



Labor and Employment Litigation Update

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Geoffrey S. Sheldon, Partner, Liebert Cassidy Whitmore
Elizabeth Tom Arce, Partner, Liebert Cassidy Whitmore

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Geoffrey S. Sheldon
LIEBERT CASSIDY WHITMORE
6033 West Century Blvd., Fifth Floor
Los Angeles, CA 90045
Telephone: (310) 981-2000
Facsimile: (310) 337-0837

Elizabeth Tom Arce
LIEBERT CASSIDY WHITMORE
6033 West Century Blvd., Fifth Floor
Los Angeles, CA 90045
Telephone: (310) 981-2000
Facsimile: (310) 337-0837

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Geoffrey S. Sheldon, Partner & Elizabeth Tom Arce, Partner
Liebert Cassidy Whitmore

INTRODUCTION

Over the course of the last few years, we have grown accustomed to adapting to many significant changes – not just in our personal lives – but in our careers as attorneys as well. At times, it may have felt like incremental changes turned into sweeping changes overnight. The labor and employment law world is no exception. Though the past year has not resulted in extensive legislation or case law that fundamentally alters employment litigation, there were recent court decisions, laws, and rules that we feel are important to note and may lead to broader changes in the near future.

Among other novel rulings, this year brought a California Supreme Court case that will make it much more difficult for employers to defend “whistleblower” retaliation claims brought under Labor Code section 1102.5. As whistleblower case filings have already been on the rise over the past few years, the State Supreme Court’s decision will multiply these cases further. We also saw a few U.S. Supreme Court decisions under the First Amendment that could modify the way public employers approach employee speech and religious practices. Additionally, there are several other cases, bills, and regulations that might indicate more consequential events on the horizon.

The following are noteworthy developments that we feel employment law practitioners may want to keep on their radar as we continue to navigate the ever-evolving landscape of labor and employment litigation.

CASES

Vatalaro v. County of Sacramento (2022) 79 Cal.App.5th 367 – The Updated Whistleblower Retaliation Standard in Practice

Earlier this year, the California Supreme Court decided *Lawson v. PPG Architectural Finishes, Inc.*, (2022) 12 Cal.5th 703, that changed how employers must defend “whistleblower

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retaliation” cases under Labor Code section 1102.5. *Vatalaro* serves as an example and reminder of the updated standard for these claims.

In 2016, after being released on probation from her employment with Sacramento County, Cynthia Vatalaro sued for retaliation under Labor Code section 1102.5. Vatalaro claimed her discharge was retaliation for her reporting that she was working below her service classification. The trial court granted the County summary judgment, and Vatalaro appealed. The California Court of Appeal affirmed and provided additional clarification as to the standard for whistleblower retaliation claims.

Until *Lawson*, courts evaluated section 1102.5 claims using a three-part framework. However, *Lawson* held that instead, courts are now required to use the framework outlined in Labor Code section 1102.6. Labor Code section 1102.6 places the burden on the employee to first establish that retaliation against the employee’s protected “whistleblowing” activities was merely a contributing factor in a contested employment action. In other words, an employee must show a prima facie claim of retaliation under Labor Code section 1102.5. Once the employee has established a prima facie claim, the burden shifts to the employer to demonstrate by *clear and convincing evidence* that it would have taken the employment action for legitimate, independent reasons even if the employee had not engaged in the protected activity.

Labor Code section 1102.5 states that “An employer ... shall not retaliate against an employee for disclosing information ... to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance ... if the employee *has reasonable cause to believe* that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation” (Emphasis added).

The Court of Appeal held that Vatalaro was unable to satisfy the “reasonable cause to believe” prong, because she admitted in a deposition that she did not believe her job description violated civil service rules. In the initial phase of this case, both Vatalaro and the County interpreted “reasonable cause to believe” as “reasonably believes.” However, the Court stated this interpretation was inaccurate, and that the two phrases are not equivalent. The Court noted that a person may have reasonable *cause* to believe something is true, even if she does not in fact reasonably believe it to be true.

With this clarification, the Court ended its analysis of this phase because it found that the trial court’s decision could be upheld on another ground. The Court moved on to the next step of

Labor Code section 1102.6 analysis– in which the employer can demonstrate it would have taken a contested action for a legitimate, independent reason, even absent the employee’s protected activity.

