Labor and Employment Litigation Update

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I. INTRODUCTION

In the last several months, California and Federal appellate courts, the Public Employment Relations Board, and the Legislature have decided cases and implemented new laws that will significantly impact labor and employment law. Though there have been many important decisions since last fall, several are especially worthy of highlighting in this update as they are particularly impactful to cities as employers.

The recent case decisions and legislation discussed in this paper cover a wide range of employment issues that city employers commonly face. Amongst these decisions we saw several cases brought by employees alleging disability-related claims in violations of the Fair Employment and Housing Act. Further, the U.S. Supreme Court provided guidance on the applicable standard for employers seeking to demonstrate that an employee is exempt from overtime pay under the Fair Labor Standards Act (FLSA). We also saw cases from the Ninth Circuit analyzing FLSA exemptions for types of employees. In addition, the California legislature passed bills prohibiting employers from requiring employees to attend political meetings, and other bills allowing employees to file discrimination claims based on a combination of multiple protected traits.

The next section includes cases and laws with key developments in labor and employment law. We broke down these cases into the following six categories: (1) New Legislation; (2) Employee Discipline; (3) Labor Relations; (4) Retirement; (5) Disability and the Interactive Process; and (6) Fair Labor Standards Act.

II. CASES AND LEGISLATION

Chapter 1: Labor and Employment Related Legislation

A. SB 1137 – Employees May Bring Intersectional Claims for Relief from Discrimination

Under SB 1137, employees can seek relief in civil rights cases against an employer when the employer discriminates against the employee based on *two or more* protected traits. This law expands the existing provisions of the California Fair Employment and Housing Act (FEHA), by allowing remedies to alleged discrimination not just because of one protected trait, but also because of the combination of multiple protected bases.

B. SB 1340 – Local Entities Authorized to Enforce California Civil Rights Law

SB requires state contractors and subcontractors to report data on the demographic information of their employees to the California Civil Rights Department (CRD).

The bill also authorizes local entities to enforce the employment components of California's civil rights laws. The new enforcement process is as follows: the complainant must file their complaint first with the CRD, and then the CRD chooses whether to pursue the action. The CRD can then issue a right to sue letter and a right to seek a local agency enforcement letter. If the complainant pursues local enforcement, and the local agency chooses not to pursue the action, then the worker can go to court. This new process is designed to alleviate the voluminous case load of discrimination claims that CRD receives by ensuring that local agencies have the first choice as to whether to pursue the action.

Lastly, this law requires the Department of Industrial Relations (DIR) to establish a Public Infrastructure Taskforce (Taskforce) which consists of representatives from entities that engage in public infrastructure contracting and procurement projects including state agencies, local governments and agencies, contractors, unions, community colleges, job and worker centers, Tribal Employment Rights Offices, and women in Apprenticeship and Nontraditional Occupations grantees. The Taskforce is required to regularly conduct meetings to make recommendations regarding recruiting and removing barriers to employment in public infrastructure projects for underrepresented communities.

C. SB 399 – Employers Prohibited from Mandating Employee Attendance at Religious or Political Meetings

SB 399 prohibits employers from subjecting employees to any adverse action because the employee declines to attend an employment-sponsored meeting, the purpose of which is to communicate the employer's opinion about religious or political matters. The law requires that an employee who refuses to attend the meeting as described to continue to be paid. The law also imposes a civil penalty of $500 on any employer who violates its provisions. Additionally, the law authorizes the Labor Commissioner to enforce the law's provisions and creates a private right of action for an employee who has suffered as a result of a violation of the bill's provisions.

D. SB 1100 – Employers May Not Discriminate on the Basis of Possession of a Driver's License

SB 1100 expands the definition of discrimination under the FEHA to include discrimination against an employee based on not possessing a driver's license. The law makes it an unlawful employment practice to require and include in employment materials that an applicant must have a driver's license, unless the employer reasonably expects the duties of the position to require driving, and the employer reasonably believes that an alternative form of transportation would not be comparable in travel time or cost to the employer.

E. AB 2499 – Expanded Protections for Family Members of Crime Victims

AB 2499 expands on existing law that allows employees who are victims of crime or abuse to take time off work for specified reasons, including serving on a jury, appearing as a witness in a judicial proceeding, and obtaining or attempting to obtain relief for their injuries.

The law expands on previous law by prohibiting an employer with 25 or more full time employees from discharging, discriminating against, or retaliating against an employee who is a victim or ***an employee who has a family member who is a victim*** for taking time off work for prescribed purposes relating to a "qualifying act of violence." A "family member" includes a parent or guardian, sibling, grandparent, or other relative living in the household of the victim. A "qualifying act of violence" constitutes domestic violence, stalking, or any act that includes brandishing a firearm or other dangerous weapon, a perceived or actual threat of force to cause physical injury or death, or an act which causes physical injury or death.

For an unscheduled absence, an employer can seek certification of the leave in the form of a document from a licensed medical professional, a court order separating employee or employee's family member from the perpetrator of violence, a police report, or any other form of document that reasonably verifies that the violence occurred.

<u>Chapter 2: Employee Discipline</u>

Sunline Transit Agency*, PERB Decision No 2928-M (2024) – *Employee's Critique of Employer is Protected Activity

Motor Coach Operator Anthony Garcia (Garcia) filed an unfair practice charge with the Public Employment Relations Board (PERB) against his employer SunLine Transit Agency. Garcia argued that SunLine violated the Meyers-Milias-Brown Act (MMBA) by retaliating against him when it: (1) issued Garcia notice of an impending written warning in January 2022 for engaging in protected activity; (2) placed Garcia on paid administrative leave pending investigation in May 2022; and (3) fired Garcia in September 2022. After a formal hearing, the ALJ sustained the first two claims and dismissed the third claim.

SunLine filed exceptions challenging the ALJ's ruling in Garcia's favor on the first two claims. In reviewing the ALJ's decision, the Public Employee Relations Board (PERB) rejected SunLine's exception challenging its liability for issuing Garcia a written warning, but sustained

SunLine’s exception regarding its decision to place Garcia on paid administrative leave pending an initial investigation.

SunLine is a public agency which employs bus drivers, who provide transit services in Riverside County. Garcia worked as a bus driver in SunLine’s fixed route division for more than 26 years. Garcia had an unblemished employment record.

SunLine's employment handbook included provisions forbidding employees from posting social media content outside of SunLine's facilities, without a disclaimer indicating that the views posted are the views of the employee, rather than SunLine's own views.

Starting in 2021, Garcia began publicizing issues he had with SunLine, including commentary and complaints about working conditions, health and safety issues, and alleged poor management on a YouTube channel.

