸ The Court concluded, however, that the Fair Employment and Housing Act (FEHA) ties the interactive process to disability accommodations, not to fitness-for-duty examinations. The Court stated, "The requirement for an interactive process was not implicated here because Kao never acknowledged having a disability or sought any accommodation for one."²⁵⁹

The Court of Appeal held that unless a disability is obvious, it is the employee's burden to initiate the interactive process.²⁶⁰ When a disability is not obvious, the employee must submit reasonable medical documentation confirming its existence.²⁶¹ The Court noted that Kao provided no information to USF after learning of the university's concerns.

The Court of Appeal held that Kao's contention that USF did not present substantial evidence that the fitness-for-duty examination was job-related and consistent with business necessity was unfounded and that USF provided substantial evidence. The Court found that the fitness-for-duty examination was job-related because it was tailored to assess the employee's

²⁵³ *Id.* at 440-450.

²⁵⁴ *Id.* at 450.

²⁵⁵ Government Code section 12940(f)(2).

²⁵⁶ California Code of Regulations, Title 2, section 11071(d)(1).

²⁵⁷ Government Code section 12940(m).

²⁵⁸ Government Code section 12940(n).

²⁵⁹ 229 Cal.App.4th 437, 450-51 (2014).

²⁶⁰ See, Gelfo v. Lockheed Martin Corporation, 140 Cal.App.4th 34, 62, fn. 22, 43 Cal.Rptr.3d 874 (2006).

²⁶¹ California Code of Regulations, Title 2, section 11069(d)(2).

ability to carry out the essential functions of the employee’s job and to determine whether the employee poses a danger to the employee or others due to disability.²⁶²

The Court of Appeal found that Kao’s jury had ample evidence from which to find that the fitness-for-duty examination was necessary to determine whether he posed a danger to others in the workplace. Multiple people reported multiple instances of threatening behavior on his part. USF’s decision to require him to have a fitness-for-duty examination was based on expert advice and USF presented unrefuted expert testimony that a fitness-for-duty examination was appropriate under the circumstances. The Court held that USF unquestionably had a duty to maintain a campus where people can safely work. The jury heard testimony that Kao frightened school administrators and that his behavior cast a pall of fear and confusion over the math department. The jury reasonably found that it was vital to the university’s business to obtain an independent assessment of Kao’s fitness-for-duty.

The Court of Appeal further rejected Kao’s argument that banning him from the campus violated the Unruh Civil Rights Act’s prohibition against disability discrimination.²⁶³ The Court found that the university had a legitimate concern that Kao was dangerous.

The Court of Appeal also rejected Kao’s argument that USF violated the Confidentiality of Medical Information Act²⁶⁴ by firing him for exercise of rights under the Act by refusing to release medical information for the fitness-for-duty evaluation. The Court of Appeal noted that Civil Code section 56.20(b) states that nothing prohibits an employer from taking such action (e.g. termination of an employee) as is necessary in the absence of medical information due to an employee’s refusal to sign an authorization. The jury was instructed that if Kao proved his refusal to authorize release of confidential information was the motivating factor in his dismissal, USF nevertheless avoids liability by showing that its decision to discharge Kao was necessary because Kao refused to take the fitness-for-duty examination. The Court found that the findings supported the conclusion that the fitness-for-duty evaluation was job-related and consistent with business necessity, and that his discharge was necessary because of his refusal to release the medical information required for the fitness-for-duty evaluation.²⁶⁵

FAMILY AND MEDICAL LEAVE AND PREGNANCY LEAVE

A. Statutory Requirements

The federal Family and Medical Leave Act of 1993 (“FMLA”)²⁶⁶ and the California Family Rights Act of 1991 (“CFRA”)²⁶⁷ set forth the requirements for providing school district employees with family medical leave.

²⁶² See, California Code of Regulations, Title 2, section 11065(k).

²⁶³ See, Civil Code section 51(b).

²⁶⁴ Civil Code section 56.20(b).

²⁶⁵ 229 Cal.App.4th 437, 456 (2014).

²⁶⁶ 29 U.S.C. Section 2601 et seq.

²⁶⁷ Government Code section 12945.2.

Both the FMLA and the CFRA authorize an employee to use unpaid family and medical leave for the employee's own "serious health condition, as well as for the care of a serious health condition of a parent, spouse or child. Leave for the birth or adoption of a child also qualifies for leave with the Act."²⁶⁸ The term "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves either of the following:

1. Inpatient care in a hospital, hospice, or residential health care facility.
2. Continuing treatment or continuing supervision by a health care provider.

Certificated and classified employees also have a right to take paid sick leave for their own serious health conditions. Family and medical leave may be run concurrently with regular sick leave if the employee is given prior notice. Medical benefits must be continued during family and medical leave.²⁶⁹

When an employee requests family and medical leave, or the employer acquires knowledge of a leave that is FMLA-employee qualifying, the employer must notify the employee of his or her eligibility to take family and medical leave within five business days. The employer also must provide the employee with a written notice of the employee's rights and responsibilities under the law. This notice may inform the employee that he/she is required to furnish certification of a serious health condition.

When an employer learns that leave is being taken for a qualifying purpose, the employer must promptly (ordinarily within two business days) notify the employee that the paid leave is designated and will be counted as family and medical leave. The notification may be oral or in writing. If the initial notice is oral, it must be confirmed in writing, ordinarily no later than the following payday. The written notice may be in any form, including a notation on the employee's pay stub. Our recommendation is that the notice be provided in a memorandum or letter to the employee.

If an employer has enough knowledge to determine that leave is for a qualifying purpose prior to commencement of the leave, the employer may not retroactively designate the leave as family and medical leave for purposes of counting the time taken against the employee's 12-week entitlement. The employer may only prospectively designate the leave as family and medical leave as of the date that the employer notifies the employee of the designation.

On the other hand, if an employer does not learn that leave is for a qualifying purpose until after leave has begun, all of a portion of the paid leave may be retroactively counted as family and medical leave. For example, if an employee goes out on paid sick leave and his or her condition worsens into a "serious health condition," the entire period of the serious health condition may be counted as family and medical leave.

²⁶⁸ 29 U.S.C. Section 2612(a)(1)(D); Government Code section 12945.2(b)(3)(C). An employee may decline to use Family Medical Leave Act leave. *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014).

²⁶⁹ 29 C.F.R. Section 825.209; Government Code section 12945.2(f).

Employers may wish to take advantage of their right to provisionally designate a leave as family and medical leave, while awaiting receipt from the employee of medical certification or other documentation confirming that the leave is for a qualifying purpose. When a provisional designation is made, the employer must so notify the employee at the time the leave begins or as soon as the reason for the leave becomes known. The provisional designation becomes final upon receipt of the medical condition or documentation confirming that the leave is for a qualifying purpose.

B. Notice to Employees

School districts may avoid the notice requirement by simply adopting a policy or negotiating collective bargaining agreement language providing that paid sick leave taken for an employee's "serious health condition" will automatically be designated as family and medical leave. Since both the FMLA and CFRA expressly require notice to individual employees, we do not believe that a policy or contract provision would substitute for the notice requirement.

When an employer receives certification that leave is being taken for a qualifying purpose, the employer must promptly (ordinarily within five business days) notify the employee in writing that the paid leave is designated and will be counted as family and medical leave. The Department of Labor has issued a sample Eligibility Notice, as well as a Sample Rights and Responsibilities Notice and a sample Designation Notice.²⁷⁰ Districts should review their medical certification forms to be sure they are not requesting an employee's healthcare provider to provide the district with a diagnosis or identify the serious health condition of the employee or the employee's family member. In addition, forms that request information concerning health information must comply with the Genetic Information Nondiscrimination Act.²⁷¹ The form must contain the following language:

“THE GENETIC INFORMATION
NONDISCRIMINATION ACT OF 2008 (GINA) PROHIBITS
EMPLOYERS AND OTHER ENTITIES COVERED BY GINA
TITLE II FROM REQUESTING OR REQUIRING GENETIC
INFORMATION OF AN INDIVIDUAL OR FAMILY MEMBER
OF THE INDIVIDUAL, EXCEPT AS SPECIFICALLY
ALLOWED BY LAW. TO COMPLY WITH THIS LAW, WE
ARE ASKING THAT YOU NOT PROVIDE ANY GENETIC
INFORMATION WHEN RESPONDING TO THIS REQUEST
FOR MEDICAL INFORMATION. ‘GENETIC INFORMATION’
AS DEFINED BY GINA, INCLUDES AN INDIVIDUAL’S
FAMILY MEDICAL HISTORY, THE RESULTS OF AN
INDIVIDUAL’S OR FAMILY MEMBER’S GENETIC TESTS,
THE FACT THAT AN INDIVIDUAL OR FAMILY MEMBER
SOUGHT OR RECEIVED GENETIC SERVICES, AND
GENETIC INFORMATION OF A FETUS CARRIED BY AN
INDIVIDUAL OR AN INDIVIDUAL’S FAMILY MEMBER OR

²⁷⁰ www.dol.gov/whd/forms (see Forms WH-381 and WH-382).

²⁷¹ 42 U.S.C. Section 2000ff et seq.

AN EMBRYO LAWFULLY HELD BY AN INDIVIDUAL OR FAMILY MEMBER RECEIVING ASSISTIVE REPRODUCTIVE SERVICES. YOU MAY PROVIDE FAMILY MEDICAL INFORMATION TO SUBSTANTIATE AN EMPLOYEE'S REQUEST FOR LEAVE TO CARE FOR A FAMILY MEMBER.”

If an employer does not designate leave in the timeframe set forth above, the employer may retroactively designate the leave as FMLA/CFRA provided the employer's failure to timely designate the leave does not cause harm or injury to the employee.

The coordination of family and medical leave with pregnancy disability leave is complicated because it involves reconciling four distinct bodies of law: the FMLA, the CFRA, Government Code section 12945 (pregnancy disability leave), and the sick leave provisions of the California Education Code. The FMLA allows an employee to take a total of 12 weeks in a 12-month period both for prenatal medical care or if her condition makes her unable to work and to care for the newborn child.²⁷² However, the employee is not entitled to 12 weeks for each event.

C. Family Medical Leave Act Regulations

The United States Department of Labor recently updated the regulations for the Family Medical Leave Act (FMLA),²⁷³ which became effective on March 8, 2013. The new regulations clarify intermittent leave and recordkeeping requirements, expand coverage for military servicemembers and families, and reference new optional model forms.²⁷⁴ The new poster, which is attached, should be posted as soon as possible. The regulatory provisions regarding military servicemembers and families were updated to align with changes from the National Defense Authorization Act. In addition, a subsequently issued Administrator's Interpretation from the Department of Labor clarifies requirements for FMLA leave to care for an adult child. Below is a summary of key provisions for schools and community colleges.

One of the significant clarifications regarding intermittent leave is that an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave.²⁷⁵ The physical impossibility provisions apply only in the most limited situations (examples in the regulations include where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed “clean room” during a certain period of time, and no equivalent position is available).²⁷⁶ The regulations reiterate that employers must restore the employee to the same or equivalent position as soon as possible.²⁷⁷

²⁷² 29 C.F.R. Section 825.112.

²⁷³ 29 U.S.C. Section 2601 et seq.

²⁷⁴ The new regulations are set forth in Title 29, section 825.100 and following.

²⁷⁵ 29 C.F.R. Section 825.205.

²⁷⁶ 29 C.F.R. Section 825.205 (a) (2).

²⁷⁷ 29 C.F.R. Sections 825.205 (a) (2), 825.214, 825.215.

The regulations further clarify that FMLA leave must be counted using the shortest increment of leave used to account for any other type of leave.²⁷⁸ For example, if an employer accounts for the use of annual leave in increments of one hour and the use of sick leave in increments of one-half hour, use of FMLA leave must be accounted for using increments no larger than one-half hour. Even if an employer accounts for other forms of leave use in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave.²⁷⁹ However, the regulations emphasize that employers cannot charge FMLA leave for periods during which they are working.²⁸⁰ This provision applies to reduced work leave schedules as well as intermittent leaves.²⁸¹

If FMLA documents contain family information, employers must keep such information confidential pursuant to the Genetic Information Nondisclosure Act (“GINA”).²⁸² GINA prohibits employers or other entities from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by law. Under GINA, genetic information includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or family member sought or received genetic services, and genetic information of a fetus carried by or embryo held by an individual or individual’s family member.²⁸³

In determining FMLA eligibility, any absence from work due to military service covered under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) must be counted toward the employee’s 12-month employment period.²⁸⁴

Administrator’s Interpretation No. 2013-1 clarifies the regulations regarding who is a “son or daughter” for purposes of a FMLA leave of an eligible employee to provide care to an adult child. For purposes of leave to care for an adult child,²⁸⁵ FMLA defines a “son or daughter” as a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability.”²⁸⁶ The FMLA does not require that a biological or legal relationship exist between the eligible employee and the child, so an employee with day-to-day responsibilities to care for or financially support a child would qualify for FMLA leave under these provisions.²⁸⁷

FMLA follows the Americans with Disabilities Act broad definition of “disability” as a physical or mental impairment that substantially limits a major life activity (as interpreted by the

²⁷⁸ 29 C.F.R. Section 825.205 (a).

²⁷⁹ 29 C.F.R. Section 825.205 (a) (1).

²⁸⁰ 29 C.F.R. Section 825.205 (a).

²⁸¹ 29 C.F.R. Section 825.205 (b).

²⁸² 42 U.S.C. Section 2000ff.

²⁸³ 42 U.S.C. Section 2000ff (4); 29 C.F.R. Section 1635.3 (c).

²⁸⁴ 29 C.F.R. Section 825.110.

²⁸⁵ The Department of Labor’s Administrator’s Interpretation does not apply to an employee’s entitlement to take FMLA military family leave for a son or daughter, for which there are separate definitions with no age restrictions. See, 29 C.F.R. Sections 825.122(g)-(h), 825.126(b)(1), 825.127(b)(1).

²⁸⁶ 29 C.F.R. Section 825.122(c).

²⁸⁷ 29 C.F.R. Section 825.122(c)(3).

EEOC) to define “physical or mental disability.”²⁸⁸ The FMLA regulations define “incapable of self-care because of mental or physical disability” as when an adult son or daughter “requires active assistance or supervision to provide daily self-care in three or more of the ‘activities of daily living’ (ADLs) or ‘instrumental activities of daily living’ (IADLs).”²⁸⁹ Under the regulations, a parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter meets all of the following requirements:

- (1) Has a disability as defined by the ADA;
- (2) Is incapable of self-care due to that disability;
- (3) Has a serious health condition; and
- (4) Is in need of care due to the serious health condition.

The Administrator’s Interpretation also states that based on this analysis and examination of the relevant factors, the disability of a son or daughter may occur or manifest at any age for purposes of coverage for a “son or daughter” 18 years of age or older under the FMLA.²⁹⁰

Under the new regulations, referred to as the military caregiver leave provisions, several new and clarified definitions were added with regard to military servicemembers and families. In general, these provisions authorize family members to take FMLA leave to provide care for military servicemembers and provide assistance under qualifying exigency leave.

“Current servicemember” now includes (1) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness, or (2) a covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. “Covered veteran” is defined as an individual who was a member of the Armed Forces, including a member of the National Guard or Reserves, and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran.²⁹¹ In calculating this coverage period, the time between October 28, 2009 and March 8, 2013, the effective date of these regulations, shall not count towards the determination of the five-year period for covered veteran status.²⁹² If the servicemember is discharged on or after March 8, 2013, the five-year period begins on the date of discharge.

“Covered active duty” is further clarified in the regulations. For a member of the Regular Armed Forces, covered active duty or call to covered active duty status means duty during deployment to a foreign country.²⁹³ For a member of the Reserve components of the Armed

²⁸⁸ 29 C.F.R. Section 825.122(c)(2).

²⁸⁹ 29 C.F.R. Section 825.122(c)(1).

²⁹⁰ U.S. Department of Labor, Wage and Hour Division, Administrator’s Interpretation No. 2013-1.

²⁹¹ 29 C.F.R. section 825.102; 825.127 (b) (2).

²⁹² 29 C.F.R. section 825.127 (b) (2) (i).

²⁹³ 29 C.F.R. sections 825.102, 825.126.

Forces (members of the National Guard and Reserves), covered active duty or call to covered active duty status means duty during deployment to a foreign country or order to active duty in support of a contingency operation. Deployment to a foreign country means the military member is deployed to an area outside of the United States, the District of Columbia, or any Territory or possession of the United States and includes deployment to international waters.²⁹⁴ The regulations expand the definition of serious injury or illness for a current servicemember, whether a current member of the armed forces or a covered veteran, to include injuries or illnesses that existed prior to the servicemember's active duty but were aggravated in the line of duty on active duty (for covered veterans, the injury or illness could manifest before or after becoming a veteran).²⁹⁵ In addition, covered veterans must show the serious injury or illness is either:

1. A continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or
2. A physical or mental condition for which the veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and the need for military caregiver leave is related to that condition; or
3. A physical or mental condition that substantially impairs the veteran's ability to work because of a disability or disabilities related to military service, or would do so absent treatment; or
4. An injury, including a psychological injury, on the basis of which the veteran is enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.²⁹⁶

The family member of a veteran only needs to show that the veteran meets one of these definitions to establish that the veteran has a serious injury or illness.

As an additional consideration, the Administrator's Interpretation notes that the FMLA military caregiver leave provision allows for subsequent leaves.²⁹⁷ For example, if the same servicemember has a subsequent serious injury or illness (e.g., on another deployment), or subsequently manifests a separate serious injury or illness based on the same service (e.g., is subsequently diagnosed with post-traumatic stress disorder), the covered family member would be entitled to another 26 workweek period of military caregiver leave in a separate single 12-month period.²⁹⁸

²⁹⁴ 29 C.F.R. section 825.126.

²⁹⁵ 29 C.F.R. section 825.127.

²⁹⁶ 29 C.F.R. Section 825.127.

²⁹⁷ U.S. Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2013-1.

²⁹⁸ 29 U.S.C. Section 2612(a)(3); 29 C.F.R. section 825.127.

For medical certification, the regulations expand the list of health care providers who can certify FMLA military caregiver leave to include health care providers who are not affiliated with the military.²⁹⁹ If a medical certification is obtained from a health care provider who is not affiliated with the military, the employer may request a second or third opinion from the employee. However, healthcare certifications obtained from healthcare providers associated with the military may not be subject to second and third opinions. In either situation, employers are not permitted to request recertification.³⁰⁰ In addition, the new regulations permit eligible employees to submit a copy of a VASRD rating determination or documentation of enrollment in the Program of Comprehensive Assistance for Family Caregivers from the Department of Veterans' Affairs to certify that the veteran has a serious injury or illness. However, if an employee submits such documents, the employee may still be required to provide additional information.³⁰¹

Finally, the regulations updated "qualifying exigency leave" provisions, which entitle an eligible employee whose spouse, son, daughter, or parent is a military member on covered active duty to take unpaid, job-protected leave. Under a new category, an eligible employee may take qualifying exigency leave related to the care of the military member's parent who is incapable of self-care where those activities arise from the military member's covered active duty, such as arranging for alternative care; providing care on a non-routine, urgent, immediate need basis; admitting or transferring the military member's parent to a new care facility; and attending certain meetings with staff at a care facility, such as meetings with hospice or social service providers.³⁰² For qualifying exigency leave for child care and school activities, the regulations clarify that the military member must be the spouse, son, daughter or parent of the employee requesting leave in order to qualify for leave.³⁰³ The regulations also increase the amount of time from five days to up to fifteen calendar days that an eligible employee may take to spend with his or her military family member during the military member's Rest and Recuperation leave, subject to the timeframe allowed in the military member's Rest and Recuperation orders, or other documentation issued by the military.³⁰⁴ Employers should note that this leave may be taken intermittently or in a block as long as the leave is taken during the time indicated on the orders.

The United States Department of Labor issued new model posters and forms in compliance with the regulations. A copy of the new poster is attached and should be posted as soon as possible to ensure compliance. The new optional forms, including forms related to the new provisions regarding military servicemembers and their families, can be found on the United States Department of Labor's web site: <http://www.dol.gov/whd/fmla/index.htm>.

D. California Law

Under California law, an employee of a public educational agency has two different entitlements with regard to pregnancy disability. Under Government Code section 12945, a

²⁹⁹ 29 C.F.R. Section 825.125.

³⁰⁰ 29 C.F.R. Section 825.310.

³⁰¹ 29 C.F.R. Section 825.310.

³⁰² 29 C.F.R. Section 825.126 (b) (8).

³⁰³ 29 C.F.R. Section 825.126 (b) (3).

³⁰⁴ 29 C.F.R. Section 825.126 (b) (7).

woman is entitled to up to four months of pregnancy disability leave for disability caused by pregnancy, childbirth, or related medical conditions. Additionally, the California Education Code guarantees pregnancy leave for classified and certificated employees of public educational agencies, and provides also that regular and differential sick leave may be taken for pregnancy related disabilities.³⁰⁵

However, the CFRA provides that family care and medical leave under California law does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions.³⁰⁶ Government Code section 12945.2(s) provides that CFRA leave runs concurrently with FMLA leave except for any leave taken under the FMLA for pregnancy disability.

Therefore, an employee may take up to four months of pregnancy disability leave, consecutively or intermittently, including 12 weeks of FMLA leave. To the extent that the employee has available regular and extended sick leave, these days of pregnancy disability leave would be fully paid. Then, after childbirth, the employee would have up to 12 weeks of CFRA leave to care for the newborn child.

Additionally, it is unlawful for an employer to refuse to maintain and pay for group health insurance for the duration of the pregnancy leave, not to exceed four months over the course of the 12-month period, commencing on the date the leave was taken. The employer may recover the cost of the health insurance premium the employer paid if both of the following conditions are met:

1. The employee fails to return from leave after the period of leave has expired.
2. The employee's failure to return from leave is for a reason other than family leave per Government Code section 129.45.2 or due to a health condition or other circumstances beyond the employee's control.³⁰⁷

The California Legislature amended the state provisions relating to pregnancy leave and family leave, effective January 1, 2012.³⁰⁸ The amendments to Government Code sections 12945(a)(4) and 12945.2(t) make it unlawful for any employer to interfere with, restrain, or deny the exercise, or the attempt to exercise, any right provided under the pregnancy leave and family and medical leave provisions of state law.

In addition, Government Code section 12945, as amended, makes it unlawful for an employer to refuse to maintain and pay for coverage for an eligible female employee who takes pregnancy leave under a group health plan for the duration of the leave, not to exceed four months over the course of a 12-month period, commencing on the date the leave begins, at the level and under the conditions that coverage would have been provided if the employee had

³⁰⁵ Education Code sections 44965, 44978, 45193.

³⁰⁶ Government Code section 12945.2(c)(3)(C).

³⁰⁷ Government Code section 129.45(a)(2). It is also unlawful for an employer to interfere with, restrain, deny or attempt to deny any right to pregnancy leave or family leave. See, Government Code sections 129.45(a)(4) and 129.45.2(t).

³⁰⁸ Stats. 2011, ch. 510 (S.B. 299); Stats. 2011, ch. 678 (A.B. 592).

continued in employment continuously for the duration of the leave. An employer may recover from the employee the premium that the employer paid as required for maintaining coverage for the employee under the group health plan if both of the following conditions occur:

1. The employee fails to return from leave after the period of leave to which the employee is entitled has expired.
2. The employee's failure to return from leave is for a reason other than family leave or the continuation, recurrence, or the onset of a health condition that entitles the employee to leave or other circumstances beyond the control of the employee.³⁰⁹

The coordination of family and medical leave with pregnancy disability leave is complicated because it involves reconciling four distinct bodies of law: the FMLA, the CFRA, Government Code section 12945 (California pregnancy disability leave), and the sick leave provisions of the California Education Code. The FMLA allows an employee to take a total of 12 weeks in a 12-month period both for prenatal medical care or if her condition makes her unable to work, and to care for the newborn child.³¹⁰ However, the employee is not entitled to 12 weeks for each event.

Under California law, an employee of a public educational agency has two different entitlements with regard to pregnancy disability. Under Government Code section 12945, a woman is entitled to up to four months of pregnancy disability leave for disability caused by pregnancy, childbirth, or related medical conditions. Additionally, the California Education Code guarantees pregnancy leave for classified and certificated employees of public educational agencies, and provides also that regular and differential sick leave may be taken for pregnancy related disabilities.³¹¹

Employers must keep in mind that family care and medical leave under California law (CFRA) does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions.³¹² Government Code section 12945.2(s) provides that CFRA leave runs concurrently with FMLA leave, except for any leave taken under the FMLA for pregnancy disability.

Therefore, an employee may take up to four months of pregnancy disability leave, consecutively or intermittently, including 12 weeks of FMLA leave. To the extent that the employee has available regular and extended sick leave, these days of pregnancy disability leave would be paid. Then, after childbirth, the employee would have up to 12 weeks of CFRA leave to care for the newborn child. Certificated and academic employees are entitled to as much leave as necessary for pregnancy, miscarriage, childbirth and recovery therefrom as determined by the employee and the employee's physician.

³⁰⁹ Government Code section 12945(a)(2).

³¹⁰ 29 C.F.R. Section 825.112.

³¹¹ Education Code sections 44965, 44978, 45193, 87766, 87781, 88193.

³¹² Government Code section 12945.2(c)(3)(C).

In Richey v. Autonation, Inc³¹³ the California Supreme Court held that an employer could dismiss an employee who is on medical leave if the employee violates a company policy during leave. This decision would apply to both public employers and private employers.

In Richey, the employee violated a company policy that prohibited employees from working while they were on medical leave. The employee was aware that outside employment while on California Family Rights Act (CFRA) leave was not allowed. Employees who had violated this policy in the past had been fired.

In October 2007, Mr. Richey decided to open a restaurant while he was still working at Power Toyota. In March 2008, Mr. Richey injured his back at home and was unable to work as a result of his injury. Mr. Richey filed for leave under the CFRA and the federal Family Medical Leave Act (FMLA) and Power Toyota granted the leave.

While Mr. Richey was on leave, Power Toyota sent him a letter stating that employees were not allowed to engage in outside employment while on leave. Mr. Richey failed to respond to the letter. After receiving information that Mr. Richey was working while on medical leave, Power Toyota investigated and determined that Mr. Richey was working at his restaurant.

The California Supreme Court held that the evidence overwhelmingly supported the arbitrator's factual findings that Mr. Richey was fired because he pursued outside employment while on CFRA leave³¹⁴ and FMLA³¹⁵ leave and the court upheld the employee's termination.

E. Revisions to the California Pregnancy Disability Leave Regulations

The Fair Employment and Housing Commission issued regulations implementing the Pregnancy Disability Leave Law, effective December 30, 2012.³¹⁶ The new pregnancy disability leave ("PDL") regulations contain provisions to comply with current statutes, additional clarifications, and guidance for coordination with other leave laws.³¹⁷ The following are the most significant clarifications and changes for schools and colleges:

The new regulations provide an expanded definition of pregnancy disability, including examples of potentially disabling conditions. Related medical conditions include any medically recognized physical or mental condition related to pregnancy, childbirth, or recovery from pregnancy or childbirth. The regulations contain non-exhaustive examples including "lactation-related medical conditions such as mastitis; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; loss or end of pregnancy, and recovery from childbirth, loss or end of pregnancy."³¹⁸ A woman is "disabled by pregnancy" if, in her health care provider's opinion, she is unable to perform any one or more essential function(s) of her job without undue risk to herself, to her pregnancy's successful completion, or to others. Her health care provider may indicate that she is disabled by pregnancy due to severe morning

³¹³ 60 Cal. 4th 909 (2015).

³¹⁴ Government Code section 12945.2.

³¹⁵ 29 U.S.C. 2601, et seq.

³¹⁶ California Government Code sections 12935(a), 12945.

³¹⁷ The new regulations are set forth in Title 2 of the California Code of Regulations, sections 7291.2 and following.

³¹⁸ 2 C.C.R. Section 7291.2 (u).

sickness or needs to take time off for pre- or post-natal care, bed rest, or related medical conditions.³¹⁹

The definition of “Health Care Provider” now contains a non-exhaustive list of additional examples of qualified providers to certify the pregnancy disability and to indicate a need for leave or reasonable accommodations. As noted in the regulations, marriage and family therapists, acupuncturists, licensed midwives, clinical psychologists, clinical social workers, chiropractors, and physician assistants who directly treat or supervise the applicant’s or employee’s pregnancy, childbirth or related medical condition now explicitly qualify.³²⁰ There is no provision for obtaining a second opinion.

“Perceived pregnancy,” defined as being regarded or treated by an employer as being pregnant or having a related condition, is now a potential basis for a discrimination complaint.³²¹ Under the new regulations, an employer faces liability for any acts of discrimination based on the employer’s perception that an applicant or employee is pregnant, whether or not she is. Perceived pregnancy does not, however, entitle the claimant to any leave or reasonable accommodations.

The new regulations clarify an employer’s obligation for reasonable accommodations, which is defined as “any change in the work environment or in the way a job is customarily done that is effective in enabling an employee to perform the essential functions of a job.”³²² The definition includes examples, such as modifying work practices or policies, modifying work schedules to provide earlier or later hours, modifying work duties, providing furniture (such as stools) or acquiring or modifying equipment or devices, and/or providing additional break time for lactation or rest room needs.³²³ Employers cannot deny a request for reasonable accommodations if (1) the employee’s request is based on the advice of her health care provider that the accommodation is medically advisable and (2) the requested accommodation is reasonable.

The employee and employer must engage in a good faith interactive process, similar to the process for other types of disabilities.³²⁴ Whether an accommodation is reasonable is a factual determination and the employer may consider factors including but not limited to the employee’s medical needs, the duration of the accommodation, and legally permissible past and current practices of the employer.³²⁵ The process begins with oral or written notice by the employee of the need for reasonable accommodations. If the need is foreseeable, the employee should notify the employer at least 30 days in advance. The regulations state that if 30 days is not practicable due to a change in circumstances, medical emergency, or other good cause, notice must be given as soon as practicable.³²⁶ Direct notice to the employer from the employee is preferred but not required. An employer may not deny the reasonable accommodation for lack

³¹⁹ 2 C.C.R. Section 7291.2 (f).

³²⁰ 2 C.C.R. Section 7291.2 (n).

³²¹ 2 C.C.R. Section 7291.2 (q).

³²² 2 C.C.R. Section 7291.2 (s).

³²³ 2 C.C.R. Section 7291.2 (s).

³²⁴ 2 C.C.R. Section 7291.7.

³²⁵ 2 C.C.R. Section 7291.7 (a).

³²⁶ 2 C.C.R. Section 7291.17.

of adequate notice if the need is an emergency or otherwise unforeseeable. Employers must respond to requests no later than ten calendar days after receiving the request. As a condition of granting reasonable accommodations, transfers, or pregnancy disability leave, employers may require medical certification. Please see section on medical certification, below, for more details about this process.

The regulations have modified the definition of “four months” so that an eligible employee’s “four month” leave period can now be calculated in hours rather than days. This clarification is helpful for intermittent leave or reduced work hours for PDL. The four month leave under PDL is per pregnancy, not per year. “Four months” is defined as one-third of a year or 693 hours and the regulations include sample full-time employee and part-time employee hourly calculations.³²⁷ Intermittent leave or reduced work schedules should be calculated using the shortest period of time that the employer’s payroll system uses to account for other forms of disability leave provided it is not greater than one hour.³²⁸ An example provided for a full-time employee follows: if the employee takes 180 hours of intermittent leave, she would still be entitled to take 513 hours of PDL (almost three months of leave) because the four month total of hours for a full time employee is calculated at 693 hours of leave entitlement.³²⁹

The regulations restate that unlike the Family Care and Medical Leave Act (“FMLA”) and the California Family Rights Act (“CFRA”), PDL does not have a minimum hours worked or length of service requirement for the employee’s entitlement to pregnancy disability leave, reasonable accommodation, or transfer.³³⁰ In addition, the regulations clarify that the right to take pregnancy disability leave is separate and distinct from the right to take leave of absence under CFRA or disability leave laws.³³¹ Therefore, employees who qualify for both pregnancy disability leave and CFRA can take them consecutively, not concurrently; for example, the employee may be disabled by pregnancy for four months under PDL plus qualify for twelve weeks of CFRA leave. Employers may require employees to use any accrued sick leave during pregnancy disability leave. Also, an employee may request the use of her sick leave, vacation leave, and/or any other leave credits she has in order to receive compensation during the otherwise unpaid portion of her pregnancy disability leave.³³²

Regarding group health coverage, employers must maintain and pay for health coverage for an eligible female employee who takes PDL for the duration of the leave (not to exceed four months in a 12-month period) at the same level and under the same conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. This coverage period is separate from an employer’s obligation to pay for twelve weeks of group health coverage during CFRA or FMLA leave.³³³ However, in specified circumstances, an employer may recover from the employee premiums paid while the employee was on PDL. Recovery is permitted if the employee fails to return at the end of the leave and the employee’s failure to return is for a reason other than one of the following: (1) taking CFRA

³²⁷ 2 C.C.R. Section 7291.9.

³²⁸ 2 C.C.R. Section 7291.9.

³²⁹ 2 C.C.R. Section 7291.9 (a) (3) (A).

³³⁰ 2 C.C.R. Section 7291.12.

³³¹ 2 C.C.R. Sections 7291.13, 7291.14.

³³² 2 C.C.R. Section 7291.11.

³³³ 2 C.C.R. Section 7291.11 (c).

leave; (2) continuation or recurrence or onset of health condition that entitles employee to pregnancy disability leave; (3) non-pregnancy related medical conditions requiring further leave; or (4) any other circumstance beyond the control of the employee, including where the employer is responsible for the employee's failure to return (for example, for failure to reinstate the employee).³³⁴

Under the new regulations, employers must reinstate the employee returning from leave to the same position or, if the position no longer exists for legitimate business reasons unrelated to her leave (e.g., due to reduction in force), a comparable position in the same manner as if she had been working and not on leave.³³⁵ Upon request of the employee, the employer must provide a written guarantee of reinstatement.³³⁶ However, reinstatement is not guaranteed if the employer can show the employee would not have been reinstated regardless of pregnancy disability leave or transfer due to unrelated, legitimate business reasons such as layoff.³³⁷ Employees on PDL have no greater right to reinstatement to a comparable position than an employee who has been continuously employed in another position that is being eliminated.³³⁸

In addition, an employer who eliminates an employee's position while she is on PDL (as in a reduction in force) must use reasonable means to notify her of other available comparable positions for which she is qualified within 60 calendar days of the date on which she would have been reinstated. The employee also has a right to reinstatement to her previous position when her health care provider certifies there is no further medical advisability for the transfer, intermittent leave, or leave on a reduced work schedule, in the same way as if she were returning from leave.³³⁹ If the employee takes a separate leave following the end of her pregnancy disability leave, the reinstatement rights pertaining to that leave, not PDL, would apply.³⁴⁰ For example, if she takes a CFRA leave after PDL, under CFRA, the employer may reinstate an employee to the same or comparable position.

An employer may require an employee to provide a release to return to work from her health care provider as a condition of return to work from a pregnancy disability leave or transfer if the employer requires such a release for non-pregnancy related disability leaves or transfers.³⁴¹

The regulations provide clarification regarding transfers.³⁴² If the employee's health care provider indicates that intermittent leave or a reduced work schedule is medically advisable, an employer may require the employee to temporarily transfer to an alternative position. Although the alternative position need not have equivalent duties, it must have an equivalent rate of pay and benefits and the employee must be qualified for the position. Temporary transfer to an

³³⁴ 2 C.C.R. Section 7291.11 (c) (3).

³³⁵ 2 C.C.R. Section 7291.10.

³³⁶ 2 C.C.R. Section 7291.10 (a). However, reinstatement is not guaranteed if the employer can show the employee would not have been reinstated regardless of pregnancy disability leave or transfer due to unrelated, legitimate business reasons such as layoff.

³³⁷ 2 C.C.R. Section 7291.10 (c) (1).

³³⁸ 2 C.C.R. Section 7291.10 (c) (2).

³³⁹ 2 C.C.R. Section 7921.8 (d).

³⁴⁰ 2 C.C.R. Section 7291.10.

³⁴¹ 2 C.C.R. Section 7291.17 (d).

³⁴² 2 C.C.R. Section 7291.8.

alternative position may include altering an existing position to accommodate the employee's need for intermittent leave or a reduced work schedule.

As a condition of granting reasonable accommodation, transfer, or pregnancy disability leave, the employer may require medical certification.³⁴³ Under the regulations, employers must notify employees of the need to provide medical certification, the deadline for providing the medical certification, what constitutes sufficient medical certification, and the consequences for failing to provide medical certification. If the employee is already out on leave due to unforeseeable circumstances, the employer's notice can be oral, followed by a mailed, email, or faxed delivery of the medical certification form to the employee or her doctor as she determines. For a foreseeable leave where at least 30 days' notice has been provided, the employee shall provide the medical certification prior to the leave.³⁴⁴

Employers must provide this notice each time medical certification is required and provide the employee with any employer-required medical certification form for the employee's health care provider to complete.³⁴⁵ As part of the regulations, a model medical certification form is included as an option for employers to use. It is strongly advised that districts use this form, as it contains all required components. The medical certification form is attached to this document.

Under the provisions of the new regulations, employers can delay granting (or continuing) a requested reasonable accommodation, transfer or leave to an employee who fails to provide timely certification after the employer requests it.³⁴⁶ The regulations are silent as to whether an employer may terminate employment based on a failure to provide medical certification.

As noted above, employers must now notify employees of the regulatory requirements for medical certification as well as employees' right to request reasonable accommodations, transfer, or pregnancy disability leave and employees' notice obligations.³⁴⁷ This notice must be posted in a conspicuous place or where employees gather.³⁴⁸ The regulations encourage employers to incorporate this notice into employee handbooks or alternatively distribute copies of this notice at least annually to all employees, which can be done via email.³⁴⁹ The regulations also contain a new requirement that employers give oral or written notice to non-proficient English speakers and written notice translated into any language spoken by 10% or more of the workforce at a particular workplace.³⁵⁰ The regulations include sample notices to address this requirement. Since school districts and colleges are subject to the Family Care and Medical Leave Act and California Family Rights Act, sample Notice B is appropriate. The most current version of Notice B can be accessed on the Department of Fair Employment and Housing website at http://www.dfeh.ca.gov/Publications_Publications.htm.

³⁴³ 2 C.C.R. Section 7291.17 (b).

³⁴⁴ 2 C.C.R. Section 7291.17 (a).

³⁴⁵ 2 C.C.R. Section 7291.17 (b) (1).

³⁴⁶ 2 C.C.R. Section 7291.17 (a) (6).

³⁴⁷ 2 C.C.R. Section 7291.16.

³⁴⁸ 2 C.C.R. Section 7291.16 (d).

³⁴⁹ 2 C.C.R. Section 7291.16 (d) (3).

³⁵⁰ 2 C.C.R. Section 7291.16 (d) (4).

F. Designation of FMLA Leave

In Ragsdale v. Wolverine World Wide, Inc.,³⁵¹ the United States Supreme Court held that even if an employer does not designate medical leave as FMLA leave, the leave taken may count against an employee's FMLA entitlement. The decision means an employee is not entitled to an additional 12 weeks of leave as a penalty for an employer's failure to designate other sick leave as FMLA leave.