The Court held that the County had clearly established it would have taken the action in question for legitimate reasons, even if Vatalaro had not complained she was doing low-level duties. The Court relied heavily on evidence that Vatalaro had been insubordinate, disrespectful, and dishonest. The Court found that Vatalaro was unable to rebut any of the three charges and the County was entitled to summary judgment.

This case emphasizes that Labor Code section 1102.5 claims rely on a fact-based analysis. Employers must keep good records and start gathering and assessing facts as early as possible when faced with a whistleblower retaliation claim, so that they can meet the more stringent “clear and convincing standard” *Lawson* established.

Kennedy v. Bremerton School District (2022) 142 S.Ct. 2407 – School District Violated the Constitution in Football Coach Prayer Case

In June 2022, the U.S. Supreme Court issued the *Kennedy* ruling, which could have far-reaching implications for public employers in terms of religious practices and free speech in the public employment sector.

Bremerton School District (BSD) employed Joseph Kennedy as a football coach at Bremerton High School (BHS), from 2008 to 2015. Kennedy is a practicing Christian, and his religious beliefs required him to give thanks through prayer at the end of each game by kneeling at the 50-yard line. Because Kennedy’s religious practices occurred on the field immediately after football games, students, parents, and community members observed his conduct. While Kennedy initially prayed alone, several student football players asked if they could join him. Over time, the group grew to include the majority of the team. Kennedy’s religious practice also evolved, and he began giving brief speeches at midfield after games while participants kneeled around him.

BSD first learned that Kennedy was praying on the football field in September 2015, when an opposing team’s coach informed BHS’s principal that Kennedy had asked his team to join him in prayer on the field. After learning of the incident, BHS’s Athletic Director spoke with Kennedy, disapproving of the religious practice. In response, Kennedy posted on Facebook, “I

think I just might have been fired for praying.” Subsequently, BSD received thousands of emails, letters, and telephone calls from around the country regarding Kennedy’s prayer.

Upon discovering Kennedy’s 50-yard line prayers, BSD launched an inquiry into whether Kennedy was complying with its Religious Related Activities and Practices policy. The school policy provided that school staff should neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or other devotional activity. BSD’s investigation revealed that the coaching staff received little training in this policy, so the superintendent sent Kennedy a letter advising him that he could continue to give inspirational talks, but they must be entirely secular. The letter also noted that student religious activity needed to be entirely student-initiated; Kennedy’s actions could not be perceived as an endorsement of that activity; and that while Kennedy was free to engage in religious activity, it could not interfere with his job responsibilities and must be physically separate from any student activity. While Kennedy temporarily prayed after everyone else had left the stadium, he claimed that he soon returned to his practice of praying immediately after games. However, BSD received no further reports of Kennedy praying on the field and BSD officials believed Kennedy was complying with its directive.

On October 14, 2015, Kennedy wrote a letter to BSD through counsel announcing that he would resume praying on the 50-yard line immediately after the conclusion of the October 16, 2015 football game. Kennedy and his representatives widely publicized Kennedy’s intention to pray on the field, and BSD arranged to secure the field from public access. Following the game, Kennedy prayed as he had indicated he would, with a large gathering of coaches and players around him. Members of the public also jumped the fence to join him, resulting in chaos. On October 23, 2015, BSD sent Kennedy a letter informing him that his conduct at the game on October 16 violated BSD’s policy.

While BSD offered Kennedy a private location to pray after games or suggested that he pray after the stadium emptied, Kennedy responded that the only acceptable outcome would be for BSD to permit Kennedy to pray on the 50-yard line immediately after games. Kennedy continued praying in violation of BSD’s directives. On October 26, 2015, BSD placed him on administrative leave.

Kennedy sued in federal court, alleging that BSD violated the First Amendment’s Free Speech and Free Exercise Clauses. The District Court granted summary judgment to BSD, and the Ninth Circuit affirmed. The Supreme Court granted certiorari to decide two central issues: (1) whether Kennedy’s prayer took place in a context in which BSD was entitled to control his

speech as “government speech,” i.e., whether it constituted speech pursuant to Kennedy’s “official duties”; and (2) “whether, assuming that such religious expression is private and protected ... the establishment clause nevertheless compels public schools to prohibit it.” BSD argued that the need to avoid an establishment clause violation overrode Kennedy’s expression rights. The Court held, in a majority opinion written by Justice Gorsuch, in favor of Kennedy on both of these questions.