In January 2022, SunLine completed an internal investigation of Garcia, in which the investigator opined that Garcia’s YouTube videos violated SunLine’s social media policy. After receiving the investigator's report, SunLine's Human Resources personnel concluded that Garcia violated SunLine’s policies by posting videos while in uniform and failing to mention that he was offering his own opinions rather than SunLine’s views.

On January 19, 2022, Garcia received written notice of the investigation’s outcome. The letter advised Garcia that he had violated SunLine’s social media policies, but it did not indicate how Garcia had violated the policies. On January 26, SunLine issued Garcia a Notice of Impending Discipline (NID) stating that it proposed to issue him a written warning. The NID also notified Garcia that he had a pre-disciplinary right to challenge the proposed discipline. It appeared from the record that after the January 31 pre-disciplinary hearing, Garcia pursued a post-disciplinary grievance regarding the written warning which remained pending through the next series of events leading up to Garcia’s termination.

Garcia briefly paused posting YouTube content based on SunLine’s warnings. However, in April, three months after the issuance of the NID, Garcia resumed posting YouTube videos critiquing SunLine. Garcia posted approximately 70 videos during his employment. Garcia commonly collaborated with another employee named Joseph Raeck, and the two of them created a YouTube channel called “J&A Voices for Change.” On May 18, SunLine informed Garcia that he was the subject of a “confidential personnel investigation” concerning whether statements made on the “J&A Voices for Change" violated company policies.

On August 23, SunLine provided Garcia with a second NID based upon Garcia’s continued posting of social media videos containing recklessly false statements, among other employment violations. On September 7, after Garcia exhausted his pre-disciplinary appeal right, SunLine finalized Garcia’s termination.

PERB affirmed the ALJ's finding that Garcia's activity was protected, and that SunLine violated the MMBA by issuing Garcia a written warning. Employees normally have a statutory right to criticize working conditions, management, or union leadership, if the criticism relates to advancing employee interests or is a logical extension of group activity. Additionally, such speech does not lose protection merely because it is intemperate or engenders ill feelings and strong responses, unless the employer meets its burden to prove such speech was maliciously dishonest. PERB also determined Garcia's speech did not rise to the level of constituting reckless and flagrant disregard for the truth. In determining whether speech is flagrant, PERB considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of what occurred; and (4) the extent to which the speech or conduct at issue can fairly be said to have been provoked by the employer. Where speech about workplace issues occurs off duty, it is normally more difficult for the employer to show that it loses protection. Each of Garcia's videos occurred off-duty. Thus, PERB held that the issuance of the written warning violated the MMBA.

PERB also held SunLine did not act improperly in placing Garcia on paid leave pending the resolution of the investigation. PERB reviewed whether Garcia's protected activity was a substantial or motivating cause for SunLine's decision to investigate him. PERB found that the Garcia's alleged misconduct was sufficient to warrant beginning an investigation, even though the investigation involved off-duty social media activity that related to workplace concerns. SunLine thus did not violate the MMBA by placing Garcia on paid administrative leave pending investigation.

PERB did not issue a ruling with respect to Garcia's third claim, alleging that SunLine violated the MMBA by terminating him, because neither SunLine nor Garcia challenged the ALJ's ruling with respect to that claim. Instead, PERB incorporated the dismissal of Garcia's third claim into its decision.

This ruling demonstrates employers cannot discipline employees just because they criticize the organization or management in social media unless the speech is maliciously false or disruptive to operations. Also, employers should review social media policies to avoid infringing on employee rights.

Bedard v. City of Los Angeles*, 106 Cal.App.5th 442, 458 (2024) – *A Public Employee's Termination for Non-Compliance with the COVID-19 Vaccine is Lawful

In *Bedard v. County of Los Angeles*, the Court of Appeals affirmed the finding of the trial court, holding that the Los Angeles Police Department Board of Rights (the Board) did not abuse its discretion in finding that a police officer was properly terminated for refusing to comply with the COVID-19 vaccination mandate.

In March 2020, the City of Los Angeles declared an emergency due to the spread of COVID-19. Subsequently, the City Council passed an ordinance which required all City employees to be vaccinated against COVID-19 or request a religious or medical exemption. Exempted employees were subject to weekly testing during work hours at no cost. The ordinance articulated that the City's goal is to have a vaccinated workforce: "As such, employees will not have the option to 'opt out' of getting vaccinated . . . Only those with a medical or religious exemption and who are required to regularly report to a work location are eligible for weekly testing." *Bedard v. City of Los Angeles*, 106 Cal. App. 5th at 446.

LAPD negotiated with the Los Angeles Police Protective League (LAPPL) over the consequences for failing to abide by the Ordinance. After negotiations failed, LAPD issued a “Last, Best and Final Offer” (LBFO). The LBFO stated the City would issue a notice to its unvaccinated, nonexempt employees, instructing each employee to either be vaccinated, or be found to be exempt from the vaccination requirement by December 18, 2021. Employees who did not timely comply would be subject to “corrective action.” An employee terminated for noncompliance could seek “reemployment”, subject to the COVID-19 vaccination requirements. Or, an employee could resign or retire, and be eligible for rehire after the vaccination order was lifted.

The mayor issued a memo directing all departments to implement the LBFO and issue a notice to every unvaccinated employee to acknowledge the LBFO deadlines. Employees were required to sign the Notice of Mandatory COVID-19 Vaccination Policy Requirements (Notice), within 24 to 48 hours. Employees who refused to sign the notice were to “be placed off duty without pay,” and sworn employees were to “be subject to applicable Board of Rights proceedings.”

The Plaintiff, Jeannine Bedard, refused to sign the City’s notice enforcing the mandate, and she did not indicate that she was exempt from the mandate for religious or medical reasons. Instead, Bedard merely argued that her daughter had an adverse reaction to the vaccine, and due to "personal reasons" she would not get vaccinated. *Bedard v. City of Los Angeles*, 106 Cal. App. 5th at 456.

Due to Bedard's non-compliance, the Chief of Police sought to terminate her employment as a Los Angeles Police Department (LAPD) officer. The LAPD Board of Rights (the Board) reviewed the Chief's proposed discipline, found Bedard guilty of failing to comply with conditions of employment, and upheld the decision to discharge Bedard. The Board stated that the ordinance had the “full force and effect of the law,” and required all City employees to obtain a COVID-19 vaccine. *Id.* at 450. Since Bedard did not apply for a vaccination exemption and did not work remotely, Bedard was obliged to become vaccinated or seek an exemption and regular testing, which she did not do. The Board also found that the City failed to provide Bedard with sufficient time to respond to the charges in violation of *Skelly v. State Personnel Board* and awarded her backpay but not reinstatement.

Bedard filed a petition in the trial court seeking reinstatement and backpay. Bedard argued that the Board's decision was an abuse of discretion. An abuse of discretion is established if the public agency “has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” *Id.* at 453. A board's determination will rarely be disturbed unless the petitioner can demonstrate “jurisdictional excess, a serious error of law, or an abuse of discretion on the facts.” *Id.* at 454.