Ragsdale began working at a Wolverine factory in 1995, but in the following year she was diagnosed with Hodgkin's disease, a form of cancer. She was eligible for seven months of unpaid sick leave under the company's leave plan. She took full advantage of this leave entitlement, missing 30 consecutive weeks of work. Her position with the company was held open throughout this leave period, and the company maintained her health benefits and paid her premiums during the first six months of her absence. However, Wolverine did not notify her that 12 weeks of the absence would count as her FMLA leave entitlement.³⁵²

When Ragsdale sought a 30-day extension of leave, Wolverine advised her that she had exhausted her seven months under the company plan. The company denied her request for additional leave, and terminated her when she did not come back to work. She sued Wolverine, relying on a U.S. Department of Labor regulation implementing the FMLA,³⁵³ which provides that if an employee takes medical leave "and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." Since Wolverine had not designated her leave as FMLA leave, she contended that she was entitled to 12 more weeks of leave.³⁵⁴

The Supreme Court rejected Ragsdale's argument, and struck down Section 825.700(a) as contrary to the FMLA and beyond the Secretary of Labor's authority. The court advanced several reasons for its decision, but primarily, the court found that the penalty set forth in Section 825.700(a) was incompatible with the remedial mechanism of the FMLA itself. Under the statute,³⁵⁵ an employer is subjected to consequential damages and equitable relief, if the employer interferes with, restrains, or denies the exercise of an employee's FMLA rights. Even then, the FMLA provides no relief unless the employee has been prejudiced by the violation. Instead of requiring the employee to prove prejudice, the court found that the regulation³⁵⁶ establishes an "irrebuttable presumption" that the employee's exercise of FMLA rights was restrained. The court found no empirical or logical basis for this presumption. Ragsdale herself did not demonstrate that she would have taken less, or intermittent, leave had she received the required notice. In fact, her physician did not clear her to work until long after the 30-week leave period had ended. In short, she was not prejudiced by the employer's failure to designate her medical leave as FMLA leave, because she received the full 12 weeks of leave to which she was entitled under the Act.

³⁵¹ 535 U.S. 81, 122 S.Ct. 1155 (2002).

³⁵² Id. at 1159.

³⁵³ 29 C.F.R. Section 825.700(a).

³⁵⁴ 122 S.Ct. 1155, 1161 (2002).

³⁵⁵ 29 U.S.C. Section 2617.

³⁵⁶ 29 C.F.R. Section 825.700(a).

The court also noted that the FMLA’s guarantee of entitlement to a “total” of 12 weeks of leave in a 12-month period represented a compromise between employers who wanted fewer weeks and employees who wanted more. The court found that the penalty set forth in Section 825.700(a) subverted this compromise by entitling certain employees to leave beyond the statutory mandate.³⁵⁷

Significantly, while the court invalidated the penalty of Section 825.700(a), the court did not invalidate Section 825.208(a), which still makes it the employer’s responsibility to notify an employee that an absence will be considered FMLA leave. The court stated: “[W]e do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute.” Thus, we anticipate the possibility that the U.S. Department of Labor may adopt a new regulation containing a penalty for violating the notice requirement of Section 825.208(a).

G. Failure to Give Adequate Notice

In Bachelder v. America West Airlines, Inc.,³⁵⁸ the Court of Appeals held that the employer failed to give adequate notice of its “leave year” for the purpose of calculating eligibility under the FMLA.

The plaintiff, Penny Bachelder, was a customer service representative for America West Airlines. From 1994 to 1996, she was often absent from work for various health-and family-related reasons. In 1994, she took five weeks of medical leave to recover from a broken toe, and in mid-1995, she took maternity leave for approximately three months. Both of these leaves were covered by the FMLA. In January of 1996, one of the airline’s managers had a discussion with Bachelder regarding her attendance record. She was advised to improve her attendance and was required to attend meetings at which her progress would be evaluated. In February 1996, she was absent from work again for a total of three weeks. In early April, she called in sick for one day to care for her baby. Right after that, she was fired. The supervisor’s termination letter gave three reasons for the company’s decision, including Bachelder’s 16 absences after being counseled about her attendance in January. Bachelder sued America West, contending that the airline impermissibly considered her use of FMLA-protected leave in its decision to terminate her. In response, America West contended that none of the plaintiff’s February 1996 absences were covered by the FMLA, because the airline used the “rolling” leave year method for calculating eligibility for FMLA leave.³⁵⁹

The FMLA “leave year” regulation, 29 C.F.R. Section 825.200 allows employers to calculate the 12-month period in which an employee is limited to 12 weeks of protected leave by one of the following four methods:

“(1) The calendar year;

³⁵⁷ 122 S.Ct. 1155, 1161 (2002).

³⁵⁸ 259 F.3d 1112.

³⁵⁹ Id. at 1118-1119.

“(2) Any fixed 12-month ‘leave year,’ such as a fiscal year, a year required by State law, or a year starting on an employee’s ‘anniversary’;

“(3) The 12-month period measured forward from the date an employee’s first FMLA leave begins; or

“(4) A ‘rolling’ 12-month period measured backward from the date an employee uses any FMLA leave.”

Under the “rolling” method, each time an employee takes FMLA leave, the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. America West contended that Bachelder had, therefore, exhausted her full annual allotment of FMLA leave as of June 1995, and was entitled to no more such leave until 12 months had elapsed from the commencement of her 1995 maternity leave. Therefore, America West maintained her February 1996 absences could not have been protected by the FMLA.³⁶⁰

The court rejected America West’s contention that Bachelder’s February 1996 absences were not covered by the FMLA, finding that the airline had failed to provide adequate notice to employees of the “leave year.” Although FMLA’s implementing regulations do not expressly require employers to notify their employees of the leave year for calculating eligibility, the court nevertheless interpreted the law as embodying a notice requirement. In particular, the court noted that 29 C.F.R. Section 825.200(b)(1) requires employers to give at least 60 days’ notice of a change in the “leave year.” The court observed that “notifying employees of a change of methods is only meaningful if they are aware that another method was previously in use.”³⁶¹

America West maintained that it had adequately notified employees of the rolling “leave year” calculation method, because its employee handbooks stated that “employees are entitled to up to 12 calendar weeks of unpaid [FMLA] leave within any 12 month period.” The court rejected this argument, finding that the statement in the handbook “does nothing more than parrot the language of the act.” Because the statute may be read to allow for any of the four different methods, the handbook language did not inform employees of the particular method the airline had chosen.³⁶²

Because choosing a “leave year” carries with it the obligation to inform employees of that choice, the court found that America West had failed to select a calculating method. Therefore, under 29 C.F.R. Section 825.200(e), “the option that provides the most beneficial outcome for the employee” must be used to determine whether the plaintiff’s 1996 absences were covered by the FMLA. The “calendar year” method provided the most favorable outcome to Bachelder. Because she began 1996 with a fresh bank of FMLA-protected leave, her February 1996 absences were covered by the FMLA.³⁶³

³⁶⁰ Id. at 1119-1121.

³⁶¹ Id. at 1129.

³⁶² Ibid.

³⁶³ Id. at 1129-1136.

Unfortunately, the court did not provide clear guidance concerning the method of notifying employees of the “leave year.” Clearly, notice may be provided in an employee handbook, but California public educational agencies do not typically provide handbooks to their employees. The court found that the notice requirement is not satisfied by posting the sample poster provided by the Wage and Hour Division of the United States Department of Labor, because the sample poster does not mention the methods by which employers calculate leave eligibility. It remains open to question whether the notice requirement would be satisfied if the sample poster were modified to specify the employer’s choice of “leave year.”³⁶⁴

The “leave year” should be specified in a document that is disseminated to employees. This document could be a collective bargaining agreement or board policy or regulation that is distributed to employees. Alternatively, a district could specify the leave year on the FMLA “fact sheet” which the United States Department of Labor provides to satisfy the requirement of providing employees who request family and medical leave with written guidance concerning their rights and obligations under the FMLA. As modified, the fact sheet should be provided to all employees, not just employees who have requested family and medical leave.

H. Exemption from Layoff

In Tomlinson v. Qualcomm, Inc.,³⁶⁵ the Court of Appeal held that California’s Family Rights Act, Government Code section 12945.2, does not immunize or exempt an employee from an otherwise valid layoff. This ruling would apply to all employers in California, public and private. Therefore, if a district lays off certificated or classified employees in conformance with the statutory provisions in the Education Code, an employee on family leave would not be immunized or exempted from that layoff.

In Tomlinson, the employee had been granted maternity and family leave in 1998 and 1999. During the period of time that the employee was on leave, the employer instituted a company-wide workforce reduction, or layoff. The employee filed suit in Superior Court alleging that since she was on family leave, she was immunized or exempted from the layoff. The employee argued that Government Code section 12945.2 guaranteed employment in the same or comparable position upon the termination of the leave. However, the Court of Appeal held that California Code of Regulations, Title 2, Section 7297.2 adopted by the Fair Employment and Housing Commission clarified that the guarantee of reinstatement to the same or comparable position does not preclude an employer from terminating the employee’s employment as part of a workforce reduction.³⁶⁶ Section 7297.2 states:

“An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during this CFRA leave period. The employer has the burden of proving, by a preponderance of the evidence that an employee would not otherwise have been

³⁶⁴ Ibid.

³⁶⁵ 97 Cal.App.4th 934, 118 Cal.Rptr.2d 822 (2002).

³⁶⁶ Id. at 939-940.

employed at the time reinstatement is requested in order to deny reinstatement. . . .”

The Court of Appeal noted that the regulation was consistent with the federal FMLA.³⁶⁷ The court in Tomlinson noted that the California law was modeled after the FMLA and that the FMLA confirms that a guarantee of continued employment after leave may coexist with a prohibition on conferring greater rights to an employee on leave.³⁶⁸

I. Activities That Do Not Qualify For FMLA Leave

In Tellis v. Alaska Airlines,³⁶⁹ the Court of Appeals concluded that an employee retrieving a family car on the other side of the country, and making periodic cell phone calls to his wife during the retrieval, was not “caring for” his wife for purposes of the FMLA. The decision highlights the requirement that there be a minimum “level of participation in the ongoing treatment” of a seriously ill family member before leave to “care for” that individual will qualify under the state federal family leave laws.

The court concluded that employee’s activities could not be considered “caring for” his wife. The court stated:

“Instead of participating in his wife’s on-going treatment by staying with her, he left her for almost four days. [Plaintiff] claims his trip provided psychological reassurance to his wife, but he did not travel to Atlanta to participate in his wife’s medical care. Having a working vehicle may have provided psychological reassurance; however, that was merely an indirect benefit of an otherwise unprotected activity – traveling away from the person needing care. [Plaintiff] also claims his phone calls provided moral support and comfort, but his phone calls during his trip did not constitute participation in on-going treatment.”³⁷⁰

The decision in Tellis establishes a standard for determining whether an employee is “caring for” a seriously ill family member. It is clear from the judicial decisions and the regulations that “caring for” a seriously ill family member includes psychological care, and even includes indirect care – e.g., caring for three healthy children while a spouse attends to a seriously ill fourth child. In essence, activity will not be deemed “caring for” a seriously ill family member unless the employee is in close and continuing proximity to the ill family member.

³⁶⁷ 29 U.S.C. Section 2614 (FMLA).

³⁶⁸ See, 29 U.S.C. Section 2614(a).

³⁶⁹ 414 F.3d 1045 (9th Cir. 2005).

³⁷⁰ Id. at 1048.

J. Military Caregiver Leave Under FMLA

On October 28, 2009, President Obama signed the National Defense Authorization Act for Fiscal Year 2010.³⁷¹ This law, which is effective immediately, modifies the entitlements for qualifying exigency leave and military caregiver leave under the FMLA. The changes discussed below will require districts to alter the notices they have posted regarding these leaves. Districts also will need to consider whether board policies, leave-related forms and collective bargaining agreements will need to be modified to reflect current law.

Under prior law, qualifying exigency leave was available only for family members whose relative is a member of the Reserves or National Guard. The new law extends qualifying exigency leave to family members whose relative is a member of the regular Armed Forces. However, the new law also limits qualifying exigency leave to occasions in which the servicemember is deployed to a foreign country or returning from such deployment. Qualifying exigencies include short-notice-deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and any other event the employer and employee agree is a qualifying exigency. The right to take qualifying exigency leave extends to the spouse, son, daughter, or parent of the servicemember.

Under prior law, military caregiver leave was limited to family members of active servicemembers who are ill or injured. The new law extends military caregiver leave to family members of veterans provided the veteran was a member of the Armed Forces (including the National Guard or Reserves) at any time during the previous five years prior to the date on which the veteran undergoes medical treatment, recuperation or therapy; the injury or illness must have been incurred in the line of duty. The leave entitlement is 26 weeks in a 12-month period. The right to take military caregiver leave extends to the spouse, son, daughter, parent, or next of kin of the servicemember.

K. Restoration of Employment

In White v. County of Los Angeles,³⁷² the Court of Appeal held when an employee takes leave under the Family Medical Leave Act (FMLA),³⁷³ the employee is entitled to be restored to employment upon certification from the employee's healthcare provider that the employee is able to resume work. The employer is not permitted to seek a second opinion regarding the employee's fitness for work prior to restoring the employee to employment.

However, the Court of Appeal held that if the employer is not satisfied with the employee's healthcare provider's certification, the employer may restore the employee to work, but then seek its own evaluation of the employee's fitness for duty at its own expense.³⁷⁴

³⁷¹ P.L. 111-84.

³⁷² 225 Cal.App.4th 690, 170 Cal.Rptr.3d 472 (2014).

³⁷³ 29 U.S.C. Section 2601 et seq.

³⁷⁴ Id. at 694.

The case involved an investigator for the Los Angeles County District Attorney's Office who was on FMLA leave for depression. The District Attorney's Office based its request for reevaluation on the employee's erratic behavior prior to her FMLA leave.³⁷⁵

The Court of Appeal held that the FMLA protections no longer apply after the employee returns to work and the employer may require a fitness for duty examination consistent with the Americans with Disabilities Act (ADA). The ADA requires that the examination be job-related and consistent with business necessity.³⁷⁶

L. Employee's Right to Decline FMLA Leave

In Escriba v. Foster Poultry Farms, Inc.,³⁷⁷ the Ninth Circuit Court of Appeal held that, based on the facts presented in this case, an employee can affirmatively decline to use Family Medical Leave Act ("FMLA")³⁷⁸ leave even if the reason for the absence would qualify under the FMLA. Under *Escriba*, upon notice from the employer of an FMLA-qualifying reason for leave, if the employer informs the employee s/he is eligible to take FMLA leave,³⁷⁹ the employee can affirmatively elect not to take FMLA leave.

Maria Escriba worked in a Foster Poultry Farms, Inc. processing plant for 18 years. Escriba requested two weeks' vacation, informing her supervisor that her father was ill in another country and she wanted to care for him. The supervisor granted the request, but followed up two days later with leave forms and asked Escriba if she needed more time. Escriba stated she did not need more time, and Escriba testified that she made her vacation request to her supervisor and not the Human Resources Department because she intended to request vacation time, not family leave.³⁸⁰ Escriba's supervisor signed off on the vacation leave request and informed Escriba that she would need to contact Human Resources if she wanted to request an extension of leave. Escriba went to the plant facility superintendent and asked for additional vacation time, but the facility superintendent indicated he could not approve additional leave. When Escriba asked what she should do if she could not return in two weeks, the facility superintendent suggested she send documentation to Human Resources. No steps were taken to designate this request as FMLA by either manager.³⁸¹

When Escriba arrived to assist her father, she testified that she realized she would need more than two weeks, but never contacted Foster Poultry Farms. Her husband, also an employee at the processing plant who shared the same Human Resources Department contact, remained working while she was away. Escriba testified that although she spoke with her husband several times while she was out of the country, she never asked him to contact Human Resources on her

³⁷⁵ *Ibid.*

³⁷⁶ *Id.* at 706-07.

³⁷⁷ 743 F.3d 1236 (9th Cir. 2014).

³⁷⁸ 29 U.S.C. Section 2601 et seq.

³⁷⁹ 29 C.F.R. Section 825.300 (b) provides the following: "Eligibility notice. (1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances."

³⁸⁰ Escriba had successfully requested FMLA leave on fifteen prior occasions, which was introduced at evidence to show her knowledge of and compliance with FMLA policies and procedures at Foster Poultry Farms (--- F.3d ----, 2014 WL 715547 (C.A. 9 (Cal.)), at 7, 8).

³⁸¹ 743 F.3d 1236, 1239 (9th Cir. 2014).

behalf. Upon her return, Escriba contacted her union representative 16 days after she was scheduled to return to work. Her union representative informed her she would likely be fired under the plant's "three day no-show, no-call rule," which called for automatic termination of an employee who misses three work days without notifying the employer or seeking a leave of absence. Escriba was terminated under this policy. As a labor relations manager from Foster Poultry Farms testified, if an employee elects to take vacation time and expressly declines FMLA-protected leave, the employer would not force the employee to take FMLA leave because it would reduce the benefit to the employee, since by policy taking FMLA leave required concurrent use of vacation time.³⁸²

Escriba filed suit for violations of the FMLA and the California Family Rights Act, and California public policy.³⁸³ The Ninth Circuit analyzed all three cases under the standards of the FMLA. Noting that the district court found that Escriba had "knowledge of FMLA leave and how to invoke it," and that although she "was given the option and prompted to exercise her right to take FMLA leave, [she] unequivocally refused to exercise that right,"³⁸⁴ the Ninth Circuit determined that there was no FMLA interference by Foster Poultry Farms. The opinion states, Holding that simply referencing an FMLA-qualifying reason triggers FMLA protections would place employers like Foster Farms in an untenable situation if the employee's stated desire is *not* to take FMLA leave. The employer could find itself open to liability for forcing FMLA leave on the unwilling employee.³⁸⁵ (Emphasis in original.)

In the Escriba decision, the Ninth Circuit provided clear guidance that FMLA leave can be affirmatively declined by an employee, even when the employee is requesting time off for an FMLA-qualifying event. However, administrators should pay close attention to the facts of the case, which indicate the level of evidence needed to show that an employee expressly declined FMLA leave. Practical steps district employers can take, to ensure compliance with the FMLA and the Escriba decision, would include the following:

1. Policies and procedures regarding different types of leave, including FMLA/CFRA, as well as absence policies or contract provisions, must be clear and the district should be able to show how employees are notified of these policies and procedures and that they are consistently applied.
2. Managers should ask whether the employee might need additional time off, if an FMLA-qualifying reason is provided for the requested leave, and direct employees to Human Resources should additional time be requested or offer that contact information should the employee later decide to request additional time under FMLA.
3. Employees should be provided with forms appropriate to the type of leave requested, with an explanation of each process.

³⁸² Id. at 1240-41.

³⁸³ Government Code section 12945.2 et seq.

³⁸⁴ 743 F.3d 1236, 1242 (9th Cir. 2014).

³⁸⁵ Ibid.

4. The requesting employee should clearly complete the appropriate form depending on the type of leave requested.
5. Managers and Human Resources administrators should document communications regarding requests for leave, including which forms were provided to the employee.

RESIGNATION

A. Education Code

The Education Code provides that a governing board of a school district shall accept the resignation of any district employee and shall fix the effective date of the resignation to be no later than the close of the school year during which the resignation is received.³⁸⁶ A resignation or dismissal may also result from the retirement of an employee under the provisions of any retirement law at the end of the school year.³⁸⁷

Effective January 1, 2000, Education Code sections 44930 and 45201 allow the governing board of a school district to accept resignations of school employees no later than two years beyond the close of the school year during which the resignation is received by the board if both parties agree. The legislation applies to both certificated and classified employees.³⁸⁸

A resignation is a contractual termination of the contract of employment, and it is ineffectual without the intent of the employee to sever the employer/employee relationship.³⁸⁹ A resignation will not be effective if it was obtained by fraud, duress, or coercion.³⁹⁰ An employee's tender of resignation is an offer to resign or to terminate his contract of employment, and therefore, the employee is entitled to withdraw it at any time before it is accepted by the governing board. An attempt to withdraw it after it has been accepted by the governing board of the school district is ineffectual.³⁹¹ The governing board of a school district may delegate to the district superintendent, pursuant to school district policy, the authority to accept an employee's resignation.³⁹²

A resignation may also be implied when a teacher refuses to sign a contract for reemployment.³⁹³ A permanent certificated employee may be requested, prior to May 30, to give notice of his/her intention to remain or not remain in the service of the district. If the employee fails to respond by July 1, he or she may be deemed to have declined employment and their employment terminated on June 30 of that year.³⁹⁴

³⁸⁶ Education Code section 44930.

³⁸⁷ Education Code section 44907.

³⁸⁸ Stats.1999, ch. 80 (A.B. 1135).

³⁸⁹ Sherman v. Board of Trustees, 9 Cal.App.2d 262 (1935); Leithliter v. Board of Trustees, 12 Cal.App.3d 1095 (1970).

³⁹⁰ Mitchell v. Board of Trustees, 5 Cal.App.2d 64 (1935); Shade v. Board of Trustees, 21 Cal.App.2d 725 (1937).

³⁹¹ Shade v. Board of Trustees, 21 Cal.App.2d 725 (1937); French v. Board of Education, 265 Cal.App.2d 955 (1968).

³⁹² American Federation of Teachers, Local No. 1050 v. Board of Education of Pasadena Unified School District, 107 Cal.App.3d 829 (1980).

³⁹³ Education Code section 44842.

³⁹⁴ *Ibid.*

Generally, the intent to resign must be clear and a failure to report to work the first day of class has been held not to constitute substantial evidence of abandonment of a written contract for the school year so as to constitute a resignation.³⁹⁵ The statutory provisions in the Education Code must be followed to dismiss a teacher.

B. Monetary Settlements

When an employee resigns in lieu of dismissal, often a monetary settlement or payment is made to the employee. Recent federal legislation has clarified when such payments are taxable income. Congress recently passed the Small Business Job Partnership Act of 1996.³⁹⁶ Section 1605 of the Act entitled, “Repeal of Exclusion for Punitive Damages and for Damages Not Attributed to Physical Injuries or Sickness,” amended the Internal Revenue Code.³⁹⁷

The Internal Revenue Act, as amended, provides an exclusion from income tax liability only for compensatory damages which are received on account of personal physical injuries or physical sickness.³⁹⁸ Damages received for nonphysical injuries will no longer be excludable from the individual’s gross income for income tax purposes.³⁹⁹ The Internal Revenue Code now provides that emotional distress will not be considered a physical injury or physical sickness even if physical symptoms result from such emotional distress. In addition, the Act provides that punitive damages will not be excludable from the individual’s gross income whether or not the punitive damages are related to a claim for personal injury or sickness.⁴⁰⁰

In actions alleging negligence where there has been no physical injury or sickness or for employment-related actions (including actions brought under 42 U.S.C. Section 1983), where there are no allegations of physical injuries, amounts received under such settlement agreements will generally be taxable with the exception of amounts received as reimbursement for medical care attributable to emotional distress. In employment-related actions in which physical injuries are validly alleged, an exclusion will be available for amounts (except for punitive damages) received for those injuries.⁴⁰¹

Districts should use extreme caution in entering into settlement agreements that attempt to circumvent the provisions of the Internal Revenue Code. Districts should avoid any agreements where a large portion of the settlement agreement is attributed to physical injuries when such is not the case. Districts should also not agree to indemnify a plaintiff for any taxes, interest or penalties later determined to be due, since such indemnification provisions do not bind federal or state taxing authorities.

In addition, damages or settlement payments received in employment-related actions which represent back pay or future pay constitute “wages” for purposes of the employment tax and income tax reporting and withholding requirements. These amounts must be reported on

³⁹⁵ Pennel v. Pond Union School District, 29 Cal.App.3d 832, 105 Cal.Rptr. 817 (1973).

³⁹⁶ Public Law 104-188 (HR 3448).

³⁹⁷ Internal Revenue Code section 104(a).

³⁹⁸ Internal Revenue Code section 104(a)(2).

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

Form W-2 and there must be withholding for federal income taxes, as well as deductions for the employee portions of FICA and FUTA, and contributions of the employer portion of FICA. Although it is not entirely clear at this time, we recommend that the remaining components of employment-related awards or settlements which represent payments for emotional distress, pain and suffering or similar damages or for punitive damages should also be classified as “wages” which must be reported and withheld in the same manner as back pay.

The Internal Revenue Code imposes civil penalties for various kinds of noncompliance with the provisions concerning the reporting and payment of employment and withholding taxes.⁴⁰² The penalty is ten percent of the amount that should have been deposited, but may be reduced if a correction is made within the required time periods.⁴⁰³ In addition, the Internal Revenue Code provides for the imposition of various types of criminal penalties for an affirmative act and willfulness (i.e., an intent to disobey the law).

C. Confidentiality Agreements

In Sanchez v. County of San Bernardino,⁴⁰⁴ the Court of Appeal held that the confidentiality provisions of a resignation agreement in which the parties agreed not to disclose the facts and circumstances giving rise to the resignation or severance agreement were enforceable. The Court of Appeal’s decision could be helpful to districts in some cases.

The plaintiff, Elizabeth Sanchez, was a high ranking employee of the County of San Bernardino. Sanchez negotiated a labor contract with the Safety Employees Benefits Association, the labor union responsible for representing sheriff’s deputies. Thereafter, she and James Erwin, the president of the employee organization, began to have an intimate relationship. Sanchez denied that this created any actual conflict of interest because she was never involved in any further negotiations with either Erwin or the Association. When her supervisor discovered the relationship, he insisted that she resign.

The County of San Bernardino and Sanchez entered into a written severance agreement which provided that neither side would disclose the facts, events and issues which gave rise to the resignation or the agreement. Despite this confidentiality provision, newspaper articles appeared almost immediately that quoted county representatives, including supervisor Dennis Hansberger, to the effect that Sanchez had resigned due to a conflict of interest arising out of an improper relationship with James Erwin.

Sanchez then filed a lawsuit against the county and Hansberger for breach of contract and other causes of action. The Superior Court granted summary adjudication in favor of the county. The trial court ruled that the confidentiality provision was void as against public policy because the county had a duty to make the disclosures that it did. However, the Court of Appeal ruled that while the county may have had a duty to disclose the severance agreement itself, it had no

⁴⁰² Internal Revenue Code sections 6651(a), 6656.

⁴⁰³ Section 6662 provides penalties for underpayment if due to negligence or intentional disregard of the rules and regulations in the amount of 20% of the amount required to be shown on the return. Section 6672 imposes a penalty for willful failure to collect and pay over withholding taxes upon the person responsible in the amount of 100% of the amount required to be withheld.

⁴⁰⁴ 176 Cal.App.4th 516, 98 Cal.Rptr.3d 96 (2009).

such duty to disclose the circumstances that gave rise to the severance agreement. The confidentiality provision stated:

“To the maximum extent permitted by law, the parties further agree that this agreement, the terms and conditions of this agreement, the facts, events and issues which gave rise to this agreement, and any and all actions by Ms. Sanchez and the County in accordance therewith, are strictly confidential and shall not be disclosed or discussed with any other persons, entities or organizations, whether within or without the County, except as may be required by applicable law.”

Sanchez and the county signed the severance agreement with the above language on or about December 20, 2004. Starting on December 22, 2004, a number of newspaper articles reported on Sanchez’s resignation. They named her supervisor and Supervisor Dennis Hansberger as sources, stating that Sanchez had resigned after disclosing that she had an improper relationship with James Erwin, the president of the union that represents sheriff’s deputies.

The County of San Bernardino defended its disclosure of the relationship between James Erwin and Elizabeth Sanchez by stating that the information was a public record under the Public Records Act.⁴⁰⁵

In BRV Inc. v. Superior Court, a school district had received complaints about the principal of the high school in the district who also served as superintendent of the district. The district hired a private investigator to interview witnesses and to produce a report regarding the truth of the complaints, and whether the evidence provided by the complaining parties supported the allegations. After the private investigator submitted her report to the district, the superintendent resigned, and the district promised to seal the report and not to release any information about the investigation except as required by law or in accordance with a court order or subpoena. When a newspaper made a public records request for the report, the district refused to release it. The newspaper then sued. The trial court ruled that almost all of the report was exempt from disclosure under the personnel file exemption.⁴⁰⁶ The Court of Appeal reversed, holding that under the balancing test applicable to the personnel file exemption, the public’s interest in disclosure outweighed the individual’s significant privacy interest.⁴⁰⁷ The Court of Appeal in BRV stated:

“Without doubt, the public has a significant interest in the professional competence and conduct of a school district superintendent and high school principal. It also has a significant interest in knowing how the district’s board conducts its business, and in particular, how the board responds to allegations of misconduct committed by the district’s chief administrator. . . .

⁴⁰⁵ See, BRV Inc. v. Superior Court, 143 Cal.App.4th 742 (2006).

⁴⁰⁶ Id. at 747-749.

⁴⁰⁷ Id. at 757-759.

“Here, members of the public were greatly concerned about the behavior of the city’s high school superintendent and his governing elected board in responding to their complaints. Indeed, from the public’s viewpoint, the district appeared to have entered into a ‘sweetheart deal’ to buy out the superintendent from his employment without having to respond to the public accusations of misconduct. The public’s interest in judging how the elected board treated this situation far outweighed the board’s or Morris’s interest in keeping the matter quiet. Because of Morris’s position of authority as a public official and the public nature of the allegations, the public’s interest in disclosure outweighed Morris’s interest in preventing disclosure of the Davis report.”⁴⁰⁸

The Court of Appeal noted that in BRV, the information was contained in a particular document under the Public Records Act, and there had been a request for a copy of the report. However, in the present case, the information regarding the relationship was not contained in any particular document, and therefore, the County of San Bernardino had no duty to disclose it and an agreement not to disclose it was not against public policy.

The Court of Appeal noted that if there had been a public records request for the severance agreement itself, the county would have had to disclose it. The disclosure of the severance agreement would not have violated the confidentiality provision because it would have been a disclosure required by applicable law. However, it does not appear that there was ever such a request. In addition, disclosing the severance agreement would not have disclosed any of the circumstances surrounding Sanchez’s resignation and her relationship with James Erwin.

Sometime after the county made its initial disclosures regarding the relationship between Sanchez and Erwin, it received the Andrus report. The Andrus report was prepared by an attorney and was labeled “Attorney-Client Confidential Communication.” The Public Records Act does not require the disclosure of a document that is subject to the attorney-client privilege.⁴⁰⁹ Therefore, until the county waived the privilege, the Public Records Act did not require it to disclose the Andrus report. Moreover, the confidentiality provision in the resignation agreement made it a breach of contract for the county to waive the privilege. The Court of Appeal held that the courts must weigh public policy in favor of open government against the broad general public policy in favor of privacy.⁴¹⁰

The Court of Appeal also held that the county’s disclosures affected the ability of Sanchez to obtain employment after her resignation. Several employers testified that they decided not to hire Sanchez due to the negative newspaper articles. Sometime after May 2005, Sanchez finally got a job in a hospital. Her compensation was less than she had enjoyed in her county job.

⁴⁰⁸ Id. at 757-759.

⁴⁰⁹ See, Government Code section 6254(k); STI Outdoor v. Superior Court, 91 Cal.App.4th 334, 340-341 (2001).

⁴¹⁰ See, California Constitution Article 1, Section 1; Government Code section 6250, which states in part, “. . . the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state . . .”

The Court of Appeal reversed the trial court's order on the breach of contract action. The decision in Sanchez could be beneficial to districts in cases in which employees breach the confidentiality provisions of resignation or severance agreements.

AFFIRMATIVE ACTION AND PROPOSITION 209

On November 5, 1996, the voters of California approved Proposition 209, an initiative which bans preferential treatment by California public agencies, including community college districts, school districts, and regional occupational programs. The new law took effect on November 6, 1996, pursuant to Article II, Section 10, of the California Constitution and was immediately challenged in court. The proposition adds Article I, Section 31 to the California Constitution and states in part:

“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting.”

The analysis by the Legislative Analyst states that Proposition 209 would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent that these programs involve preferential treatment based on race, sex, color, ethnicity or national origin. The Legislative Analyst stated that the measure would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs where sex, race or ethnicity are preferential factors in hiring, promoting, training or recruiting decisions. In addition, according to the Legislative Analyst, the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts. The Legislative Analyst stated that the measure would also affect a variety of public school and community college programs, such as counseling, tutoring, outreach, student financial aid, and financial aid to selected school districts in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity or national origin.

The measure, by its terms, does not ban preferential treatment when necessary for any of the following reasons:

1. To keep the state or local governments eligible to receive money from the federal government;
2. To comply with a court order in force as of the effective date of the enactment of Proposition 209 (the day after the election);
3. To comply with federal law or the United States Constitution; or
4. To meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

On April 8, 1997, the United States Ninth Circuit Court of Appeals, in Coalition for Economic Equity v. Wilson,⁴¹¹ upheld the constitutionality of Proposition 209.

The Court of Appeals held that Proposition 209 was constitutional and complied with the Equal Protection Clause of the Fourteenth Amendment since the central purpose of the Equal Protection Clause is the prevention of official conduct discriminating on the basis of race. The Court of Appeals stated:

“When the government prefers individuals on account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or to the other gender . . .

“Proposition 209 amends the California Constitution simply to prohibit state discrimination against or preferential treatment to any person on account of race or gender. Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. If merely stating that this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.”⁴¹²

The Court of Appeals went on to reject plaintiff’s argument that minorities were disadvantaged by Proposition 209 because they must seek a constitutional amendment to reenact affirmative action programs benefiting them. The Court of Appeals held that merely requiring an issue to be resolved at a higher level of state government does not make it unconstitutional. The Court of Appeals stated:

“Impediments to preferential treatment do not deny equal protection. It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.

“The alleged ‘equal protection’ burden that Proposition 209 imposes on those who would seek race and gender preferences is a burden that the Constitution itself imposes. The Equal Protection Clause, parked at our most ‘distant and remote’ level of government, singles out racial preferences for severe political burdens – it prohibits them in all but the most compelling circumstances.”⁴¹³

⁴¹¹ 122 F.3d 692 (9th Cir. 1997).

⁴¹² Id. at 702.

⁴¹³ Id. at 708.

The Court of Appeals also found that Proposition 209 was not preempted by Title VII of the 1964 Civil Rights Act. The Court of Appeals found that the district court relied on an erroneous legal premise concluding that the plaintiffs were likely to succeed on the merits of their claims and held that the plaintiffs were not entitled to a preliminary injunction enjoining the enforcement of Proposition 209.⁴¹⁴

On November 3, 1997, the United States Supreme Court refused to grant a hearing in Coalition for Economic Equity v. Wilson, (the Proposition 209 case).⁴¹⁵ As a result, there can be no further appeals of the U.S. Ninth Circuit Court of Appeals decision which upheld the constitutionality of Proposition 209. The United States Supreme Court's action allowed the Court of Appeals decision to become the final judicial decision in the matter.

On September 3, 1997, the same three judge panel of the United States Ninth Circuit Court of Appeals in Monterey Mechanical Co., v. Wilson,⁴¹⁶ held that the affirmative action provisions relating to minority and women contractors in Public Contract Code sections 10115 were unconstitutional and violated the provisions of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

In Monterey Mechanical, California Polytechnic State University, San Luis Obispo (Cal Poly) solicited bids for a utilities upgrade. Monterey Mechanical submitted the low bid but did not get the job. The second lowest bidder, Swinerton and Walberg, was awarded the contract with a bid that was \$318,000 higher than Monterey Mechanical's bid.⁴¹⁷

Monterey Mechanical's bid was disqualified because the company did not comply with Public Contract Code section 10115. Section 10115 requires general contractors to subcontract 23% of the work to minority women and disabled veteran owned subcontractors, or demonstrate good faith efforts to do so. The subcontractor must be at least 51% owned and controlled by members of minority groups, women, or disabled veterans.⁴¹⁸

Monterey Mechanical could have complied with the statute by using minority, women, and disabled veteran business enterprises for 23% of the contract amount or by demonstrating good faith efforts to meet their goals. Monterey Mechanical did not fully comply with the statute by either method since it did not subcontract out the required 23% of the contract amount or fully comply with the good faith requirement. Swinerton and Walberg did not subcontract out at least 23% of the work but did comply with the good faith requirements of the statute. Cal Poly rejected Monterey Mechanical's bid as nonresponsive.⁴¹⁹

Monterey Mechanical requested that Cal Poly provide it with a disparity study which justified the goals for the designated classes. Cal Poly replied that there was not such a study. Cal Poly took the position that because the goal requirements of the statute did not involve racial

⁴¹⁴ Id. at 710.

⁴¹⁵ 118 S.Ct.17(1997).

⁴¹⁶ 125 F. 3d.702 (9th Cir. 1997).

⁴¹⁷ Id. at 704-705.

⁴¹⁸ Id. at 704-705.

⁴¹⁹ Id. at 704-705.

or gender quotas, set aside or preferences, Cal Poly needed no disparity documentation or study.⁴²⁰

Monterey Mechanical protested the contract award and sued Cal Poly and Swinerton and Walberg for declaratory relief, injunctive relief and damages. Monterey Mechanical argued that the statute violated the Equal Protection Clause of the United States Constitution.⁴²¹ The district court denied Monterey Mechanical's request for a preliminary injunction and Monterey Mechanical appealed. The Court of Appeals reversed and remanded the matter back to the district court.⁴²²

The Court of Appeals held that a bidder need only demonstrate that a discriminatory policy prevented it from competing on an equal footing, not that the discrimination caused it to lose the contract award in order to have standing to challenge the policy or statute in court. To establish standing, the Court of Appeals held bidders need only show that they are forced to compete on an unequal basis. The court held that when it prepared and submitted its bid, Monterey Mechanical had to prepare its bid in the face of a statute conferring advantages to competing bidders. The court held that a general contractor who suffers no discrimination itself has standing if a statute requires the general contractor to discriminate against others on the basis of their ethnicity or sex. A person required by the government to discriminate by ethnicity or sex against others has standing to challenge the validity of the requirement even though the government does not discriminate against him.⁴²³ The Court of Appeals stated:

“A person suffers injury in fact if the government requires or encourages as a condition of granting him a benefit that he discriminate against others based on their race or sex. . . .The principle that ethnic discrimination is wrong is what makes discrimination against groups of which we are not members wrong, and by that principle, discrimination is wrong even if the beneficiaries are members of groups whose fortunes we would like to advance. . . .”⁴²⁴

The court also noted that general contractors who themselves are women or minority owned were exempt from the requirement to subcontract out 23% of the work to women, minority, and disabled veteran-owned businesses. The court held that this was unequal treatment in violation of the Equal Protection Clause since not all bidders on state projects were treated in the same way.⁴²⁵

The Court of Appeals held that even though the statute does not impose rigid quotas, it does require the making of a good faith effort to meet the percentage goals listed in Public Contract Code section 10115. A low bidder who does not meet the good faith effort requirements of the statute will not be awarded a contract. The Court of Appeals cited an earlier

⁴²⁰ Id. at 704-705.

⁴²¹ Id. at 704-705.

⁴²² Id. at 705.

⁴²³ Id. at 706-707.

⁴²⁴ Id. at 707-708.

⁴²⁵ Id. at 705.

case, Bras v. California Public Utilities Commission,⁴²⁶ which held that provisions were not immunized from scrutiny under the Equal Protection Clause because they purport to establish goals rather than quotas and held that a statute that authorizes or encourages the use of quotas is unconstitutional. The Court of Appeals noted that the Tenth Circuit in Concrete Works of Colorado v. Denver,⁴²⁷ reached the same conclusion. The Court of Appeals held that the statute treats contractors differently according to their ethnicity and sex with respect to the good faith requirements since not all contractors are required to make good faith efforts. Only those firms that are not minority or women owned must advertise and make good faith efforts to find minority and women owned subcontractors.⁴²⁸ The Court of Appeals stated:

“We are not faced with a non-discriminatory outreach program requiring that advertisements for bids be distributed in such a manner as to assure that all persons, including women owned and minority owned firms, have a fair opportunity to bid. The Equal Protection Clause as construed in Adarand applies only when the government subjects a person to unequal treatment. There might be a non-discriminatory outreach program which did not subject anyone to unequal treatment. But this statute is not of that type. . . .