Regarding the free speech issue, the Court determined that Kennedy’s prayers at games did not constitute speech pursuant to his “official duties” as a coach. Thus, the prayers were not “government speech.” The Court reasoned that when Kennedy conducted his prayers, he was not engaged in speech ordinarily within the scope of his duties as a coach. He was “not instructing players, discussing strategy, encouraging better on-field performance, or engaging in any other speech the District paid him to produce as a coach.” According to Justice Gorsuch, Kennedy’s prayers did not “ow[e their] existence” to Kennedy’s responsibilities as a public employee. The Court’s reasoning suggests that if Kennedy had incorporated religious expression more directly into his work with students, the result could have been different. For example, the Court stated that the contested exercise – silently praying at the 50-yard line – did not involve leading prayers with the team or before any other captive audience, indicating if Kennedy had, perhaps, led a “team prayer” the Court might have viewed the practice in a different light. Further, the Court reasoned the timing and circumstances of Kennedy’s prayers were important because they occurred during the postgame period when other coaches were free to attend briefly to personal matters – from checking sports scores on their phones to greeting friends and family in the stands, signaling that a distinction could have been drawn had Kennedy engaged in prayer during actual game play.

Because Kennedy’s prayer constituted his own private expression and not “official duties” speech, the Court went on to consider whether a balancing of interests favored BSD, in particular whether BSD’s concern about avoiding a violation of the establishment clause justified its actions. The Court found that Kennedy’s prayers did not raise establishment clause concerns, primarily because Kennedy’s private religious exercise “did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.” Thus, BSD’s balancing arguments lacked merit.

The Court determined that BSD essentially overreacted to concerns about separation of church and state, and had no other valid reasons for responding to Kennedy’s speech as it did. To reach this conclusion, the Court made another significant determination of constitutional law by interpreting the establishment clause to have less force than many courts have interpreted it to

have. The Court described that courts should use a test guided by “reference to historical practices and understandings.” Under this standard, Kennedy’s personal prayer, which did not constitute the “government speech” of BSD, did not threaten an establishment clause violation. The Court also found that based on the evidence in the case record, Kennedy’s prayer did not coerce students with regard to religion. It is now uncertain what kind of religious conduct by public employees *would* raise establishment clause concerns and cross the line separating protected private expression from government coercion or endorsement.

With respect to the free exercise issue, the Court held that BSD’s response to Kennedy’s actions violated the free exercise clause. The Court found that BSD, by forbidding Kennedy’s personal religious conduct at the games but allowing similar secular personal conduct, was targeting Kennedy’s religious practice. The Court found that BSD’s reasons for its response did not satisfy strict scrutiny (or even a less stringent standard). As described above, BSD argued that it needed to stop Kennedy from praying in front of game participants in the way he did, because allowing him to continue would violate the establishment clause. The Court disagreed, and opined that Kennedy’s conduct did not threaten such a violation.

(NOTE: Kennedy is important for a few reasons. First, it dictates that the following general framework for public employee free speech continues to apply: an employee speaking on a matter of public concern, that is outside of official duties, has First Amendment protection if the speech survives the applicable balancing test of interests, which courts test on a case-by-case basis. However, Kennedy gives much wider latitude to employee religious expression, even in public workplaces. Second, this case dictates that public employers consider employee free expression rights when regulating workplace religious conduct. If an expression infringes a neutral workplace rule of general applicability (e.g., no personal messages may be displayed at public-service counters), then employers will have a better chance of enforcing the rule notwithstanding free exercise concerns. But if the public employer seeks to target religious speech, e.g., because the employer is concerned about separation of church and state principles, the employer must make a stronger showing (perhaps that members of the public or other employees complain of coercion to participate in expressions of beliefs that are not their own). An employer will have to apply establishment clause law as described in the Kennedy opinion — narrowly and cautiously.)

Shurtleff v. City of Boston 142 S.Ct. 1583 (2022) – Flag Raisings are Private Expression, Not Government Speech

In another First Amendment case involving a public agency, the Supreme Court considered when a City can restrict which flags fly on City flagpoles and when a City can limit religious speech under the First Amendment.

There are three flagpoles on the plaza outside Boston’s City Hall. The first flies the American flag; the second, the Commonwealth of Massachusetts flag; and the third, usually, flies the City flag. Boston allows the public to use City Hall Plaza for events, and acknowledges that it is a “public forum.” A public forum is a place the public can use for the free exchange of ideas and for purposes of assembly. When an unlimited public forum exists on government property, the government may regulate the content of expressive activity there only if it serves a compelling government interest, and is narrowly drawn to achieve that interest.