On appeal, the Court affirmed the lower court's ruling, concluding that the Board did not abuse its discretion in finding that termination was the appropriate remedy for Bedard’s failure to comply with the vaccination policy. Bedard’s non-compliance put her coworkers and the public at risk of harm. The Court also rejected an argument that Bedard raised for the first time on appeal — that her termination was improper because it was based solely on her refusal to sign the Notice, which she claimed was an illegal contract. The Court found that her termination was based on both her failure to sign the Notice and her refusal to comply with vaccine requirements. The Court also found that the penalty of termination was within the Board's discretion. Finally, the Appellate Court held that the only remedy for the violation of the officer's right to have 30 days to respond to the charges was backpay, and reinstatement was not required. *Id.* at 442.

This ruling clarifies that when a public agency lawfully imposes a valid condition of employment, such as a condition intended to promote the health and security of its employees, an employer may impose discipline when an employee fails to comply with the condition of employment without providing a valid excuse.

Quesada v. County of Los Angeles*, 106 Cal. App. 5th 880, 880 (2024) – *Burden Shifting for Discrimination Claims is Only Applicable in Limited Contexts

In *Quesada v. County of LA*, the Court of Appeal determined that a deputy sheriff, bringing a claim for an improper denial of a promotion, was not entitled to shift his burden of proof. Instead, the plaintiff bore the burden of establishing the elements of his claim by a preponderance of the evidence.

The plaintiff, Marlon Quesada, was employed as a deputy sheriff for the Los Angeles County Sheriff's Department (the Department) since 1995. Over the course of his career, he was suspended for misconduct twice.

In 2015, the Department launched an administrative investigation into Quesada's alleged misconduct. The investigation concerned allegations that Quesada fraternized with someone transporting money or drugs. During the investigation, Quesada was put on administrative leave.

In 2017, the Department notified Quesada of its intent to discharge him. In turn, Quesada filed a petition to halt the Department from taking any further action with respect to his employment, indicating that the Department sent its notice 91 days after the statute of limitations expired. The trial court found in favor of Quesada and enjoined the Department from pursuing disciplinary action relating to the investigation. The Department reinstated Quesada's employment as a deputy sheriff later that same year. Further, the Department labeled the investigation as "inactive" which means that Quesada was neither found guilty or not guilty of the misconduct.

Upon reinstatement, Quesada was assigned to fleet and communications duties. In 2017, Quesada applied for promotion into a position as a sergeant. In determining whether or not to award a promotion, the Department evaluated a variety of factors, including the score on a promotional exam, along with "performance, personal characteristics, and other work-related criteria and merit factors." *Quesada v. County of Los Angeles*, 106 Cal. App. 5th at 885. Quesada took the sergeant's exam and placed in the 80th percentile, but the panel evaluating promotions declined to award him a promotion.

Quesada took the promotional exam again in 2019, this time scoring in the 90th percentile. In reviewing Quesada's application, the panel of evaluators noted that Quesada was "generally a mediocre employee" who "did not have the best work ethic." *Id.* at 886. One evaluator noted that he did not consider the 2017 investigation in reviewing Quesada's application, commenting that "if the case has not been proven, I don't consider it." *Id.*

Quesada filed a second petition in March 2021 requesting that the Court compel the Department to promote him to sergeant and to give him back pay plus interest. The complaint alleged that the Department used the investigation against him in its review process. Quesada also requested that the trial court apply a burden-shifting test in evaluating the evidence, which is typically used in race discrimination claims. Under the burden-shifting test, as adopted in *McDonnell Douglas Corp. v. Green*, once the plaintiff sufficiently sets forth a claim of racial discrimination, the burden is on the defendant to articulate "some legitimate, non-discriminatory reason for the plaintiff's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973).

On appeal, the Court affirmed the ruling of the trial court, finding that "the concerns that motivated the *McDonnell* Douglas rule are absent here." *Quesada v. County of Los Angeles*, 106 Cal. App. 5th at 889. Rather than framing himself as a member of a historically oppressed and disfavored class, Quesada framed himself as a law enforcement officer seeking a supervisory promotion.

The *Quesada* ruling demonstrates that burden shifting is only appropriate in limited contexts. The test is not applicable when a generally aggrieved employee does not argue they were discriminated against because of a protected trait.

Ramirez v. City of Indio,* 105 Cal.App.5th 939 (2024) – *Unambiguous Language in an MOU Authorizes Termination Decisions

In *Ramirez v. City of Indio*, the Plaintiff appealed a city manager's decision to terminate his employment as a police officer at the conclusion of the appeals procedure set forth in a memorandum of understanding (MOU) between the city and a police officers' association. While an arbitrator had recommended the reinstatement of the officer, the city manager upheld the police chief's decision to terminate plaintiff. The MOU vested the City Manager with power to revoke the arbitrator's advisory findings.

The trial court concluded that under the Public Safety Officers Procedural Bill of Rights Act (POBRA) and the unambiguous language of the appeals procedure set forth in the MOU, the city manager was not required to defer to the arbitrator's findings. The city manager successfully shouldered its burden of proof by showing justifiable cause for the termination by a preponderance of the evidence.

The facts of *Ramirez* are as follows. Ramirez had been employed as a police officer in the City of Indio (City) since 2005. In August 2016, Ramirez was charged with rape and two additional counts of sexual assault of his 18-year-old niece. The City placed Ramirez on administrative leave, asked him to turn in his work cell phone, and initiated an internal affairs investigation. In June 2018, a jury acquitted Ramirez of all criminal charges.

The City's own investigation resulted in two conflicting reports. In a November 2018 memorandum, the sergeant who conducted the initial investigation concluded Ramirez had violated multiple standards of conduct set forth in the Department's policy manual, including misrepresenting material facts, dishonest or disgraceful off-duty conduct affecting the officer's relationship with the department, and conduct reflecting unfavorably on the department. After further investigation, a different sergeant concluded in a March 2019 memorandum that the previously identified policy violations were "not sustained."

In June 2019, the Chief issued a notice of intent to terminate Ramirez and conducted a *Skelly* meeting in September, which provided Ramirez with an opportunity to orally respond. Ramirez was ultimately terminated from his employment. Subsequently, Ramirez sought an administrative appeal of the City's decision.

In September 2021, an arbitrator issued a written statement of advisory findings, recommending the Chief's decision to terminate Ramirez "be overturned and that Ramirez be reinstated and made whole with full back pay and benefits." *Ramirez v. City of Indio*, 105 Cal. App. 5th at 944. After carefully reviewing the arbitrator's written statement of advisory findings and recommendations, the MOU, the Chief's notice of intent to terminate and notice of termination and associated attachments, and other related policies, the City Manager issued a detailed final written decision on December 14, 2021, rejecting the arbitrator's findings and affirming Ramirez's termination.