“It requires distribution of information only to members of designated groups, without any requirement or condition that persons in other groups receive the same information. Thus, the statute may be satisfied by distribution of information exclusively to persons in the designated groups. Bidders in the designated groups are relieved, to the extent they kept the required percentages of work, of the obligation to advertise to people in their groups. The outreach the statute requires is not from all equally, or to all equally.”⁴²⁹

The Court of Appeals cited City of Richmond v. J.A. Croson Company,⁴³⁰ and noted that in order to justify racial classifications findings of societal discrimination will not suffice. The findings must show prior discrimination by the governmental agency involved. The Court of Appeals noted that Cal Poly offered no evidence to justify the race and sex classifications and had no documentation of past discrimination by Cal Poly. The Court of Appeals also noted that there were no legislative findings of past discrimination by the state or Cal Poly.⁴³¹

The Court of Appeals concluded:

“All persons, of either sex and any ethnicity, are entitled to equal protection of the law. That principle, and only that principle,

⁴²⁶ 59 F.3d 869 (9th Cir. 1995).

⁴²⁷ 36 F.3d 1513 (10th Cir. 1994).

⁴²⁸ Id. at 708.

⁴²⁹ Id. at 711.

⁴³⁰ 109 S.Ct. 706 (1989).

⁴³¹ Id. at 713.

guarantees individuals that their ethnicity will not turn into legal disadvantages as the political power of one or another group waxes or wanes. The statute at issue in this case violates the Equal Protection Clause. . . .”⁴³²

In Hi-Voltage Wire Works, Inc. v. City of San Jose,⁴³³ the California Supreme Court held that the City of San Jose’s MBE/WBE bidding requirement was unconstitutional.

Hi-Voltage Wire Works was the low bidder on a project advertised by the City of San Jose. The city required all bidders on its projects to include a specified percentage of women and minority subcontractors, or document efforts to do so. Because Hi-Voltage intended to use only its own personnel on the project, it was unable to comply with this requirement and its bid was rejected. Hi-Voltage sued the city alleging that the bidding requirement violated the state constitutional prohibition against giving preferential treatment to anyone on the basis of race or sex.

The court found both the outreach and participation components of the city’s program to be unconstitutional. The court concluded that the outreach component required contractors to treat minority business enterprise/women’s business enterprise (MBE/WBE) subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for their services, none of which contractors were required to do for non-MBEs/WBEs. For the court, the relevant constitutional consideration was that contractors were compelled to contact MBEs/WBEs, which were thus accorded preferential treatment within the meaning of Article I, Section 31 of the California Constitution.

The court found that the participation component of the city’s program authorized or encourage what amounted to discriminatory quotas or set-asides, or at least race- and sex-conscious numerical goals. The court stated: “A participation goal differs from a quota or set-aside only in degree; by whatever label, it remains ‘a line drawn on the basis of race and ethnic status’ as well as sex. . . .”

After the Hi-Voltage decision, it is unclear what “outreach” programs will pass constitutional muster. The California Supreme Court stated:

“Although we find the City’s outreach option unconstitutional under Section 31, we acknowledge that outreach may assume many forms, not all of which would be unlawful. . . . Our holding is necessarily limited to the form at issue here, which requires prime contractors to notify, solicit, and negotiate with MBE/WBE subcontractors as well as justify rejection of their bids. Plainly, the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicted on an impermissible classification. We

⁴³² Id. at 715.

⁴³³ 24 Cal.4th 537 (2002).

express no opinion regarding the permissible parameters of such efforts.”

In Crawford v. Huntington Beach Union High School District,⁴³⁴ the Court of Appeal held that the Huntington Beach Union High School District’s open transfer policy violated Proposition 209.⁴³⁵

As indicated in the court decision, the district has an open transfer policy for all of its high schools. The open transfer policy had a “racial and ethnic balance” component as required by Education Code section 35160.5. Section 35160.5 states that school districts shall retain the authority to maintain appropriate racial and ethnic balances among their respective schools at the school district’s discretion.⁴³⁶

The Court of Appeal indicated that there are six high schools in the district, but only Westminster High School has been declared “ethnically isolated.” The school district employed a private firm to do a demographic study of Westminster High School. The demographic study for the 1999-2000 academic year showed that the ethnic make-up of Westminster High School was approximately:

- Asian, 45.2%
- Hispanic, 30.5%
- White, 15.9%.⁴³⁷

As a result of the ethnic make-up of Westminster High School, the Court of Appeal noted that the school district put restrictions on white students seeking a transfer out of Westminster High School (transfers were allowed only if another white student was willing to transfer to Westminster High School to take that student’s place). However, a non-white student could transfer out without restrictions. In addition, a non-white student could not transfer into Westminster High School unless another non-white student was willing to transfer out and take that student’s place.⁴³⁸

Crawford, a taxpayer in the district, filed a lawsuit in September 1999, to challenge the constitutionality of the district’s policy under Proposition 209. In December 2000, the Orange County Superior Court ruled in favor of the school district. The Court of Appeal reversed the superior court’s decision.⁴³⁹

The Court of Appeal held that under the California Supreme Court’s decision in High Voltage Wire Works, Inc. v. City of San Jose,⁴⁴⁰ and an earlier Court of Appeal decision

⁴³⁴ 98 Cal.App.4th 1275, 121 Cal.Rptr.2d 96, 165 Ed.Law Rep. 712 (2002).

⁴³⁵ California Constitution Article I, Section 31.

⁴³⁶ 98 Cal.App.4th 1275, 1277 (2002).

⁴³⁷ Id. at 1278.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ 24 Cal.4th 537 (2000).

Connerly v. State Personnel Board,⁴⁴¹ the school district's policy was in violation of Proposition 209.

In Connerly v. State Personnel Board, the Court of Appeal held that a number of government affirmative action programs violated Proposition 209. These programs included subcontracting programs requiring bidders to utilize subcontractors who are socially and economically disadvantaged (which included racial and ethnic minorities within the definition), community college affirmative action employment programs, which included hiring goals and timetables for ethnic minorities, and participation goals for state contracts.⁴⁴²

In Crawford, the Court of Appeal concluded that the balancing component of Education Code section 35160.5 violated Proposition 209. The court noted that school districts could develop magnet schools which might lead to increased desegregation without offending Proposition 209. The Court of Appeal concluded by stating:

“We do not dispute the evils of segregated schools and we recognize the potential benefits of attending a racially and ethnically diverse school, but the people have spoken. California Constitution, Article I, Section 31 is clear in its prohibition against discrimination or preferential treatment based on race, sex, color, ethnicity, or national origin. Thus, the racial balancing component of the district's open transfer policy is invalid under our State Constitution.”⁴⁴³

In Grutter v. Bollinger⁴⁴⁴ and Gratz v. Bollinger,⁴⁴⁵ the courts ruled that race may be considered a factor in student admissions by the University of Michigan Law School, but that the admission policies of the University of Michigan undergraduate schools, which awarded additional points for race, was unconstitutional.

In Grutter, the United States Supreme Court upheld the law school's admission policy of considering race as part of an individual review of a student's application. The court upheld the law school's policy of attempting to achieve diversity to enrich everyone's education. The court noted that, under the Equal Protection Clause of the Fourteenth Amendment, no state shall deny any person within its jurisdiction equal protection of the laws. The court noted that the Fourteenth Amendment protects persons, not groups, and all government actions based on race are subject to strict scrutiny by the courts to ensure that the personal right to equal protection of the laws has not been infringed. The court held that the government may not treat people differently because of their race, except for the most compelling reasons. In essence, the court held that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. The court held that the law school's interest in a diverse student body was a compelling state interest.⁴⁴⁶ The court stated:

⁴⁴¹ 92 Cal.App.4th 16 (2001).

⁴⁴² Ibid.

⁴⁴³ 98 Cal.App.4th 1275, 1287 (2002).

⁴⁴⁴ 123 S.Ct. 2325 (2003).

⁴⁴⁵ 123 S.Ct. 2411 (2003).

⁴⁴⁶ 123 S.Ct. 2325, 2335-2339.

“The law school’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The law school’s assessment that diversity will, in fact, yield educational benefits is substantiated . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits. . . .”⁴⁴⁷

The court noted that the law school’s admission policy promotes cross-racial understanding, helps break down racial stereotypes, and enables students to better understand persons of different races. The court noted that numerous studies showed that student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce in society and better prepares them as professionals. The court noted that many major American businesses filed briefs stating that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse peoples, cultures, ideas, and viewpoints. The court noted that high-ranking retired officers and civilian leaders of the United States military argued that, based on their decades of experience, a highly qualified, racially diverse officer corps is essential to the military’s ability to fulfill its principle mission to provide national security.⁴⁴⁸

The court noted that to be narrowly tailored, a race conscious admissions program cannot use a quota system, but a university may consider race or ethnicity only as a plus in a particular applicant’s file without insulating the individual from comparison with all other candidates for the available seats. The court stated:

“In other words, an admissions program must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”⁴⁴⁹

The court found that the law school’s admission program met this test, but the undergraduate admissions policy in Gratz did not. The court defined a “quota” as a program in which a certain fixed number of, or proportion of, opportunities are reserved exclusively for certain minority groups.

The impact of these rulings in California is unclear as a result of the passage of Proposition 209, passed by the voters of California on November 5, 1996. Proposition 209 added Article I, Section 31, to the California Constitution and states, in part:

“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of

⁴⁴⁷ Id. at 2339.

⁴⁴⁸ Id. at 2339-2341.

⁴⁴⁹ Id. at 2342.

race, sex, color, ethnicity, or national origin, in the operation of public employment, public education, or public contracting.”

The Court of Appeals in Coalition for Economic Equity v. Wilson,⁴⁵⁰ upheld the constitutionality of Proposition 209. In Monterey Mechanical Company v. Wilson,⁴⁵¹ the Ninth Circuit Court of Appeal held that affirmative action provisions relating to minority and women contractors in Public Contract Code sections 10115 were unconstitutional. These provisions required a good faith effort to meet percentage goals for minority contractors. As a result, it is unclear whether these decisions are consistent with the Supreme Court’s decisions in Grutter and Gratz. Until future courts rule on this issue, this possible inconsistency will remain.

EMPLOYEE REFERENCES

On January 27, 1997, the California Supreme Court ruled that employers can be held liable for negligent misrepresentation or fraud when an employer fails to use reasonable care in recommending former employees for employment without disclosing material information bearing on their fitness. Specifically, the court held that where employers unreservedly recommend a former employee for employment without disclosing the facts an employer knew regarding prior charges or complaints of sexual misconduct, the employer could be held liable for negligent misrepresentation and fraud.⁴⁵²

In Randi W. v. Muroc Joint Unified School District,⁴⁵³ Randi W. filed a lawsuit against five school districts, the State of California, and a number of school administrators. Randi W.’s complaint alleges that while she was a student at Livingston Middle School, a vice principal offensively touched her, molested her, and engaged in sexual touching. The complaint alleges the vice principal worked in the Mendota Unified School District from 1985 to 1988 and that school administrators in that district knew of the vice principal’s prior improper conduct towards female students. The complainant alleges that despite this knowledge, school administrators in the Mendota Unified School District gave a detailed recommendation regarding the vice principal, knowing that it would be passed on to prospective employers, stating that the vice principal had genuine concern for his students, had outstanding rapport with everyone, and concluded in the recommendation, “I wouldn’t hesitate to recommend [the vice principal] for any position!”⁴⁵⁴

The complaint makes similar allegations against the Golden Plains Unified School District. The complaint alleges that the Golden Plains Unified School District had received a number of parent complaints regarding sexual misconduct by the vice principal and that the vice principal resigned under pressure due to these sexual misconduct charges. The complaint further alleges that despite this knowledge, the Golden Plains Unified School District gave the vice principal a favorable recommendation and stated that the school district “would recommend him for almost any administrative position he wishes to pursue.”⁴⁵⁵

⁴⁵⁰ 125 F.3d 702 (9th Cir.1997).

⁴⁵¹ 125 F.3d 702 (9th Cir.1997).

⁴⁵² Randi W. v. Muroc Joint Unified School District, 14 Cal.4th 1066, 60 Cal.Rptr.2d 263 (1997).

⁴⁵³ 14 Cal.4th 1066 (1997).

⁴⁵⁴ Id. at 1072.

⁴⁵⁵ Id. at 1072.

The complaint alleges that the Muroc Joint Unified School District received allegations of sexual touching from female students and forced the vice principal to resign. Despite these facts, it is alleged that the Muroc Joint Unified School District recommended the vice principal and described him as an upbeat, enthusiastic administrator who relates well to students and was, “in a large part . . . responsible for making the campus . . . a safe, orderly and clean environment for students and staff.” The recommendation concluded that it would recommend the vice principal for an assistant principalship or equivalent position without reservation.⁴⁵⁶

The defendants demurred (i.e., sought dismissal of the complaint) and the Fresno County Superior Court dismissed the complaint. Randi W. appealed and the California Supreme Court reversed and found that the complaint alleged sufficient facts to require a trial on the negligent misrepresentation and fraud allegations. The court noted that an individual who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other person or a third person in reliance upon the truth of the representation if the individual intended his statement to induce, or should realize that it is likely to induce, action by another or a third person which involves an unreasonable risk of physical harm to the other when he or she knows that the statement is false or that he or she has no knowledge of the information he or she professes. The court also noted that one who negligently gives false information to another is subject to liability for physical harm caused by action taken by another person in reasonable reliance upon such information where such harm results to that person or to such third person which is foreseeable under the circumstances. Such negligence may consist of failure to exercise reasonable care in ascertaining the accuracy of the information or in the manner in which it is communicated.⁴⁵⁷

The California Supreme Court went on to note that under these circumstances, if proven at trial, the defendants could be held liable. The court found that the school districts owed a duty to Randi W. to use ordinary care to prevent her from being injured as a result of their conduct. The court held that it was foreseeable that if these allegations were true, that the misrepresentations could cause injury to a student such as Randi W. The court noted that the districts in question could have made a full disclosure of their knowledge of the vice principal’s conduct, or could have provided no information whatsoever.⁴⁵⁸

The California Supreme Court rejected the argument that employers would decline to write reference letters for fear of tort liability. The court noted that an employer would be protected from a defamation suit by the statutory qualified privilege for non-malicious communications regarding a job applicant’s qualifications set forth in Civil Code section 47(c). Section 47(c) states that communications to and by interested persons apply to and includes communications concerning the job performance or qualifications of an applicant for employment when the communication is based upon credible evidence and is made without malice by a current or former employer of the applicant to, and upon the request of, the prospective employer. Such communications are privileged, and therefore, protected from libel lawsuits.⁴⁵⁹

⁴⁵⁶ Id. at 1072.

⁴⁵⁷ Id. at 1074.

⁴⁵⁸ Id. at 1075-1087.

⁴⁵⁹ Id. at 1075-1087.

The court stated:

“In light of these factors and policy considerations, we hold, consistent with Restatement Second of Torts sections 310 and 311, that the writer of a letter of recommendation owes to prospective employers and third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the prospective employer or third persons. In the absence, however, of resulting physical injury, or some special relationship between the parties, the writer of a letter of recommendation should have no duty of care extending to third persons for misrepresentations made concerning former employees. In those cases, the policy favoring free and open communication with prospective employers should prevail.”⁴⁶⁰

Based on the decision in Randi W., districts, in giving employee references, should be very careful not to misrepresent, mislead or fail to disclose material facts to prospective employers which might cause injury to students in the future. Districts should fully disclose all relevant information (positive and negative) or refuse to give a reference when they are aware of negative information involving an employee.

After the Randy W. decision was rendered, the Legislature amended Civil Code section 47 to authorize a current or former employer, or the employer’s agent to state whether the employer would rehire a current or former employee. This type of response would be privileged and protected from a libel or slander lawsuit unless made maliciously.

DRUG ABUSE AND DRUG TESTING

The Education Code authorizes the governing board of school districts to dismiss certificated employees for alcoholism or other drug abuse which makes the employee unfit to instruct or associate with children, and authorizes the governing board of school districts to adopt rules and regulations regarding the dismissal of classified employees for alcoholism or drug abuse.⁴⁶¹ Certainly, alcoholism or drug abuse which affects the performance of employees on the job is grounds for dismissal.

However, a more difficult question is whether the use of illegal drugs outside of work is grounds for dismissal and whether employers are permitted to test public employees for drug abuse. The Fourth Amendment prohibition against unreasonable search and seizures come into play. The United States Supreme Court has stated that taking a blood sample was a search and seizure within the meaning of the Fourth Amendment.⁴⁶²

⁴⁶⁰ Id. at 1081.

⁴⁶¹ Education Code sections 44932(a)(12), 45113.

⁴⁶² Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966).

In Skinner v. Railway Labor Executives' Association,⁴⁶³ the United States Supreme Court upheld regulations promulgated by the Secretary of Transportation which required blood and urine tests for certain employees following major train accidents or incidents. After the occurrence of a specified accident or incident, the regulations require the railroad to transport all crew members and covered employees to an independent medical facility where blood and urine samples are taken from each employee and then analyzed to detect and measure alcohol and drugs. The employees are notified of the results of the tests and may respond in writing to the results before the final investigatory report is completed. Employees who refuse to provide blood or urine samples may not perform specified services for nine months but are entitled to a hearing with respect to their refusal.

The court noted that the Fourth Amendment's prohibition against unreasonable search and seizures guarantees the privacy, dignity, and security of people against certain arbitrary and invasive acts by officers of the government or people acting at the direction of the government. It held that a railroad which complies with the regulations is compelled by the government to do so and for this reason the Fourth Amendment's prohibition against unreasonable seizures applies. Because the collection of urine intrudes upon expectations of privacy, the Supreme Court found that the collection and testing of a urine sample is a search with the meaning of the Fourth Amendment.⁴⁶⁴

However, the court went on to note that not all searches and seizures are prohibited by the Fourth Amendment, but only searches and seizures that are unreasonable. What is reasonable depends upon the circumstances involved and the individual's privacy interests must be balanced against the interest being promoted by the government.⁴⁶⁵

The court found that the government's compelling interest in regulating the conduct of railroad employees is to ensure safety and held that requiring a warrant be issued before drug testing takes place would be impractical.⁴⁶⁶ The court stated:

“An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. . . . A warrant also, provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case... In the present context, however, a warrant would do little to further these aims. Both the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees . . . Indeed, in minimal

⁴⁶³ 489 U.S. 602, 109 S.Ct. 1402.

⁴⁶⁴ Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989).

⁴⁶⁵ Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989).

⁴⁶⁶ Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989).

discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate. . . .

* * *

“The Government’s need to rely on private railroads to set the testing process in motion also indicates that insistence on a warrant requirement would impede the achievement of the Government’s objective. Railroad supervisors, like school officials, are not in the business of investigating violations of the criminal laws or enforcing administrative codes, and otherwise have little occasion to become familiar with the intricacies of this Court’s Fourth Amendment jurisprudence. ‘Imposing unwieldy warrant procedures . . . upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.’

“In sum, imposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating, the objectives of the Government’s testing program. We do not believe that a warrant is essential to render the intrusions here at issue reasonable under the Fourth Amendment.”⁴⁶⁷ [Emphasis added.]

The court rejected arguments that the drug tests were not conclusive and could not show that drug use necessarily caused a particular accident, noting that information obtained from the tests could provide the basis for a more extensive investigation. The court also stated that the use of drug tests will assist railroads in obtaining valuable information with respect to the cause of major accidents and enable railroads to adopt measures to protect the general public.⁴⁶⁸ For these reasons, the Supreme Court upheld the validity of the drug testing regulations as reasonable with the Fourth Amendment.⁴⁶⁹

In a case decided the same day, National Treasury Employees Union v. Von Raab,⁴⁷⁰ the United States Supreme Court upheld regulations promulgated by the United States Customs Service, a bureau of the Department of the Treasury. The customs regulations required a urinalysis test for employees who sought transfers or promotions to certain positions. The court noted that an important responsibility of the Customs Service is the interdiction and seizure of contraband, including illegal drugs, and that the covered positions were positions which involved direct involvement in the interdiction and seizure of drugs, required the carrying of firearms or required the handling of classified material.

⁴⁶⁷ Skinner v. Railway Labor Executives Association, 489 U.S. 621-624 (1989).

⁴⁶⁸ Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989).

⁴⁶⁹ Ibid.

⁴⁷⁰ 109 S.Ct. 1384 (1989).

The court stated that the purpose of the drug tests were not criminal prosecutions but to prevent drug abusers from being involved in drug enforcement and firearm use.⁴⁷¹ The court noted that such personnel must be physically fit and have impeccable integrity and judgment. Drug abusers may suffer from impaired judgment in life and death situations and may be more susceptible to bribery by drug dealers. The court's decision in Skinner and Von Raab may apply to such school district job classifications as school bus driver and security guard.

The drug testing of employees also raises issues of due process if employers seek to terminate employees who have tested positive.⁴⁷² Since there is a stigma attached to a person who is branded as a drug abuser, there may be a liberty interest involved under the Fourteenth Amendment.⁴⁷³ A person is deprived of liberty when the government impugns his or her good name, reputation, honor or integrity to the extent of creating a stigma that affects the freedom to take advantage of other employment opportunities.⁴⁷⁴

Such stigma occurs when the government publicly discloses the disparaging reason for an employee's discharge.⁴⁷⁵ Disclosure of an employee's drug abuse to a prospective employer would impugn a liberty interest.⁴⁷⁶

The accuracy of the testing done before the termination of an employee invokes due process considerations since the Fourteenth Amendment substantive due process requirements prohibit all dismissals which are arbitrary and capricious.⁴⁷⁷ Also, whether such testing violates a federal constitutional right of privacy under the Ninth Amendment has not been decided.⁴⁷⁸ Other potential sources of liability under state law include invasion of privacy, wrongful discharge, defamation, false imprisonment, assault and battery, negligence, intentional infliction of emotional distress, and discrimination.

Therefore, it is recommended that drug testing policies of employers include the following:

1. Clear advance notice to employees in writing of an employer's drug testing policy and rules pertaining to drugs and alcohol.
2. Confirming tests by a reliable method before disciplinary action is taken.
3. Reliable certified laboratories that utilize procedures that ensure a proper chain of custody of all testing samples.
4. Strict confidentiality of test results.

⁴⁷¹ National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989).

⁴⁷² Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487, 23 Ed.Law Rep. 473 (1985).

⁴⁷³ Paul v. Davis, 424 U.S. 693, 708-09 (1976).

⁴⁷⁴ Ibid.

⁴⁷⁵ Bishop v. Wood, 426 U.S. 341 (1976).

⁴⁷⁶ Hester v. Milledgeville, 598 F.Supp. 1456, 1473 (M.D. Ga. 1984).

⁴⁷⁷ Norton v. Macy, 417 F.2d 1161, 1164 (D.C. Cir. 1969).

⁴⁷⁸ See, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965).

5. Opportunity for employees to explain or rebut positive results by meeting with supervisors and through an administrative hearing process.
6. Retention of the positive test samples for a reasonable period of time.
7. Strong emphasis on rehabilitation and employee assistance, not discipline.
8. Across the board application of policy to managers and rank and file employees.
9. Thorough training of supervisors and proper implementation of policy.
10. Non-discriminatory application of the policy.

In Loder v. City of Glendale,⁴⁷⁹ the California Supreme Court held that public employers may require job applicants to take drug and alcohol tests as a condition of employment, but may not require testing of current employees who are seeking promotions. If a district is considering a pre-employment drug and alcohol testing program, the district should ensure that:

1. Applicants execute written authorizations for disclosure of test results, in compliance with the California Confidentiality of Medical Information Act;⁴⁸⁰ and
2. Testing should take place after a district has made an offer of employment to a job applicant, in compliance with the ADA.⁴⁸¹

With regard to current employees who are applicants for promotions, the California Supreme Court concluded that the Von Raab decision establishes that under the Fourth Amendment to the United States Constitution, it is not constitutionally permissible for a government employer to require urinalysis drug testing of every current governmental employee who applies for promotion to another governmental position – without regard to the nature of the position sought – but rather that the reasonableness of such testing turns upon the nature and duties of the position in question. The California Supreme Court declined to engage in a position-by-position review of all city jobs to determine whether suspicionless drug testing could be constitutionally applied to an employee promoted to a particular position.⁴⁸²

The California Supreme Court reversed the Court of Appeal's decision with regard to testing of job applicants, holding that public employers may require all job applicants to take drug and alcohol tests as a condition of employment. In finding that such testing does not violate

⁴⁷⁹ 14 Cal.4th 846, 59 Cal.Rptr.2d 696 (1997).

⁴⁸⁰ Civil Code section 56 et seq.

⁴⁸¹ 42 U.S.C. Section 12000 et seq.

⁴⁸² Id. at 877-881.

the constitutional prohibition against unlawful searches and seizures, the court applied a two-part rationale. First, the court noted that “[i]n light of the well documented problems that are associated with the abuse of drugs and alcohol by employees – increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover – an employer, private or public, clearly has a legitimate . . . interest in ascertaining whether persons to be employed in any position currently are abusing drugs or alcohol.”⁴⁸³ Although the same rationale could be applied to current employees who are seeking promotion, the court said that employers have other means of checking for substance abuse for current employees, such as excessive absences, tardiness, or poor job performance.

Second, the court reasoned that the intrusion on a job applicant’s reasonable expectations of privacy “is significantly diminished because the drug testing urinalysis in this case was administered as part of a preemployment medical examination that the job applicant, in any event, would have been required to undergo.”⁴⁸⁴

The court applied essentially the same rationale in holding that the city’s program of preemployment testing did not violate job applicants’ right of privacy under Article I, Section 1 of the California Constitution.

Following these concerns about employee drug testing, the United States Department of Transportation promulgated regulations under the Omnibus Transportation Employees Testing Act of 1991. Effective January 1, 1995, every public educational agency in the United States will be required to conduct pre-employment controlled substance testing, and reasonable suspicion, random, and post-accident alcohol and controlled substance testing of employees who are required to hold commercial driver’s licenses. With respect to school districts, this generally includes school bus drivers.

California has implemented these provisions of federal law by enacting Education Code section 34520.3, which requires a school district or county office of education that employs drivers of “school transportation vehicles,” to participate in a program that is consistent with the controlled substances and alcohol use testing requirements of federal regulations.⁴⁸⁵

In Lanier v. the City of Woodburn,⁴⁸⁶ the Court of Appeals held that a city was prohibited from drug testing an applicant for a library page position. The Court of Appeals in City of Woodburn noted that the Sixth Circuit Court of Appeals in Knox County Education Association v. Knox County Board of Education⁴⁸⁷ held that the testing of applicants for administrative and teaching positions is permissible under the Fourth Amendment.

In Knox County, the school district adopted a policy of suspicionless drug testing for all individuals who apply for, transfer to, or are promoted to safety sensitive positions within the Knox County school system, including teacher positions. The teachers union challenged the

⁴⁸³ Id. at 882-883.

⁴⁸⁴ Id. at 881-887.

⁴⁸⁵ Stats. 2005; ch. 324 (A.B. 1052).

⁴⁸⁶ 518 F.3d 1147 (9th Cir. 2008).

⁴⁸⁷ 158 F.3d 361 (6th Cir. 1998).

testing program as a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.

The school district's policy stated that the goals and objectives of its drug testing policy were:

1. To establish, promote and maintain a safe, healthy working and learning environment for employees and students;
2. To aid the affected employee in locating a rehabilitation program for employees with self-admitted or detected substance abuse problems;
3. To promote the reputation of the Knox County school system and its employees as responsible citizens of public trust and employment;
4. To eliminate substance abuse problems in the workplace;
5. To aid in the reduction of absenteeism, tardiness, and apathetic job performance;
6. To provide a clear standard of job performance for Knox County school employees; and
7. To provide a consistent model of substance free behavior for students.⁴⁸⁸

The Knox County policy allows suspicionless testing for people applying for positions that are safety sensitive. The policy defines safety sensitive positions as those positions where a single mistake by an employee can create an immediate threat of serious harm to students and fellow employees. Under this category, the policy includes principals, assistant principals, teachers, traveling teachers, teacher aides, substitute teachers, school secretaries, and school bus drivers.⁴⁸⁹

Applicants for these positions are tested after they are offered a position but before their employment begins. An applicant refusing to complete any part of the drug testing procedure is not hired and the job offer is revoked.⁴⁹⁰

Current employees of the school district, attempting to transfer into safety sensitive positions, including those who already hold such positions, are also tested. Employees who test positive for illegal drugs on a promotion transfer test would no longer be considered an applicant for that position. Employees seeking a transfer or promotion who refuse any portion of the drug testing procedure forfeit the opportunity to transfer to, or advance into, a safety sensitive position and are subject to discipline for insubordination, including termination.⁴⁹¹

⁴⁸⁸ Id. at 366.

⁴⁸⁹ Id. at 366-367.

⁴⁹⁰ Id. at 367.

⁴⁹¹ Id. at 367.

In reviewing the law of search and seizure, the Court of Appeals in Knox County noted that the Fourth Amendment safeguarded the privacy of individuals against arbitrary and unwarranted governmental intrusions by providing that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. However, the Fourth Amendment does not prohibit all searches and seizures, but only those that are unreasonable. The reasonableness of a search depends upon all the circumstances surrounding a search or seizure and the nature of the search or seizure itself.⁴⁹²

The Fourth Amendment applies to state and local agencies and applies to drug testing. Drug testing which utilizes urinalysis is a search that falls within the scope of the Fourth Amendment.⁴⁹³

In Knox County, the Court of Appeals noted that as a general rule, in order to be reasonable, a search must be undertaken pursuant to a warrant issued upon a showing of probable cause. In essence, a valid search must ordinarily be based on an individualized suspicion of wrongdoing.⁴⁹⁴

However, the court noted that where there are special needs beyond the normal need for law enforcement, suspicionless searches may be reasonable. The court noted two factors though that the Supreme Court has allowed suspicionless testing:

1. Where the group of people targeted for testing exhibit a pronounced drug pattern, or the group occupies a unique position such that the existence of a pronounced drug problem is unnecessary to justify suspicionless testing; and
2. The magnitude of the harm that could result from use of illicit drugs on the job.⁴⁹⁵

The court in Knox County noted that there was little evidence of a pronounced drug or alcohol abuse problem among Knox County's employees, but held that teachers and administrators in public schools occupy a unique position in the society. The court stated:

“We can imagine few governmental interests more important to a community than that of insuring the safety and security of its children while they are entrusted to the care of teachers and administrators. Concomitant with this governmental interest is the community's interest in reasonably insuring that those who are entrusted with the care of our children will not be inclined to influence children . . . in the direction of illegal and dangerous activity which undermine values which parents attempt to instill in children in the home. Indeed, teachers occupy a

⁴⁹² Id. at 371.

⁴⁹³ Id. at 371; see also Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966); Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 109 S.Ct. 1402 (1989).

⁴⁹⁴ Id. at 373.

⁴⁹⁵ Id. at 373.

singularly critical and unique role in our society in that for a great portion of a child's life, they occupy a position of immense direct influence on a child, with the potential for both good and bad. Teachers and administrators are not simply role models for children. . . . Through their own conduct and daily direct interaction with children, they influence and mold the perceptions, and thoughts and values of children. Teachers and administrators are not some distant societal role models, as in the case of the Georgia political candidates in Chandler; rather, on a daily basis, there is a direct nexus between the jobs of teachers and administrators and the influence they exert upon the children who are in their charge. Indeed, directly influencing children is their job.”⁴⁹⁶

The Court of Appeals noted that the State of Tennessee, in its statutes and regulations, provides that teachers shall serve in an in loco parentis capacity and are charged with the responsibility to secure order and to protect students from harm while in their custody. The court noted that the existence of this duty is unique to school teachers and administrators and significant enough to overcome the presumption against suspicionless testing.⁴⁹⁷

The Court of Appeals noted that teachers are on the front line of school security, including drug interdiction. Teachers are faced with pervasive drug use in our schools and are perhaps in the best position to determine if the child is either in danger or involved with drugs. The Court of Appeals stated:

“Like customs agents, teachers do not work in an ordinary work environment in which they are constantly scrutinized by their peers and others; rather, they spend most of their days (about six hours) in the solitude of their classrooms surrounded only by students, some of whom are very young, who may or may not be able to detect drug use among teachers. Even if a student did detect drug use by a teacher, that student would likely be wary of reporting such conduct for fear of being disbelieved, ridiculed or retaliated against.”⁴⁹⁸

Other courts have upheld suspicionless drug testing for nuclear power plant workers,⁴⁹⁹ seamen operating oil tankers,⁵⁰⁰ a meter repairman for a gas company,⁵⁰¹ a firefighter and emergency medical technician,⁵⁰² a process technician at a petrol refining facility,⁵⁰³ police officers,⁵⁰⁴ a bus driver,⁵⁰⁵ and pipeline operators.⁵⁰⁶

⁴⁹⁶ Id. at 374.

⁴⁹⁷ Id. at 375.

⁴⁹⁸ Id. at 375.

⁴⁹⁹ Rushton v. Nebraska Public Power District, 844 F.2d 562, 566 (8th Cir. 1988).

⁵⁰⁰ Exxon v. Exxon Seamen's Union, 73 F.3d 1287, 1294 (3rd Cir. 1996).

⁵⁰¹ Mountaineer Gas Company v. Oil, Chemical and Atomic Workers' International Union, 76 F.3d 606, 609 (4th Cir. 1996).

⁵⁰² Saavedra v. Albuquerque, 73 F.3d 1525, 1532 (10th Cir. 1996).

⁵⁰³ Gulf Coast Industrial Workers' Union v. Exxon, 991 F.2d 244, 250 (5th Cir. 1993).

⁵⁰⁴ Ford v. Dowd, 931 F.2d 1286, 1290 (8th Cir. 1991).

Thus, the Court of Appeals in Knox County concluded that school teachers and administrators also occupy these sensitive positions and due to the nature of their duties, which require essential monitoring and prevention of incidents of drug abuse occurring in the first place, suspicionless drug testing is warranted.⁵⁰⁷ The Court of Appeals went on to state that education is a heavily regulated industry, and therefore, school employees have a diminished expectation of privacy which justifies suspicionless searches.⁵⁰⁸

Other court decisions have allowed drug testing of applicants for safety sensitive positions such as bus drivers, firefighters, police officers and employees handling dangerous equipment. If the classified positions that are involved in the district's drug testing program fall into that category then the drug testing program should be okay. For example, if groundskeepers operate equipment that could result in serious injury to the employee or others if operated while under the influence of drugs, then the drug testing program would be found to be permissible.

A. Medical Use of Marijuana

In Ross v. Ragingwire Telecommunications, Inc.,⁵⁰⁹ the California Supreme Court held that FEHA did not require the employer to accommodate an employee who used medical marijuana. The court also held that the employee did not state a cause of action for termination in violation of public policy.

The California Supreme Court reviewed the provisions of the Compassionate Use Act of 1996⁵¹⁰ which gives a person who uses marijuana for medical purposes on a physician's recommendation a defense to certain state criminal charges involving the drug, including possession. Federal law, however, continues to prohibit the drug's possession even by medical users.⁵¹¹

In Ross, the plaintiff was fired when a pre-employment drug test required of new employees revealed his marijuana use. The marijuana had been prescribed by his physician for medical purposes. The lower court held that plaintiff could not state a cause of action against his employer for disability related discrimination under FEHA,⁵¹² or for wrongful termination in violation of public policy.⁵¹³ The California Supreme Court affirmed the decisions of the lower court and noted that under California law, an employer may require a pre-employment drug test and take illegal drug use into consideration in making employment decisions.⁵¹⁴

The plaintiff alleged that under FEHA, the employer discriminated on the basis of physical disability or medical condition and that the employer must make reasonable

⁵⁰⁵ Tanks v. Greater Cleveland Regional Transit Authority, 930 F.2d 475, 480 (6th Cir. 1991).

⁵⁰⁶ International Brotherhood of Electrical Workers v. Skinner, 913 F.2d 1454, 1463 (9th Cir. 1990).

⁵⁰⁷ Id. at 378-379.

⁵⁰⁸ Id. at 379.

⁵⁰⁹ 42 Cal.4th 920, 174 P.3d 200, 70 Cal.Rptr.3d 382 (2008).

⁵¹⁰ Health and Safety Code section 11362.5, added by initiative, Prop. 215, as approved by voters, Gen. Elec. (Nov. 5, 1996).

⁵¹¹ Id. at 923; 21 U.S.C. Section 812, 844(a).

⁵¹² Government Code section 12900 et seq.; Section 12940(a).

⁵¹³ Stevenson v. Superior Court, 16 Cal.4th 880, 887, 66 Cal.Rptr. 2d 888 (1997); Tameny v. Atlantic Richfield Company, 27 Cal.3d 167, 170, 176-178, 164 Cal.Rptr. 839 (1980).

⁵¹⁴ Loder v. City of Glendale, 14 Cal.4th 846, 882-883, 59 Cal.Rptr. 2d 696 (1997).

accommodations for plaintiff's lower back pain which he treats with marijuana. By denying him employment and failing to make reasonable accommodations, the plaintiff alleges that the defendant violated FEHA.⁵¹⁵

The California Supreme Court rejected plaintiff's argument that marijuana has the same status as a legal prescription drug and noted that the California voters merely exempted medical users and their primary caregivers from criminal liability. The court held that nothing in the text or history of the Compassionate Use Act suggest the voters intended the measure to address the rights and obligations of employers and employees.⁵¹⁶ The court held that state law does not require employers to accommodate the use of illegal drugs, and in Loder, the court held that employer could require prospective employees to undergo testing for illegal drugs and alcohol.⁵¹⁷

The Supreme Court also held in Loder that the employer could have access to the test results without violating California's Confidentiality of Medical Information Act.⁵¹⁸ The court held in Loder that the employer had an interest in drug testing since employee drug use was associated with increased absenteeism, diminished productivity, greater health cost, increased safety problems, and potential liability to third parties.⁵¹⁹ In Loder, the court also noted that an employer may reject a job applicant if it lawfully discovers that the applicant is currently using illegal drugs or engaging in excessive consumption of alcohol.⁵²⁰

The court in Ross noted that the proponents of the Compassionate Use Act consistently described the proposed measure to the voters as motivated by the desire to create a narrow exception to criminal law.⁵²¹ The court in Ross further stated, ". . . The measure did not purport to change the laws affecting public intoxication with controlled substances . . . or the laws addressing controlled substances in such places as schools and parks . . . and the act expressly provided that it did not 'supersede legislation prohibiting persons from engaging in conduct that endangers others.'"⁵²²

The court in Ross further stated that the plaintiff could not sustain a cause of action for wrongful termination. Under wrongful termination law, the cause of action must satisfy four requirements:

1. The policy must be supported by either constitutional or statutory provisions.
2. The policy must be "public" in the sense that it inures to the benefit of the public rather than serving merely the interest of the individual.
3. The policy must be articulated at the time of the discharge.

⁵¹⁵ 42 Cal. 4th 920, 926 (2008).

⁵¹⁶ Id. at 926.

⁵¹⁷ Loder v. City of Glendale, 14 Cal.4th 846 (1997).

⁵¹⁸ Civil Code section 56 et seq.

⁵¹⁹ Id. at 882.

⁵²⁰ Id. at 883, note 15.

⁵²¹ Id. at 929.

⁵²² Id. at 929.

4. The policy must be fundamental and substantial.⁵²³

The court held that the Compassionate Use Act did not address employment law, therefore, there was no intent on the part of the voters to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees.⁵²⁴ Since the Compassionate Use Act articulates no such policy, the court held that the plaintiff could not state a cause of action for wrongful termination.

Therefore, public employees may be subject to discipline for being under the influence of marijuana while at work. Particularly, if as a result of their marijuana use, they are unable to properly perform the essential functions of their job. Districts should consult with legal counsel if an employee is suspected of marijuana use, even if that use is medical in nature.⁵²⁵

CHILD ABUSE REPORTING REQUIREMENTS

Due to the strong interest of society in protecting children from abuse, the Legislature has passed child abuse and child neglect reporting laws which require designated school employees to report suspected child abuse to a child protective agency. School employees who are designated as mandated reporters who have knowledge or observe a child within the scope of their employment whom they reasonably suspect is a victim of child abuse are required to report known or suspected instances of child abuse to a child protective agency as soon as practicably possible by telephone and are required to prepare a written report and send it to the child protective agency within 36 hours of receiving the information concerning the incident.⁵²⁶

Reasonable suspicion means a suspicion which is objectively reasonable for a person to entertain based upon facts that could cause a reasonable person in a similar position, drawing when appropriate on his or her training or experience, to suspect child abuse.⁵²⁷

A mandated reporter is defined as a teacher, an instructional aide, a teacher's aide, a teacher's assistant employed by any public or private school who has been trained in the duties of child abuse reporting, a classified employee who has been trained in the duties of child abuse reporting, an administrative officer, supervisor of child welfare and attendance, a certificated pupil personnel employee of any public or private school, an athletic coach, athletic administrator, athletic director, or an administrator of a public or private day camp.⁵²⁸

A child protective agency is a police or sheriff's department, county probation department, or a county welfare department and is not a school district police or security department.⁵²⁹ A child is a person under the age of 18 years. Child abuse is defined as a

⁵²³ Stevenson v. Superior Court, 16 Cal. 4th 889-890 (1997).

⁵²⁴ Id. at 932.

⁵²⁵ In the public employment context, there may be additional limitations in the Education Code and in the district's collective bargaining agreement that must be considered.

⁵²⁶ Penal Code section 11164 et seq.

⁵²⁷ Penal Code section 11166.

⁵²⁸ Penal Code section 11165.7.

⁵²⁹ Penal Code section 11165.9.

physical injury which is inflicted by other than accidental means on a child by another person and includes the sexual abuse of the child or any act or omission prohibited by law such as unlawful corporal punishment or injury, the willful or harming or injuring of a child or endangering the person or health of a child.⁵³⁰ Child abuse also includes the neglect of the child or abuse in out-of-home care but does not include a mutual affray or sexual relationship between minors.⁵³¹ Sexual abuse is sexual assault or sexual exploitation including but not limited to rape, rape in concert, incest, sodomy, lewd or lascivious acts upon a child under 14 years of age, oral copulation, penetration of genital or anal opening by a foreign object or child molestation. Sexual exploitation includes conduct involving matters depicting a minor engaging in obscene acts, a person who knowingly promotes, aids or assists, uses, persuades, induces or coerces a child or any person responsible for a child's welfare to engage in or assist others in the engagement of prostitution or a like performance involving obscene sexual conduct.⁵³²

Child neglect is defined as negligent treatment or maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare and includes both acts and omissions on the part of the responsible person.⁵³³ General neglect means the negligent failure of a person having the care or custody of the child to provide adequate food, clothing, shelter, medical care or supervision where no physical injury to the child has occurred.⁵³⁴

Severe neglect means the negligent failure of a person having the care and custody of the child to protect the child from severe malnutrition or medically diagnosed nonorganic failure to thrive or where a person willfully causes or permits the health of the child to be placed in a situation of endangerment including the intentional failure to provide adequate food, clothing, shelter or medical care.⁵³⁵

Any mandated reporter who has knowledge or who reasonably suspects that a child is suffering from serious emotional damage or is at a substantial risk of suffering serious emotional damage may make a child abuse report. The serious emotional damage may be evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others.⁵³⁶

The observance of any of this type of conduct should be reported immediately to a police or sheriff's department, county probation department, or county welfare department and a written report should be made within 36 hours. The reporting duties are individual and no supervisor or administrator may impede or inhibit the reporting and no person making such a report shall be subject to any sanction for making the report. Internal procedures to facilitate reporting and apprise supervisors and administrators of reports may be established provided that they are not inconsistent with the child abuse reporting requirements and so long as they do not require any employee to make reports to disclose his or her identity to the employer. A joint report may be

⁵³⁰ Penal Code section 11165.6.

⁵³¹ Ibid.

⁵³² Penal Code section 11165.1.

⁵³³ Penal Code section 11165.2.

⁵³⁴ Ibid.

⁵³⁵ Penal Code section 11165.2.

⁵³⁶ Penal Code section 11166.05.

made by two or more persons who are required to report child abuse and are present and have joint knowledge of the suspected instance of child abuse.⁵³⁷

School districts, prior to employment of persons who meet the definition of child care custodian, must require such persons to sign a statement provided by the employer to the effect that he or she has knowledge of the child abuse reporting requirements.⁵³⁸ The Penal Code sets forth the wording that must be contained in the form given to the employees.

A telephone report of known or suspected instances of child abuse must include the name of the person making the report, the name of the child, the address of the child, the present location of the child, the school, grade and class of the child, if applicable, and the name, address and telephone number of the parents of the child, the nature and extent of the injury and any other information, including information that led that person to suspect child abuse, requested by the child protective agency. Information relevant to the incident of child abuse will also be given to an investigator from the child protective agency who will investigate the known or suspected case of child abuse.⁵³⁹

The identity of all persons who report child abuse shall be confidential and disclosed only between child protective agencies, to counsel representing a child protective agency, to the district attorney in a criminal prosecution, or an appropriate civil action arising from alleged child abuse, to a licensing agency when abuse and out-of-home care is reasonably suspected, when those persons who reported child abuse waive confidentiality, or by court order. Persons who are not required to report child abuse, but who do so, are not required to include their names in the report.⁵⁴⁰ Child abuse reports are confidential and may only be disclosed to persons who have access to the name of the person reporting the child abuse.⁵⁴¹

Any violation of the confidentiality of the child abuse report is a misdemeanor punishable up to six months in jail or by a fine or \$500.00 or both.⁵⁴² Mandated reporters who report known or suspected instances of child abuse are immune from civil or criminal liability for any report required by the child abuse reporting laws. Civil or criminal liability shall be incurred only if it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report. Any such person who makes a report of child abuse known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused.⁵⁴³

The mandated reporter who provides a child protective agency with access to the victim of known or suspected child abuse shall not incur civil or criminal liability as a result of providing the requested access. Child care custodians who are sued and incur legal fees in defending lawsuits for making required child abuse reports may present a claim to the State Board of Control for reasonable attorney fees if (1) the case was dismissed upon a demurrer or motion for summary judgment made by that person; or (2) he or she prevails in the action. The

⁵³⁷ Penal Code section 11166.

⁵³⁸ Penal Code section 11166.5.

⁵³⁹ Penal Code section 11167.

⁵⁴⁰ Penal Code section 11167.

⁵⁴¹ Penal Code section 11167.5.

⁵⁴² Penal Code section 11167.5.

⁵⁴³ Penal Code section 11172.

State Board of Control is required to allow the claim. Attorney's fees awarded to persons claiming child abuse must not exceed an hourly rate greater than the rate charged by the Attorney General of the State of California at the time the award is made and may not exceed a maximum of \$50,000. A person who is defended by a public agency under the California Tort Claims Act may not file a claim.⁵⁴⁴

In P.S. v. San Bernardino City Unified School District,⁵⁴⁵ the Court of Appeal held that students who were allegedly victims of molestation by a substitute teacher could not state a cause of action against a school district for negligence, negligence per se, and negligent infliction of emotional distress. The school district demurred on the ground that the Child Abuse and Neglect Reporting Act and Penal Code section 11164 et seq. did not impose a duty on them toward these plaintiffs. The trial court sustained the demurrer without leave to amend as to all three causes of action against the San Bernardino City Unified School District. The plaintiffs appealed as to the negligence and negligence per se causes of action. The Court of Appeal affirmed the judgment of the trial court.

The Court of Appeal held that Penal Code section 11164 et seq. did not create a cause of action for negligence or negligence per se, and that the California Supreme Court's decision in Randy W. v. Muroc Joint Unified School District,⁵⁴⁶ did not apply.

THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA) is the primary federal law that sets minimum wage, overtime pay, equal pay, record keeping, and child labor standards for employees who are covered by the Act and are not exempt. The Fair Labor Standards Act was enacted by the United States Congress in 1938 as part of the New Deal Economic Recovery Program from the Great Depression. The FLSA sought to ensure a maximum number of jobs which paid a minimum livable wage. By requiring overtime pay, the FLSA created a monetary penalty from employers who did not spread their existing work among a greater number of employees. In essence, it provided an incentive to employers to hire more people rather than increase the hours worked by existing employees.

In determining whether the FLSA applies to particular employees, it is important to determine whether the employees are covered by the Act or whether they are exempt from certain provisions of the FLSA. For example, exempt employees are subject to the equal pay provisions even if they are exempt from the minimum wage and overtime provisions. In addition, it is important to ensure compliance with state laws.

The administration and enforcement of the FLSA and related federal statutes are the responsibility of the United States Department of Labor (DOL). Within the United States DOL, the Wage and Hour Division of the Employment Standards Administration has authority over the FLSA. The Wage and Hour Division issues rules, regulations, and interpretations under the FLSA and conducts inspections and investigations to determine compliance.

⁵⁴⁴ Penal Code section 11172; see, also, Government Code section 995.

⁵⁴⁵ 174 Cal.App.4th 953, 94 Cal.Rptr.3d 788, 245 Ed.Law Rep. 354 (2009).

⁵⁴⁶ 14 Cal.4th 1066 (1997).

Initially, the FLSA did not apply to public employees. Government employees were added to FLSA coverage by amendments to the Act in 1966 and 1974.⁵⁴⁷

In Garcia v. San Antonio Metro Transit Authority, the United States Supreme Court held that state and local government agencies are covered by the FLSA.⁵⁴⁸ The effect of the decision in Garcia is that state and local government agencies must comply fully with federal minimum wage and overtime laws and regulations.

One of the basic purposes of the FLSA is to establish a general minimum hourly wage rate for those employees who are within its coverage and not exempt from its requirements. Many states, including California, have a higher minimum wage which must be followed by local governmental agencies. The FLSA also provides for equal pay regardless of sex and establishment of minimum wage rates lower than the general standard for certain classes of employment. The FLSA also seeks to limit the number of hours worked by requiring additional pay (i.e., overtime pay) for hours worked in excess of the established 40 hour per week maximum.

In summary, the purpose of the FLSA was to:

1. Create a minimum wage standard to prevent wage exploitation of workers;
2. To promote fair competition in interstate commerce by establishing a nationwide floor for wages; and
3. To generate more jobs by encouraging employers to spread the existing work around.

A. Exempt and Non-Covered Employees

Not all state and local government employees are covered by the FLSA. Non-covered employees include elected officials and their personal staffs, policy-making appointees, legal advisors, legislative employees, bona fide volunteers, independent contractors, prisoners, and certain trainees.

Exempt employees are covered by the FLSA but are exempted from specific provisions of the Act. Exempt employees generally fall into three major categories:

1. Executive
2. Administrative
3. Professional

Most exempt “white collar” employees must meet what is referred to as the “salary basis test” to be exempt from the overtime provisions of the FLSA. It is common for state and local

⁵⁴⁷ See Maryland v. Wirtz, 392 U.S. 183 (1968) (Upholding the constitutionality of applying the FLSA federal minimum wage and overtime laws to state and local governments).

⁵⁴⁸ 469 U.S. 528, 105 S.Ct. 1005 (1985).

agencies to contract with private employers to perform many operations. Independent contractors control their own workers and must ensure that their workers are compensated in accordance with the FLSA.

B. The Salary Basis Test

In order to be exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act, executive, administrative, or professional employees must be paid on a salary basis and must meet the applicable standard or highly compensated employee duties test to be exempt.⁵⁴⁹ If the salary basis requirement is not met, an employee will be required to be paid overtime.

On April 20, 2004, the United States DOL announced regulations on the various exemptions from overtime eligibility under the FLSA. The new rules became effective on August 23, 2004, and are set forth in 29 Code of Federal Regulations (C.F.R.) Part 541.

The FLSA requires employers to pay overtime to nonexempt employees who work in excess of 40 hours in a work week. It has been judicially determined that local government agencies are subject to the FLSA's minimum wage, overtime, and record-keeping requirements.⁵⁵⁰

The FLSA exempts the following categories of employees from minimum wage and overtime requirements: (1) bona fide executive, administrative, or professional employees; (2) highly skilled computer-related employees; and (3) employees working in outside sales.⁵⁵¹ Under the regulations, employees must satisfy three basic tests in order to qualify for the various exemptions:

1. The salary level test, which requires the employee to be compensated above a specified minimum salary level;
2. The duties test, which requires the employees to perform certain specified primary job duties; and
3. The "salary basis" test, which evaluates whether the employees are compensated on a salary basis.

The 2004 regulations increased the minimum annual salary to \$455 per week (\$23,600 per year).⁵⁵² Almost all employees earning less than this minimum salary will qualify for overtime, regardless of their job duties. There is a notable exception for teachers, who are exempt regardless of their salary.⁵⁵³

Non-exempt school employees would generally include the following classifications:

⁵⁴⁹ See, 29 C.F.R. Section 541.601, 29 C.F.R. Section 541.602.

⁵⁵⁰ Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

⁵⁵¹ 29 U.S.C. Section 213(a)(1) and (17).

⁵⁵² 29 C.F.R. Section 541.600.

⁵⁵³ 29 C.F.R. Section 541.600(e).

1. Bus Drivers
2. Cafeteria Workers
3. Dieticians
4. Custodial Workers
5. Day Care Teachers and Workers
6. Hall or Lunch Room Monitors
7. Secretarial Support
8. Security Personnel
9. Building Management

Examples of exempt executives would include directors of computer programming, principals and vice-principals, superintendents, and assistant superintendents. Exempt professionals would include guidance counselors, certified public accountants in the budget office, school board attorneys, school psychologists, school registered nurses, and school librarians. Non-covered school employees would include appointed members of the board of education, elected members of the board of education, volunteers, and personal staff of elected board of education officials.

C. Executive Employees

To qualify for the executive exemption under the new regulations, an “employee employed in a bona fide executive capacity” is any employee:

1. Compensated on a salary basis at a rate of not less than \$455.00 per week . . . , exclusive of board, lodging or other facilities;
2. Whose primary duty is management of the enterprise in which the employee is employed, or of a customarily recognized department or subdivision thereof;
3. Who customarily and regularly directs the work of two or more other employees; and
4. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.⁵⁵⁴

The “hire or fire” requirement constitutes a new requirement for all employees who qualify under the executive exemption. This element is satisfied even if the employee does not have full authority to hire or fire. The requirement is satisfied if the employee gives suggestions and recommendations that are given “particular weight” by the employer. The regulations list a number of factors to be considered in determining whether an employee’s suggestions and recommendations are given “particular weight,” including “whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such

⁵⁵⁴ 29 C.F.R. Section 541.100.

suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon.”⁵⁵⁵

Exempt executive employees in districts are typically supervisors of support staff employees, such as food service managers, transportation supervisors, custodial and maintenance supervisors. It is unlikely that such employees would lose their exemption under the new regulations, for two reasons. First, these employees typically earn far in excess of \$455 per week. Second, it would be very unusual for a district not to give “particular weight” to such employees’ “recommendations or suggestions” for hiring, firing, or other changes in status.

D. Administrative Employees

Under the 2004 regulations, an “employee employed in a bona fide administrative capacity” means any employee:

1. Compensated on a salary or fee basis at a rate of no less than \$455.00 per week . . . , exclusive of board, lodging or other facilities;
2. Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
3. Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.⁵⁵⁶

Examples of administrative employees are managers in the areas of tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, and legal and regulatory compliance.⁵⁵⁷

E. Professional Employees

The professional exemption extends to “learned” professionals and “creative” professionals. To qualify for the exemption for learned professionals, an employee must meet the minimum salary level (i.e., \$455.00 per week) and salary basis test, and must also satisfy the following duties test:

1. The employee must perform work requiring advanced knowledge;
2. The advanced knowledge must be in a field of science or learning; and

⁵⁵⁵ 29 C.F.R. Section 541.105.

⁵⁵⁶ 29 C.F.R. Section 541.200.

⁵⁵⁷ 29 C.F.R. Section 541.201(b).

3. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.⁵⁵⁸

The 2004 regulations define “work requiring advanced knowledge” as “work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work.”⁵⁵⁹

The 2004 regulations also retain a specific exemption for teachers. The 2004 regulations make it clear that the minimum salary requirements do not apply to teaching professionals.⁵⁶⁰

F. Computer Employees

The 2004 regulations consolidated existing rules establishing an exemption for computer employees, including “computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field. . . .”⁵⁶¹ The exemption is no longer limited to workers in the computer software field. The requirements for the exemption are as follows:

“The . . . exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than \$455 per week . . . , exclusive of board, lodging or other facilities, and the . . . exemption applies to any computer employee compensated on an hourly basis at a rate of not less than \$27.63 per hour. In addition, . . . the exemptions apply only to computer employees whose primary duty consists of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.
3. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.”⁵⁶²

⁵⁵⁸ 29 C.F.R. Section 541.300 and 541.301.

⁵⁵⁹ 29 C.F.R. Section 541.301(b).

⁵⁶⁰ 29 C.F.R. Section 541.303.

⁵⁶¹ 29 C.F.R. Section 541.400(a).

⁵⁶² 29 C.F.R. Section 541.400(b).

The 2004 regulations deleted the old requirement that computer employees “consistently exercise discretion and judgment.” This change appears to expand the exemption somewhat by allowing these employees to work under closer supervision. Additionally, the 2004 regulations explain that employees engaged in computer manufacture and repair are not exempt, unless they happen to qualify under the executive or administrative exemptions.⁵⁶³

G. Highly Compensated Employees

The 2004 regulations created a new exemption for “highly compensated employees” who are employees with total annual compensation of at least \$100,000.00, who “customarily and regularly” perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.⁵⁶⁴ The 2004 regulations establish a less restrictive test for a highly compensated employee, because the employee’s primary duty does not need to fit within any of the defined exemptions as long as the employee “customarily and regularly” performs exempt duties.

H. Deductions for Violation of Work Rules

As indicated above, to qualify for most of the exemptions, employees must be paid on a “salary basis.” The 2004 regulations retained the “salary basis” test, meaning that an exempt employee must receive a “predetermined amount” on a weekly or less frequent basis, and that salary cannot be subject to reduction due to “variations in the quality or quantity of the work performed.”⁵⁶⁵ The 2004 regulations retained the so-called “no-docking” rule, requiring that “an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.” That is, partial pay deductions from salary are generally not allowed.

The 2004 regulations contain a number of exceptions from the “no-docking” rule. A significant exception provides that a public agency employee does not lose his or her exemption if the employee is paid according to a pay system under which the employee accrues sick leave and which requires the employee’s pay to be reduced for absences because of illness or injury when accrued leave has been exhausted.⁵⁶⁶ Employers may also make deductions from the pay of exempt employees for “unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules.”⁵⁶⁷ Formerly, such unpaid suspensions had to be imposed for periods of at least one week, with the exception of suspensions imposed for infractions of “safety rules of major significance.” By allowing unpaid suspensions of a shorter duration, the 2004 regulations allow employers to impose the same sort of discipline on exempt employees that is imposed on non-exempt employees for serious workplace misconduct, such as sexual harassment, violence, controlled substance offenses, etc. The new rule is not intended to apply to suspensions for performance or attendance problems.

⁵⁶³ 29 C.F.R. Section 541.401 and 541.402.

⁵⁶⁴ 29 C.F.R. Section 541.601(a).

⁵⁶⁵ 29 C.F.R. Section 541.602.

⁵⁶⁶ 29 C.F.R. Section 541.710.

⁵⁶⁷ 29 C.F.R. Section 541.602(b)(5).

The 2004 regulations also provide greater protection to employers that may make improper deductions. If an employer has a practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made, but only for employees in the same job classification working for the same managers responsible for the improper deduction.⁵⁶⁸

In addition, the 2004 regulations establish the following “safe harbor” for employers that occasionally make improper deductions:

“If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in Section 541.602(a) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. . . . The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer’s Intranet.”⁵⁶⁹

I. Overtime Compensation

The FLSA places no limits on the number of hours that an employee may work. The Act requires that overtime compensation be paid at a rate of not less than one and one-half times the non-exempt employee’s rate of pay for each hour worked in a work week in excess of the maximum hours applicable to the type of employment in which the employee is engaged, generally in excess of 40 hours per week.

The FLSA does not require that an employee be paid overtime compensation for hours worked in excess of eight hours per day or for work on Saturdays, Sundays, holidays or regular days of rest, so long as the maximum number of hours (40 hours per week) are not exceeded. State law or collective bargaining agreements may require employers to pay overtime in excess of eight hours per day or work on Saturdays, Sundays, holidays, etc. Only non-exempt employees are entitled to overtime under the FLSA.

Under the FLSA, the regular rate of pay includes all payments made by the employer to that employee except for certain specified types of payments.⁵⁷⁰ The FLSA allows employers and employees to agree to certain basic wage rates, and thereby, to set a basic rate on which overtime will be calculated.⁵⁷¹

⁵⁶⁸ 29 C.F.R. Section 541.603(b).

⁵⁶⁹ 29 C.F.R. Section 541.603(d).

⁵⁷⁰ 29 U.S.C. Section 207(e).

⁵⁷¹ 29 U.S.C. Section 207(g)(3); 29 C.F.R. Section 548.1.

The FLSA requires the payment of overtime at one and one-half times the employee's regular rate which must be at least equal to the FLSA minimum wage.⁵⁷² Where an employee in a single work week works at two or more types of different work, the employee's regular rate of pay for that week is calculated as the weighted average of such rates.⁵⁷³

In Purdham v. Fairfax County School Board,⁵⁷⁴ the Fourth Circuit Court of Appeals held that public school employees were not entitled to overtime under the FLSA.

James Purdham was employed as a safety and security assistant by the Fairfax County School Board. Purdham filed a lawsuit alleging that the school board failed to pay him overtime wages for his services as the coach of a high school golf team, and therefore, violated the FLSA.⁵⁷⁵ For approximately 20 years, Purdham worked as a safety and security assistant for the Fairfax County public schools. Purdham's security duties included monitoring the school buildings, assisting in investigations, and monitoring the arrival and departure of school buses. In addition to his regular full-time position, Purdham served for the past 15 years as Hayfield Secondary School's golf coach. Purdham's position as a security assistant is not conditioned on his coaching activities and he is free to relinquish his coaching duties at any time without an adverse impact on his full-time security position.⁵⁷⁶

As part of his coaching services, Purdham maintained a varsity golf squad of 12-16 students in addition to a "B" squad of several students. The golf season begins the first week of August and runs through November. After tryouts, the regular competitive season includes 8-10 golf competitions in addition to daily practices. At the end of the regular season, the team participates in several tournaments. For all golf activities, Purdham transports players to and from the golf course and he occasionally drives them to their homes.⁵⁷⁷

In addition to his coaching duties during the regular season, Purdham also schedules the upcoming season, responds to telephone calls, e-mails and text messages from parents and players, arranges golf team finances, holds an annual interest meeting for perspective players, arranges for the team to complete a community service project, and oversees the team's fundraising activities. Purdham estimates that he spends 400-450 hours annually on golf coaching activities. The school board permits Purdham to work on coaching activities during his regular work day. In addition, when the golf team has a tournament or activity that occurs during Purdham's normal working hours, the school board permits him and other coaches to use paid administrative leave when he is away from his regular duties.⁵⁷⁸

Purdham receives reimbursement for his expenses, including a mileage allowance, for his coaching activities. Purdham also receives a stipend from the school board in consideration for his services as a coach. The school board's stipend policy mirrors that of other school systems. When Purdham first began coaching, his stipend was between \$500 and \$800. More recently,

⁵⁷² 29 U.S.C. Section 207.

⁵⁷³ 29 C.F.R. Section 778.115.

⁵⁷⁴ 637 F.3d 471, 266 Ed.Law Rep. 603 (4th Cir. 2011).

⁵⁷⁵ 29 U.S.C. § 201 et seq.

⁵⁷⁶ Id. at 424.

⁵⁷⁷ Ibid.

⁵⁷⁸ Id. at 424-25.

the stipend increased to \$2,114 for the 2008-2009 school year. The stipends for all coaches of a particular sport are the same, regardless of how many hours each coach devotes to coaching activities and regardless of the team's performance. The majority of the Fairfax County coaches are regular employees of the school board, and the most common regular position among golf coaches was as a health and physical education teacher.⁵⁷⁹

The DOL issued a guidance opinion letter about school coaching and FLSA compliance. The guidelines stated that its full-time, non-exempt employees were properly deemed "volunteers" in connection with their coaching services, and thus, not eligible for overtime compensation. This change in policy was communicated in a letter to all principals on June 13, 2006.⁵⁸⁰

Purdham filed a lawsuit in U.S. District Court on behalf of himself and all other school board employees who were similarly situated. The district court granted the school board's motion for summary judgment, denied Purdham's cross-motion, and held that Purdham was not to be deemed an employee with respect to his services as the coach of the golf team, but instead was to be deemed a "volunteer." The court reasoned that Purdham was a volunteer because Purdham was not doing the same type of work as required by his regular position as a security assistant and because the stipend he received was a "nominal fee" authorized by law to be paid to volunteers. Purdham appealed.⁵⁸¹

The Court of Appeals noted that generally all covered employers must compensate their employees at the rate of one and one-half times their normal hourly rate for all hours worked in excess of a 40-hour week. Under the FLSA, "employ" means to suffer or permit to work. The FLSA also provides that any individual who volunteers to perform services for a public agency is exempt from FLSA coverage. If the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered, and such services are not the same type of services which the individual is employed to perform for such public agency.⁵⁸² Thus, where a public employee engages in services different from those he or she is normally employed to perform, and receives no compensation or only a nominal fee, such work is exempt from the FLSA and the public employee is deemed a volunteer. An individual may not be deemed a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.⁵⁸³ The Court of Appeals concluded:

"In summary, we conclude that as a matter of law, under an objective view of the totality of the circumstances, the school board correctly rejected Purdham's claim to employee status during the time he spends coaching the golf team. Accordingly, we affirm the district court's judgment."⁵⁸⁴

⁵⁷⁹ *Id.* at 425.

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Id.* at 426.

⁵⁸² 29 U.S.C. Section 203(e)(4)(A).

⁵⁸³ 29 C.F.R. Section 553.101(d).

⁵⁸⁴ *Id.* at 434.

J. Compensatory Time

The FLSA allows flexibility for state and local government employees regarding compensation for statutory overtime hours. The FLSA authorizes a public agency to provide compensatory time off in lieu of monetary overtime compensation, at a rate not less than one and one-half hours of compensatory time for each hour of overtime worked. The calculation used is the same as that generally used for calculating monetary overtime. Only state and local governments may use compensatory time, private employers are not eligible and must pay overtime in cash.⁵⁸⁵

The regulations allow the use of compensatory time if it is provided for in a collective bargaining agreement, employment agreement, or memorandum of understanding. The agreement may be established through negotiation with individual employees, through negotiation with employees' representatives, or through negotiation with a recognized collective bargaining agent.⁵⁸⁶ The agreement must be agreed to before the performance of the work and may provide for compensatory time off in lieu of overtime payments in cash or for any combination of compensatory time off and overtime payment in cash so long as the principle of time and one-half is maintained.⁵⁸⁷ An employee who has accrued compensatory time and requests use of the time must be permitted to use the time off within a reasonable period after making a request so long as it does not unduly disrupt the operations of the employer.⁵⁸⁸

K. The Education Code

California school and community college districts are not only subject to the new DOL regulations, but are also subject to Education Code section 45127/88026 et seq., governing overtime for classified employees. Section 45128/88027 provides an overtime premium for time required to be worked in excess of eight hours in any one day and in excess of 40 hours in any calendar week. The FLSA overtime premium is limited to time worked in excess of 40 hours in a week.

Education Code section 45130/88029 authorizes a governing board or personnel commission to specify certain positions or classes of positions as supervisory, administrative, or executive and exclude the employees serving in those positions from overtime. Although Section 45130/88029 refers to "administrative" and "executive" employees, the Education Code does not incorporate the FLSA definitions of these employees. Additionally, there is no FLSA category for "supervisory" employees. Section 45130/88029 provides that these positions must be "management positions." In the EERA, Government Code section 3540.1(g) defines "management employee" and Section 3540.1(m) defines "supervisory employee."

L. Hours Worked and Compensation

⁵⁸⁵ 29 U.S.C. Section 207(o); 29 C.F.R. Section 553.20.

⁵⁸⁶ 29 C.F.R. Section 553.23.

⁵⁸⁷ 29 C.F.R. Section 553.23(a)(2).

⁵⁸⁸ 29 U.S.C. Section 207(o)(5).

All employees covered under the Fair FLSA must be paid a minimum wage for all hours worked. Disputes arise as to what constitutes “hours worked.” The regulations define “all hours” as including all hours that an employee is “suffered or permitted to work” for the employer.⁵⁸⁹ Hours worked also include time during which an employee is required to be on the employer’s premises, on duty, or at a prescribed work place.⁵⁹⁰ This definition of hours worked may require that an employee be compensated for time the employer does not otherwise consider working time such as travel time, waiting time, and certain meal, rest, and sleep periods.

The courts and the United States DOL have developed a “de minimis” rule whereby short periods of time may be disregarded in calculating work time and the FLSA authorizes the rounding of an employee’s start and stop times. For example, in Anderson v. Mt. Clemens Pottery Company,⁵⁹¹ the United States Supreme Court held that employees were entitled to be paid once they clocked in, walking from the entrance of the employer’s plant to their work station, but not for any additional time in which an employee engaged in personal conversation. The regulations cite some examples of compensable work time as follows:

- Time spent by budget or fiscal employees required to remain until an official audit is finished;⁵⁹²
- Charitable work requested or controlled by the employer;⁵⁹³
- Cleaning and oiling machinery;⁵⁹⁴
- Emergency work travel time;⁵⁹⁵
- Grievance assistance unless a contract provides otherwise;⁵⁹⁶
- Labor management committee meetings on daily operations or contract interpretation, unless a union contract provides otherwise;⁵⁹⁷
- Meal periods if employees are not free to leave their post or the time is too short to be useful to employees;⁵⁹⁸
- Medical attention during working hours at the employer’s direction;⁵⁹⁹
- On-call time where liberty is restricted;⁶⁰⁰
- Rest periods of twenty minutes or less;⁶⁰¹

⁵⁸⁹ 29 U.S.C. Section 203(g).

⁵⁹⁰ 29 C.F.R. Section 785.7.

⁵⁹¹ 328 U.S. 680 (1946).

⁵⁹² 29 C.F.R. Section 785.15.

⁵⁹³ 29 C.F.R. Section 785.44.

⁵⁹⁴ 29 C.F.R. Section 785.24(b)(1).

⁵⁹⁵ 29 C.F.R. Section 785.36.

⁵⁹⁶ 29 C.F.R. Section 785.42.

⁵⁹⁷ 29 C.F.R. Section 785.42.

⁵⁹⁸ 29 C.F.R. Section 785.19.

⁵⁹⁹ 29 C.F.R. Section 785.43.

⁶⁰⁰ 29 C.F.R. Section 785.17.

- Stand-by time during short plant shutdowns;⁶⁰²
- Training in regular duties to increase efficiency;⁶⁰³
- Training programs required by employer;⁶⁰⁴
- Traveling (but not performing work, from one work site to another, or traveling out of town during work hours);⁶⁰⁵
- Waiting for work after reporting time or while on duty.⁶⁰⁶

The regulations also cite examples of work-related matters for which an employee need not be compensated:

- Absences (including sick leave, annual leave, holidays, funerals, and weather-related absences);⁶⁰⁷
- Changing clothes, if the change is for the employee's convenience;⁶⁰⁸
- Charitable work done voluntarily outside of working hours;⁶⁰⁹
- Grievance procedures classified as non-paid by a union contract;⁶¹⁰
- Meal periods involving no duties and lasting one-half hour or longer;⁶¹¹
- Medical attention outside of working hours, or not at the direction of the employer;⁶¹²
- On-call time where the employee merely leaves a telephone number and is not restricted;⁶¹³
- Personal time for a worker who lives on his or her employer's premises;⁶¹⁴
- Shutdowns for regular customary equipment maintenance where the employee is free to leave the premises;⁶¹⁵
- Time spent before, after, or between regular working hours;⁶¹⁶

⁶⁰¹ 29 C.F.R. Section 785.18.

⁶⁰² 29 C.F.R. Section 785.15.

⁶⁰³ 29 C.F.R. Section 785.29.

⁶⁰⁴ 29 C.F.R. Section 785.27.

⁶⁰⁵ 29 C.F.R. Sections 785.38, 785.39.

⁶⁰⁶ 29 C.F.R. Section 785.15.

⁶⁰⁷ 29 C.F.R. Section 778.218(d)

⁶⁰⁸ 29 U.S.C. Section 203(o).

⁶⁰⁹ 29 C.F.R. Section 785.44.

⁶¹⁰ 29 C.F.R. Section 785.42.

⁶¹¹ 29 C.F.R. Section 785.19.

⁶¹² 29 C.F.R. Section 785.43.

⁶¹³ 29 C.F.R. Section 785.72.

⁶¹⁴ 29 C.F.R. Section 785.23.

⁶¹⁵ 29 C.F.R. Section 785.15.

⁶¹⁶ 29 C.F.R. Section 790.7.

- Trade school attendance, which is unrelated to present working conditions;⁶¹⁷
- Training programs voluntarily attended that are unrelated to regular duties and that involve no productive work;⁶¹⁸
- Traveling from home to a work site and vice-versa;⁶¹⁹
- Traveling on overnight trips, during non-working hours, except while performing duties or other work;⁶²⁰
- Washing up or showering under normal conditions.⁶²¹

Employees who, with the knowledge or acquiescence of their employer, continue to work after their shift is over, even voluntarily, are engaged in compensable working time as long as the employer “suffers or permits” employees to work on the employer’s behalf, and therefore, proper compensation must be paid.⁶²² In essence, once an employer allows the employee to work or knows that the employee is working, the employee must be compensated whether the work is performed at the place of business or at home.⁶²³

The employer is required to make certain that regular work and overtime work it does not want performed is not, in fact, performed. The drafting of a rule to that effect is not sufficient to avoid compensation for additional hours worked.⁶²⁴

Employers can protect themselves from lawsuits by employees who are seeking back pay for unauthorized work by:

- Adopting a clear time and attendance policy;
- Requiring managers to review weekly time entries;
- Training all staff about timekeeping policies;
- Uniformly addressing any policy violations by employees or supervisors.

With respect to training programs, a training activity is not considered compensable working time if all of the following four criteria are met:

1. Attendance occurs outside the employee’s regular work hours;
2. Attendance is voluntary;

⁶¹⁷ 29 C.F.R. Section 785.30.

⁶¹⁸ 29 C.F.R. Section 785.27.

⁶¹⁹ 29 C.F.R. Section 785.35.

⁶²⁰ 29 C.F.R. Section 785.39.

⁶²¹ 29 C.F.R. Section 790.7(g).

⁶²² 29 C.F.R. Section 785.11.

⁶²³ 29 C.F.R. Section 785.12.

⁶²⁴ 29 C.F.R. Section 785.13.

3. The employee does not produce work while attending the training;
4. The program, lecture, or meeting is not directly related to the employee's job.⁶²⁵

With respect to travel time, all time that is spent walking, riding, or traveling to and from the actual place of performance of the principal activity of an employee, and time spent in activities which are preliminary or subsequent to the principal activity, are not compensable.⁶²⁶ Travel time at the beginning or end of the work day is not compensable unless agreed otherwise. In general, employees should be compensated for all travel unless it is overnight and outside of regular working hours and on a common carrier and where no work is done.⁶²⁷

M. Enforcement Procedures and Remedies

The Secretary of Labor has the power to initiate investigations to determine whether an employer has violated any of the provisions of the FLSA. Employees may sue their employers for the recovery of back wages and liquidated damages (an amount equal to the back wages) which may equal the sum of double back pay.

The Secretary of Labor can also bring a lawsuit on the employee's behalf of the recovery of back wages and liquidated damages, or for back wages and an injunction enjoining the employer from committing any further violations of the FLSA.⁶²⁸ If the Secretary of Labor seeks an injunction, the employer cannot be held liable for liquidated damages. An employee may recover attorney's fees but the Secretary of Labor may not.

The United States Department of Justice may criminally prosecute persons who commit willful violations of the FLSA. The penalty for a first offense is a fine of up to \$10,000.00, and for subsequent violations, a fine of up to \$10,000.00 and/or imprisonment for up to six months. The DOL can also initiate procedures to collect civil penalties for violations of the minimum wage overtime and child labor requirements.⁶²⁹

An employer cannot retaliate against an employee for filing a complaint or participating in a FLSA proceeding. There are specific provisions protecting whistle blowers from retaliation.⁶³⁰

N. Employer Defenses

Employers have several defenses in answering an FLSA lawsuit. These defenses include an absolute good faith defense, a defense to liquidated damages, the statute of limitations, and constitutional immunity for states.

⁶²⁵ 29 C.F.R. Section 785.27.

⁶²⁶ 29 U.S.C. Section 254(a).

⁶²⁷ 29 C.F.R. Section 785.33.

⁶²⁸ 29 U.S.C. Section 216, 217.

⁶²⁹ 29 U.S.C. Sections 206, 207, 216.

⁶³⁰ 29 U.S.C. Section 215.

Employers may rely on U.S. DOL Wage and Hour Opinion Letters as an absolute good faith defense. If the employer provides the DOL with all the relevant facts and requests an opinion letter and then follows the advice rendered by the DOL, the employer has an absolute good faith defense against subsequent lawsuits brought by an employee over the contents of the letter. In such a situation, no monetary damages can be assessed.⁶³¹

Where an employer can show that the employer acted in good faith and had reasonable grounds for believing that it acted in a manner that did not violate the FLSA, a court, in its discretion, may reduce or deny the amount of liquidated damages awarded. This defense does not relieve the employer of liability but it may reduce the amount of the award. The good faith defense does not require specific reliance on DOL opinion letters and any evidence of good faith and reasonable grounds can be introduced as evidence.⁶³²

The employer may also assert the defense of statutory limitations. The FLSA establishes a general two year statute of limitations. However, willful violations have a statute of limitations of three years.⁶³³

DOMESTIC PARTNERS

Assembly Bill 205⁶³⁴ amended various provisions of the Family Code and Government Code relating to domestic partners. Key portions of the legislation take effect on January 1, 2005. The Act is also known as the California Domestic Partner Rights and Responsibilities Act of 2003.

Assembly Bill 205 modifies existing procedures for the establishment and termination of domestic partnerships and requires additional duties of the Secretary of State. Assembly Bill 205 “. . . would extend the rights and duties of marriage to persons registered as domestic partners on and after January 1, 2005.”⁶³⁵

Section 1 of AB 205 states that the purpose of the legislation is to provide all caring and committed couples the opportunity to obtain essential rights protections and benefits and to assume corresponding responsibilities, obligations and duties, and further the state’s interest in promoting stable and lasting family relationships.

Effective January 1, 2005, Family Code section 297 will define domestic partners as two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring. Section 297(b) states that a domestic partnership shall be established in California when both persons file a Declaration of Domestic Partnership with the Secretary of State and at the time of the filing, all of the following requirements are met:

1. Both persons have a common residence.

⁶³¹ 29 U.S.C. Section 259.

⁶³² 29 U.S.C. Section 260.

⁶³³ 29 U.S.C. Section 255(a).

⁶³⁴ Stats.2003, ch. 421.

⁶³⁵ Legislative Counsel’s Digest, A.B. 205.

2. Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved or adjudged a nullity.
3. The two persons are not related by blood in a way that would prevent them from being married to each other in California.
4. Both persons are at least 18 years of age.
5. Both persons are members of the same sex or one or both of the persons meet the eligibility criteria for benefits under the Social Security Act. In addition, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62.
6. Both persons are capable of consenting to the domestic partnership.

Family Code section 297(c) defines a common residence as meaning that both domestic partners share the same residence. Section 297(c) does not require that the common residence be in both their names and states that they may have a common residence even if one or both have additional residences.

Section 297.5(a) states that registered domestic partners shall have the same rights, protections and benefits and shall be subject to the same responsibilities, obligations, and duties under law as are granted to and imposed upon spouses. Section 297.5(a) contains very broad language which may have far reaching effects with respect to many rights, protections, and benefits, as well as responsibilities, obligations, and duties under law.

Section 297.5(b) states that former registered domestic partners shall have the same rights, protections, and benefits and shall be subject to the same responsibilities, obligations, and duties under law as are granted to and imposed upon former spouses. Section 297.5(c) states that a surviving registered domestic partner, following the death of the other partner, shall have the same rights, protections and, benefits and shall be subject to the same responsibilities, obligations, and duties under law as are granted to and imposed upon a widow or a widower. Section 297.5(d) states that the rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses and that the rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses. Section 297.5(e) states that to the extent that provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law.

Section 297.5(f) states that registered domestic partners shall have the same rights regarding nondiscrimination as those provided to spouses. Section 297.5(g) states that notwithstanding Section 297.5 in filing their state income tax returns, domestic partners shall use

the same filing status as is used on their federal income tax returns or that would have been used had they filed federal income tax returns and earned income may not be treated as community property for state income tax purposes. Section 297.5(h) states that no public agency in California may discriminate against any person or couple on the ground that the person is a registered domestic partner rather than spouse or that the couple is registered as domestic partners rather than spouses. Section 297.5(k) states that Section 297.5 does not amend or modify federal laws or the benefits, protections, and responsibilities provided by federal law.

Section 298 states that the Secretary of State shall prepare forms entitled “Declaration of Domestic Partnership” and “Notice of Termination of Domestic Partnership” to meet the requirements of this legislation. Section 298 sets forth the content of the forms and the procedure for establishing and dissolving domestic partnerships.

Section 298.5 states that two persons desiring to become domestic partners may complete and file a Declaration of Domestic Partnership with the Secretary of State. The Secretary of State shall register the Declaration of Domestic Partnership in a registry for those partnerships and shall return a copy of the registered form and a Certificate of Registered Domestic Partnership to the domestic partners. No person who has filed a Declaration of Domestic Partnership may file a new Declaration of Domestic Partnership or enter a civil marriage with someone other than their registered domestic partner unless the most recent domestic partnership has been terminated or a final judgment of dissolution or nullity of the most recent domestic partnership has been entered. This prohibition does not apply if the previous domestic partnership ended because one of the partners died.

Section 299 sets forth the process for terminating a domestic partnership. Section 299.2 states that legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and is substantially equivalent to a domestic partnership shall be recognized as a valid domestic partnership in California regardless of whether it bears the name domestic partnership. Section 299.3 states that on or before June 30, 2004, and again on or before December 1, 2004, and again on or before January 31, 2005, the Secretary of State shall send a letter to each registered domestic partner who registered more than one month prior to each of those dates informing them of the provisions of this legislation.

Labor Code section 233(a) states that any employer who provides sick leave for employees shall permit an employee to use accrued and available sick leave entitlement to attend to an illness of a child, parent, spouse, or domestic partner of the employee.

In addition, Section 233(c) states that no employer shall deny an employee the right to use sick leave, or discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using, or attempting to exercise the right to use, sick leave to attend to an illness of a child, parent, spouse, or domestic partner of the employee.

Under federal income tax law, compensation for services, including fees, commissions, fringe benefits, and similar items are includable in an employee’s gross income.⁶³⁶ The Internal Revenue Code, however, makes an exception for employer paid health plans that meet the

⁶³⁶ Internal Revenue Code section 61.

requirements of the tax code.⁶³⁷ The exemption from inclusion in gross income includes adding the employee's spouse or dependents to the health plan.⁶³⁸

However, under federal law, adding a domestic partner to an employee's medical plan will make the benefit taxable for federal income tax purposes unless the domestic partner qualifies as a dependent under the Internal Revenue Code. The Internal Revenue Code excludes from an employee's gross income only amounts the employer paid for medical care provided to the employee and an employee's spouse and dependents. Under federal law, the definition of spouse does not include a domestic partner.⁶³⁹

Generally, it is very difficult for a domestic partner to qualify as a dependent under the Internal Revenue Code.⁶⁴⁰ Most domestic partnerships are composed of two partners working full-time. Such partners would not meet the 50% support test necessary to qualify as a dependent under the Internal Revenue Code. The Internal Revenue Service determines whether an individual qualifies as a dependent on the basis of the facts and circumstances in each case, including the source of the domestic partner's support and applicable state law.

Therefore, if a domestic partner is added to an employee's health plan, the employee must be taxed on the fair market value of the health care coverage extended to the domestic partner.⁶⁴¹

The federal tax regulations define fair market value as follows:

“In general, fair market value is determined on the basis of all the facts and circumstances. Specifically, the fair market value of a fringe benefit is the amount that an individual would have to pay for the particular fringe benefit in an arms length transaction. Thus, for example, the effect of any special relationship that may exist between the employer and the employee must be disregarded. Similarly, an employee's subjective perception of the value of a fringe benefit is not relevant to the determination of the fringe benefit's fair market value, nor is the cost incurred by the employer determinative of its fair market value . . .”⁶⁴²

If a domestic partner of an employee does not qualify as a dependent of the employee, the exclusion from gross income pursuant to Section 106 of the Internal Revenue Code does not apply to the accident and health coverage attributable to the domestic partner.⁶⁴³ Accordingly,

⁶³⁷ Internal Revenue Code section 106.

⁶³⁸ Internal Revenue Code section 106.

⁶³⁹ Section 3 of the Defense of Marriage Act provides that “In determining the meaning of any act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus or agencies of the United States the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or wife. 1 U.S.C. Section 7, Public Law 104-199.

⁶⁴⁰ Internal Revenue Code section 152.

⁶⁴¹ See, IRS Private Letter Ruling 9850011 (September 10, 1998); IRS Private Letter Ruling 9717018 (January 22, 1997); IRS Private Letter Ruling 9231062 (May 7, 1992); IRS Private Letter Ruling 9111018 (December 14, 1990); and IRS Private Letter Ruling 9034048 (May 29, 1990).

⁶⁴² IRS Regulations section 1.61-21(b)(2).

⁶⁴³ IRS Private Ruling 9231062 (May 7, 1992).

the excess of the fair market value of the group medical coverage provided to a domestic partner over the amount paid by the employee for such coverage is includable in the gross income of the employee under the Internal Revenue Code.⁶⁴⁴ A taxable fringe benefit is included in the income of the person performing the services in connection with the fringe benefit (i.e., the employee). The fringe benefit may be taxable to the employee even though the employee did not actually receive the fringe benefit. If a fringe benefit is furnished to someone other than the employee, such benefit is considered as furnished to the employee, and use by another person (e.g., domestic partner) is considered use by the employee.⁶⁴⁵

In several private letter rulings, the IRS has stated that once the fair market value of the health coverage has been included in the employee's gross income, any benefit paid to the domestic partner is not taxable to either the employee or the domestic partner.⁶⁴⁶

The fair market value of coverage depends on the cost of coverage. This cost can be calculated in several ways:

1. The difference between the premium the employer would contribute for the employee alone and the premium the employer contributes for coverage of an employee and a spouse or family, minus the amount the employee contributes for the coverage.
2. The difference between the actuarial value of insurance for a single person and insurance for a couple or family, minus the amount the employee pays for the coverage. This method involves actuarial calculations and is more expensive to complete than the first.⁶⁴⁷

In IRS Private Letter Ruling 9034048, the IRS determined that the amount of compensation includable in the employee's gross income will be the fair market value of a policy at the individual policy rates.⁶⁴⁸ This private letter ruling was expressly revoked by the IRS in IRS Private Letter Ruling 9231062, in which the IRS held that the amount includable in an employee's gross income is the fair market value of the group coverage, notwithstanding the fact that the fair market value of group coverage may be substantially less or more than the fair market value of individual coverage to the employer.⁶⁴⁹

While private letter rulings are not binding except as to the parties that requested the rulings, they are a good indication of the IRS's interpretation of the Internal Revenue Code.

Based on the private letter rulings discussed above and IRS Regulation 1.61-21(b)(2), districts should calculate the fair market value of a district's medical plan for tax purposes (when a nondependent domestic partner is added by an employee) by determining the difference between the premium the district would contribute for the employee alone and the

⁶⁴⁴ Internal Revenue Code section 61.

⁶⁴⁵ IRS Regulation section 1.61-21(a)(4).

⁶⁴⁶ See, IRS Private Letter Ruling 9850011 (September 10, 1998); IRS Private Letter Ruling 9034048 (May 29, 1990).

⁶⁴⁷ IRS Private Letter Ruling 9111018; IRS Private Letter Ruling 9034048 (May 29, 1990).

⁶⁴⁸ This ruling was expressly revoked in IRS Private Letter Ruling 9111018 (December 14, 1990).

⁶⁴⁹ See, IRS Private Letter Ruling 9111018 (December 14, 1990); see also, IRS Private Letter Ruling 9034048 (May 29, 1990).

premium the district contributes for coverage of an employee and a spouse or family, minus the amount the employee pays for coverage.

Therefore, if adding the domestic partner increases the medial insurance costs by putting the employee in a different tier coverage (e.g., for simple to two party or family coverage), the fair market value would be the difference between the premium for the employee alone and two party or family coverage (depending on the terms of the medical plan) minus the employee's contribution toward the premium.

However, if adding the domestic partner does not increase the cost of medical insurance to the employer because the employee is already on a family tier rate (e.g., the employee is covering his or her dependent children), the fair value of the added benefit attributed to the employee under the tax code would be zero and there would be no tax due.

The same conclusion would be reached if the employer's medical plan had one composite rate that covers employees whether they are single, married or have dependent children. Since there is no added cost to the employer when a domestic partner is added, the fair market value of the added benefit attributed to the employee is zero and there would be no tax due.

An employer making payment of wages is required to deduct and withhold upon such wages a tax determined in accordance with the tables prescribed by the Secretary of the Treasury.⁶⁵⁰ The term "wages" means all remuneration for services provided by an employee for the employer, including the cash value of fringe benefits paid in any medium other than cash.⁶⁵¹ The Internal Revenue Code also requires the employer to withhold for Federal Insurance Contribution Act (FICA) a percentage of wages received or paid with respect to employment.⁶⁵² For FICA purposes, the term "wages" means all remuneration for employment, including the cash value of all fringe benefits paid in any medium other than cash.⁶⁵³

Therefore, districts must recalculate the employee's withholding if there is increased tax liability to the employee as a result of adding a domestic partner to the medical plan or other health and welfare plans.

THE AFFORDABLE CARE ACT

A. Introduction

In National Federation of Independent Business v. Sebelius,⁶⁵⁴ the United States Supreme Court held that the individual mandate, imposing minimum essential coverage requirements under which certain individuals must purchase and maintain health insurance coverage, exceeded Congress's power under the Commerce Clause. The Court upheld the individual mandate as a tax that was within Congress's taxing power. The Court also held that giving the Secretary of Health and Human Services the authority to penalize States that chose not to participate in the

⁶⁵⁰ Internal Revenue Code section 3402.

⁶⁵¹ Internal Revenue Code section 3401(a).

⁶⁵² Internal Revenue Code section 3101(a) and 3111.

⁶⁵³ Internal Revenue Code section 3121(a).

⁶⁵⁴ 125 S.Ct. 2566 (2012).

Affordable Care Act's expansion of the Medicaid Program exceeded Congress's power under the Spending Clause.

B. Limited Powers of the Federal Government

Chief Justice Roberts announced the judgment of the Court and delivered the opinion of the Court. Chief Justice Roberts noted that in our federal system, the national government possesses only limited powers and that States and the people retain the remainder. Chief Justice Roberts noted that the federal government can exercise only the powers granted to it.⁶⁵⁵ If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.⁶⁵⁶

Chief Justice Roberts noted that the Constitution did not initially include a Bill of Rights, at least partly because the Framers felt that the enumeration of powers sufficed to restrain the federal government. When the Bill of Rights was adopted, it included the Tenth Amendment which stated in part, "the powers not delegated to the United States by the Constitution...are reserved to the States respectively or to the people."⁶⁵⁷

Chief Justice Roberts noted that the same limitations do not apply to the States because the Constitution is not the source of their power. The Constitution may restrict state governments but where such prohibitions as the Fourteenth Amendment do not apply state governments, States do not need constitutional authorization to act. States may act under their general police power.⁶⁵⁸

Chief Justice Roberts noted that state sovereignty is not just an end in itself but rather the diffusion of sovereign power between the federal government and States secures to citizens the liberties that derive from the diffusion of power. The Framers of the Constitution wanted to ensure that the powers in which the ordinary courses of affairs are regulated were held by governments more local and more accountable than a distant federal bureaucracy. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.⁶⁵⁹

C. The Commerce Clause

In analyzing the federal government's argument that the individual mandate is a valid exercise of power under the Commerce Clause, Chief Justice Roberts noted that Congress had never attempted to rely on the commerce power to compel individuals not engaged in commerce to purchase an unwanted product.⁶⁶⁰ The Constitution grants Congress the power to regulate commerce which presupposes the existence of commercial activity to be regulated. If the power

⁶⁵⁵ *Id.* at 2577; citing McCulloch v. Maryland, 4 L.Ed. 579 (1819).

⁶⁵⁶ *Id.* at 2577-78.

⁶⁵⁷ *Ibid.*

⁶⁵⁸ *Id.* at 2578; citing United States v. Morrison, 529 U.S. 598, 618-619, 120 S.Ct. 1740 (2000).

⁶⁵⁹ *Id.* at 2578-79; citing Bond v. United States, 131 S.Ct. 2355, 2364 (2011).

⁶⁶⁰ *Id.* at 2579.

to regulate something included the power to create it, many of the provisions in the Constitution would be superfluous.⁶⁶¹ Chief Justice Roberts in his opinion stated:

“The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; and others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation, and – under the government’s theory – empower Congress to make those decisions for him.”⁶⁶²

Chief Justice Roberts noted that under the government’s logic, Congress could use its commerce power to compel citizens to act as the government would have them act. Chief Justice Roberts responded to this argument by stating:

“That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was ‘an addition which few opposed and from which no apprehensions are entertained.’ While Congress’s authority under the Commerce Clause has of course expanded with the growth of the national economy our cases have ‘always recognized that the power to regulate commerce, though broad indeed, has limits . . .’ Congress already enjoys vast power to regulate much of what we do. Accepting the government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the federal government. . . .

The Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions and Congress’s actions have reflected this understanding. There is no reason to depart from that understanding now.”⁶⁶³

⁶⁶¹ *Id.* at 2579-80.

⁶⁶² *Id.* at 2580.

⁶⁶³ *Id.* at 2589.

D. The Necessary and Proper Clause

The Court also rejected the government’s argument that Congress has the power under the Necessary and Proper Clause to enact the individual mandate. The Court held that prior cases upholding laws under the Necessary and Proper Clause involve exercise of authority derivative of a power granted in the Constitution. The Court concluded, “Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a ‘necessary and proper’ component of the insurance reforms.”⁶⁶⁴

E. The Power to Tax

The Court then reviewed the government’s argument that the mandate may be upheld as within Congress’s enumerated power to lay and collect taxes. The government argues that the individual mandate does not require individuals to buy insurance but rather it imposes a tax on those who do not buy insurance.⁶⁶⁵

The Court concluded that the requirement was a tax for the following reasons:

1. For most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more.
2. The individual mandate contains no knowledge requirement.
3. The payment is collected solely by the Internal Revenue Service through the normal means of taxation except that the IRS is not allowed to use criminal prosecution.⁶⁶⁶

The Court concluded:

“The Affordable Care Act’s requirement that certain individual’s pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”⁶⁶⁷

F. The Spending Clause and the Expansion of Medicaid

The Court then reviewed the Medicaid expansion requirements under Congress’s authority under the Spending Clause. The States claim that Congress was coercing States to adopt changes it wants by threatening to withhold all of the State’s Medicaid grants unless the State accepts the new expanded funding and complies with the conditions that come with it.⁶⁶⁸

⁶⁶⁴ *Id.* at 2591-92.

⁶⁶⁵ *Id.* at 2593-94.

⁶⁶⁶ *Id.* at 2599-2601.

⁶⁶⁷ *Id.* at 2600.

⁶⁶⁸ *Id.* at 2601.

The Court noted a Spending Clause grants Congress the power to pay the debts and provide for the general welfare of the United States. The courts have long recognized that Congress may use its Spending Clause power to grant federal funds to the States and make conditions upon the States to take certain actions that Congress could not require them to take under other constitutional provisions. The conditions imposed by Congress ensure that the funds are used by the States to provide for the general welfare in the manner Congress intended.⁶⁶⁹

The Court noted that Spending Clause legislation has been characterized as being in the nature of a contract.⁶⁷⁰ The legitimacy of Congress's exercise of the spending power rests on whether the State voluntarily and knowingly accepted the terms of the contract.⁶⁷¹ Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system rests on what might have first seemed a counterintuitive insight that freedom is enhanced by the creation of two governments not one.⁶⁷²

The Court stated that Congress may use its spending power to create incentives for States to act in accordance with federal policies but may not exert a power akin to undue influence. When the pressure turns into compulsion the legislation runs contrary to the system of federalism. Permitting the federal government to force the States to implement a federal program threatens the political accountability key to our federal system. Where the federal government directs States to regulate it, it may be state officials who will bear the brunt of public disapproval while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.⁶⁷³

The Court noted that in the South Dakota v. Dole,⁶⁷⁴ the Court upheld a federal law that threatened to withhold five percent of a state's federal highway funds if the state did not raise its drinking age to 21. The Court found that the condition was directly related to one of the main purposes for which highway funds are expended (i.e. safe interstate travel). The Court asked whether the financial inducement offered by Congress was so coercive as to pass the point at which pressure turns into compulsion but determined that the threat of losing 5% of highway funds was not impermissible or coercive.

However, in this case, Congress was threatening to withhold all Medicaid funds and the Court characterized it as "...a gun to the head..." of the States.⁶⁷⁵ The Court noted that a State that opts out of the Affordable Care Act's expansion in health care coverage stands to lose all of its Medicaid funds which accounts for over 20% of the average State's total budget. The Court noted that in South Dakota v. Dole, South Dakota was threatened with a loss with less than one half of one percent of its state budget but with the Affordable Care Act the loss could be over 10% of a state's budget.⁶⁷⁶

⁶⁶⁹ Id. at 2601-02.

⁶⁷⁰ Id. at 2602. See, Barnes v. Gorman, 536 U.S. 181, 186, 122, S.Ct. 2097 (2002).

⁶⁷¹ Id. at 2602. See, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531 (1981).

⁶⁷² Id. at 2602.

⁶⁷³ Id. at 2602-03.

⁶⁷⁴ 483 U.S. 203, 107 S.Ct. 2793 (1987).

⁶⁷⁵ Id. at 2604.

⁶⁷⁶ Id. at 2605.

The Court concluded that the provision withholding all Medicaid funds in the Affordable Care Act was unconstitutional and it invalidated that provision while upholding the remainder of the Affordable Care Act. The Court stated:

“As for the Medicaid expansion that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with the accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: they must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the federal government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.”⁶⁷⁷

G. Summary

In summary, the United States Supreme Court upheld the individual mandate as a tax that was within the Congress’s taxing powers and struck down the penalties for States that choose not to participate in the Affordable Care Act’s expansion of Medicaid as unconstitutional under the Spending Clause.

MEDICAL BENEFITS FOR RETIRED EMPLOYEES

In Sappington v. Orange Unified School District,⁶⁷⁸ the Court of Appeal held that retired employees of the Orange Unified School District did not have a vested right to their choice of free medical coverage either under a health maintenance organization (HMO) or preferred provider organization (PPO) medical plan. The Court of Appeal held that the school district’s policy adopted in 1976 did not require the school district to provide free coverage under the more expensive PPO medical plan.

In 1976, the governing board of the Orange Unified School District adopted Policy 4244.2, which stated, “[t]he District shall underwrite the cost of the District’s medical and hospital insurance program for all employees who retire from the District provided they have been employed in the District for the equivalent of ten years or longer.” From 1977 until 1997 the district offered retired employees free medical insurance through an ever changing

⁶⁷⁷ Id. at 2608.

⁶⁷⁸ 119 Cal.App.4th 949, 14 Cal.Rptr.3d 764 (2004).

combination of HMOs, indemnity plans, and PPOs. The Court of Appeal observed that the particular offering of HMOs, indemnity plans, and PPOs offered, as well as the applicable deductibles, co-payments and prescription drug charges paid by retirees under each plan, changed yearly. Despite these changes, the district paid the entire subscription cost for whichever plan a retired employee chose among those offered that year.⁶⁷⁹

In 1998, in recognition of the spiraling costs of health insurance and the district's financial situation, the district instituted a financial charge for the participation in the PPO plan. Any retired employee electing PPO coverage would have to pay the difference in cost between enrolling in the HMO and the more expensive PPO. The district continued to offer retirees the HMO plan at no cost. The financial charge rose annually from an initial cost of \$49.49 (retiree only) – \$63.64 (retiree plus spouse) per month in 1998 to \$105.37 (retiree only) – \$440.35 (retiree plus spouse) per month by 2002/2003.⁶⁸⁰

The retired employees alleged that the district had breached its contractual obligation under Policy 4244.2 since 1998, by requiring retired employees to pay a fee for PPO coverage. The retired employees filed a declaratory and injunctive relief action in superior court seeking to compel the school district to continue offering them free coverage under a PPO plan.⁶⁸¹

The Orange County Superior Court ruled that the retirees had a vested right to retirement medical benefits under Policy 4244.2, noting that promised retirement benefits (in addition to pensions) comprise a part of a public employee's contract of employment, and are thus constitutionally protected.⁶⁸² The trial court then focused specifically on the nature of the vested right and noted the regular changes in the types of medical plans offered over the years and the wide fluctuations in the retirees' costs for co-payments, deductibles, and prescription drugs. The trial court concluded that Policy 4244.2 did not obligate the district to offer free PPO coverage and construed the policy as a promise of at least one health insurance plan with no monthly premium for retired employees. The court held that the district's offer of free HMO coverage satisfied the district's contractual obligation under Policy 4244.2. The trial court held that the district could impose a fee for coverage under the PPO plan for retired employees.⁶⁸³

The Court of Appeal affirmed the decision of the trial court. The Court of Appeal noted that the use of the word "underwrite" in the policy indicates that the district had a duty to provide substantial financial support, but not necessarily a duty to bear the entire cost. The Court of Appeal noted that the policy did not specify the type of health benefit plan or level of benefits promised. Here, the Court of Appeal held that the language in the policy was so broad as to obligate the district only to provide a program, but there was no requirement that the program include any particular type of insurance. The Court of Appeal held, "[g]enerous benefits that exceed what is promised in a contract are just that: generous. They reflect a magnanimous spirit, not a contractual mandate."⁶⁸⁴

⁶⁷⁹ *Id.* at 951.

⁶⁸⁰ *Id.* at 951-52.

⁶⁸¹ *Id.* at 952.

⁶⁸² See, *Kern v. City of Long Beach*, 29 Cal.2d 848, 852 (1947); *Miller v. State of California*, 18 Cal.3d 808, 801 (1977).

⁶⁸³ *Id.* at 952-53.

⁶⁸⁴ *Id.* at 955.

The Court of Appeal went on to state that the fact that the district provided a free PPO benefit for 20 years before health insurance premiums skyrocketed and the cost of PPO coverage became far greater than HMO coverage does not prove that the school district promised to provide the PPO option forever. The Court of Appeal concluded that the retired employees had no vested right under Policy 4424.2 to free PPO coverage.⁶⁸⁵

In summary, the decision turned mainly on the language of the school district's policy. Districts that have similar policies that provide health benefits to retired employees may want to have their policies reviewed by legal counsel in light of the decision in Sappington.

In 2012, the California Legislature passed Assembly Bill 340.⁶⁸⁶ The purpose of Assembly Bill 340 was to modify the retirement benefits for public employees who were employed after January 1, 2013. While most of the provisions only affected employees who began their employment after January 1, 2013, a few provisions apply to individuals employed prior to January 1, 2013.

One of these provisions is the enactment of Government Code section 7522.40. Government Code section 7522.40 was enacted as part of Assembly Bill 340 and amended in 2013 effective October 4, 2013.⁶⁸⁷ Government Code section 7522.40 states:

“(a) A public employer shall not provide to a public employee who is elected or appointed, a trustee, excluded from collective bargaining, exempt from civil service, or a manager any vesting schedule for the employer contribution payable for postretirement health benefits that is more advantageous than that provided generally to other public employees, including represented employees, of the same public employer who are in related retirement membership classifications.

(b) This section shall not require an employer to change the vesting schedule for the employer contribution payable for postretirement health benefits of any public employee who was subject to a specific vesting schedule pursuant to statute, collective bargaining agreement, or resolution for these employer contributions prior to January 1, 2013, or who had a contractual agreement with an employer prior to January 1, 2013, for a specific vesting schedule for these employer contributions.”

In essence, Government Code section 7522.40(a) prohibits a public employer from providing to a public employee who was elected or appointed, excluded from collective bargaining, or a manager any postretirement health benefits that is more advantageous than that provided generally to other public employees, including represented employees of the same employer who are in related retirement membership classifications. Government Code section

⁶⁸⁵ Id. at 955-56.

⁶⁸⁶ Stats. 2012, ch. 296.

⁶⁸⁷ Stats. 2013, ch. 528 (Senate Bill 13) effective October 4, 2013.

7522.40(b) was added in 2013,⁶⁸⁸ to clarify that subsection (a) does not apply to contractual agreements entered into prior to January 1, 2013.

Clearly, under Government Code section 7522.40 if a management employee enters into a new contractual agreement on or after January 1, 2013, the contractual agreement is prohibited from including a postretirement health benefit that is more advantageous than that provided generally to other public employees. It is somewhat unclear as to whether Section 7522.40 applies if a contractual agreement entered into prior to January 1, 2013 and is then amended on or after January 1, 2013.

It appears that the intent was that Government Code section 7522.40 would possibly apply to all contractual agreements, including amendments to contractual agreements. Therefore, if a contractual agreement is amended on or after January 1, 2013, Section 7522.40 may be interpreted to prohibit postretirement health benefits that are more advantageous than that provided to other public employees and affected school administrators should consider the possible applicability of Section 7522.40.

RETIREMENT BENEFITS

A. Impairment of the Obligation of Contract

The contract clause of the United States Constitution, Article I, Section 10, prohibits any state from passing a law impairing the obligations of contracts. The California Constitution, Article I, Section 9 states, “A bill of attainder, ex post facto law, or law impairing the obligation of contracts, may not be passed.”

In a long line of cases, the California courts have interpreted these provisions to mean that public employees’ retirement rights or pension rights are contractual, and they are vested so that the Legislature’s power to alter these rights after they have been earned is quite limited.⁶⁸⁹ In Kern v. City of Long Beach, the California Supreme Court held that since a pension right is an integral portion of contemplated compensation, it cannot be destroyed, once it has vested, without impairing a contractual obligation.⁶⁹⁰ A pension is considered to be deferred compensation that the retired beneficiary is entitled to as part of the fulfillment of his employment contract and which may not be changed to the employee’s detriment.⁶⁹¹

B. The Nature of the Vested Right to a Pension

In Miller v. State of California, the California Supreme Court stated that the right to pension benefits vests upon the acceptance of employment.⁶⁹² Even though the right to immediate payment of a full pension may not mature until certain conditions are satisfied, the

⁶⁸⁸ Stats. 2013, ch. 528 (Senate Bill 13), effective October 4, 2013.

⁶⁸⁹ Lyon v. Flounoy, 271 Cal.App.2d 774, 779, 76 Cal.Rptr. 869 (1969). See, also, Kern v. City of Long Beach, 29 Cal.2d 848, 179 P.2d 799 (1947); Terry v. City of Berkeley, 41 Cal.2d 698, 263 P.2d 833 (1953); Allen v. City of Long Beach, 45 Cal.2d 128, 287 P.2d 765 (1955); Abbott v. City of Los Angeles, 50 Cal.2d 438, 326 P.2d 484 (1958).

⁶⁹⁰ 29 Cal.2d 848, 853, 855, 179 P.2d 802 (1947).

⁶⁹¹ Lyon v. Flounoy, 271 Cal.App.2d 774, 783, 76 Cal.Rptr. 869 (1969).

⁶⁹² Miller v. State of California, 18 Cal.3d 808, 815, 557 P.2d 970, 135 Cal.Rptr. 386 (1977).

employee has earned some pension rights as soon as he or she has performed substantial services for the employer. While the payment of these benefits is deferred, and is subject to the condition that the employee continues to serve for the period required by the statute, the mere fact that the performance of employment duties is dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due.⁶⁹³

In Miller, the California Supreme Court noted that prior court decisions held that upon acceptance of public employment the employee acquired a vested right to a pension based on the system then in effect. The system in effect allowed the employee to earn successively higher levels of benefits based on the employee's years of service and the employee's highest average salary.⁶⁹⁴

C. The Extent of the Vested Right to a Pension

In Betts v. Board of Administration of the Public Employees Retirement System,⁶⁹⁵ the California Supreme Court noted that there was an extensive line of California decisions involving public employee pension benefits. The court stated:

“A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity. . . .

“. . . There is a strict limitation on the conditions which may modify the pension system in effect during employment . . . such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.”⁶⁹⁶

In Betts, the California Supreme Court noted that “comparable new advantages” must focus on a particular employee whose own vested pension rights are involved. The offsetting improvement must be balanced against the benefit that has been diminished.⁶⁹⁷ Most notably, the California Supreme Court held in Betts:

⁶⁹³ Id. at 815.

⁶⁹⁴ Id. at 817.

⁶⁹⁵ 21 Cal.3d 859, 582 P.2d 614, 148 Cal.Rptr. 158 (1978).

⁶⁹⁶ Id. at 863-864.

⁶⁹⁷ Id. at 864-865.

“An employee’s contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee’s subsequent tenure.”⁶⁹⁸

In Betts, the California Supreme Court recognized that the result of its decision would result in a double increment of increase to Betts, but the court ruled that both enhanced provisions were in effect between 1963 and 1974 while Betts was State Treasurer, and therefore, Betts was entitled to the benefit of both enhancements to the pension formula.

In Carmen v. Alvord,⁶⁹⁹ the California Supreme Court took the concept of vested retirement benefits a step further and held that not only were pension benefits a vested contractual right that are earned benefits in the form of deferred compensation, but that they become a fixed indebtedness of the employer.⁷⁰⁰

D. Vested Right to Level of Benefits

In United Firefighters of Los Angeles City v. City of Los Angeles,⁷⁰¹ the City of Los Angeles and its board of pension commissioners attempted to place a three percent cap on police and firefighter pension benefit cost of living adjustments. Prior to 1966, the pension system made no provision for the adjustment of benefits to reflect inflation. In 1966, voters adopted a charter amendment which provided for a yearly cap of two percent on cost of living adjustments. In 1971, voters approved another charter amendment which removed the cap on cost of living adjustments, permitting them instead to fully reflect the rate of inflation each year. In 1982, the City of Los Angeles placed a measure before the voters which placed a three percent cap on police and firefighter pension benefit cost of living adjustments based on the consumer price index.

The Court of Appeal struck down the three percent cap holding that it violated the constitutional provision on impairment of contracts. The Court of Appeal held that pension laws are to be liberally construed to protect pensioners and their dependents from economic insecurity.⁷⁰² The Court of Appeal held that the plaintiffs have a vested right not only to benefits substantially similar to those in effect when they accepted public employment, but have a vested right to any changes in the pension system that enhance benefits during their employment. When the voters lifted the cap on cost of living adjustments, the employees affected had a reasonable contractual expectation that those benefits would continue and no further cap would be imposed.⁷⁰³ Therefore, the Court of Appeal concluded that the imposition of the three percent cap on cost of living adjustments in 1982 impaired the contractual rights of employees who were employed when that change took place.

⁶⁹⁸ Id. at 866.

⁶⁹⁹ 31 Cal.3d 318, 644 P.2d 192, 182 Cal.Rptr.506 (1982).

⁷⁰⁰ Id. at 325.

⁷⁰¹ 210 Cal.App.3d 1095, 259 Cal.Rptr. 65 (1989).

⁷⁰² Id. at 1102.

⁷⁰³ Id. at 1107-1108.

In contrast, in Retired Employees Association of Orange County v. County of Orange,⁷⁰⁴ the Ninth Circuit Court of Appeals held that the county's annual approval of healthcare rates that pooled retiree health benefits with active employees did not impliedly create a lifetime rate to pooled premiums.

The retired employees sued the County of Orange alleging that the retired employees had an implied vested right to the pooling of their healthcare benefits with those of current employees.

The County of Orange first began providing group medical insurance for its retired employees in 1966. The county decided to cover retiree health insurance premium costs through a monthly grant. In 1979, the Board of Retirement decided to stop providing monthly grants for prospective retirees, but to continue grants for employees retiring before June 28, 1979.⁷⁰⁵ In a 1991 case, the California Court of Appeal held that California law does not require local agencies to treat retired and active employees in the same manner when providing health benefits.⁷⁰⁶

From 1966 through 1984, on an annual basis, the county approved one premium rate for active employees and another rate for retired employees. Starting in 1985 and continuing through 2007, the County of Orange decided to pool health insurance premium rates for retired and active employees. Over time, the pool premiums substantially subsidized retirees' premium rates.

Effective January 1, 2008, the county and its various labor unions agreed to split the insurance rate pool. As a result, the health benefit premiums for retired employees rose substantially.

The Ninth Circuit Court of Appeals certified the following question to the California Supreme Court, "Whether, as a matter of California law, a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees." The California Supreme Court held that vested health benefits can be implied under certain circumstances from a county ordinance or resolution.⁷⁰⁷

The California Supreme Court, however, declined to determine whether such circumstances had been met, and the Ninth Circuit Court of Appeals remanded the matter back to the trial court.⁷⁰⁸ On remand, the district court granted the county's motion for summary judgment, holding that under Government Code section 25300, any right to employee compensation must in some way be approved by the Board of Supervisors with a resolution or ordinance. The district court concluded that the retired employees bear the burden of proving

⁷⁰⁴ 742 F.3d 1137 (9th Cir. 2014).

⁷⁰⁵ See, Orange County Employees Association v. County of Orange, 234 Cal.App.3d 833, 839, 285 Cal.Rptr. 799 (1991).

⁷⁰⁶ Id. at 843.

⁷⁰⁷ Retired Employees Association of Orange County v. County of Orange, 52 Cal.4th 1171, 134 Cal.Rptr.3d 779, 266 P.3d 287, 301 (2011).

⁷⁰⁸ Retired Employees Association of Orange County v. County of Orange, 663 F.3d 1292 (9th Cir. 2011).

that the relevant statutes or ordinances reflect clear legislative intent to enter into such a contract and that it failed to make this showing.⁷⁰⁹

The Court of Appeals concluded that the retired employees failed to establish an implied contractual right to the pooled premium and affirmed the lower court's decision.

E. Changes in the Funding of the Pension System

In Claypool v. Wilson,⁷¹⁰ the Court of Appeal held that the state could change the method for funding the Public Employees' Retirement System (PERS). The court held that employees do not have a vested right to control the administration of the plan which provides for the payment of pensions.⁷¹¹

However, if the Legislature, by statute, creates a vested right to a particular method of funding, then it would be an impairment of a contractual obligation for the Legislature to then change that method of funding.⁷¹² In Teachers' Retirement Board, the Court of Appeal noted that under the statutory provisions regulating the State Teachers' Retirement System (STRS), the Legislature, by statute, promised to fund the STRS Supplemental Benefit Maintenance Account (SBMA) at a specified level of 2.5% of the total of the creditable compensation of the immediately preceding calendar year. In enacting Education Code section 24415, the Legislature stated that it was the intent of the Legislature to establish the supplemental payments pursuant to Section 24415 as vested benefits pursuant to a contractually enforceable promise to make annual contributions.

In 2003, the Legislature passed, and Governor Davis signed, Senate Bill 20, reducing the state's obligation to fund the SBMA by \$500 million for the fiscal year 2003-2004. Since the Legislature stated that it was a vested benefit and a contractually enforceable promise, the Court of Appeal held that the Legislature violated the contract clauses of both the federal and California Constitutions by passing a law that impaired the obligation of contracts. The Court of Appeal stated:

“Here, the state entered into a contractually enforceable promise to transfer a specified percentage of funds into the SBMA; the state breached this contract by diverting \$500 million of the promised funds; . . .”⁷¹³

F. Retroactive Retirement Benefits

Most recently, in County of Orange v. Association of Orange County Deputy Sheriffs,⁷¹⁴ the Court of Appeal reaffirmed the long line of cases upholding pension benefits. In County of Orange, the Court of Appeal held that the enactment of a retroactive pension formula to current

⁷⁰⁹ 742 F.3d 1137, 1140 (9th Cir. 2014).

⁷¹⁰ 4 Cal.App.4th 646, 6 Cal.Rptr.2d 77 (1992).

⁷¹¹ Id. at 670.

⁷¹² See, Teachers Retirement Board v. Genest, 154 Cal.App.4th 1012, 65 Cal.Rptr.3d 326 (2007).

⁷¹³ Id. at 1045.

⁷¹⁴ 192 Cal.App.4th 21, 121 Cal.Rptr.3d 151 (2011).

county employees for past service did not violate the constitutional prohibition against granting extra compensation for services already rendered.

In County of Orange, the Court of Appeal noted that a public employee's pension constitutes an element of compensation and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity.⁷¹⁵ Unlike other terms of public employment, which are wholly a matter of statute, pension rights are obligations protected by the contract clause of the federal and state constitutions. Upon acceptance of public employment, an employee acquires a vested right to a pension based on the system then in effect.⁷¹⁶

G. Future Employees

In California Association of Professional Scientists v. Schwarzenegger,⁷¹⁷ the Court of Appeal upheld a statute which created an alternate retirement program for certain new state employees during their first two years of employment. The Court of Appeal held that the challenged statute did not impair any contract rights.

In 2004, the Legislature passed a bill creating an alternate retirement program that applied to certain new state employees during their first two years of employment. The alternative retirement system covered employees in the bargaining unit from July 1, 2003 through July 1, 2006. Under this program, new employees did not accrue credit for service in the system and did not make employee contributions to the system for employment with the state until the first day of the first pay period commencing 24 months after becoming a member of the system.⁷¹⁸ During the first two years of state employment, these new employees contributed to a defined contribution retirement plan.⁷¹⁹

The Court of Appeal held that the contractual basis of a pension right is the exchange of an employee's services for the pension right offered by the statute, and thus, future employees do not have a vested right in any particular pension plan.⁷²⁰

In summary, changes in retirement benefits that would result in a decrease in the amount of benefits current employees or retirees receive upon retirement would, in most cases, be struck down by the courts as a violation of the contracts clause of the United States Constitution and the California Constitution. However, the courts have upheld changes in retirement systems for future employees who have not commenced their employment with a state or local public agency. Other changes to the retirement system with respect to funding and administration have been upheld by the courts.

⁷¹⁵ Id. at 165; citing Betts v. Board of Administration, 21 Cal.3d 859, 863, 148 Cal.Rptr.158 (1978).