The City Manager explained his decision was "based on Ramirez's poor judgment and conduct." *Id.* at 945. The City Manager concluded that the City had demonstrated, by a preponderance of evidence, that Ramirez drove under the influence, reset his department-issued cell phone with the intention to prevent the discovery of incriminating information, and made dishonest and/or inconsistent statements during the investigations and trial regarding the alleged rape and sexual assault.

On appeal, the Court affirmed the ruling of the lower court. The Court analyzed the MOU in accordance with the rules of contract interpretation, finding that the language of the MOU, if clear and explicit, governs the conduct of the parties. The Court also concluded that the MOU's Appeals Procedure also satisfies due process requirements. Ramirez was provided with a notice of termination that included the specific reasons and materials upon which the proposed termination was based, and Ramirez had an opportunity to respond to the Chief in writing. At the appeal hearing, the City maintained the burden of proof while Ramirez was given an opportunity to present his side of the story by presenting evidence and cross-examining witnesses.

Accordingly, the Appellate Court concluded that the City and the City Manager "proceeded in the manner required by law," and there was no abuse of discretion.

This ruling clarifies that when an MOU governs conduct between the parties, including the dispute resolution process, courts are disinclined from interfering or overturning decisions made in accordance with the MOU. This is because both parties, including the union as the representative of the bargaining unit members, already negotiated and agreed to the dispute resolution process set forth in the MOU after a process of meeting and conferring.

<u>Chapter 3: Labor Relations</u>

A.L.A.D.S. v. County of Los Angeles,* 106 Cal.App.5th 982 (2024) – *County Must 'Meet and Confer' Before Initiating Investigation into Sheriff Gangs

In *A.L.A.D.S.*, a preliminary injunction was properly issued when it halted an investigation into gang activity among law enforcement officers, pending collective bargaining on the investigation's effects or the resolution of an unfair labor practice claim, whichever occurred first. Although the decision to investigate gang activity was lawful, the investigation itself directly implicated certain officers and created a new basis for disciplinary action, which would have had significant and adverse effects on working conditions.

On May 12, 2023, the Office of the Inspector General for the County of Los Angeles (OIG) sent a letter to 35 individual Los Angeles Sheriff's Department (LASD) deputies. The letter directed the deputies "to participate in an interview" "to establish the membership of the Banditos and Executioners" and advised that the deputies "must appear and answer questions." *Assn. for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 106 Cal. App. 5th at 990. The letter informed the deputies that their legs would be inspected at the interview.

Six days after the issuance of OIG's letter, Los Angeles County Sheriff Robert Luna sent the deputies his own letter, ordering them to participate in the interviews, and warning that refusal to cooperate would be grounds for discipline, including termination.

The union representing the deputies—the Association for Los Angeles Deputy Sheriffs (ALADS)—filed an unfair labor practice claim with the Employee Relations Commission (ERCOM) and simultaneously sought injunctive relief from the trial court to enjoin the OIG from proceeding with the interviews without first meeting and conferring with ALADS under the MMBA and the Employee Relations Ordinance of the County of Los Angeles (ERO).

On June 2, 2023, the trial court issued a temporary restraining order, and scheduled a hearing regarding a preliminary injunction, specifying that while it rejected ALADS' constitutional rights-related arguments - that the planned interrogations would violate the deputies' Fourth and Fifth Amendment rights – against the investigation, it would hear argument on other grounds.

In its July 10, 2023, written ruling on the preliminary injunction hearing, the trial court concluded ALADS had shown a likelihood of success on its claim under the MMBA and ERO. Under the ERO, "[a]ll matters affecting employee relations, including those that are not subject to negotiations, are subject to consultation between management representatives and the duly authorized representatives of affected employee organizations. Every reasonable effort shall be made to have such consultation prior to effecting basic changes in any rule or procedure affecting employee relations." *Id.* at 996.

The trial court concluded that "the consequences of those interviews include the duty to cooperate on pain of discipline, the discretionary application of discipline and its range, and the referral to POST for possible decertification, all of which are easily the subject of bargaining." *Id.* at 991. The court also weighed the "irreparable harm [that would result] from the County's failure to meet and confer" before implementing its interviews, against the "need for immediate investigation," and concluded that "the balancing of the harms works in favor of a preliminary injunction that will maintain the status quo." *Id.* The trial court issued a preliminary injunction enjoining the OIG's interviews of the deputies "until the County completes its bargaining or until ERCOM decides the unfair labor practices charge." *Id.*

In affirming the trial court's ruling, the Court of Appeal held that the interviews target specific deputies with questions about their personal affiliations with gangs. The letter mandating the interviews also cites legislation that expressly prohibits deputies' membership in gangs and mandates disciplinary action on that basis. As a result, the interviews, with such a close link to disciplinary action, have a "significant and adverse effect" on working conditions. *Id.* at 982. In accordance with the parties' collective bargaining agreement, the parties were required to meet and confer before the interview directive, as the interviews would create a new basis for imposing discipline on employees. Under the MMBA, "management directives" which "impact employee discipline" trigger the MMBA's meet and confer requirements. *Id.* at 995.

In this decision, the Court of Appeal reinforces for public employers that when the parties are governed by a collective bargaining agreement, the parties must meet and confer with respect to matters that have a significant and adverse effect on working conditions that could lead to employee discipline. It is also important to note that while public employers are not subject to the meet and confer requirement before initiating an investigation, this requirement is triggered when the employer implements a condition of employment, such as the "interview directive" at issue, that would have had a direct impact on the employment conditions (*e.g.* potential discipline) of the deputies being investigated.

Chapter 4: Retirement

Petree v. Public Employees' Retirement System*, 106 Cal. App. 5th 585 (2024) – *County and City Entities Do Not "Merge" Without One Entity Assuming the Functions of the Other

In *Petree*, former city police officers claimed the simultaneous closing of the City's police department and the hiring of the officers by the County sheriff's department resulted in a merger of the departments entitling them to a higher pension. The trial court found that there was no effective merger of the County and the City because the County never assumed any municipal obligations of the City. Law enforcement inside the municipality remained the City's obligation, which it fulfilled by contracting with the County. Therefore, the pensions for city officers and sheriff deputies were calculated and paid out under separate contracts.

The plaintiffs in *Petree* were former officers with the City of Perris Police Department (Perris PD). In 1996, the City of Perris (City) decided to close its police department and contract with Riverside County (County) for municipal law enforcement services, subsequently, the officers were hired as deputies with the Riverside County Sheriff. As a result of this closure, plaintiffs contend that the County and the Public Employees' Retirement System (CalPERS) must credit the officers' service with the Perris PD as service with the Sheriff's Department, which would entitle them to a more generous pension.