⁷¹⁶ Id. at 164-165; citing United Fire Fighters of Los Angeles City v. City of Los Angeles, 210 Cal.App.3d 1095, 1102, 259 Cal. Rptr. 65 (1989). See, also, Miller v. State of California, 18 Cal.3d 808, 817, 135 Cal.Rptr. 386 (1977).

⁷¹⁷ 137 Cal.App.4th 371, 40 Cal.Rptr.3d 354 (2006).

⁷¹⁸ See, Government Code section 20281.5 (b).

⁷¹⁹ See, Government Code section 1999.3 (b).

⁷²⁰ Id. at 383; Claypool v. Wilson, 4 Cal.App.4th 646, 662, 670, 6 Cal.Rptr.2d 77 (1992).

H. PERS Retirement

In Prentice v. Board of Administration,⁷²¹ the Court of Appeal held that a retired city general manager was not entitled to credit for a 10.49% salary increase in the general manager's salary within three years of retirement, since he was not part of the pay rate for similarly situated employees, and the salary increase was not special compensation that could be included in calculating retirement benefits.

The plaintiff worked in various capacities for a number of water and sewer agencies in Southern California. In his last two jobs, he was the director of water utilities for the City of Corona, and then the general manager for the City of Corona's Department of Water and Power.

The City of Corona created its Department of Water and Power in 2001 in order to develop its own energy delivery system and asked Prentice to become its general manager. At the time the city gave Prentice this new responsibility, it also gave him a 10.49% pay raise.

PERS determined that under Government Code section 20636(e), the salary increase should be excluded from the calculation of retirement allowances since it was unclear that Prentice's successor would receive the same level of compensation. At the time the determination was made, it was unclear whether the city would retain the same compensation structure or hire a separate electric utility director to lead the operations once it was up and running. PERS then denied the city's request for an exemption and held that Prentice's additional pay did not qualify under any of the exceptions of the retirement law.

The Court of Appeal affirmed the decision by PERS. The Court of Appeal held that the salary increase was outside the limits of compensation which may be used in calculating a public employee's retirement allowance because it was not reflected in the city's published salary range and it was not part of the manager's regular pay rate. The court held that because the increase was not available to other managers, it could not be included in the retirement calculation as special compensation.

It is not clear whether this issue will come up in the school district context since superintendents' compensation is generally set forth in their employment contracts and the superintendents who preceded and succeeded the superintendent usually receive a similar rate of pay.

In San Diego Police Officers' Association v. San Diego City Employees' Retirement System,⁷²² the Ninth Circuit Court of Appeals dismissed the police officers' 1983 action against the City Employees' Retirement System, claiming that an ordinance reducing the city's contribution to the retirement fund violated the union's contractual right to an actuarially sound retirement and that the city's imposition of its last, best and final offer after breakdown of labor negotiations violated the union's vested contractual rights, pursuant to the collective bargaining agreement. The U.S. District Court granted the defendants' summary judgment motion and the Ninth Circuit Court of Appeals affirmed, except for the award of attorneys' fees.

⁷²¹ 157 Cal.App.4th 983, 69 Cal.Rptr.3d 167 (2007).

⁷²² 568 F.3d 725 (9th Cir. 2009).

PENSION REFORM ACT OF 2013

A. Introduction

Governor Brown signed AB 340,⁷²³ which amends numerous provisions of the law with respect to public employee retirement effective January 1, 2013.

The California Public Employees Pension Reform Act of 2013⁷²⁴ adds provisions which apply to all state and local public retirement systems and to their participating employers, including the Public Employees' Retirement System, the State Teachers' Retirement System, the Legislators' Retirement System, the Judges' Retirement System, county and district retirement systems, independent public agency retirement systems, and individual retirement plans offered by public employers.⁷²⁵ The benefit plans required by the California Public Employees Pension Reform Act of 2013 apply to public employees who are new members as defined in Government Code section 7522.04.

B. New Members

Government Code section 7522.04(f) defines "new employees" as either of the following:

1. An employee, including one who is elected or appointed, of a public employer who is employed for the first time by any public employer on or after January 1, 2013, and who was not a member of any other public retirement system prior to that date.
2. An individual who becomes a member of a public retirement system for the first time on or after January 1, 2013, and who was a member of another public retirement system prior to that date, but who is not subject to reciprocity under Section 7522.02(c).
3. An individual who is an active member in a retirement system and who, after a break in service of more than six months, returned to active membership in that system with a new employer. For purposes of this subdivision, a change in employment between state entities from one school employer to another shall not be considered as service with a new employer.

Government Code section 7522.02(c) states that individuals who were employed by any public employer before January 1, 2013 and who became employed by a subsequent public employer for the first time on or after January 1, 2013, shall be subject to that retirement plan that would have been available to employees of the subsequent employer who were first employed by the subsequent employer on or before December 31, 2012, if the individual was subject to reciprocity established under any one of the following provisions:

⁷²³ Stats. 2012, ch. 296.

⁷²⁴ Government Code section 7522 et seq.

⁷²⁵ Government Code section 7522.02.

1. Article 5 (commencing with Section 20350) of Chapter 3 of Part 3 of Division 5 of Title 2.⁷²⁶
2. Chapter 3 (commencing with Section 31450) of Part 3 of Division 4 of Title 3.⁷²⁷
3. Any agreement between public retirement systems to provide reciprocity to members of the systems.⁷²⁸

C. Limits on New Retirement Plans

Government Code section 7522.04(g) defines “normal cost” as the portion of the present value of projected benefits under the defined benefit that is attributable to the current year of service, as determined by the Public Retirement Systems Actuary, according to the most recently completed valuation.

Government Code section 7522.10 states that on and after January 1, 2013, each public retirement system shall modify its plan or plans to comply with the requirements of Section 7522.10 for each public employer that participates in the system. Section 7522.10(c) states that the pensionable compensation used to calculate the defined benefit paid to a new member who retires from the system shall not exceed 100 percent for a member whose service is included in the federal system (i.e., \$110,000 at the present time) and 120 percent for a member whose service is not included in the federal system (i.e., approximately \$130,000 at the present time). These amounts will be adjusted for inflation.

Government Code section 7522.10(e) states that a public employer shall not offer a defined benefit or any combination of defined benefits, including a defined benefit offered by a private provider, on compensation in excess of the limitations set forth above. A public employee who receives an employer contribution to a defined contribution plan shall not have a vested right to continue receiving the employer contribution. Any employer contributions to any employee defined contribution plan above the pensionable compensation limits shall not, when combined with the employer’s contribution to the employee’s retirement benefits below the compensation limit, exceed the employer’s contribution level, as a percentage of pay, required to fund the retirement benefits of employees with income below the compensation limits.

Government Code section 7522.15 requires each public employer and each public retirement system that offers a defined benefit plan to offer only the defined benefit formulas established pursuant to Government Code sections 7522.20 and 7522.25 to new members. Government Code section 7522.18 states that a public employer that does not offer a supplemental defined benefit plan before January 1, 2013, shall not offer a supplemental defined benefit plan for any employee on or after January 1, 2013. A public employer that provides a supplemental defined benefit plan, including a defined benefit plan offered by a private provider, before January 1, 2013, shall not offer a supplemental defined benefit plan to any additional

⁷²⁶ Reciprocity between PERS, county retirement systems, and other public retirement systems.

⁷²⁷ Reciprocity between county retirement systems and other public retirement systems.

⁷²⁸ Government Code section 7522.02(c).

employee group to which the plan was not provided before January 1, 2013. A public employer shall not offer or provide a supplemental defined benefit plan, including a defined benefit plan offered by a private provider, to any employee hired on or after January 1, 2013, with certain limited exceptions.⁷²⁹

Government Code section 7522.20 sets forth a new formula for a defined benefit plan for non-safety members. It creates a new defined benefit formula of two percent at age 62 for all new non-safety employees with an early retirement age of 52 and a maximum benefit of 2.5 percent at age 67.

Government Code section 7522.30 states that all public employers and all new members are required to participate in equal sharing or normal costs between public employers and public employees, Section 7522.30(a) states in part, “The standard shall be that employees pay at least 50 percent of normal costs and that employers not pay any of the required employee contribution.” For new employees of schools, the initial employee contribution rate may not be less than 50 percent of the total annual normal cost of pension benefits.⁷³⁰

Notwithstanding these requirements, employee contributions may be more than one half of the normal cost rate if the increase has been agreed to through the collective bargaining process, subject to the following conditions:

1. The employer shall not contribute at a greater rate to the plan for nonrepresented, managerial, or supervisory employees than the employer contributes for other public employees, including represented employees of the same employer who are in related retirement membership classifications.
2. The employer shall not increase an employee contribution rate in the absence of a memorandum of understanding that has been collectively bargained in accordance with applicable laws.
3. The employer shall not use impasse procedures to increase an employee contribution rate above the rate required by Section 7522.30.⁷³¹ If the terms of a contract, including a memorandum of understanding between a public employer and its public employees that is in effect on January 1, 2013, would be impaired by any of the provisions of Section 7522.30, that provision shall not apply to the public employer and public employee subject to that contract until the expiration of that contract. A renewal, amendment, or any other extension of that contract shall be subject to the requirements of Section 7522.30.⁷³²

⁷²⁹ Government Code section 7522.18.

⁷³⁰ Government Code section 7522.30.

⁷³¹ Government Code section 7522.30(e).

⁷³² Government Code section 7522.30(f).

For the purposes of determining a retirement benefit to be paid to a new member of a public retirement system, the following shall apply:

1. Final compensation shall mean the highest average annual pensionable compensation earned by the member during a period of at least 36 consecutive months, or at least three school years if applicable, immediately preceding his or her retirement or last separation of service if earlier, or during any period of at least 36 consecutive months during the member's applicable service that the member designates on the application for retirement.
2. On or after January 1, 2013, an employer shall not modify a benefit plan to permit a calculation of final compensation on a basis of less than the average annual compensation earned by the member during a consecutive 36 month period, or three school years if applicable, for members who have been subject to at least a 36 month or three school year calculation prior to that date.

D. Final Compensation

Government Code section 7522.32 defines "final compensation" for the purposes of determining a retirement benefit to be paid to a new member of a public retirement system. Section 7522.32(a) states that final compensation shall mean the highest average annual pensionable compensation earned by the member during a period of at least thirty-six (36) consecutive months, or at least three school years, if applicable, immediately preceding his or her retirement or last separation from service if earlier, or during any other period of at least thirty-six (36) consecutive months during the member's applicable service that the member designates on the application for retirement.

Government Code section 7522.32(b) states that on or after January 1, 2003, an employer shall not modify a benefit plan to permit a calculation of final compensation on a basis less than the average annual compensation earned by the member during a consecutive thirty-six (36) month period, or three school years, if applicable, for members who have been subject to at least the thirty-six (36) months or three school year calculation prior to that date.

E. Pensionable Compensation

Government Code section 7522.34 defines "pensionable compensation" of a new member of any public retirement system as the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. Compensation that has been deferred shall be deemed pensionable compensation when earned rather than when paid. Pensionable compensation does not include the following:

1. Any compensation determined by the board to have been paid to increase a member's retirement benefit under that system.
2. Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to a third party, other than the retirement system for the benefit of the member and which was converted to and received by the member in the form of a cash payment.
3. Any one-time or ad hoc payments made to a member.
4. Severance or any other payment that is granted or awarded to a member in connection with or in anticipation of a separation from employment, but is received by the member while employed.
5. Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, regardless of when reported or paid.
6. Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.
7. Any employer paid allowance, reimbursement, or payment, including, but not limited to, one made for housing, vehicle or uniforms.
8. Compensation for overtime work, other than as defined in 29 U.S.C. Section 207(k).⁷³³
9. Employer contributions to deferred compensation or defined contribution plans.
10. Any bonus paid in addition to the compensation described in subdivision (a) as the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules.
11. Any form of compensation a public retirement board determines is inconsistent with the requirements of Section 7522.34(a) (which defines "pensionable compensation" as the normal monthly rate of pay or base pay of the member).

⁷³³ The Fair Labor Standards Act, 29 U.S.C. Section 207(k), establishes separate requirements for determining overtime work and maximum hours for public agencies engaged in fire protection or law enforcement activities.

12. Any other form of compensation a public retirement board determines shall not be pensionable compensation.

Government Code section 7522.40 states that a public employer shall not provide to a public employee who is elected or appointed, a trustee, excluded from collective bargaining, exempt from civil service, or a manager, any health benefit vesting schedule that is more advantageous than that provided generally to other public employees, including represented employees, of the same public employer who are in related retirement and membership classifications.

Government Code section 7522.42 states that, in addition to any other benefit limitation proscribed by law, for the purposes of determining a public retirement benefit paid to a new member of a public retirement system, the maximum salary, compensation, or pay rate taken into account under the plan for any year shall not exceed the amount permitted to be taken into account under 26 U.S.C. Section 401(a)(17)⁷³⁴ or its successor. A public employer shall not seek an exception to the prohibition on or after January 1, 2013. For employees first hired on or after January 1, 2013, a public employer shall not make employer contributions to any qualified retirement plan or plans on behalf of an employee based on that portion of the amount of total pensionable compensation that exceeds the amount specified in 26 U.S.C. Section 401(a)(17) or its successor. Section 7522.42 shall not apply to salary compensation or pay rate paid to individuals who, due to their dates of hire, are not subject to the limits specified in Section 7522.42(a).

Government Code section 7522.43 states that a public employer shall not offer a plan of replacement benefits for members and any survivors or beneficiaries whose retirement benefits are limited by 26 U.S.C. Section 415. This section shall apply to new employees. A public retirement system may continue to administer a plan of replacement benefits for employees first hired prior to January 1, 2013. A public employer that does not offer a plan of replacement benefits prior to January 1, 2013, shall not offer such a plan for any employee on or after January 1, 2013. A public employer that offers a plan of replacement benefits prior to January 1, 2013, shall not offer such a plan to any additional employee group to which the plan was not provided prior to January 1, 2013.

F. Retroactive Retirement Benefits Prohibited

Government Code section 7522.44 states that it shall apply to all public employers and to all public employees. Section 7522.44(a) states that any enhancement to a public employee's retirement formula or retirement benefit adopted on or after January 1, 2013 shall apply only to service performed on or after the operative date of the enhancement, and shall not be applied to any service performed prior to the operative date of the enhancement. In effect, this section would prohibit public employers from granting retroactive pension benefit enhancements that would apply to service performed prior to the date of enhancement.

⁷³⁴ This provision of the Internal Revenue Code states that a trust established under Section 401(a) does not constitute a qualified trust unless, under the retirement plan, the annual compensation of each employee does not exceed \$200,000 (adjusted by a cost of living allowance).

Government Code section 7522.44(b) states that if a change to a member's retirement membership classification or a change in employment results in an enhancement in the retirement formula or a retirement benefit applicable to that member, that enhancement shall apply only to service performed on or after the operative date of the change and shall not be applied to any service performed prior to the operative date of the change. Section 7522.44(c) states that "operative date" in a collective bargaining agreement means one of the following:

1. The date that the agreement is signed by the parties.
2. A date agreed to by the parties that will occur after the date that the agreement is signed by the parties.
3. A date designated by the parties that occurred prior to the date the agreement was signed if the most recent collective bargaining agreement was expired at the time of the agreement and the date designated is not earlier than twelve months prior to the date of the agreement or the day after the last day of the expired bargaining agreement, whichever occurred last.

Government Code section 7522.44(d) states that for purposes of Section 7522.44, an increase to a retiree's annual cost of living adjustment within existing statutory limits shall not be considered to be an enhancement to a retirement benefit.

G. Purchase of Airtime

Government Code section 7522.46 states that a public retirement system shall not allow the purchase of nonqualified service credit or "airtime" unless the application was received by the public retirement system prior to January 1, 2013. The application may be approved by the public retirement system after January 1, 2013, if the application was received prior to January 1, 2013.

H. Suspension of Employee Contributions

Government Code section 7522.52 states that in any fiscal year, a public employer's contribution to a defined benefit plan, in combination with employee contributions to that defined benefit plan, shall not be less than the normal cost rate, as defined in Section 7522.30 (the annual actuarially determined normal cost for the defined benefit plan of an employer expressed as a percentage of payroll), for that defined benefit plan for that fiscal year. The board of a public retirement system may suspend contributions when all of the following apply:

1. The plan is funded by more than 120%, based on a computation by the retirement system actuary, in accordance with the Governmental Accounting Standards Board requirements that is included in the annual evaluation.

2. The retirement system actuary, based on the annual evaluation, determines that continuing to accrue excess earnings could result in disqualification of the plan's tax exempt status under the provisions of the federal Internal Revenue Code.
3. The board determines that the receipt of any additional contributions required under Section 7522.52 would conflict with its fiduciary responsibility.

I. Employment of Retirees

Government Code section 7522.56 states that it applies to any person who is receiving a pension benefit from a public retirement system and shall supersede any other provision in conflict with Section 7522.56. Section 7522.56(b) states that a retired person shall not serve, be employed by, or be employed through, a contract directly by a public employer in the same public retirement system from which the retiree receives the benefit without reinstatement from retirement, except as permitted by Section 7522.56.

Government Code section 7522.56© states that a person who retires from a public employer may serve without reinstatement from retirement or loss of interruption of benefits provided by the retirement system upon appointment by the appointing power of a public employer either during an emergency to prevent stoppage of public business or because the retired person has skills needed to perform work of limited duration. Section 7522.56(d) states that appointments of the persons authorized under Section 7522.56 shall not exceed a total for all employers in that public retirement system of 960 hours or other equivalent limit, in a calendar or fiscal year, depending on the administrator of the system. The rate of pay for the employment shall not be less than the minimum, nor exceed the maximum, paid by the employer to other employees performing comparable duties divided by 173.333 to equal an hourly rate. A retired person whose employment without reinstatement is authorized by Section 7522.56 shall acquire no service credit or retirement rights under Section 7522.56 with respect to the employment unless he or she reinstates from retirement.

Government Code section 7522.56© states that notwithstanding subdivision © of Section 7522.56, any retired person shall not be eligible to serve or be employed by a public employer if, during the twelve month period prior to an appointment described in Section 7522.56, the retired person receives any unemployment insurance compensation arising out of prior employment subject to Section 7522.56 with a public employer. A retiree shall certify in writing to the employer upon accepting an offer of employment that he or she is in compliance with this requirement. A retired person who accepts an appointment after receiving unemployment insurance compensation shall terminate that employment on the last day of the current pay period and shall not be eligible for reappointment subject to Section 7522.56 for a period of twelve months following the last day of employment.

Government Code section 7522.56(f) states that a retired person shall not be eligible to be employed pursuant to Section 7522.56 for a period of 180 days following the date of retirement unless the public school employer certifies the nature of the employment, certifies that the

employment is necessary to fill a critically needed position before 180 days has passed and the appointment has been approved by the governing body of the employer in a public meeting. The appointment may not be placed on a consent calendar.

Government Code section 7522.56(g) states that a retired person who accepted a retirement incentive upon retirement shall not be eligible to be employed pursuant to Section 7522.56 for a period of 180 days following the date of retirement. Government Code section 7522.56(h) states that Section 7522.56 does not apply to a person who is retired from the State Teachers' Retirement System and who is subject to Sections 24214, 24214.5, or 26812 of the Education Code.

J. Conviction of a Felony

Government Code section 7522.72 applies to a public employee first employed by a public employer before January 1, 2013. Section 7522.72(b) states that if a public employee is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of, or in performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in subdivision (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction. If a public employee who has contact with children as part of his or her official duties is convicted of a felony that was committed within the scope of his or her official duties against or involving a child who he or she has contact with as part of his or her official duties, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member and shall not accrue further benefits in the public retirement system, effective on the date of the conviction.

Government Code section 7522.72(c) states that a public employee shall forfeit all retirement benefits earned or accrued from the earliest date of the commission of any felony to the forfeiture date. The retirement benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the public employee's conviction. Retirement benefits attributable to service performed prior to the date of the first commission of the felony for which the public employee was convicted shall not be forfeited as a result of this section.

The forfeiture date is defined as the date of the conviction. Any contributions to the public retirement system made by the public employee on or after the earliest date of the commission of an applicable felony shall be returned without interest to the public employee upon the occurrence of a distribution event unless otherwise ordered by a court or determined by the pension administrator. Any funds returned to the public employee shall be disbursed by electronic funds transferred to an account of the public employee, in a manner conforming to the requirements of the Internal Revenue Code, and the public retirement system shall notify the court and the District Attorney at least three business days before the disbursement of funds. A

disbursement event is defined as separation from employment, death of the member, or retirement of the member.⁷³⁵

Upon conviction, a public employee and the prosecuting agency shall notify the public employer who employed the public employee at the time of the commission of the felony within sixty days of the felony conviction of the date of the conviction and the date of the first known commission of the felony.⁷³⁶ The public employer that employs or employed a public employee and that public employee shall each notify the public retirement system in which the public employee is a member of that public employee's conviction within ninety days of the conviction.⁷³⁷

A public retirement system may assess a public employer a reasonable amount to reimburse the cost of audit, adjustment, or correction, if it determines that the public employer failed to comply with Section 7522.72.⁷³⁸ If a public employee's conviction is reversed and that decision is final, the employee shall be entitled to do either of the following:

1. Recover the forfeited retirement benefits as adjusted for the contributions received.
2. Redeposit those contributions and interest, as determined by the system actuary, and then recover the full amount of the forfeited benefits.⁷³⁹

Government Code section 7522.74 applies to a public employee first employed by a public employer or first elected or appointed to an office on or after January 1, 2013. Government Code section 7522.74 contains provisions very similar to Government Code section 7522.72, as it applies to public employees first elected or appointed before January 1, 2013.

Government Code section 7522.74(b) states that if a public employee is convicted by a state or federal court of any felony under state or federal law for conduct arising out of or in performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in Section 7522.74(c), and shall not accrue further benefits in that public retirement system, effective on the date of the conviction. If a public employee who has contact with children as part of his or her official duties is convicted of a felony that was committed within the scope of his or her official duties against or involving a child who he or she has contact with as part of his or her official duties, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member to the extent provided in Section 7522.74(c), and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.

⁷³⁵ Government Code section 7522.70; Government Code section 7522.72(c).

⁷³⁶ Government Code section 7522.72(e).

⁷³⁷ Government Code section 7522.72(f).

⁷³⁸ Government Code section 7522.72(g).

⁷³⁹ Government Code section 7522.72(h).

Government Code section 7522.74(c) states that a public employee shall forfeit all retirement benefits earned or accrued from the earliest date of the commission of any felony described in Section 7522.74(b) to the forfeiture date, inclusive. The retirement benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the public employee's conviction. Retirement benefits attributable to service performed prior to the date of the first commission of the felony for which the public employee was convicted shall not be forfeited as a result of this section. For purposes of Section 7522.74(c), "forfeiture date" means the date of the conviction.

Government Code section 7522.74(d) states that any contributions to the public retirement system made by the public employee on or after the earliest date of the commission of any felony described in Section 7522.74(b) shall be returned, without interest, to the public employee upon the occurrence of a distribution event unless otherwise ordered by a court or determined by the pension administrator. Any funds returned to the public employee shall be disbursed by an electronic funds transfer to an account of the public employee in a manner conforming with the requirements of the Internal Revenue Code, and the public retirement system shall notify the court and the District Attorney at least three business days before that disbursement of funds. For the purposes of Section 7522.74(d), a "distribution event" means any of the following:

1. Separation from employment.
2. Death of the member.
3. Retirement of the member.

Government Code section 7522.74(e) states that upon conviction, a public employee, as described in Section 7522.74(b), and the prosecuting agency shall notify the public employer who employed the public employee at the time of the commission of the felony within sixty (60) days of the felony conviction of all of the following information:

1. The date of conviction.
2. The date of the first known commission of the felony.

Government Code section 7522.74(f) states that the public employer who employs or employed a public employee described in Section 7522.74(b) and that public employee shall each notify the public retirement system in which the public employee is a member of that public employee's conviction within ninety (90) days of the conviction. Section 7522.74(g) states that a public retirement system may assess a public employer a reasonable amount to reimburse the cost of audit, adjustment, or correction, if it determines that the public employer failed to comply with Section 7522.74.

Government Code section 7522.74(h) states that if a public employee's conviction is reversed and that decision is final, the employee shall be entitled to do either of the following:

1. Recover the forfeited retirement benefits as adjusted for the contributions received.
2. Redeposit those contributions and interest, as determined by the system actuary, and then recover the full amount of the forfeited benefits.

K. Changes to PERS

Government Code section 20516 states that notwithstanding any other provision of this part, with or without a change in benefit, a contracting agency and its employees may agree, in writing, to share the costs of employer contributions. The cost sharing, pursuant to Section 20516, shall also apply for related nonrepresented employees as approved in a resolution passed by the contracting agency. The collective bargaining agreement shall specify the exact percentage of member compensation that shall be paid toward the current service cost of the benefits by members. The member contributions shall be contributions over and above normal contributions otherwise required by this part and shall be treated as normal contributions for all purposes of this part. The contributions shall be uniform, with respect to all members within each of the classifications, the balance of any costs shall be paid by the contracting agency and shall be credited to the employer's account. The employer shall not use impasse procedures to impose member cost sharing on any contribution amount above that which is required by the law.

Government Code section 20516(c) states that member cost sharing may differ by classification for groups of employees subject to different levels of benefits pursuant to Sections 7522.20 (the new retirement benefits schedule), 7522.25 (the new retirement benefits schedule for safety members), and 20475 (amendment of MOU between public retirement system and contracting agency), or by a recognized collective bargaining unit, if agreed to in a memorandum of understanding reached pursuant to the applicable collective bargaining laws. Government Code section 20516(d) states that this section shall not apply to any contracting agency or to the employees of a contracting agency until the agency elects to be subject to Section 20516 by contract or by amendment to its contract made in the manner prescribed for approval of contracts. Contributions provided by this section shall be withheld from member compensation or otherwise collected when the contract amendment becomes effective.

Government Code section 20516(g) states that if, and to the extent that, the retirement board determines that a cost sharing agreement under Section 20516 would conflict with Title 26 of the United States Code, the board may refuse to approve the agreement. Government Code section 20516(h) states that nothing in this section shall require a contracting agency to enter into a memorandum of understanding or collective bargaining agreement with a bargaining representative in order to increase the amount of member contributions and such a member contribution increase is authorized by other provisions under this part.

Government Code section 20516.5 states that equal sharing of normal costs between a contracting agency or school employer and their employees shall be the standard. It shall be the

standard that employees pay at least fifty percent of normal costs and that employers not pay any of the required employee contributions.

Government Code section 20516(b) states that notwithstanding any other provisions of this part, a contracting agency or a school district may require that members pay fifty percent of the normal costs of benefits. However, that contribution shall be no more than eight percent of pay for local miscellaneous or school members. Government Code section 20516.5(c) states that before implementing any change pursuant to Section 20516.5(b), for any represented employees, the employer shall complete the good faith bargaining process as required by law, including any impasse procedures requiring mediation and fact finding.

Government Code section 20516.5(b) shall become operative on January 1, 2018. Government Code section 20516.5(b) shall not apply to any bargaining unit when the members of that contracting agency or school district are paying for at least fifty percent of the normal cost of their pension benefit or the contribution rate specified in Government Code section 20516.5(b) under an agreement reached pursuant to Section 20516.

Government Code section 20677.96 states that beginning July 1, 2013, the normal rate of contribution for employees shall be the contribution established by Government Code section 20677.95, as adjusted by Section 7522.30 (equal sharing of normal costs), in excess of the compensation identified in subdivision (c) of Section 20677.95. Effective July 1, 2014, the normal rate of contributions for employees subject to subdivision (a) of Section 20677.95 shall be the contribution established pursuant to Section 20677.95, as adjusted by Section 7522.30 (equal sharing of normal costs), in excess of the compensation identified in subdivision (b) of Section 20677.95.⁷⁴⁰

L. Changes to STRS

Education Code section 22119.3 defines “creditable compensation” for members employed on or after January 1, 2013, as not including any compensation that is excluded from the definition of pensionable compensation pursuant to Government Code section 7522.34.⁷⁴¹ Section 22119.3(b) states that creditable compensation credited to the defined benefit plan of the State Teachers’ Retirement System shall be consistent with the requirements for pensionable compensation pursuant to Section 7522.34 of the Government Code. Section 22119.3(c) states that member and employer contributions on creditable compensation for creditable services that exceeds one year in a school year shall be credited to the defined benefit supplement program.

Education Code section 22164.5(a) defines “retired member activities” as one or more activities within the California public school system and performed by a member retired for service as one of the following:

1. An employee of an employer.

⁷⁴⁰ Most likely, this contribution rate will need to be calculated by the retirement systems.

⁷⁴¹ Government Code section 7522.34 defines “pensionable compensation” as the normal monthly rate of pay or base pay and excludes most other forms of additional compensation.

2. An employee of a third party, except as specified below.
3. An independent contractor.

Education Code section 22164.5(b) states that the activities of an employee of a third party shall not be included in the definition of “retired member activities” if any of the following conditions apply:

1. The employee performs a limited term assignment.
2. The third party employer does not participate in a California public pension system.
3. The activities performed by the individual are not normally performed by employees of an employer, as defined in Section 22131.

Education Code section 24214 states that a member retired for service under the State Teachers’ Retirement System may perform retired member activities except that these provisions shall not apply to a member who has not attained normal retirement age (62 years of age) at the time the compensation is earned by the member, received additional service credit pursuant to Section 22714 or 22715, or received from any public employer any financial inducement to retire in the previous six months. Financial inducement to retire includes, but is not limited to, any form of compensation or other payment that is paid directly or indirectly by a public employer to the member, even if not in cash, either before or after retirement, if the member retires for service on or before a specific date or a specific range of dates established by the public employer on or before the date the inducement is offered.

Education Code section 24214.5 states that notwithstanding Section 24214(f), the post-retirement compensation limitation shall be zero dollars in either of the following circumstances:

1. During the first 180 days after the most recent retirement of a member retired for service under the State Teachers’ Retirement System.
2. During the first six consecutive months after the most recent retirement if the member received additional service credit pursuant to Section 22714 or 22715,⁷⁴² or received from any public employer any financial inducement to retire, as defined by subdivision (j) of Section 24214.⁷⁴³

Education Code section 24214.5(b) states that if the member has attained normal retirement age (62) at the time the compensation is earned, subdivision (a) shall not apply and Section 24214 shall apply if the appointment has been approved by the governing board of the

⁷⁴² Education Code section 22715 authorizes additional service credit for state employees.

⁷⁴³ Education Code section 24214(j) states that Section 24214 becomes operative July 1, 2014.

employer in a public meeting, as reflected in a resolution adopted by the governing body of the employer prior to the performance of retired member activities, expressing its intent to seek an exemption from the limitations specified in subdivision (a). Approval of the appointment may not be placed on a consent calendar. The resolution shall be subject to disclosure by the public entity adopting the resolution and the State Teachers' Retirement System. The resolution shall include the following specific information and findings:

1. The nature of the employment.
2. A finding that the appointment is necessary to fill a critically needed position before 180 days have passed.
3. A finding that the member is not ineligible for application of this subdivision pursuant to Education Code section 24214.5(d).
4. A finding that the termination of employment of the retired member with the employer is not the basis for the need to acquire the services of the member.

Education Code section 24214.5(c) states that subdivision (b) shall not apply to a retired member whose termination of employment with the employer is the basis for the need to acquire the services of the member. Education Code section 24214.5(d) states that subdivision (b) shall not apply if the member received additional service credit pursuant to Sections 22714⁷⁴⁴ or 22715,⁷⁴⁵ or received from any public employer any financial inducement to retire.

Education Code section 24214.5(e) states that the Superintendent of Public Instruction, the county superintendent of schools, or the chief executive officer of the community college shall submit all documentation required by the State Teachers' Retirement System to substantiate the eligibility of the retired member for application of subdivision (b), including but not limited to, a resolution adopted pursuant to Section 24214.5(b).

Education Code section 24214.5(f) states that if a member will be receiving compensation for performance of retired member activities before 180 days after the most recent retirement, the Superintendent of Public Instruction, the county superintendent of schools, or the chief executive officer of the community college shall submit all documentation required by the system that certifies that the member did not receive from any public employer any financial inducement to retire. The documentation required shall be received by the State Teachers' Retirement System prior to the retired member's performance or retired member's activities.⁷⁴⁶

Within thirty calendar days after the receipt of all documentation required by the State Teachers' Retirement System, the system shall inform the public agency and the retired member whether the compensation paid to the member will be subject to the limitations specified in Education Code section 24214.5(a).

⁷⁴⁴ Education Code section 22714 authorizes districts to provide a retirement incentive (two additional years of service credit) under specified circumstances.

⁷⁴⁵ Education Code section 22715 authorizes additional service credit for state employees.

⁷⁴⁶ Education Code section 24214.5(g).

Education Code section 24214.5(i) states that if a member retired for service under the State Teachers' Retirement System earns compensation for performing retired member activities in excess of the limitations specified in Section 24214.5(a), the member's retirement allowance shall be reduced by the amount of the excess compensation. The amount of the reduction may be equal to the monthly allowance payable, but may not exceed the amount of the allowance payable during the first 180 days, in accordance with Section 24214.5(a), after a member retired for service under the State Teachers' Retirement System.

Education Code section 24202.6 sets forth a retirement schedule for members who are first hired on or after January 1, 2013. The table provides a 2.000 percentage at age 62, and a 2.400 percentage for retirement at age 65.

Education Code section 24202.7 states that for any member who was hired on or after January 1, 2013, the minimum retirement age shall be 55 years of age, the early retirement age shall be 55 years of age, and the normal retirement age shall be 62 years of age. Education Code section 24202.8 states that it is the intent of the Legislature that the State Teachers' Retirement System identify and propose all statutory changes necessary by June 30, 2013.

RESERVING THE RIGHT TO NEGOTIATE A REDUCTION IN SALARIES

A. Statutory Provisions

Education Code section 45022 states:

“The governing board of any school district shall fix an order paid to compensation of persons in public school services requiring certification qualifications employed by the board unless otherwise prescribed by law.”

Education Code section 45032 authorizes the governing board of a school district to increase the salaries of certificated employees at any time during the school year on any date ordered by the governing board, but does not authorize decreases in salary during the school year.

Education Code section 45162(a) states that the governing board of any school district shall fix the annual salaries for the ensuing school year for classified employees. The governing board may, at the time, include an increase in such annual salaries, all or part of which increase is conditional upon the actual receipt by the district of anticipated revenue from all sources. If the revenue actually received is less than anticipated, the governing board may, at any time during the school year, reduce such annual salaries by an amount not to exceed the amount which was granted subject to the receipt of such revenues. In essence, unless the governing board reserves the right in the prior school year to reduce the annual salaries of classified employees based upon the failure to receive anticipated revenues, the governing board of the school district may not reduce the annual salary of classified employees during the school year. Education Code section 45162(b) authorizes the governing board of a school district to increase the salaries of classified employees at any time during the school year, but does not authorize

school districts to decrease the salaries of classified employees at any time during the school year.

B. Case Law Prior to Collective Bargaining

The case law also indicates that the governing board of school districts may not reduce the salary of certificated and classified employees, including management employees, during the school year. In Abraham v. Sims,⁷⁴⁷ the California Supreme Court held that the governing board of a school district had the power to raise or reduce the salaries of permanent teachers provided that power was reasonably exercised and no attempt was made after the beginning of any particular school year to reduce the salaries for that year.⁷⁴⁸

In Rible v. Hughes,⁷⁴⁹ the California Supreme Court stated:

“The power of the trustees to raise or reduce the salaries of permanent teachers cannot be doubted, provided it is reasonably exercised and no attempt is made after the beginning of any particular school year to reduce the salaries for that year. According to these decisions, then, a board of education may exercise its discretion in adopting salary schedules fixing the compensation to be paid to permanent teachers although (1) the schedule must be adopted prior to the beginning of the school year; (2) any allowance based upon years of training and experience must be uniform, and subject to reasonable classification; and (3) the schedule must not be arbitrary, discriminatory or unreasonable.”⁷⁵⁰

In A.B.C. Federation of Teachers v. A.B.C. Unified School District,⁷⁵¹ the Court of Appeal held the governing board of a school district could not unilaterally reduce or delete extra pay for certificated employees after the beginning of a school year. The Court of Appeal noted that past cases held that a school board may not lower salaries fixed by its salary schedule after the beginning of the school year.⁷⁵² The Court of Appeal held that the stipends for certificated employees were in effect for the school year, and therefore, the governing board of the school district may not lower or delete the stipends after the beginning of the school year.

⁷⁴⁷ 2 Cal.2d 698, 711, 42 P.2d 1029, 1034 (1935).

⁷⁴⁸ See, also, Fidler v. Board of Trustees, 112 Cal.App.296, 301-305, 296 P.912 (1931); Chambers v. Davis, 131 Cal.App.500, 22 P.2d 27 (1933).

⁷⁴⁹ 24 Cal.2d 437, 150 P.2d 455 (1944).

⁷⁵⁰ Id. at p. 444. See, also, Emerson v. Board of Trustees, 23 Cal.App.2d 432, 73 P.2d 935 (1937); Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434 (1938); Kacsur v. Board of Trustees, 18 Cal.2d 586, 116 P.2d 593 (1941); Aebli v. Board of Education, 62 Cal.App.2d 706, 145 P.2d 601 (1944); San Diego Federation of Teachers v. Board of Education, 216 Cal.App.2d 758, 31 Cal.Rptr. 146 (1963); Brown v. Hanford Elementary School Board, 263 Cal.App.2d 170, 69 Cal.Rptr. 154 (1968); Eastham v. Santa Clara Elementary School District, 270 Cal.App.2d 807, 76 Cal.Rptr. 198 (1969); City and County of San Francisco v. Cooper, 13 Cal.3d 898, 120 Cal.Rptr. 707 (1975).

⁷⁵¹ 75 Cal.App.3d 332, 142 Cal.Rptr. 111 (1977).

⁷⁵² Id. at 337. See, also, Ellerbroek v. Saddleback Valley Unified School District, 125 Cal.App.3d 348, 371-72, 177 Cal.Rptr. 910 (1981).

C. The Enactment of Collective Bargaining

With the enactment of collective bargaining laws, the question becomes whether the statutory provisions and case law discussed above apply to bargaining unit employees. The courts have not ruled as to whether a school district employer and the exclusive representative of the bargaining unit employee may negotiate a valid agreement to reduce salaries of bargaining unit employees during a current school year. As a result of this uncertainty, districts should do the following if the school district intends to negotiate a decrease in employee salaries and/or a reduction in the work year with a corresponding reduction in compensation:

- “Sunshine” the district’s initial salary/work year reduction proposals by June 30 of the prior fiscal year.
- Enact a resolution by June 30, referencing the current fiscal crisis and reserving the right to reduce compensation and work year for bargaining unit employees subject to negotiations under state collective bargaining laws in the next fiscal year.
- Consider giving written notice to individual employees by June 30, that their compensation and work year may be reduced in the ensuing school year, pursuant to bilateral negotiations with the exclusive representatives.

D. Management Employees

With regard to management employees, school districts may reduce the salary of these individuals, both certificated and classified, by giving notice to management employees prior to June 30. If the district intends to reduce the *work year* of certificated management employees as part of the reduction in salary, districts should have given notice prior to March 15, of possible release and reduction in the work year, pursuant to Education Code section 44951, and must give a final notice by June 30. If districts intend to reduce the work year of classified management employees, districts must give employees a 45-day written notice of reduction in the work year.

WRONGFUL TERMINATION

In Carter v. Escondido Union High School District,⁷⁵³ the Court of Appeal reversed a jury award against the school district and held that the school district had not wrongfully terminated a probationary employee. The Court of Appeal held that for an employer to be liable for the tort of wrongful termination in violation of public policy, the employer’s conduct must violate a public policy that is fundamental, well established, and carefully tethered to a constitutional or statutory provision.⁷⁵⁴ The Court of Appeal held that in Carter, the employee failed to establish, as a matter of law, any public policy tethered to a constitutional or statutory provision had been violated.

⁷⁵³ 148 Cal.App.4th 922, 56 Cal.Rptr.3d 262 (2007).

⁷⁵⁴ Gantt v. Sentry Insurance, 1 Cal.4th 1083, 1090, 1095, 4 Cal.Rptr.2d, 874 (1992).

The Court of Appeal held that a policy against teachers recommending weight gaining substances to students failed to meet the requirements of a public policy that is fundamental, well established, and carefully tethered to constitutional or statutory provisions since there is no statute which prohibits teachers or public employees from recommending weight gaining substances to students.⁷⁵⁵

The underlying facts were that the employee was employed at Monte Vista High School in the Grossmont Union High School District during 1999-2000 school year. The football coach at Monte Vista High School suggested to a student that if the student wished to play Division I college football the student must gain weight and suggested that the student consume protein drinks containing creatine to gain weight. The student purchased the protein drinks and told Carter, the basketball coach at Monte Vista High School, that the football coach had recommended the protein drinks. About a week after drinking the protein shake, the student began having problems with his kidneys and required temporary hospitalization. When Carter heard about the hospitalization, he went to see the school's athletic director. The school's athletic director told Carter that he was not going to take any action unless the parents got involved. Carter responded that if no action was taken he would be leaving Monte Vista High School if he could find a job somewhere else.⁷⁵⁶

Carter then applied to teach at Orange Glenn High School in the Escondido Union High School District and received a probationary appointment as a teacher. After accepting the position, Carter learned that the football coach's wife would be the interim principal at Orange Glenn. Carter taught at Orange Glenn for the 2000-2001 school year and again for the 2001-2002 school year after his probationary teacher status was renewed for a second year. On March 13, 2002, Carter received a letter from the Escondido Union High School District informing him that his employment at Orange Glenn High School would terminate at the end of the second probationary year.⁷⁵⁷

Carter subsequently filed suit against the Escondido Union High School District alleging that he was unlawfully terminated in violation of public policy. A jury trial was held and the jury concluded that Carter had been wrongfully terminated because he had reported that the football coach had encouraged a student athlete to use a weight gaining substance and it was a motivating reason for the determination not to reelect Carter and that the nonreelection caused Carter harm. The jury then awarded damages in the amount of \$1,185,258.00. The school district appealed.⁷⁵⁸

On appeal, the court held that Carter had failed to show that the discharge was actionable as against public policy. Under the doctrine of wrongful discharge, an employer may discharge an at-will employee for no reason or for an arbitrary or irrational reason but is precluded from doing so for an unlawful reason or a purpose that contravenes fundamental public policy.⁷⁵⁹ A discharge is actionable as against public policy only if it violates a policy that is:

⁷⁵⁵ *Id.* at 925-26.

⁷⁵⁶ *Id.* at 926-27.

⁷⁵⁷ *Id.* at 927.

⁷⁵⁸ *Id.* at 927-28.

⁷⁵⁹ *Id.* at 925. See, *Gantt v. Sentry Insurance*, 1 Cal.4th 1083, 1094, 4 Cal.Rptr.2d. 874 (1992).

1. Delineated in either constitutional or statutory provisions;
2. Public, in the sense that it inures to the benefit of the public rather than serving merely the interest of the individual;
3. Well established at the time of the discharge;
4. Substantial and fundamental.⁷⁶⁰

The requirement that the policy underlying employer liability must be tethered to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge.⁷⁶¹ This limitation recognizes an employer's general discretion to discharge an at-will employee without cause and best serves the Legislature's goal to give law-abiding employers broad discretion in making managerial decisions.⁷⁶²

Whether the policy upon which a wrongful termination claim is based is sufficiently fundamental, well established, and tethered to a statutory or constitutional provision to support liability as a legal question that the Court of Appeal reviews de novo. The Court of Appeal held that there was no statutory provision that would make it unlawful for a football coach to recommend a weight gaining substance to a student.

The Court of Appeal also held that California's general whistleblower statute, Labor Code section 1102.5, was not violated. Labor Code Section 1102.5 prohibits termination of an employee for disclosing information to a government or a law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute or a violation or non-compliance with a state or federal rule or regulation. The Court of Appeal held that Carter's conduct in disclosing to the athletic director that the football coach had recommended a protein shake to a student is not protected by Labor Code section 1102.5, since there was no violation of a state or federal statute or a state or federal rule or regulation. The court noted that protein shakes containing creatine are not unlawful under either state or federal law. Consequently, there is no reason to believe that merely suggesting that a high school senior drink one at some unspecified time in the future is illegal.⁷⁶³

The Court of Appeal characterized Carter's disclosure as a routine internal personnel disclosure that was, at its core, a disagreement between the football and basketball coaches about the proper advice to give to student athletes. The Court of Appeal held that this type of disclosure is not protected by Labor Code section 1102.5, and consequently cannot support a wrongful termination action.⁷⁶⁴

The Court of Appeal then reversed the judgment of the trial court and the award of damages. As a result, the school district will not have to pay damages in the matter.

⁷⁶⁰ Stevenson v. Superior Court, 16 Cal.4th 880, 901-902, 66 Cal.Rptr.2d 888(1997).

⁷⁶¹ Id. at 889

⁷⁶² Green v. Ralee Engineering Company, 19 Cal.4th 66, 79-80, 82, 78 Cal.Rptr.2d 16 (1998).

⁷⁶³ 148 Cal.App.4th 922, 933-35 (2007).

⁷⁶⁴ Id. at 934. See, also, Patten v. Grant Joint Union High School District, 134 Cal.App.4th 1378, 37 Cal.Rptr.3d 113 (2005).

TAX SHELTERED ANNUITIES

The California Attorney General's Office was recently asked to render an opinion⁷⁶⁵ on questions related to school district sponsoring of Internal Revenue Code section 403(b) plans, specifically whether a school district may promote or give preferred status to a particular provider when offering plans to employees, and whether a school district or its employees may receive compensation for the promotion or sale of a particular 403(b) plan to employees. As is explained further below, the Attorney General concluded that:

1. A school district and its employees may promote or give preferred status to a particular provider of 403(b) plans if the arrangement will aid the district in the administration of its benefit programs, does not unreasonably discriminate against any provider, and does not interfere with the rights of employees to purchase investment products from qualified providers of their own choice.
2. A school district and its employees may not receive compensation for the promotion or sale of a particular 403(b) plan to public school employees. However, a third-party administrator that is under contract to perform 403(b) plan administrative services for a school district and its employees may receive such compensation, so long as the third-party administrator's relationship with a plan vendor or provider, and the nature of the compensation received, are fully disclosed to the school district and to the employees participating in the 403(b) plan.⁷⁶⁶

On the issue of a preferred provider, the Education Code allows a school district employer to offer 403(b) plans to, and collect the costs of regulatory compliance and administrative services from, its participating employees.⁷⁶⁷ A school district may use its own employees to administer a program, or it may contract with STRS or a private third-party administrator to act as its agent in administering the program.⁷⁶⁸

The Education Code also expressly provides that, in selecting 403(b) plan providers and administrators, a district may place "nonarbitrary requirements" on providers if those requirements aid the district in the "administration of its benefit programs" and "do not unreasonably discriminate against any provider."⁷⁶⁹ The Attorney General, therefore, concluded that "it is plain that a school district is not required to promote or work with all eligible 403(b) plans equally." The Attorney General cautioned that a district "must be careful not to interfere with the rights of its employees to choose different licensed agents, brokers, or companies with which to invest their school-administered 403(b) funds," noting that case law has interpreted the Insurance Code as being "generally concerned with prohibiting those who stand in a superior

⁷⁶⁵ 91 Ops.Cal.Atty.Gen. 40 (2008).

⁷⁶⁶ 91 Ops.Cal.Atty.Gen. 40 (2008).

⁷⁶⁷ Education Code sections 24592, 24593, 44041(b).

⁷⁶⁸ Education Code sections 24593(c), 44041.5(b), (g).

⁷⁶⁹ Education Code section 24593(f)(2).

position in certain financial transactions from imposing the use of particular insurance agents, brokers or companies on those in a weaker position.”⁷⁷⁰

The Attorney General commented that the recent “overhaul of statutes governing annuity plans has significantly altered the context within which school districts must discharge their administrative responsibilities,” but that “the Legislature has largely left intact the authority of district officials to craft their own approaches to plan administration so long as principles of reasonableness and nondiscrimination are observed.” Whether a particular administrative methodology actually imposes arbitrary requirements or unreasonably discriminates against a particular provider is determined on a case-by-case basis.

On the issue of compensation, the Attorney General noted that recent legislation gave school districts the authority, for the first time, to recover the costs associated with 403(b) transactions based on sharply increasing administrative burdens on school districts that offer 403(b) plans.⁷⁷¹ But the narrower question was whether a school district employee may receive compensation, distinct from administrative costs, specifically for promoting or selling 403(b) plans to other school employees.

The Attorney General concluded school district employees may not receive compensation for promoting or selling 403(b) plans, citing the provision of the Education Code stating that “personnel . . . acting on behalf of a local school district . . . may not receive consideration from a vendor in exchange for the promotion of a particular vendor or vendor's products.”⁷⁷² The Attorney General was careful to highlight the clear distinction between a school employee’s regular salary or wages, which is permitted, and any fees or commissions that are based on promoting or selling a particular 403(b) product, which is not permitted. It is clearly permissible to have employees whose day-to-day duties include, and whose compensation therefore depends to some extent on, tasks such as facilitating 403(b) transactions or recouping costs associated with 403(b) administration. However, a school employee may not receive compensation from a vendor for promoting or selling the vendor’s 403(b) products.

Also, where a provider itself is the third party administrator, the law does not preclude it from receiving its usual fees and commissions in connection with the sales of investment products to participating employees, but the law requires third party administrators to disclose any commissions or promotional arrangements that the third party administrator receives from a plan provider, and to disclose any relationships it has with providers.⁷⁷³

TEMPORARY DISABILITY PAYMENTS

In Mt. Diablo Unified School District v. Workers’ Compensation Appeals Board,⁷⁷⁴ the Court of Appeal held that payments made to an injured school district employee under Education

⁷⁷⁰ Education Code sections 24953(f) (citing Insurance Code section 770.3), 44041.5(f)(1).

⁷⁷¹ Education Code section 44041(b).

⁷⁷² Education Code section 25112.

⁷⁷³ Education Code section 44041.5(d).

⁷⁷⁴ 165 Cal.App.4th 1154, 81 Cal.Rptr.3d 597, 235 Ed.Law Rep. 518 (2008).

Code section 44043⁷⁷⁵ are, in part, temporary disability benefits under the workers' compensation laws and terminate after two years.

In Mt. Diablo Unified School District, the employee contended that payments made under Section 44043 were not temporary disability benefits under the workers' compensation law and did not end two years after the first payment. The employee argued that, because the school district did not strictly follow the procedure outlined in Section 44043, the payments should continue. Under Section 44043, the employee's temporary disability payments from the workers' compensation appeals board are required to be endorsed by the employee payable to the district. However, the court noted that the practice in California has been for the temporary disability payments to be sent directly to the school district and then the school district issues a check to the employee pursuant to Section 44043.⁷⁷⁶

Education Code section 44043 states:

“Any school employee of a school district who is absent because of injury or illness which arose out of and in the course of the person's employment, and for which the person is receiving temporary disability benefits under the workers' compensation laws of this state, shall not be entitled to receive wages or salary from the district which, when added to the temporary disability benefits, will exceed a full day's wages or salary.

“During such periods of temporary disability so long as the employee has available for the employee's use sick leave, vacation, compensating time off or other paid leave of absence, the district shall require that temporary disability checks be endorsed payable to the district. The district shall then cause the employee to receive the person's normal wage or salary less appropriate deductions including but not limited to employee retirement contributions.

“When sick leave, vacation, compensating time off or other available paid leave is used in conjunction with temporary disability benefits derived from workers' compensation, as provided in this section, it shall be reduced only in that amount necessary to provide a full day's wage or salary when added to the temporary disability benefits.”

The Court of Appeal noted that by sending the checks directly to the school district it streamlined the process and that to accept the employee's argument would be to elevate form over substance and lead to an absurd result. Therefore, the Court of Appeal concluded that the payments under Section 44043 are temporary disability benefits under the workers' compensation laws and end after two years.⁷⁷⁷

⁷⁷⁵ Education Code section 87042 contains similar language that applies to community college districts.

⁷⁷⁶ Id. at 1158-59.

⁷⁷⁷ Id. at 1161.

INDUSTRIAL WELFARE COMMISSION (IWC) WAGE ORDERS

In Johnson v. Arvin – Edison Water Storage District,⁷⁷⁸ the Court of Appeal held that IWC wage orders regarding overtime and meal breaks did not apply to public agencies. The Court of Appeal held that public agencies were exempt under the California Labor Code from IWC wage orders.

The Court of Appeal held that, “. . . unless Labor Code provisions are specifically made applicable to public employers, they only apply to employers in the private sector.” The Court of Appeal held that the Labor Code sections relating to meal breaks and overtime did not expressly apply to public entities. The Court of Appeal held that while public entities must comply with the federal FLSA,⁷⁷⁹ public agencies are not subject to the more stringent California Labor Code provisions and wage orders unless the Legislature specifically indicated that the specific provisions apply to public agencies.⁷⁸⁰

PAYMENT OF MINIMUM WAGE

In Sheppard v. North Orange County Regional Occupational Program,⁷⁸¹ the Court of Appeal held that a part-time instructor employed by the North Orange County Regional Occupational Program (NOCROP) stated a cause of action for payment of the minimum wage. The Court of Appeal held that IWC Wage Order No. 4-2001 and Labor Code section 218 applied to public agencies.

In November 2004, Sheppard filed a complaint against NOCROP for failure to pay wages in violation of IWC Wage Order No. 4-2001, failure to pay wages in breach of a written contract, and unfair competition. The complaint alleged that between January 1, 2000 and November 2004, Sheppard was employed as a full-time and/or part-time instructor by NOCROP. The complaint alleged that Sheppard was required to sign a document which stated that part-time assignments required 20 minutes of unpaid preparation time for each hour of classroom or lab instruction. Sheppard complained that he had not been paid for the 20 minutes of required preparation time and Sheppard sought all unpaid wages owed between approximately January 2000 and November 2004.⁷⁸²

NOCROP paid its part-time instructors between \$31.35 and \$36.15 per hour to spend 20 minutes of unpaid time to prepare for every hour of classroom or laboratory instruction they performed. The trial court granted judgment on the pleadings to NOCROP and Sheppard appealed.⁷⁸³

On appeal, the Court of Appeal reversed the trial court with respect to IWC Wage Order No. 4-2001 and the breach of contract cause of action. The Court of Appeal held that, by its terms, the minimum wage provision contained in IWC Wage Order No. 4-2001 applies to

⁷⁷⁸ 174 Cal.App.4th 729, 95 Cal.Rptr.3d 53 (2009).

⁷⁷⁹ 29 U.S.C. Section 2001 et seq.

⁷⁸⁰ *Id.* at 734-41.

⁷⁸¹ 191 Cal.App.4th 289, 120 Cal.Rptr.3d 442, 263 Ed.Law Rep. 837 (2010).

⁷⁸² *Id.* at 295.

⁷⁸³ *Ibid.*

Sheppard's employment with NOCROP, and the Legislature authorized the IWC to extend the application of the minimum wage law to apply to certain public employees, and the Legislature has plenary authority over public school districts in California and was not barred by the state Constitution from requiring school districts to comply with the minimum wage provisions of IWC Wage Order No. 4-2001.⁷⁸⁴

The Court of Appeal noted that in Martinez v. Combs,⁷⁸⁵ the California Supreme Court stated that the fundamental task of the courts in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. In determining what the Legislature meant, the statutory language itself is the most reliable indicator, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, the courts should presume the Legislature meant what it said, and the statute's plain meaning governs. If the language allows more than one reasonable construction, the courts may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, the courts may also consider the consequences of a particular interpretation, including its impact on public policy.⁷⁸⁶

The Court of Appeal applying the rules of statutory construction set forth in Martinez v. Combs interpreted the language of IWC Wage Order No. 4-2001, by its terms, to impose the minimum wage provision as to all employees in the occupation described, including employees directly employed by the state or any political subdivision of the state.

The Court of Appeal further held that in Section 1173, the Legislature provided the IWC with broad statutory authority to regulate the working conditions of employees in California, including setting standards for minimum wages and maximum hours. Section 1173 states in part, "It is the continuing duty of the Industrial Welfare Commission . . . to ascertain the wages paid to all employees in this state . . ." Based on the use of the term "all employees," the Court of Appeal held that the IWC had authority to include public employees in IWC Wage Order No. 4-2001.⁷⁸⁷

In addition, the Court of Appeal noted that the Legislature has plenary authority over school districts.⁷⁸⁸

The Court of Appeal also held that Sheppard stated a cause of action for breach of contract. The court noted that the breach of contract claim was solely focused on recovering earned but unpaid wages and concluded that Sheppard had a contractual right to such wages which is protected by the contract clause of the state Constitution.⁷⁸⁹

⁷⁸⁴ Id. at 297-98.

⁷⁸⁵ 49 Cal.4th 35, 51 (2010).

⁷⁸⁶ Id. at 51.

⁷⁸⁷ 191 Cal.App.4th 289, 304-06 (2010).

⁷⁸⁸ See, Cal. Const., Article IX, Section 14; Butt v. State of California, 4 Cal.4th 668, 680-681 (1992).

⁷⁸⁹ 191 Cal.App.4th 289, 311-13 (2010).

ARRESTS OF EMPLOYEES

A. Sex Offenses

Penal Code Section 291 requires law enforcement agencies to notify school districts if school employees are arrested for sex offenses under Education Code Section 44010, Penal Code Section 291 states:

“Every sheriff, chief of police, or the Commissioner of the California Highway Patrol, upon the arrest for any of the offenses enumerated in Section 290, subdivision (a) of Section 261, or Section 44010 of the Education Code, of any school employee, shall, provided that he or she knows that the arrestee is a school employee, do either of the following:

“(a) If the school employee is a teacher in any of the public schools of this state, the sheriff, chief of police, or commissioner of the California Highway Patrol shall immediately notify by telephone the superintendent of schools of the school district employing the teacher and shall immediately give written notice of the arrest to the Commission on Teacher Credentialing and to the superintendent of schools in the county where the person is employed. Upon receipt of the notice, the county superintendent of schools and the Commission on Teacher Credentialing shall immediately notify the governing board of the school district employing the person.

“(b) If the school employee is a nonteacher in any of the public schools of this state, the sheriff, chief of police, or Commissioner of the California Highway Patrol shall immediately notify the superintendent of schools of the school district employing the nonteacher and shall immediately give written notice of the arrest to the governing board of the school district employing the person.”

While Section 291 does not require notification to school districts for all offenses, it does require notification when employees are arrested for sex offenses listed in Education Code Section 44010.

B. Plea of Nolo Contendere

In Cahoon v. Governing Board of Ventura Unified School District,⁷⁹⁰ the Court of Appeal held that a school custodian could not be terminated pursuant to Education Code section 45123, because his plea of nolo contendere does not constitute a “conviction” for purposes of Section 45123(b). However, the court noted that for sex offenses, as defined in Section 44010, a

⁷⁹⁰ 171 Cal.App.4th 381, 89 Cal.Rptr.3d 783, 241 Ed.Law Rep. 279 (2009).

plea of nolo contendere does constitute a “conviction” because of the explicit language of Section 45123(a).

Section 45123 reads in part:

“(a) No person shall be employed or retained in employment by a school district who has been convicted of any sex offense as defined in Section 44010. A plea or verdict of guilty, a finding of guilt by a court in a trial without jury, or a conviction following a plea of nolo contendere shall be deemed to be a conviction within the meaning of this subdivision.

“(b) No person shall be employed or retained in employment by a school district, who has been convicted of a controlled substance offense as defined in Section 44011.”

The court held that when the Legislature intends for a plea of nolo contendere to constitute a “conviction,” it makes that determination explicit as in Section 45123(a) for sex offenses. Since the Legislature did not include such explicit language in Section 45123(b) for controlled substance offenses, a plea of nolo contendere in such a case is not a “conviction.” The court rejected the district’s argument that Education Code section 44009, which defines “conviction” to include nolo contendere pleas, implicitly amends Section 45123(b).⁷⁹¹

It is possible that the Legislature will cure this discrepancy by amending Section 45123(b) as the court invited it to do. In the meantime, districts are advised to consult with the District Attorney’s office when a drug charge is pending against a district employee so the District Attorney’s office will know the consequence of accepting a plea of nolo contendere. The District Attorney may refuse to accept the plea, or may require the employee to resign from the school district in exchange for accepting the plea.

INTERNET ACCESS POLICIES FOR EMPLOYEES

In Crosby v. South Orange County Community College District,⁷⁹² the Court of Appeal held that the Community College District’s board policy regarding Internet access was vague and overbroad, and also held that the revised policy was consistent with Education Code section 66301.

Education Code section 66301(a) states:

“Neither the Regents of the University of California, the Trustees of the California State University, the governing board of a community college district, nor an administrator of any campus of those institutions, shall make or enforce a rule subjecting a student to disciplinary sanction solely on the basis of conduct that

⁷⁹¹ Id. at 385-86.

⁷⁹² 172 Cal.App.4th 433, 91 Cal.Rptr.3d 161, 242 Ed.Law Rep. 851 (2009).

is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.”⁷⁹³

The Court of Appeal noted that Section 66301 would allow a community college to enforce regulation of the time, place, and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.⁷⁹⁴

The Court of Appeal went on to state that the government is not required to create a public forum and nothing in the record suggests that Saddleback College’s library is a public forum. The Court of Appeal stated:

“Accordingly, the limitation of computer use to educational and employment purposes found in the revised Board Policy 4000.2 is an acceptable limitation, and does not represent a public official’s effort to silence opposing view points.”⁷⁹⁵

EMPLOYEE COOPERATION WITH EMPLOYER INVESTIGATION

A. Duty to Answer Employer Questions

In Spielbauer v. County of Santa Clara,⁷⁹⁶ the California Supreme Court held that a public employee may be compelled to answer questions about the employee’s job performance or face disciplinary action by the employer. The information obtained may not be used in a criminal prosecution against the employee and the employee should be advised of that fact in advance.⁷⁹⁷

Thomas Spielbauer was a public defender who was investigated by his employer for allegedly making deceptive statements to the court. He refused to answer questions posed to him during the internal investigation because he feared that the information he provided might be used against him in a possible criminal action. However, the county advised Mr. Spielbauer that no criminal use could be made of any answers he gave under compulsion by his employer. He was then directed to answer questions related to the investigation or face discipline up to and including termination. Mr. Spielbauer continued to refuse to answer questions and was terminated for insubordination, among other things.⁷⁹⁸

⁷⁹³ Section 66301 was added at the same time as Section 48950, which contains similar language and applies to high school students.

⁷⁹⁴ See, Perry Education Association v. Perry Local Education Association, 460 U.S. 37, 45 (1983).

⁷⁹⁵ 172 Cal.App.4th 433, 443 (2009).

⁷⁹⁶ 45 Cal.4th 704, 88 Cal.Rptr.3d 590 (2009).

⁷⁹⁷ Spielbauer v. County of Santa Clara, 45 Cal.4th 704, 88 Cal.Rptr.3d 590 (2009).

⁷⁹⁸ Id. at 709.

Mr. Spielbauer sued the county arguing that he could be forced to answer questions in an internal investigation only if he received a formal grant of immunity from criminal prosecution in advance. The Supreme Court rejected this argument, stating:

“When a public employer demands job-related information from its employee, while advising that the employee does not thereby surrender the constitutional right against use of the information in a subsequent criminal prosecution, the employer acts legally. In such circumstances, the employee’s constitutional right against self-incrimination is thus directly and precisely satisfied ‘by precluding use of his statements at a subsequent criminal proceeding.’” [Citation omitted].⁷⁹⁹

The court noted that while this rule may hinder certain criminal prosecutions against the employee, the public interest is best served when a public employer, in its administrative capacity, may investigate and remedy misconduct and breaches of trust by those serving on the public payroll.⁸⁰⁰

If the matter involves a possible crime, districts are advised to contact the appropriate law enforcement agency before proceeding with an internal investigation. Once it has been determined that the district should move forward with its own investigation (either because the law enforcement agency does not intend to investigate or because the investigations will proceed concurrently), the district should direct the employee to cooperate with the investigation.

Note, too, that employers are advised to give such a directive in conjunction with a warning to the employee that the information he or she provides cannot be used in a subsequent criminal proceeding. If the employee is a peace officer, Government Code section 3303(h) requires that the employee be advised of his constitutional right to remain silent if it is deemed that he or she might be charged with a criminal offense. For non-peace officer employees, districts should use the following script: “You are being directed to answer questions related to this investigation. If you refuse to answer these questions, your silence may be deemed insubordination, leading to administrative discipline up to and including termination. However, any statement made during this interview cannot be used against you in any subsequent criminal proceeding.”

B. Attorney-Client Privilege and the Work Product Doctrine

In Sandra T.E. v. South Berwyn School District 100,⁸⁰¹ the Seventh Circuit Court of Appeals held that documents in the possession of a law firm relating to an internal investigation of sexual abuse by a school district employee was protected by the attorney-client privilege and were not required to be disclosed. The Court of Appeals also held that the work-product doctrine protected the documents and were not required to be disclosed.

⁷⁹⁹ Id. at 727.

⁸⁰⁰ Id. at 728-29.

⁸⁰¹ 600 F.3d 612, 255 Ed.Law Rep. 525 (7th Cir. 2010). The Ninth Circuit Court of Appeals in United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996), reached a similar conclusion.

The Court of Appeals held that the purpose of the factual investigation was to provide legal advice to the school board, and therefore, the documents and other communications were protected from disclosure by the attorney-client privilege. The Court of Appeals relied on the language of the law firm's engagement letter and the testimony of the law firm's attorneys that the law firm provided legal advice to the board based on the law firm's investigation of the factual circumstances it uncovered in the investigation.⁸⁰²

An elementary school music teacher in the South Berwyn School District 100 was charged with sexually molesting numerous students over a period of several years during his tenure in the district. Some of the victims filed a civil lawsuit against the school district and a school principal who allegedly knew about the abuse long before the charges were filed but did not take appropriate action. In response to the criminal charges and the filing of the lawsuit, the school board hired an outside law firm to conduct an internal investigation and provide legal advice to the school board.

As part of the investigation, the attorneys interviewed current and former district employees and third-party witnesses. The attorneys took handwritten notes and later drafted memoranda summarizing the interviews. The law firm delivered its findings and legal advice to the school board in an oral report and a written summary, but the law firm did not represent the school district in the civil litigation.⁸⁰³

In January 2005, police arrested an elementary school band teacher employed by the school district on charges that he had repeatedly sexually abused numerous female students. The abuse began in 1998 and continued until the teacher's arrest in early 2005. The teacher confessed to the crimes and was convicted and sentenced to 20 years in prison. Some of the victims told police they had reported the abuse to the school principal after it occurred, but the principal failed to take appropriate action against the teacher. Shortly after the teacher's arrest, some of the victims and their families filed a civil lawsuit against the school district and the school principal.⁸⁰⁴

The school board retained the law firm of Sidley Austin LLP to conduct an internal investigation. The law firm was asked to review the criminal charges against the teacher, investigate the actions of school administrators in response to the allegations of sexual abuse, examine whether any district employees had failed to comply with district policies or federal or state law, and analyze the effectiveness of the district's existing compliance procedures. The engagement letter between the Sidley law firm and the school district stated that Sidley was to "investigate the response of the school administration to allegations of sexual abuse of students," and to "provide legal services in connection with" the investigation.⁸⁰⁵

As the investigation proceeded, the law firm interviewed many school district employees. In April 2005, the law firm delivered a written report marked "Privileged and Confidential,

⁸⁰² *Id.* at 615.

⁸⁰³ *Ibid.*

⁸⁰⁴ *Ibid.*

⁸⁰⁵ *Id.* at 616.

Attorney-Client Communication” and “Attorney Work Product” to the school board. Another law firm represented the defendants in the civil litigation.⁸⁰⁶

In the fall of 2006, the plaintiffs in the civil litigation subpoenaed the documents produced by the Sidley law firm and sought to depose attorneys from the Sidley law firm regarding the investigation. The U.S. District Court held that the report and testimony was not covered by the attorney-client privilege and work-product claims and ordered the firm to produce the documents. The law firm and the school district appealed.⁸⁰⁷

On appeal, the law firm claimed that the interview notes and legal memoranda its attorneys prepared in connection with the school district investigation were protected from disclosure by both the attorney-client privilege and the work-product doctrine. The general rule is that the attorney-client privilege protects communications made in confidence by a client and a client’s employees to an attorney, acting as an attorney, for the purpose of obtaining legal advice.⁸⁰⁸ The attorney-client privilege belongs to the client, although an attorney may assert the privilege on the client’s behalf.⁸⁰⁹

The work-product doctrine protects documents prepared by attorneys in anticipation of litigation for the purpose of analyzing and preparing a client’s case.⁸¹⁰ An attorney has an independent privacy interest in the attorney’s work product and may assert the work-product doctrine on his or her own behalf. The work-product doctrine’s protection is not waived simply because the attorney shared the information with the client.⁸¹¹

Generally, to determine whether a communication falls within the protection of the attorney-client privilege, the courts will ask whether legal advice of any kind was sought from a professional legal adviser in his or her capacity as such and whether the communication was related to that purpose and made in confidence by the client.⁸¹² The Court of Appeals noted that the engagement letter between the Sidley law firm and the school district explained that Sidley had been hired to investigate the response of the school administration to allegations of sexual abuse of students and to provide legal services in connection with the specific representation. The court held that if the factual investigation was for the purpose of providing legal advice to the client, then it is protected by the attorney-client privilege.⁸¹³

The Court of Appeals stated, “. . . other circuits have concluded that when an attorney conducts a factual investigation in connection with the provision of legal services, any notes or memoranda documenting client interviews or other client communications in the course of the investigation are fully protected by the attorney-client privilege.”⁸¹⁴ In United States v. Rowe, the Ninth Circuit Court of Appeals held that fact finding which pertains to legal advice is

⁸⁰⁶ Ibid.

⁸⁰⁷ Ibid.

⁸⁰⁸ See, Upjohn Company v. United States, 449 U.S. 383, 394-99, 101 S.Ct. 677 (1981); Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906 (1980).

⁸⁰⁹ See, United States v. Smith, 454 F.3d 707, 713 (7th Cir. 2006).

⁸¹⁰ United States v. Smith, 502 F.3d 680, 689 (7th Cir. 2007).

⁸¹¹ See, Hobley v. Burge, 433 F.3d 946, 949-50 (7th Cir. 2006).

⁸¹² United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997).

⁸¹³ Id. at 617-18.

⁸¹⁴ Id. at 618; citing, United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996).

considered professional legal services and falls within the protection of the attorney-client privilege.⁸¹⁵

In Sandra T.E., the Court of Appeals noted that the engagement letter made it clear that the school district retained the Sidley law firm to provide legal services in connection with developing a school district's response to the teacher's sexual abuse of the students. The law firm's investigation of the factual circumstances surrounding the abuse was an integral part of the legal services for which the law firm was hired and a necessary prerequisite to the provision of legal advice about how the district should respond.⁸¹⁶ In addition, the law firm testified that it had been hired to provide legal advice in the context of the facts it uncovered during the internal investigation. The Court of Appeals concluded, "Because the Sidley lawyers were hired in their capacity as lawyers to provide legal services – including a factual investigation – the attorney-client privilege applies to the communications made and documents generated during that investigation."⁸¹⁷

The Court of Appeals held that the attorney-client privilege in this context applies to public agencies as well as private companies. The Court of Appeals stated, "The public interest is best served when agencies of the government have access to the confidential advice of counsel regarding the legal consequences of their past and present activities and how to conform their future operations to the requirements of the law."⁸¹⁸

The Court of Appeals also held that the work-product doctrine protects the materials at issue from disclosure. The purpose of the work-product doctrine is to protect an attorney's thought processes and mental impressions against disclosure and to limit the circumstances in which opposing counsel may piggyback on the fact finding investigation of their more diligent counterparts. Work-product protection applies to attorney-led investigations when the documents at issue can fairly be said to have been prepared or obtained because of the prospect of litigation.⁸¹⁹

The Court of Appeals reviewed the chronology of events and held that the Sidley law firm was hired to conduct the school district investigation not merely in anticipation of likely litigation but in response to the actual filing of the lawsuit. Even though the school board was responding to public outrage over the allegations and the possible complicity of a school employee, the interviews were conducted with an eye toward pending litigation, and therefore, qualify for the work-product protection.⁸²⁰

The Sandy T.E. case points out the importance of the engagement letter when retaining outside legal counsel to conduct an investigation. Districts in that situation should ask the law firm to make it clear in the engagement letter that the purpose of the investigation is to provide legal advice to the district as well as to uncover the underlying facts of what occurred.

⁸¹⁵ 96 F.3d 1294, 1297 (9th Cir. 1996); citing, Upjohn v. United States, 449 U.S. 383, 101 S.Ct. 677 (1981).

⁸¹⁶ Sandra T.E. v. South Berwyn School District 100, 600 F.3d 612, 618-19 (7th Cir. 2010).

⁸¹⁷ Id. at 620.

⁸¹⁸ Id. at 621.

⁸¹⁹ Id. at 622.

⁸²⁰ Id. at 622-23.

SCHOOL COUNSELORS AND CONFIDENTIALITY

On December 29, 2011, the California Attorney General's office issued an opinion interpreting Education Code section 49602(c) as permitting, but not requiring, a school counselor to disclose personal information (including pregnancy-related information) received from an unemancipated student age twelve or older, to the student's parents or school principal when the counselor has reasonable cause to believe that disclosure was necessary to avoid a clear and present danger to the student's health, safety or welfare.⁸²¹

The Attorney General's opinion interprets Education Code section 49602. Education Code section 49602 states that any information of a personal nature disclosed by a student twelve years of age or older in the process of receiving counseling from the school counselor is confidential. However, Education Code section 49602(c) creates an exception and authorizes reporting information to the principal or parents of the student when the school counselor has reasonable cause to believe that disclosure is necessary to avoid a clear and present danger to the health, safety, or welfare of the pupil or other persons in the school community, including administrators, teachers, school staff, parents, pupils and other school community members.⁸²²

The Attorney General stated that because Education Code section 49602(c) does not, by its terms, compel disclosure, it does not form the basis of civil liability against the school counselor or the school district under the doctrine of negligence per se, where the school counselor fails to disclose pregnancy-related personal information to the parents or school principal of an unemancipated student age twelve or older and the minor thereafter suffers harm that could have been avoided by the disclosure of that information. The Attorney General reviewed the language of Section 49602 and concluded that a school counselor is permitted, but not required, to disclose confidential pregnancy-related information received from an unemancipated student age twelve or older, to the minor's parents or principal.⁸²³

The Attorney General noted that a perceived "danger" to a student's health, safety or welfare should not be interpreted too loosely. The Attorney General noted that an individual's or a community's moral, ethical, or religious values should not be considered in determining whether there is a clear and present danger to the health and safety of the student. The Attorney General stated that Section 49602(c) would not permit a counselor to reveal a student's pregnancy-related personal information based solely on the counselor's personal views on the subject of teen pregnancy, or on the counselor's or community's subjective belief that this is the type of information that every parent should know. The Attorney General further stated that whether pregnancy-related personal information may be properly disclosed under Section 49602(c) would depend on whether the school counselor reasonably believes that disclosing the specific information, to the specific persons listed in the statute, is necessary to avert a perceived clear and present danger. The Attorney General stated that construed in this narrow manner, Section 49602(c) does not, on its face, violate a minor's constitutional right to privacy.⁸²⁴

⁸²¹ 94 Ops.Cal.Atty.Gen. 111 (2011).

⁸²² *Id.* at 114.

⁸²³ *Id.* at 114.

⁸²⁴ *Id.* at 114-115.

In addition, the Attorney General stated that Section 49602(c) permits a school counselor to reveal confidential information and that permissive action implies permissive inaction. Therefore, the school counselor does not have a mandatory duty to act and civil liability, under the doctrine of negligence per se, would not attach.⁸²⁵

Districts should consult legal counsel under these circumstances when deciding whether to disclose information to parents or the principal.

SCHOOL SECURITY GUARDS

Education Code section 38000 states that the governing board of any school district may establish a security department under the supervision of a chief of security or a police department under the supervision of a chief of police. The governing board may also employ classified personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer to a school site to supplement the duties of school police personnel.

Education Code section 38000(b) states that the governing board of a school district that establishes a security department or a police department shall set minimum qualifications of employment for the chief of security or chief of police, including prior employment as a peace officer or completion of any peace officer training course approved by the Commission on Peace Officer Standards and Training.

Education Code section 38001 states that persons employed and compensated as members of a police department of a school district, when appointed and duly sworn, are peace officers for the purposes of carrying out their duties of employment pursuant to Penal Code section 830.32.

Education Code section 38001.5⁸²⁶ states that it is the intent of the Legislature to ensure the safety of pupils, staff, and the public on or near California's public schools by providing school security officers with the training that will enable them to deal with increasingly diverse and dangerous situations. Section 38001.5(b) states that after July 1, 2000, every school security officer employed by a school district who works more than twenty hours a week as a school security officer shall complete a course of training developed no later than July 1, 1999, by the Bureau of Security and Investigative Services of the Department of Consumer Affairs in consultation with the Commission on Peace Officer Standards and Training. If any school security officers subject to the requirements of this section is required to carry a firearm while performing his or her duties, the school security officer shall additionally satisfy the training requirements set forth in Penal Code section 832.

Education Code section 38001.5(c) defines "school security officer" as any person primarily employed or assigned to provide security services as a watchperson, security guard, or patrol person on or about the premises owned or operated by a school district to protect persons or property or to prevent the theft or unlawful taking of district property of any kind, or to report

⁸²⁵ *Id.* at 115.

⁸²⁶ Stats. 1998, ch. 7745 (SB 1626).

any unlawful activity to the district and local law enforcement agencies. Section 38001.5(d) states that no school security officer shall be employed or shall continue to be employed by the school district after July 1, 2000 until both of the following conditions have been met:

1. The applicant or employee has submitted to the district two copies of his or her fingerprints for processing by the Department of Justice and Federal Bureau of Investigation.
2. The applicant or employee has been determined not to be a person prohibited from employment by a school district or by the Department of Justice from possessing a firearm if the applicant is required to carry a firearm.

Education Code section 38001.5(e) states that every school security officer employed by a school district prior to July 1, 2000, who works more than twenty hours a week as a school security officer shall meet the training requirements by July 1, 2002.

The Department of Consumer Affairs, Bureau of Security and Investigative Services has posted a frequently asked questions (FAQ) regarding school security guards. We have attached a copy. Please feel free to distribute a copy of this memo and the attachment from the Department of Consumer Affairs, Bureau of Security Investigative Services, to school districts.

SCHOOL COACHES

Assembly Bill 1451⁸²⁷ amends Education Code section 35179.1 (the California High School Coaching Education and Training Program Act), effective January 1, 2013. Section 35179.1, as amended, will require coaches to receive training every two years in a basic understanding of the signs and symptoms of concussions and the appropriate response to concussions. The concussion training may be fulfilled through entities offering free, online, or other types of training courses.