Under the City's formula for law enforcement officers, former officers who retired at age 55 or older were entitled to annual pension payments equal to 2.5 percent of their final salary multiplied by their years of service. Under the County's formula, law enforcement officers who retired at age 50 or older could draw annual pensions equal to 2 percent of their final salary multiplied by their years of service. In 2001, the County changed this formula to 3 percent at age 50 or older, and applied it to deputies' "credited prior and current service." The Court concluded that since the plaintiffs did not become employed by the County before 1996, the increase to the pension formula did not apply to credits earned with the Perris PD. Rather, plaintiffs' pension benefits are calculated in two separate segments: (1) one based on service credit with the Perris PD (2.5 percent at 55), and (2) another based on service credit with the Sheriff's Department (now 3 percent at 50).

Plaintiffs' sought a declaration that the closing of the Perris PD and the Sheriff's Department's hiring of the officers resulted in a merger of the departments. They also sought a declaration that the County is liable for the officers' service credit with the Perris PD and because the departments merged. The trial court entered judgment in defendants' favor. The County was not required to treat the former police officers' service as service with the Sheriff's Department.

On appeal, the Court affirmed the lower court's ruling, finding that the City and the County both continue to exist as separate entities, and thus the contracts have not merged for the purpose of providing an increased pension. In determining whether a contract has necessarily "merged," the Court of Appeal concluded that courts should consider whether an agency has succeeded a prior agency or assumed its functions. In the present case, the County never assumed any municipal obligations for the City, it merely contracted with the City to provide certain governmental services. Thus, the City did not give away its obligation to provide its residents with law enforcement services, it merely contracted those services out to the County, while retaining its right to end the contract at any time and retaining its status as a separate municipality.

The Court of Appeal's analysis sets forth the test for determining whether two separate municipalities have effectively merged: whether the entities continue to exist as separate entities, or whether the one agency assumes the functions of the other. Additionally, consideration should be given to whether the agencies have taken any steps to merge their contracts.

Chapter 5: Disability Discrimination and the Interactive Process

Howell v. State Department of State Hospitals,* 107 Cal.App.5th 784 (November 7, 2024) – *Employee Seeking Non-Economic Damages Must Prove Termination Actually Caused Non-Economic Injuries

In *Howell v. State Department of State Hospitals*, the Appellate Court determined that a viable FEHA claim for non-economic damages must actually set forth facts demonstrating that the employee incurred injuries as a direct result of being terminated or experiencing another adverse employment action.

At the trial court level, the jury found plaintiff Ashley Howell had been discriminated against by her former employer, State Department of State Hospitals (DSH). The jury awarded Howell $36,751.25 in lost earnings and health insurance benefits but nothing for pain and suffering (noneconomic damages). After trial, the court denied Howell's motion for a limited new trial regarding noneconomic damages and granted DSH's motion for judgment notwithstanding the verdict. In addition, Howell sought $1.75 million in attorney fees and prejudgment interest, but the court awarded her $135,102.

The facts of *Howell* are as follows. During DSH's hiring process, Howell underwent a preliminary health screening, which required Howell to disclose, "disorders of the nervous system," any "respiratory trouble," and any shortness "of breath." *Howell v. State Dept. of State Hospitals*, 107 Cal. App. 5th at 147. Although Howell disclosed having asthma, she responded "no" to the other questions.

However, Howell had been previously diagnosed with major depressive disorder and post-traumatic stress disorder following a 2017 sexual assault by a patient inmate at a Department of Corrections and Rehabilitation (CDCR) hospital in Stockton, where Howell previously worked. After the assault, Howell experienced panic attacks with trouble breathing.

When Howell commenced working with DSH, she was still on medical leave with CDCR. DSH was not aware of Howell's medical leave status until it communicated with CDCR regarding employment transfers. DSH discovered that Howell had sustained an injury to her nervous system, which was inconsistent with Howell's representations on her DSH health questionnaire. Subsequently, DSH terminated Howell's employment. After the trial court's ruling denied her noneconomic damages, Howell sought a new trial limited to the noneconomic damages award, which the court denied.

On Appeal, the Court affirmed the ruling of the lower court, finding that the termination by DSH did not cause Howell physical injury, additionally, there was undisputed evidence that Howell endured pain and suffering in connection with the 2017 assault, rather than the termination from employment at DSH. In ruling, the Court relied on the evidence from Howell's physician, who testified that Howell's "mental health symptoms," including her panic attacks, "were substantially caused by the sexual assault at the CDCR." *Id.* at 151. In addition, Howell acknowledged that her physician "testified he did not believe the termination exacerbated any mental disorder." *Id.* at 152.

As to the award of attorney fees, the Court affirmed the lower court's finding that the total hours expended were "outside all bounds of reason given the number of issues involved in the matter and their relative lack of complexity." *Id.* at 146. It concluded that "given the unreasonably inflated fee request, the court was authorized to substantially reduce the requested amount." *Id.*

Through *Howell*, the Appellate Court demonstrates that there must be a link between the alleged adverse employment action or wrongful termination and the injury that the employee incurs for the employee to recover noneconomic damages.

Miller v. Department of Corrections,* 105 Cal.App.5th 261 (2024) – *A Reasonable Accommodation Must Facilitate an Employee's Return to Work

Plaintiff Maria Miller was employed as a correctional officer with the Department of Corrections and Rehabilitation (CDCR) at the California Institution for Women (CIW). Eight years into her employment, she was injured as the result of a slip and fall incident while working offsite in a temporary assignment. The CDCR offered to demote Miller to an alternative available position that would accommodate her work restrictions. In turn, Miller did not accept the position offered, and she informed CDCR that she suffered from a previously undisclosed mental disability that prevented her from returning to work while receiving treatment. When Miller did not accept the position, she was placed on an unpaid leave of absence. In addition, Miller sought CDCR's assistance in applying for disability retirement as an "alternative accommodation," and disagreed with CDCR's decision not to assist her in applying.

In 2020, Miller filed suit against CDCR under FEHA, alleging claims for disability discrimination, failure to accommodate, failure to engage in the interactive process, failure to prevent discrimination, and retaliation. Miller's original complaint also included a claim for violation of Government Code section 21153, which requires a public employer to apply for a CalPERS disability retirement on an employee's behalf in certain situations, but Miller voluntarily dismissed that claim. CDCR filed a motion for summary judgment on the remaining claims.