The addition of training in the basic understanding of the signs and symptoms of concussions is added to the requirements of Section 35179.1 which require coaches to be trained in the following:

1. Development of coaching philosophies consistent with school district goals;
2. Sport psychology: emphasizing communication, reinforcement of the efforts of pupils, effective delivery of coaching regarding technique and motivation of the pupil athlete;
3. Sport pedagogy: how pupil athletes learn, and how to teach sport skills;

⁸²⁷ Stats 2012, ch. 173.

4. Sport physiology: principles of training, fitness for sport, development of a training program, nutrition for athletes, and the harmful effects associated with the use of steroids and performance enhancing dietary supplements by adolescents;
5. Sport management: team management, risk management and working within the context of an entire school program;
6. Training: certification in CPR and first aid (including concussions);
7. Knowledge of and adherence to statewide rules and regulations, as well as school regulations including, but not necessarily limited to, eligibility, gender equity and discrimination; and
8. Sound planning and goal setting.

This legislation is related to Assembly Bill 25⁸²⁸ which added Education Code section 49475, effective January 1, 2012. Section 49475 requires school districts to ensure that if an athlete is suspected of sustaining a concussion or head injury in an athletic activity, the athlete must be immediately removed from the activity for the remainder of the day. The athlete is not permitted to return to the activity until he or she is evaluated by a licensed health care provider, trained in the management of concussions, acting within the scope of his or her practice. The athlete is not permitted to return to the activity until he or she receives written clearance to return to the activity from the licensed healthcare provider.

In addition, Section 49475 states that on a yearly basis, a Concussion and Head Injury Information Sheet shall be signed and returned by the athlete and the athlete's parents or guardian before the athlete's initiating practice or competition. Section 49475 does not apply to an athlete engaging in an athletic activity during the regular school day or as part of a physical education course.

DESIGNATION OF BENEFICIARY

In Hillman v. Maretta,⁸²⁹ the United States Supreme Court held that the former spouse of a federal employee is entitled to the proceeds of a federal employee's life insurance policy under the Federal Employee's Group Life Insurance Act of 1954 (FEGLIA).⁸³⁰

FEGLIA provides that an employee may designate a beneficiary to receive the proceeds of his life insurance at the time of his death.⁸³¹ A Virginia statute states that if an employee's marital status has changed and the employee did not update his beneficiary designation before his death, the Virginia statute renders a former spouse liable for insurance proceeds to whoever

⁸²⁸ Stats. 2011, ch. 456.

⁸²⁹ 133 S.Ct. 1943 (2013).

⁸³⁰ 5 U.S.C. Section 8701 et seq.

⁸³¹ 5 U.S.C. Section 8705(a).

would have received them under applicable law, usually a widow or widower, but for the beneficiary designation.⁸³²

The United States Supreme Court held that federal law preempts the Virginia statute and the former spouse/beneficiary is not liable to the widow of the federal employee.

This case may apply to situations in which school employees designate a beneficiary for their last paycheck and fail to update the information. In several cases, employees have designated former spouses as the beneficiary.⁸³³ It has been our practice to award the money to the beneficiary, even if it is a former spouse. In several cases, where the amount has been disputed, we have worked out settlements among the parties. This case may have applicability to our situation.

DIRECT DEPOSIT OF SALARY AND PAY CARDS

Labor Code section 212 states, in part:

“(a) No person, or agent or officer thereof, shall issue in payment of wages due, or to become due, or as an advance on wages to be earned:

(1) Any order, check, draft, note, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the state, the name and address of which must appear on the instrument, and at the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer has sufficient funds in, or credit, arrangement, or understanding with the drawee for its payment.

(2) Any scrip, coupon, cards, or other thing redeemable, in merchandise or purporting to be payable or redeemable otherwise than in money.” [Emphasis added]

Labor Code section 212 has been broadly interpreted by the courts as intended to prevent employers from paying wages by giving orders payable only in goods or orders of an indefinite nature not payable on demand, but at some future time, or paychecks which cannot be honored because of insufficient funds.⁸³⁴ Therefore, any order, check, draft, note or other acknowledgement of indebtedness must be negotiable and payable in cash on demand without discount at some established place of business in the state, the name and address of which must appear on the instrument. The instrument must be negotiable for at least thirty days and the maker or drawer must have sufficient funds for payment.

⁸³² See, Section 20-111.1(D) of the Virginia Code.

⁸³³ Government Code section 53245.

⁸³⁴ Brown v. Superior Court, 199 Cal.App.4th 971, 132 Cal.Rptr. 3d 448 (2011).

Labor Code section 213(d) states:

“Nothing contained in Section 212 shall:

(d) Prohibit an employer from depositing wages due or to become due or an advance on wages to be earned in an account in any bank, savings and loan association, or credit union of the employee’s choice with a place of business located in this state, provided that the employee has voluntarily authorized that deposit. If an employer discharges an employee or the employee quits, the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit authorized pursuant to this subdivision, provided that the employer complies with the provisions of this article relating to the payment of wages upon termination or quitting of employment.” [Emphasis added]

Therefore, employers may deposit wages due in an account in any bank, savings and loan, or credit union of the employee’s choice, provided that the employee has voluntarily authorized that deposit. The requirements of Labor Code section 213 are consistent with federal law that regulates electronic fund transfers.⁸³⁵ Federal law and regulations prohibit the compulsory use of electronic fund transfers, but authorize electronic fund transfers if they are voluntary.⁸³⁶

The federal regulation states, “No financial institution or other person may require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment or receipt of a government benefit.”⁸³⁷ A government agency is deemed to be a financial institution for purpose of an electronic fund transfer if it directly or indirectly issues an account device (e.g., pay card or convenience check) to a consumer for use in initiating an electronic fund transfer.⁸³⁸

The State of California Department of Industrial Relations, Division of Labor Standards Enforcement, discussed the federal regulations in its July 7, 2008 letter to Carl Morris, National Debit Card Manager for American EPay, Incorporated, and Daniel P. Schwallie at Hewitt Associates, LLC, and concluded that “payroll debit cards” and “pay cards” are covered by the federal regulations and participation by the employee must be voluntary.⁸³⁹ Therefore, unless the employee consents to receive salary payments by direct deposit, pay card, or convenience checks, the employee must be paid with a payroll check or warrant.

In the letter dated July 7, 2008 from the State of California Department of Industrial Relations, Division of Labor Standards Enforcement (copy attached) to Carl Morris at American EPay, Inc. and Daniel Schwallie at Hewitt Associates, LLC, the Division of Labor Standards Enforcement stated that pay cards would comply with the requirements of California Labor Code

⁸³⁵ See, 15 U.S.C. Section 1693 et seq.; 12 C.F.R. Section 205 et seq.

⁸³⁶ 12 C.F.R. Section 205.10(e); 12 C.F.R. Section 205.15.

⁸³⁷ 12 C.F.R. Section 205.10(3).

⁸³⁸ 12 C.F.R. Section 205.15.

⁸³⁹ See, page 4 of the letter from the Division of Labor Standards Enforcement to Carl Morris.

section 212 if the pay cards meet the requirements of a negotiable instrument. The Department of Labor Standards Enforcement interpreted “negotiable instrument” as meaning an instrument that is legally capable of being transferred by endorsement or delivery.

The Department of Labor Standards Enforcement noted that electronic “payroll cards” are subject to federal law and that payroll card programs provided an alternative for employees to receive their wage payments. The letter states, “Since an employee’s participation in the payroll card program is optional, and provided that the employee has voluntarily and specifically authorized the deposit, the payroll card programs simply provide another alternative for employees to receive their wage payments by direct deposit. Thus, the two programs sufficiently satisfy the voluntary requirement in Labor Code section 213(d).”⁸⁴⁰ [Emphasis added]

The Department of Labor Standards Enforcement noted that compliance with the direct deposit aspect of the payroll card program under Labor Code section 213(d) only partially resolves compliance with the wage payment laws. The deposit of wages into the payroll card account must provide effective access to the funds. The Department of Labor Standards Enforcement noted that the payroll card program must make wages payable in cash without discount. If the program allows for at least one transaction per pay period without fee, it complies with Labor Code section 212.

The Department of Labor Standards Enforcement stated that the fact that there are other options for employees to choose, such as to withdraw a lesser amount, does not render the use of the payroll card violative of Labor Code section 212, so long as the employee may withdraw all of their wages as cash on the established pay date by performing an electronic transfer using the payroll card at a locally accessible location. In essence, so long as the employee has access to their full wages on the scheduled pay date at no charge, the program complies with Labor Code section 212.

The Department of Labor Standards Enforcement also noted that in addition to complying with the requirements of Labor Code section 212 and 213, the employer must comply with Labor Code section 226(a), which requires distribution of an itemized wage statement. The Department of Labor Standards Enforcement stated that providing employees with an itemized wage statement on the scheduled pay date electronically complies with Labor Code section 226(a).

In a second letter dated July 7, 2008, from the Division of Labor Standards Enforcement to Donald J. Mosher at Schulte Roth & Zabel, LLP (copy attached), the Department of Labor Standards Enforcement stated that the use of a money network check for payment of wages complies with Labor Code section 212. Under the program reviewed, employees are provided a supply of undenominated money network checks which can be replenished at any time. On pay day, an employee calls the money network check service at a toll free number to obtain authorization information (issuer and transaction numbers). The number is then written in spaces provided on the face of the check and the check is not valid without such authorization information. To obtain his or her pay as cash, the employee makes out the check to themselves.

⁸⁴⁰ See, page 6, of the letter dated July 7, 2008, from the Division of Labor Standards Enforcement to Carl Morris.

The money network check can be cashed (one check free of fee per pay period) at numerous locations locally. The money network has formal arrangements with local businesses to provide check cashing services for money network checks without a fee for at least one transaction per pay period.

The Division of Labor Standards Enforcement noted, “It is significant that the program does not mandate employee participation in the money network check service, and that it is designed to provide an alternative for employees receiving their wage payment. Employees are also given the option of having their pay direct deposited into an account of their choosing at a bank, savings and loan association, or credit union of their choosing.”⁸⁴¹ [Emphasis added]

The Department of Labor Standards Enforcement noted that the fact that an employee must fill out a check made to themselves is no more burdensome than having to appear at a place to obtain one’s paycheck, or provide identification verification to an employer or payroll service in order to receive wages in person. Again, the Division of Labor Standards Enforcement noted that the employee’s participation in the program is voluntary, so that employees who do not wish to have a role in obtaining the required authorization cannot be required to do so.⁸⁴²

The Division of Labor Standards Enforcement also noted that the money network check must provide an itemized wage statement pursuant to Labor Code section 226(a). The itemized wage statement may be provided electronically, so long as it is available to the employee on pay day.

In summary, the use of pay cards and convenience checks (money network checks) is permissible under federal and state law, so long as it is voluntary. Employees cannot be compelled to use pay cards or convenience checks. Federal regulations state, “No financial institution or other person may require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment or receipt of governmental benefit.”⁸⁴³

Federal law has interpreted direct deposit of funds for salary or wages into an employee’s bank account or into a pay card or convenience check account as an electronic fund transfer subject to federal regulations. These federal regulations require employee authorization to participate in the program. Therefore, employees may not be compelled to choose direct deposit, pay cards, or convenience checks, but may be offered these programs as options to paychecks. If the employee does not voluntarily agree to salary payments in the form of direct deposit, pay cards, or convenience checks, the employer must issue a payroll check or payroll warrant to the employee.

⁸⁴¹ See pages 3-4 of the letter dated July 7, 2008 from the Division of Labor Standards Enforcement to Donald J. Mosher. In footnote 4 on page 4, the Division of Labor Standards Enforcement stated, “the optional nature of the money network service is mandated under federal laws. Specifically, the Federal Reserve Board’s Regulation E states, ‘no financial institution or other person may require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment or receipt of government benefit.’” 12 C.F.R. Section 205.10(e).

⁸⁴² Division of Labor Standards Enforcement letter to Donald J. Mosher, dated July 7, 2008, page 4-5.

⁸⁴³ 12 C.F.R. Section 205.10(e).

If an employer wishes to pursue a pay card program as an option for payment of salaries and wages to employees, then we would recommend that the employer draft a formal Request for Proposal and seek written proposals from vendors. The proposals must comply with all of the legal requirements for pay card and convenience check programs. Criteria should be developed to evaluate the proposals based on efficiency of the system, convenience for employees, and the fee structure, if any, for the services.

UNEMPLOYMENT INSURANCE

A. Recent Administrative Decision

In Rendon v. Garden Grove Unified School District,⁸⁴⁴ the California Unemployment Insurance Appeals Board ruled that Kerri A. Rendon was eligible for unemployment benefits. The claimant's last day of work before the one-week Thanksgiving break was November 16, 2012. The claimant's last day of work before the start of the two-week winter break was December 21, 2012. Claimant returned to work on January 7, 2013, and the semester ended on January 30, 2013. The claimant seeks unemployment benefits for the one-week ending November 24, 2012, and for the two weeks ending January 5, 2013. In previous years, the claimant has always returned to her position following the Thanksgiving and winter recess breaks.

The claimant signed an offer of employment on September 26, 2012, which identifies the duration of employment to be a period from September 10, 2012 through January 30, 2013. The employment agreement states in part, "Employment, for the period of time described in Article 1 above, is contingent upon an average of 22 student attendance hours for each recorded instructional hour of each specified class assignment below. Accordingly, if this condition is not met, your employment may be reduced or discontinued." The agreement also states that there are non-paid furlough days on November 19, 20, and 21, 2012.

The employer testified at the hearing on appeal that the class was already funded through student tuition which had been paid at the beginning of the semester and that the risk of the class being cancelled was minimal. The claimant was unaware of this fact.

The California Unemployment Insurance Appeals Board noted that unemployment insurance benefits based on services performed for a school district shall not be payable to any individual with respect to any week which commences during an established and customary vacation period or holiday recess if the individual performs services in the period immediately before such vacation or holiday recess and there is a reasonable assurance that the individual will perform services in the period immediately following the vacation period or recess.⁸⁴⁵ "Reasonable assurance" is defined as an offer of employment or assignment made by an educational institution, provided that the offer or assignment is not contingent on enrollment, funding, or program changes. An individual who has been notified that he or she will be replaced and does not have an offer of employment or assignment to perform services for an educational institution is not considered to have reasonable assurance.⁸⁴⁶

⁸⁴⁴ Case No. 4704056 dated February 1, 2013.

⁸⁴⁵ Unemployment Insurance Code section 1253.3(d).

⁸⁴⁶ Unemployment Insurance Code section 1253.3(g).

Reasonable assurance of reemployment does not require an absolute guarantee of reemployment. The exclusion of benefits to school employees under Section 1253.3 applies whether their employment status is vested or non-vested.⁸⁴⁷

In Irving v. California Unemployment Insurance Appeals Board,⁸⁴⁸ the Court of Appeal held that the plaintiff, a former employee of the Los Angeles Unified School District, was not entitled to unemployment insurance benefits under Unemployment Insurance Code section 1256.

The Court of Appeal held that plaintiff was terminated for misconduct for exceeding his break times on four separate occasions and then falsifying his timesheets. The Court of Appeal held that such conduct constitutes misconduct within the meaning of Unemployment Insurance Code section 1256. As a result, the Court of Appeal held that the plaintiff was not entitled to receive unemployment compensation benefits.

B. Substitute Teachers

In Board of Education of Long Beach Unified School District v. California Unemployment Appeals Board,⁸⁴⁹ the Court of Appeal reviewed a precedent benefit decision rendered by the California Unemployment Insurance Appeals Board holding that a substitute teacher in the Long Beach Unified School District was entitled to unemployment benefits during summer recess pursuant to Unemployment Insurance Code section 1253.3.

On or about June 16, 1980, Steven M. Smith received a form letter from the school district addressed to substitute teachers who had served the district during the 1979-1980 academic year. The form letter thanked each of the substitute teachers for their fine service and offered substitute teachers the opportunity to serve during the coming year. The form letter indicated that the school district hoped that the substitutes would accept this offer of continuing employment as a substitute teacher for the 1980-1981 academic year. The form letter also contained a detachable return form for the substitute teacher to fill out and return to the school district signifying whether the teacher would or would not be available for substitute teaching during the 1980-1981 school year.⁸⁵⁰

On July 2, 1980, Mr. Smith filled out and returned the detachable form letter indicating that he would be available for substitute teaching during the 1980-1981 school year in the secondary schools of the district. Mr. Smith also wrote on the letter, "For legal purposes: I do not accept this letter as reasonable assurance of employment, but rather 'the opportunity of such.'"⁸⁵¹

On August 8, 1980, Mr. Smith received another notice from the district which advised each substitute teacher that the governing board of the school district approved their election as a substitute teacher for the 1980-1981 school year and indicated the applicable rates of substitute teacher pay. The notice contained the following paragraph:

⁸⁴⁷ Board of Education of Long Beach Unified School District v. California Unemployment Insurance Appeals Board, 160 Cal.App.3d 674 (1984).

⁸⁴⁸ 229 Cal.App.4th 946 (2014).

⁸⁴⁹ 160 Cal.App.3d 674, 206 Cal.Rptr. 788 (1984).

⁸⁵⁰ Id. at 677-678.

⁸⁵¹ Id. at 678.

“Substitute teachers are given no assurance of employment, however, calls are rotated as equitably as possible in the best interest of the school district. Because the work of substitute employees is only from day-to-day, their services are used as needed. The success of the substitute in the situation to which he/she has been assigned is an important criterion in determining the frequency of calls.”⁸⁵²

On June 15, 1980, Mr. Smith applied for unemployment benefits for the summer recess of 1980. The employment development department denied Mr. Smith’s claim for unemployment benefits, having determined that he was ineligible for summer benefits under the provisions of Unemployment Insurance Code section 1253.3, since he was reasonably assured of returning to work following the recess.⁸⁵³

On January 20, 1981, the Unemployment Insurance Appeals Board reversed the decision of the ALJ and determined that unemployment benefits were payable to Mr. Smith during the summer recess period since he did not have a reasonable assurance of returning to work following the summer recess. The school district filed a petition for writ of mandate in the Superior Court seeking to overturn the Unemployment Insurance Appeals Board decision and to restrain the Unemployment Insurance Appeals Board from applying that decision to all future similar claims for unemployment insurance benefits by substitute teachers similarly employed. The Superior Court granted the district’s petition for writ of mandate and the Unemployment Insurance Appeals Board appealed.⁸⁵⁴

The Court of Appeal held that there was substantial evidence to support the trial court’s findings and judgment.⁸⁵⁵ The Court of Appeal held that the Unemployment Insurance Appeals Board improperly relied on the tenuous impermanent nature of the substitute teacher’s employment (e.g., that he or she acquired no vested or protected right to continuous employment and that he or she was not subject to termination since his job ended at the conclusion of each school day).⁸⁵⁶

The Court of Appeal held that the exclusion of unemployment benefits apply to instructional educational employees regardless of whether their employment status is vested or non-vested. If there is a contract or a reasonable assurance that a teacher, who has taught for the district during the pre-recess period, will perform teaching services for the employer in the academic year or term during the post-recess period, then the teacher must be denied unemployment benefits during summer recess regardless of whether he or she is a tenured or non-tenured teacher or whether his or her employment is vested or non-vested.⁸⁵⁷

The Court of Appeal held that there is nothing in Section 1253.3 which sets as a criterion the tenuous nature of a substitute teacher’s position as a basis for determining the reasonable assurance issue. The court noted that under Section 1253.3(f), reasonable assurance includes at least an offer of employment provided that such employment is not contingent on enrollment funding or

⁸⁵² *Id.* at 678.

⁸⁵³ *Id.* at 678.

⁸⁵⁴ *Id.* at 679.

⁸⁵⁵ *Id.* at 682.

⁸⁵⁶ *Id.* at 682.

⁸⁵⁷ *Id.* at 682-683.

program changes. Under Education Code section 44917, the sole function of a substitute teacher is to fill the position of a regularly employed person who is absent from service. Therefore, Mr. Smith's services on any given day during the pre-recess 1979-1980 academic year, as well as during the post-recess 1980-1981 academic year, was contingent upon the needs of the district to fill the position of absent regular teachers. Such contingency, the court held, is not included in Section 1253.3(f). The court held that the only contingencies specifically spelled out which would operate to nullify the offer of employment aspect as a basis for reasonable assurance are enrollment, funding, or program changes. There was no evidence that such contingencies impact on the post-recess employment of Mr. Smith as a substitute teacher.⁸⁵⁸

The Court of Appeal rejected Mr. Smith's contention that his personal note that he added to his acceptance of the district's offer of post-recess employment was relevant. The court held that a substitute teacher cannot add a disclaimer to an acceptance of an offer of continued employment as a substitute teacher and thereby render himself eligible for unemployment benefits during summer recesses, and thus, circumvent or nullify the unambiguous controlling statutory language of Section 1253.3.⁸⁵⁹

The Court of Appeal also rejected Mr. Smith's contention that the language in the form letter that stated, "Substitute teachers are given no assurance of employment," made him eligible for unemployment benefits. The court held that sentence in the form letter reasonably described the realities of substitute teaching and cautioned substitute teachers that there can be no absolute guarantee of work.⁸⁶⁰

The Court of Appeal noted that other state courts had also found substitute teachers ineligible for unemployment benefits during the summer recess.⁸⁶¹ The Court of Appeals stated:

"In sum, in the case at bench, we hold that substitute teacher Smith who worked in that professional relationship with the district during the academic year 1979-1980; who was offered by the district continued employment during the post-recess academic year 1980-1981; who accepted such employment offer, however tenuous, and intended to continue that employment relationship with the district during the post-recess term, is ineligible for summer recess unemployment benefits during summer vacation periods having 'reasonable assurance' of such post-recess employment within the meaning and intent of the disqualifying provisions of Section 1253.3."⁸⁶²

⁸⁵⁸ Id. at 683.

⁸⁵⁹ Id. at 683.

⁸⁶⁰ Id. at 684.

⁸⁶¹ See, Ykovchick v. Public Schools of Minneapolis, 251 N.W.2d 626 (1977); Pac v. Unemployment Compensation Board, 409 A.2d 470 (1979); Milkowski v. Illinois Department of Labor, 402 N.E.2d 646 (1980); Ellman v. Unemployment Compensation Board, 407 A.2d 478 (1979); Rish v. Unemployment Compensation Board, 409 A.2d 959 (1980); Holmes v. State Department of Employment Security, 353 So.2d 737, 739 (1977); Goralski v. Commonwealth Unemployment Compensation Board of Review, 408 A.2d 1178 (1979); Herrera v. Industrial Commission, 593 P.2d 329 (1979).

⁸⁶² Id. at 690.

C. Part-Time Instructors

In Cervisi v. Unemployment Insurance Appeals Board,⁸⁶³ the Court of Appeal reviewed the case of several part-time community college instructors' applications for unemployment insurance benefits for the period between fall and spring semesters. The court noted that the hourly employees were denied unemployment insurance benefits by the Unemployment Insurance Appeals Board and that the Superior Court in a writ of mandate action set aside the Unemployment Insurance Appeals Board's decision. The Unemployment Insurance Appeals Board appealed.⁸⁶⁴

The Court of Appeal noted that based on undisputed facts, the trial court found that the clear language of the statute compelled issuance of the writ. The trial court distinguished prior case law and held that the notices of potential assignment were contingent on adequate enrollment, funding, and the approval of the district's board of governors. The Unemployment Insurance Appeals Board had noted that although classes might have been subject to cancellation for lack of funds and/or enrollment, the evidence indicated that the general experience was that the claimants had continued in employment for several ensuing semesters. The Unemployment Insurance Appeals Board found this to constitute a reasonable assurance of continued employment precluding eligibility for benefits. The Superior Court rejected this ruling.

The Court of Appeal held that the unambiguous language of Section 1253.3 and substantial evidence supports the trial court's findings. The Court of Appeal stated:

“Under the statute, an assignment that is contingent on enrollment, funding, or program changes is not a ‘reasonable assurance’ of employment. . . . The administrative record provides sufficient evidence that the assignments given to these hourly instructors depended on their ability to attract a sufficient number of students to justify offering the classes. In fact, the standard faculty assignment form states that ‘employment is contingent upon . . . adequate class enrollment.’ The record also establishes that district enrollment had dropped. A contingent assignment is not a ‘reasonable assurance’ of continued employment within the meaning of Section 1253.3; therefore, the trial court properly issued the writ requiring the respondents to be paid unemployment benefits for the period between the fall and spring semesters.”⁸⁶⁵

PAID SICK DAYS FOR ALL EMPLOYEES

A. Enactment of Legislation

On September 10, 2014, Governor Brown signed Assembly Bill 1522,⁸⁶⁶ effective July 1, 2015. Assembly Bill 1522 would require all employers, public and private, to provide a maximum of three days of paid sick leave. Community college districts, school districts, county

⁸⁶³ 208 Cal.App.3d 635, 256 Cal.Rptr. 142 (1989).

⁸⁶⁴ Id. at 637.

⁸⁶⁵ Id. at 639.

⁸⁶⁶ Stats. 2014, ch. 317. This memo updates the memo of September 10, 2014 (OPAD 14-54).

offices of education, and regional occupational programs will be required to provide paid sick leave to employees who are exempt from paid sick leave benefits under the Education Code under these Labor Code provisions.

Assembly Bill 1522 adds Labor Code sections 245 through 248.5 and amends Labor Code section 2810.5. Labor Code section 245 states that this new law will be cited as the Healthy Workplaces, Healthy Families Act of 2014. The provisions of this new law are in addition to and independent of any other rights, remedies or procedures available under any other law and do not diminish, alter, or negate any other legal rights, remedies, or procedures available to an aggrieved person.

Assembly Bill 304⁸⁶⁷ amends Labor Code sections 245.5, 246 and 247.5 effective July 13, 2015.

B. Applicability to Public Agencies

Labor Code section 245.5 exempts employees covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for paid sick days or a paid time off policy that permits the use of sick days for those employees, final and binding arbitration of disputes concerning the application of its paid sick days provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30% more than the state minimum wage rates. Section 245.5 will, most likely, exempt most public employees since most public employees are covered by collective bargaining agreements and their regular hourly rate of pay is 30% more than the state minimum wage. However, Section 245.5 will not exempt public employees who are not covered by a valid collective bargaining agreement and are not paid more than 30% than the state minimum wage rate.⁸⁶⁸ However, many of these employees receive sick leave pursuant to the Education Code which exceed the amount of sick leave mandated by Assembly Bill 1522.

Assembly Bill 304 amends Labor Code section 245.5(a) and states that an employee of a state, city, county, city and county district or any other public entity who is a recipient of a retirement allowance and employed without reinstatement into his or her respective retirement system is exempt from receiving paid sick leave. The purpose of this latest amendment was to clarify that retirees are not entitled to sick leave.

Labor Code section 245.5(b) defines “employer” and expressly includes political subdivisions of the state. Section 245.5(c) defines a “family member” as any of the following:

1. A child, which for purposes of this article means a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis. This definition of a child is applicable regardless of age or dependency status.

⁸⁶⁷ Stats. 2015, ch. 67.

⁸⁶⁸ This new provision may apply to substitutes, noon and yard duty aides who are not covered by a collective bargaining agreement and may not be paid 30% more than the state minimum wage.

2. A biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child.
3. A spouse.
4. A registered domestic partner.
5. A grandparent.
6. A grandchild.
7. A sibling.

C. Scope of Sick Leave Benefits

Labor Code section 246(a) states that an employee who, on or after July 1, 2015, works in California for 30 or more days within a year from the commencement of employment is entitled to paid sick days. Section 246(b) states that an employee shall accrue paid sick days at the rate of not less than one hour per every 30 hours worked, beginning at the commencement of employment or July 1, 2015, whichever is later. An employee who is exempt from overtime requirements as an administrative executive or professional employee is deemed to work 40 hours per work week for purposes of Section 246, unless the employee's work week is less than 40 hours, in which case the employee shall accrue paid sick days based upon that normal work week.

Assembly Bill 304 amends Labor Code section 246(b) and adds subsections (3) and (4). Section 246(b)(3) states that an employer may use a different accrual method, other than providing one hour per every thirty hours worked, provided that the accrual is on a regular basis so that an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each twelve month period. Section 246(b)(4) states that an employer may satisfy the accrual requirements of Section 246 by providing not less than 24 hours or three days of paid sick leave that is available to the employee to use by the completion of his or her 120th calendar day of employment.

Labor Code section 246(c) states that an employee shall be entitled to use accrued paid sick days beginning on the 90th day of employment, after which day the employee may use sick days as they are accrued. Section 246(d) states that accrued paid sick days shall carry over to the following year of employment. However, an employer may limit an employee's use of accrued paid sick days to 24 hours or three days in each year of employment. Section 246 shall be satisfied and no accrual or carryover is required if the full amount of leave is received at the beginning of each year of employment, calendar year, or 12 month period. The term "full amount of leave" means three days or 24 hours.

An employer is not required to provide additional paid sick leave if the employer has a paid leave policy or paid time off policy, the employer makes available an amount of leave that may be used for the same purpose and under the same conditions, and the policy does either of the following:

1. Satisfies the accrual, carry over, and use requirements of Section 246.
2. Provided paid sick leave or paid time off to a class of employees before January 1, 2015, pursuant to a sick leave policy or a paid time off policy that use an accrual method different than providing one hour per thirty hours worked, provided that the accrual is on a regular basis so that an employee, including an employee hired into that class after January 1, 2015, has no less than one day or eight hours of accrued sick leave or paid time off within three months of employment of each calendar year, or each twelve month period, and the employee was eligible to earn at least three days or 24 hours of sick leave or paid time off within nine months of employment. If an employer modifies the accrual method used in the policy it had in place prior to January 1, 2015, the employer shall comply with any accrual methods set forth in subdivision (b) or provide the full amount of leave at the beginning of each year of employment, calendar year, or twelve month period. This section does not prohibit the employer from increasing the accrual amount or rate for a class of employees covered by this subdivision.
3. Notwithstanding any other law, sick leave benefits provided pursuant to the provisions of Section 19859 or 19868.3 inclusive of the Government Code, or annual leave benefits provided pursuant to Sections 19858.3 to 19858.7 inclusive, of the Government Code, or by provisions of the memorandum of understanding reached pursuant to Section 3517.5, that incorporate or receive provisions of Section 19859 to 19868.3, inclusive, or Sections 19858.3 to 19858.7, inclusive of the Government Code, meet the requirements of this section.

Labor Code section 246(f) states that an employer is not required to provide compensation to an employee for accrued, unused paid sick days upon termination, resignation, retirement, or other separation from employment, except if an employee separates from an employer and is rehired by the employer within one year from the date of separation. In such cases, previously accrued and unused paid sick days must be reinstated. The employee shall be entitled to use those previously accrued and unused paid sick days and to accrue additional paid sick days upon rehiring subject to the use and accrual limitations set forth in Section 246. An employer is not required to reinstate accrued paid time off to an employee that was paid at the time of termination, resignation or separation of employment.

Labor Code section 246(g) states that an employer may lend paid sick days to an employee in advance of accrual, at the employer's discretion and with proper documentation. Section 246(h) states that an employer shall provide an employee with written notice that sets forth the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either the employee's itemized wage statement or in a separate writing provided on the designated pay date with the employee's payment of wages.

If an employer provides unlimited paid sick leave or unlimited paid time off to an employee, the employer may satisfy Section 246 by indicating on the notice or the employees itemized wage statement unlimited.

Labor Code section 246(i) states that an employer has no obligation under Section 246 to allow an employee's total accrual of paid sick leave to exceed 48 hours or six days, provided that an employee's rights to accrue and use paid sick leave under this section are not otherwise limited. Section 246(j) states that an employee may determine how much paid sick leave he or she needs to use, provided that an employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave.

Labor Code section 246(k) states that for purposes of Section 246, the employer, shall calculate sick leave using any of the following calculations:

1. Paid sick time for non-exempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.
2. Paid sick time for non-exempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay by the employee's total hours work in the full pay periods of the prior ninety days of employment.
3. Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Labor Code section 246(l) states that if the need for paid sick leave is foreseeable, the employee shall provide reasonable advance notification. If the need for paid sick leave is unforeseeable, the employee shall provide notice of the need for the leave as soon as practicable. Section 246(m) states that an employer shall provide payment for sick leave taken by an employee no later than the payday for the next regular payroll period after the sick leave was taken.

Labor Code section 246.5(a) states that upon the oral or written request of an employee, an employer shall provide paid sick days for the following purposes:

1. Diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member.
2. For an employee who is a victim of domestic violence, sexual assault, or stalking.

Labor Code section 246.5(b) states that an employer shall not require as a condition of using paid sick days that the employee search for or find a replacement worker to cover the days during which the employee uses paid sick days. Section 246.5(c) states that an employer shall not deny an employee the right to use accrued sick days, discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using accrued sick days, attempting to exercise the right to use accrued sick days, filing a complaint with the Department of Labor or alleging a violation of these sick leave provisions, cooperating in an investigation or prosecution of an alleged violation of these sick leave laws, or opposing any policy or practice or act that is prohibited by these sick leave laws. There shall be a rebuttable presumption of unlawful retaliation if an employer denies an employee the right to use accrued sick days, discharges, threatens to discharge, demotes, or suspends, or in any manner discriminates against an employee within 30 days of any of the following:

1. The filing of a complaint by the employee with the Labor Commissioner or alleging a violation of these sick leave laws.
2. The cooperation of an employee with an investigation or prosecution of an alleged violation of these sick leave laws.
3. Opposition by the employee to a policy, practice, or act that is prohibited by these sick leave laws.⁸⁶⁹

D. Posting of Information

Labor Code section 247(a) states that in each workplace of the employer, the employer shall display a poster in a conspicuous place containing all of the information required by Section 247(b). The Labor Commissioner is required to create a poster containing this information and make it available to employers. Section 247(c) states that an employer who willfully violates the posting requirements of Section 247 is subject to a civil penalty of not more than \$100 per each offense.

E. Maintenance of Records

Labor Code section 247.5 states that an employer shall keep for at least three years records documenting the hours worked and paid sick days accrued and used by an employee, and shall allow the Labor Commissioner to access these records. An employer shall make these records available to an employee in the same manner as required by Labor Code section 226. If an employer does not maintain adequate records, it shall be presumed that the employee is entitled to

⁸⁶⁹ Labor Code section 246.5(c)(2).

the maximum number of hours accruable, unless the employer can show otherwise by clear and convincing evidence.

Notwithstanding any other provisions of this legislation, an employer is not obligated to inquire into or record the purposes for which an employee uses paid leave or paid time off.

F. Enforcement by Labor Commissioner

Labor Code section 248.5(a) states that the Labor Commissioner shall enforce the provisions of these laws relating to sick days, including investigating an alleged violation, and ordering appropriate temporary relief to mitigate the violation or to maintain the status quo pending the completion of a full investigation or hearing. Section 248.5(b) states that if the Labor Commissioner, after a hearing that contains adequate safeguards to ensure that the parties are afforded due process, determines that a violation has occurred, the Labor Commissioner may order any appropriate relief, including reinstatement, backpay, the payment of sick days unlawfully withheld, and the payment of an additional sum in the form of an administrative penalty to an employee or other person whose rights were violated. If paid sick days were unlawfully withheld, the dollar amount of paid sick days withheld from the employee multiplied by three, or \$250, whichever amount is greater, but not to exceed an aggregate penalty of \$4,000, shall be included in the administrative penalty. If a violation results in other harm to the employee or person, such as discharge from employment, or otherwise results in a violation of the rights of the employee or person, the administrative penalty shall include a sum of \$50 for each day or portion thereof that the violation occurred or continued, not to exceed an aggregate penalty of \$4,000.

Labor Code section 248.5(c) states that where prompt compliance by an employer is not forthcoming, the Labor Commissioner may take any appropriate enforcement action to secure compliance, including the filing of a civil action. Section 248.5(d) states that an employee or other person may report to the Labor Commissioner a suspected violation of these sick day provisions.

Section 248.5(e) states that the Labor Commissioner or the Attorney General may bring a civil action in a court of competent jurisdiction against the employer or other person for violations and, upon prevailing, shall be entitled to collect legal or equitable relief on behalf of the aggrieved as may be appropriate to remedy the violation, including reinstatement, backpay, the payment of sick days unlawfully withheld, the payment of an additional sum, not to exceed an aggregate penalty of \$4,000, as liquidated damages in the amount of \$50 to each employee or person whose rights were violated for each day or portion thereof. If the employer has unlawfully withheld paid sick days to an employee, the dollar amount of paid sick days withheld from the employee multiplied by three, or \$250, whichever amount is greater, and reinstatement in employment or injunctive relief; and further shall be awarded reasonable attorney's fees and costs, provided however, that any person or entity enforcing these provisions on behalf of the public as provided for under applicable state law shall, upon prevailing, be entitled only to equitable, injunctive, or restitutionary relief, and reasonable attorney's fees and costs.

Labor Code section 248.5(f) states that in an administrative or civil action, the Labor Commissioner or court, as the case may be, shall award interest on all amounts due and unpaid. Section 248.5(g) states that the remedies, penalties, and procedures provided under these provisions are cumulative. Section 248.5(h) states that an employer shall not be assessed any penalty or liquidated damages due to an isolated and unintentional payroll error or written notice error that is a clerical or an inadvertent mistake regarding the accrual or available use of paid sick leave.

G. Effect on Other Laws

Labor Code section 249(a) states that this article does not limit or affect any laws guaranteeing the privacy of health information, or information related to domestic violence or sexual assault, regarding an employee or an employee's family member. That information shall be treated as confidential and shall not be disclosed to any person except to the affected employee, or as required by law. Section 249(b) states that this article shall not be construed to discourage or prohibit an employer from the adoption or retention of a paid sick days policy more generous than the one required by these provisions. Section 249(c) states that this article does not lessen the obligation of an employer to comply with a contract, collective bargaining agreement, employment benefit plan, or other agreement providing more generous sick days to an employee than required by these provisions. Section 249(d) states that this article establishes minimum requirements pertaining to paid sick days and does not preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for greater accrual or use by employees of sick days, whether paid or unpaid, or that extends other protections to an employee.

H. Notice to Employee

Labor Code section 2810.5, as amended, requires that at the time of hiring, an employer shall provide to each employee a written notice, in the language the employer normally uses to communicate employment-related information to the employee, containing information that an employee may accrue and use sick leave, has a right to request and use accrued paid sick leave, may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave, and has the right to file a complaint against an employer who retaliates.

BODY PIERCINGS AND TATTOOS

The Public Employment Relations Board (PERB) has held that California school districts have a non-negotiable right to adopt a dress and grooming policy for employees. In Inglewood Unified School District,⁸⁷⁰ an administrative law judge held that the school district had the non-negotiable managerial prerogative to implement an employee dress code. In Santa Ana Unified School District,⁸⁷¹ an administrative law judge found that the district's dress and grooming policy was non-negotiable because the policy did not logically and reasonably relate to enumerated subjects within the scope of bargaining. The administrative law judge rejected the faculty association's argument that the dress code policy was related to the negotiable subject of wages because the employees had to buy new clothes and pay increased cleaning bills. The

⁸⁷⁰ 10 P.E.R.C. 17000 (1985).

⁸⁷¹ 22 P.E.R.C. 29136 (1998).

administrative law judge did find that the district was obligated to negotiate the effects of the policy on negotiable subjects.

Our review of federal and state law indicates that the regulation of employee tattoos and body piercings would withstand a discrimination challenge and would fall within the district's prerogative to adopt a dress and grooming policy for employees. The policy should be consistently enforced and the employees should be given notice of the intent to adopt the policy, and the union should be given the opportunity to negotiate the effects, if any, of the policy.

It should be kept in mind that a policy requiring existing employees to cover up tattoos, in individual cases, could create some practical difficulties; individual cases that raise difficulties should be discussed with legal counsel.