In support of its motion for summary judgment, CDCR presented the undisputed fact that in August 2018, Miller's doctor determined that she had reached maximum medical improvement and would be subject to permanent work restrictions. Miller's doctor's medical orders precluded her from lifting, pushing, or pulling items over 30 pounds in weight; repetitive bending, twisting, or stooping; and kneeling or squatting. CDCR presented additional undisputed facts to demonstrate that the essential functions of a CDCR correctional officer require the physical ability to run, climb, lift and carry, stoop, crawl and crouch, push and pull, brace, and twist. Due to her permanent restrictions, Miller sought, but did not receive, CDCR's assistance in applying for disability retirement under CalPERS (California Public Employees' Retirement System). Miller's manager informed her that disability retirement is only pursued after CDCR has "exhausted all potential options that might permit an employee to return to work." *Miller v. Department of Corrections & Rehabilitation*, 105 Cal. App. 5th at 270.

In December 2018, Miller agreed to accept a medical demotion and placement in alternative positions as an accommodation that would permit her to return to work. CDCR identified three potential positions for Miller and offered to medically demote her to the position that had the highest salary. However, Miller failed to appear for two orientations for the new position. Miller informed CDCR that her absences coincided with her commencing mental health treatment, and that her treating psychologist had determined she was unable to work while receiving treatment for her mental health.

In support of her Opposition to the summary judgment motion, Miller submitted excerpts from her own deposition stating that (1) as a result of being placed on unpaid leave, she was not paid, stopped accruing seniority, was not receiving health benefits, and did not receive a renewed state identification card; (2) she recalled that other officers had been given "light duty" positions as an accommodation; (3) she declined to attend orientation for the alternative position offered to her because it was not at her regular work location and CDCR did not offer to pay for her travel to the new location; and (4) she disagreed with CDCR's decision not to apply for disability retirement on her behalf.

CDCR presented evidence that Miller's permanent restrictions were incompatible with the essential duties of a correctional officer, Miller's own testimony admitted that her permanent restrictions rendered her incapable of performing the essential duties of a correctional officer, and Miller's own testimony conceded that she has been unable to return to work while receiving treatment for her mental disability. Additionally, CDCR offered evidence to show that (1) it communicated with Miller on multiple occasions regarding potential alternative positions; (2) it identified medical demotion to an alternative position as a potential option; (3) once Miller consented to a medical demotion, CDCR offered her an alternate position; and (4) Miller declined to accept the alternate position. This was evidence that a reasonable accommodation was offered and refused.

Miller did not present any evidence to dispute the essential duties of a correctional officer or any evidence to suggest that her disability-related restrictions would permit her to perform the essential duties of a correctional officer. As a result, Miller failed to meet her burden to refute the summary judgment motion.

Under FEHA, a reasonable accommodation means "a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." *Id.* at 280. Reasonable accommodations must constitute efforts intended to facilitate the disabled employee's eventual return to work.

In affirming the lower court's ruling, the Court of Appeal found that a reasonable accommodation is limited to efforts that facilitate an employee's return to work. In contrast, the purpose of disability retirement is to separate an employee from work. Although the CalPERS retirement law at Government Code section 21153 requires an employer to file for a disability retirement on an employee's behalf in some circumstances, Miller had voluntarily dismissed her section 21153 claim. The Court said that even if CDCR wrongfully refused to apply for disability benefits on Miller's behalf, that fact would not have created a material dispute of fact on CDCR's motion.

Finally, the Court found that Miller's claim for retaliation failed because there was no evidence that Miller undertook any protected activity, which is an essential element of a retaliation claim. Miller's complaint alleged that her sole protected activity was becoming disabled. The Court found that neither the involuntary act of becoming disabled, nor the fact that Miller notified the CDCR that she had a disability, was protected activity.

The Appellate Court's ruling explains that disability retirement in the PERS system does not constitute an accommodation under FEHA, as it does not make it possible for the employee to return to work.

Wentworth v. Regents of University of California*, 105 Cal. App. 5th 580 (2024) – *A Reasonable Accommodation Does not Excuse an Employee from Performing the Essential Functions of Their Role

Plaintiff Blake Wentworth, formerly a professor at the University of California, Berkeley (UC Berkeley), appealed from a trial court order granting the defendant, Regents of the University of California (Regents), summary judgment as to Wentworth's claims under the FEHA that he was denied a reasonable accommodation, and that the Regents failed to engage in the interactive process. Wentworth's remaining causes of action went to a jury, where they returned a verdict in favor of the Regents on all of Wentworth's causes of action with the exception of failure to disclose Wentworth's personnel file.

Wentworth additionally contested the trial court's ruling on summary judgment as to Information Privacy Act claims, but for this paper's purposes, this summary will only describe the FEHA claims. A brief summary of the events of *Wentworth* is as follows.

Wentworth commenced employment in 2012 as an assistant professor in South and Southeast Asian Studies at UC Berkeley. In 2014, Wentworth wrote to Jeffrey Hadler, chair of his department at the time, explaining that he was suffering from certain mental health issues stemming from a bipolar diagnosis but would "pull through." *Wentworth v. Regents of University of California*,105 Cal. App. 5th at 588. In February 2015, Wentworth was hospitalized after attempting to commit suicide.

Hadler initiated a meeting with Wentworth, as he was unsure how Wentworth's mental condition would affect his job performance. Hadler wanted to explore whether there were any accommodations that would allow Wentworth to fulfill the essential functions of his job. Hadler suggested that Wentworth review the processes for faculty accommodations. Wentworth agreed to meet but initially resisted any suggestion that his disability would require accommodations.

At the February 2015 meeting, Hadler offered Wentworth a medical leave, which involved: 1) relieving him of all duties; 2) stopping his tenure clock, which would require him to continue to teach and perform other duties, but push back his deadlines for completing a body of research for consideration for tenure purposes; and 3) other accommodations. In an e-mail after the meeting, Wentworth thanked Hadler for the "deeply humane" conversation and said Hadler could get in touch with his doctor about his prognosis. Hadler responded that Wentworth simply needed to provide medical documentation of the limits of his condition. Hadler also told Wentworth to discuss with his doctors what would be best for him, such as medical leave, stopping his tenure clock, or a request for accommodations. Hadler provided Wentworth a copy of the university's procedures for providing accommodations. Later in April 2015, Wentworth provided doctors notes: 1) saying that he had a partial disability that prevented him from satisfying the research component of his duties; and 2) requesting to stop his tenure clock for two semesters. In July 2015, the University approved his request for accommodation.

During the interactive process, the university was also investigating student complaints against Wentworth for sexual harassment. Some of the students who alleged Wentworth had sexually harassed them discussed their experiences with the media. Soon articles were published about Wentworth. The article in the San Francisco Chronicle included a description of a letter department professors had written to the department head regarding Wentworth. Also, in a faculty-student department meeting in April 2016, the head of the department described the interactive process conversations he had with Wentworth, among other confidential information regarding the complaints against Wentworth.

In September 2016, Wentworth filed an action against the university, alleging several causes of action under the Fair Employment and Housing Act (FEHA) (including disability harassment, disability discrimination, retaliation, failure to engage in the interactive process, failure to provide reasonable accommodation, and failure to prevent discrimination, harassment, and retaliation). Wentworth claimed that the University failed to engage in the interactive process and provide reasonable accommodations for his bipolar disorder. Wentworth also alleged privacy-related causes of action related to the university's disclosure of information related to the student complaints and disability accommodations.

Ultimately, the Court of Appeal affirmed the trial court's rulings on the interactive process and reasonable accommodation claims because the evidence showed that the university engaged in the interactive process in good faith and offered a reasonable accommodation.

In accordance with the FEHA, it is an unlawful employment practice to fail to make reasonable accommodations for the known physical or mental disability of an employee, unless the employer demonstrates that doing so would impose an undue hardship. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions.

The Regents pointed to evidence that after Wentworth's hospitalization, Hadler met with Wentworth and offered different accommodations. Wentworth did not tell Hadler he was unable to teach. Similarly, after Hadler asked Wentworth to provide medical documentation of the functional limitations of his condition, Wentworth and his doctors only said he was unable to perform research, not unable to teach. In affirming the ruling of the lower court, the Appellate Court held that this evidence is sufficient to establish that the Regents engaged in the interactive process in good faith and offered accommodations that would reasonably meet Wentworth's needs as he identified them.

The Court determined that each of Wentworth's arguments against summary adjudication lacked merit. First, Wentworth argued that the Regents should have accommodated him by excusing his frequent absences, and instead the Regents punished him by denying him reappointment and disciplining him. The Court denied this contention, noting that this claim was merely a reformulation of Wentworth's complaint that the Regents discriminated against him by subjecting him to adverse actions. The discrimination claim was already rejected by the jury. Second, Wentworth argued that the Regents should have engaged further in the interactive process by offering him research leave or modified duty. The Court denied this claim because Wentworth told the Regents that his disability impaired his ability to conduct research. Thus, it would not make sense for the Regents to place Wentworth on modified duty to perform a task that he indicated he could not perform.

Wentworth next disputed that stopping his tenure clock constituted a reasonable accommodation. Instead, Wentworth argued that the Regents should have accommodated him by relieving him of his research duties and allowing him to progress to tenure at the same pace as his peers. The Court denied this argument on the basis that since research and writing were essential functions of employment as a professor, it could not be a reasonable accommodation to relieve Wentworth of those duties. The Court concluded that "elimination of an essential function is not a reasonable accommodation." *Wentworth*, 105 Cal. App. 5th at 602. Lastly, Wentworth argued that the Regents failed to engage in the interactive process by denying him reappointment as a professor based on his insufficient research. The Court again concluded that this argument was a reformulation of his complaint that he was subject to adverse action. The Court noted that this issue was already decided and resolved in the Regents' favor by the jury.

The Court reversed the summary adjudication of the invasion of privacy causes of action, finding that there were triable issues of fact regarding whether the University violated the Information Practices Act (IPA). The IPA prohibits state agencies, like the University from disclosing information that identified or described employees like Wentworth, including information about medical or employment history. The letter about student complaints and the discussion at the April 2016 student-faculty meeting contained information regarding Wentworth's medical and employment history. The University did not dispute that the leaks of information about Wentworth could be attributed to it. The Court held that a reasonable jury could conclude from this evidence that someone in the department leaked the letter to the media to bring attention to Wentworth. The IPA claim was remanded to the trial court for further proceedings.

This decision reminds public agency employers to engage in the interactive process in good faith by offering accommodations that allow an employer to perform their essential job functions, however, an employer does not need to excuse an employee from the performance of functions which are essential to their employment. A reasonable accommodation cannot be an action which ultimately relieves the employee from the performance of their essential job duties.

Chapter 6: Fair Labor Standards Act

E.M.D. Sales, Inc. v. Carrera, 604 S. Ct. 45, 46 (2025) – *The Preponderance of the Evidence Standard Applies When Alleging that an Employee is FLSA Exempt*

EMD Sales sets forth the legislative history behind the Fair Labor Standards Act (FLSA), as a means of providing further context as to why the preponderance of the evidence standard is most appropriate when determining FLSA exemptions. In 1938, Congress enacted FLSA, guaranteeing a federal minimum wage, and requiring overtime pay for those working more than 40 hours per week. Congress exempted many types of employees from the FLSA's overtime-pay requirement, including outside salesmen who primarily work away from their employer's place of business. The employer shoulders the burden of showing that an exemption applies.

The petitioner, EMD Sales, distributes food products and employs sales representatives to manage inventory and take orders at local stores. In 2018, several sales representatives sued EMD Sales at the Maryland District Court, alleging that the company violated the FLSA by failing to pay them overtime. EMD Sales argued that the sales representatives were outside salesmen and therefore exempt from the FLSA's overtime-pay requirement. After a bench trial, the District Court found EMD Sales liable for overtime because EMD Sales did not prove by ***clear and convincing evidence*** that its sales representatives were outside salesmen. In holding that the sales representatives were not outside salesman, the district court noted that the employees primarily executed the terms of sales already made, rather than making new sales themselves. The court therefore ordered EMD Sales to pay overtime wages and liquidated damages.

On appeal, EMD Sales argued that the clear and convincing standard was inapplicable to FLSA exemption matters, and instead the preponderance-of-the-evidence standard was applied. The Fourth Circuit court disagreed and affirmed the District Court's judgment.

When Congress enacted the FLSA, the preponderance-of-the-evidence standard was the default. The Court has only deviated from this standard when 1) a statute requires a heightened standard of proof, 2) The Constitution mandates a heightened standard of proof, or 3) when the matter involves coercive Government action, such as taking away a person's citizenship.

In rejecting the Fourth Circuit's decision, the U.S. Supreme Court indicated that the preponderance of the evidence standard was appropriate in FLSA matters where the case does not involve constitutional rights. In addition, FLSA cases do not involve the government taking unusual or coercive action against an individual. Instead, FLSA cases are similar to Title VII employment-discrimination cases, where the Court has applied the preponderance standard. Finally, the FLSA does not specify a standard of proof for the Act's exemptions. Given the silence in the statute, courts usually apply the default preponderance standard.

The employees argued that the heightened standard is applicable because the FLSA protects the public interest in a fair economy. However, the Supreme Court noted that other workplace protections, like those under Title VII, also serve important public interests but are subject to the preponderance standard. The employees argue that rights under the FLSA are nonwaivable and therefore different from other rights subject to the preponderance standard. However, the Court pointed out that the waivability or non-waivability of a right does not relate to the standard of proof.

Ultimately, the Court concluded that the preponderance-of-the-evidence standard is apt when an employer seeks to show that an employee is exempt from the minimum-wage and overtime-pay provisions of the FLSA. This ruling is favorable to public employers, as it does not impose heightened standards of proof for proving that a particular employee is exempt from FLSA.

Kennedy v. Las Vegas Sands Corp.*, 110 F.4th 1136 (9th Cir. August 1, 2024) – *An Employee's High Level of Complex Decision-Making can Lead Towards Exemption Under FLSA

In *Kennedy v. Las Vegas Sands*, the Ninth Circuit Court of Appeals held that the plaintiffs, a group of corporate jet pilots, were considered exempt workers under the FLSA and thus, not subject to FLSA's overtime or minimum wage provisions.

Under the FLSA, there are exemptions for specified employees which excuse an employer from having to pay overtime. The FLSA particularly exempts employees whose primary duties are of an executive, administrative, or professional nature. In determining whether an exemption is applicable, courts look to the employee's primary duties, or the "principal, main, major, or most important" duties of the role. *Kennedy v. Las Vegas Sands Corp.*, 110 F.4th at 1140.

After a bench trial, the 9th Circuit Court of Appeals affirmed the district court's judgment, holding that because the corporate jet pilots' duties primarily involved complex decision-making, and exercising discretion over significant matters, they were exempt from overtime pay. Further, the court held that the pilots were also not entitled to overtime pay because the pilots did not work over 40 hours per week.

The five plaintiffs were a group of full-time corporate jet pilots who flew their employer's customers, high level executives, and family members. The pilots were assigned to scheduled flights but often were assigned to "pop-up flights" where they might be needed to fly a plane if the actual scheduled pilot was unable to fly. The pilots argued that they were entitled to overtime pay for "on-call" time spent between scheduled flights.

The trial court held that: 1) the pilots were not entitled to overtime pay because of the independent judgment the pilots exercised in their duties, and 2) the pilots' on-call time did not constitute compensable work, because it was not actual hours worked in service of the employer, and thus the pilots did not meet the minimum threshold for overtime pay of 40 hours per week.

On appeal, the pilots argued that the district court erred in declaring them exempt because: 1) the pilots performed manual labor, and 2) the pilots followed a set of procedures and checklists as part of carrying out their job duties.

Under the FLSA, jobs whose primary duties require the employee to perform tasks of a demanding or physical nature are non-exempt employees entitled to overtime. The pilots argued that because their jobs required physical training, and because they had to frequently operate the planes manually, they were non-exempt. The court concluded that while the pilots were required to undertake some physical duties, their primary duties or "principal, main, major, or most important" duties were not physical in nature. In contrast, the pilots' primary duties involved the "safe transport" of the passengers and the pilots' "judgment, aviation acumen, and decision-making skills were far more important to the job of piloting a plane." *Id.* at 1142.

Secondly, the pilots argued that they were non-exempt because they rarely exercised discretionary judgment, and instead their duties were limited to a set of established procedures and checklist. In turn, the court held that the primary duties were still of a discretionary nature as the pilots were required to create their own flight plans, detail the amount of fuel balances, and confirm all safety checks. Even absent emergency conditions, the pilots regularly and customarily made discretionary decisions.

As a final conclusion, the court clarified that due to the highly complex nature of their roles, and the pilots' ability to freely spend their on-call waiting time, the pilots were exempt from the FLSA and not entitled to overtime. Even if the pilots did not qualify as exempt employees under the FLSA, they still would not be entitled to overtime for the time spent waiting “on-call” for a “pop-up flight”. The Court found that the pilots’ on-call time was not work time because the pilots could and did participate in personal activities. If a pilot said they were unavailable for a pop-up flight, the scheduler moved to the next pilot on the list. The pilots did not receive compensation for the on-call time, which also indicated that the time was not work.

In considering whether on-call work constitutes compensable work, the court considered the degree to which the employee is free to engage in personal activities, and any agreement between the parties suggesting that wait time is compensable. The court held that there was no explicit agreement governing on-call time. Further, the pilots were free to engage in personal activities without geographical or physical restrictions.

This ruling is helpful to cities and other public agencies that pay employers to wait for a particular event to happen, such as cities that employ on-call bus operators. The language characterizing the pilots' on-call work clarifies that when the employee is not restricted in their physical movement or geographical location, it is less likely that the on-call time is compensable.

Further, the ruling clarifies that even when an employees' duties include tasks that are associated with non-exempt roles, employers should ascertain whether the employee's ***primary duty*** falls under an applicable exemption.

Silloway v. City & Cnty. of San Francisco*, 117 F.4th 1070 (9th Cir. 2024) – *Under FLSA, Salary Pay Weighs Towards Classifying an Employee as Exempt

In *Silloway v. City and County of San Francisco*, the 9th Circuit Court determined that there were factual questions as to whether the plaintiffs, staff nurses, were compensated on a salary basis, and thus, it was improper to grant a summary judgment motion in favor of the defendants. The court concluded that the focus in determining whether an employee is compensated on a salary basis is whether an employee receives a predetermined amount of compensation on a weekly or less frequent basis “irrespective of any promises made in an employment contract.” *Silloway v. City & Cnty. of San Francisco,* 117 F.4th at 1072.

The plaintiffs, who were employed by the City and County of San Francisco, claimed that they were paid on an hourly, rather than salary basis. As such, the nurses argued that they were entitled to overtime pay under the FLSA. In turn, the defendants argued that the nurses were exempt from overtime pay as salaried, professional employees. The defendant payroll department translated each nurse's annual salary into an hourly rate by dividing the annual amount by 2,080, which amounted to the number of hours a full-time nurse working 40 hours per work would make.

The professional exemption to overtime pay under the FLSA covers positions wherein employees' primary duties relate to work requiring advanced knowledge in a field of science or learning which is predominantly intellectual in nature. The professional exemption typically covers professions like attorneys, accountants, engineers, accountants, and teachers.

At the district court level, the court held that because annual pay figures for the nurses were published in a salary ordinance, the nurses were definitively compensated on a salary basis.

On appeal, the 9th Circuit Court concluded that the county must analyze how employees are ***actually paid*** when determining whether an employee is paid a salary. An employer generally loses the benefit of the professional capacity exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An employer's intent not to pay employees on a salary basis can be demonstrated by an actual practice of making improper deductions.

The court concluded that even the City's 3.2% error rate in making improper deductions was high enough to preclude summary judgment. The City made at least one improper deduction in 46% of pay periods, which weighed in favor of finding that the City maintained an actual practice of making improper deductions. Given the number of improper deductions, there were factual questions that needed to be resolved as to whether the nurses were paid at a salary basis.

This ruling provides additional clarity on the professional exemption from FLSA's overtime provisions. When determining whether to classify an employee as exempt, employers should consider strongly whether the employee is paid on a salary or hourly basis.