Since at least 2005, Boston allowed various groups to raise flags of their choice on the Plaza’s third flagpole in conjunction with events there. Examples included flags of other nations, LGBTQ+ Pride Week, emergency medical workers, and a community bank. About 50 different flags were raised between 2005 and 2017, and Boston had never denied a request.

Harold Shurtleff was the director and co-founder of an organization called Camp Constitution. In 2017, Shurtleff applied for a flag-raising event on the Plaza to “commemorate the civic and social contributions of the Christian community,” desiring to raise what was described as the “Christian Flag.” The flag depicts a “red cross on a blue field against a white background.” Boston denied Shurtleff’s request because it was the “Christian flag” and the City believed that raising the flag would violate the establishment clause of the First Amendment. Boston told Shurtleff that the event could still proceed if Camp Constitution raised a different flag.

Shurtleff and Camp Constitution sued claiming that the City’s refusal violated their right to free speech. The parties agreed on all the relevant facts. The District Court ruled for Boston, and the First Circuit affirmed. The U.S. Supreme Court unanimously reversed.

The Court focused on two main questions: (1) is the flag-raising program government speech; and (2) can Boston deny the request under the First Amendment?

The Court first recognized that the First Amendment does not limit a government’s ability to express opinions or “speak for the community.” This line “can blur” when there is public participation in a government program. The Court explained that it makes a “holistic inquiry” to evaluate “whether the government intends to speak for itself or to regulate private expression.” The Court considered the following factors, such as “the history of the expression at issue; the public’s likely perception as to who ... is speaking; and the extent to which the government has actively shaped or controlled the expression.”

While acknowledging flags convey government messages, the court noted that the flag-raising program allows other flags that the public may not associate with Boston. More importantly, Boston did not control the flags raised. While Boston controlled the scheduling of the event, maintained the physical premises, and provided a crank to raise the flag, Boston exercised no control over the content or messages flags conveyed. Boston has no policies or guidance on what flags groups could fly, and expressed it wanted to accommodate all applicants. Moreover, until the event at issue, Boston never even saw the flags before the events.

Because Boston had little to no involvement in the selection of the flags raised by the public or their message, or the events at which they were raised, the Court concluded that the flag raisings are private expression and not government speech.

Further, because the public flag raisings constitute private expression and not government speech, Boston cannot discriminate based on viewpoint. Thus, the Court determined that the Christian Flag is Camp Constitution’s speech – not Boston’s. In effect, the City’s third flagpole had become an unlimited public forum.

Public employers must be mindful of First Amendment rights when seeking to limit expressive activity on government property. The main reason the Supreme Court concluded the flag raising program in this case was private speech, was because Boston had no policies as to the selection of flags. When a government agency creates a public forum for free expression, unless formal policy limits the purpose of the forum, allowing content-based restrictions on speech to maintain the purpose of the forum (like limiting comment at Council meetings to agency business), a general purpose forum is created in which only time, place and manner restrictions are permitted – no content-specific regulation. Limitations must be based on the time, place, and manner of the activity, and those limitations must be content-neutral, serve a significant government interest, and leave open alternative channels of communication. In short, if government allows private expression using its facilities, it must have a written policy

carefully reviewed by legal counsel to avoid creating an unlimited forum in which youth groups and hate speech have equal standing.

Hernandez v. City of Phoenix (9th Cir. 2022) No. 21-16007 – Government Employers Cannot Prohibit Speech Merely Because It Is Embarrassing or Critical

Hernandez involves a law enforcement officer’s social media posts that were offensive to Muslims. The case highlights the importance of employers carefully analyzing public employees’ social media posts before imposing discipline due to that speech.

Sergeant Juan Hernandez worked for the City of Phoenix Police Department. In 2013, the Department adopted a policy governing its employees’ use of social media. The policy prohibited employees from engaging in speech on social media that would be “detrimental to the mission and functions of the Department,” “undermine respect or public confidence in the Department,” or “impair working relationships” of the Department.

Between 2013 and 2014, Hernandez made four posts on Facebook denigrating Muslims and Islam. Hernandez’s Facebook profile did not explicitly state he was a law enforcement officer with the Department, but he posted photos of himself in uniform identifying him as such. Hernandez posted four “memes” with offensive titles and photos regarding Muslims and stereotypes of Muslims.

In 2019, the Plain View Project, an organization that maintains a database of Facebook posts from law enforcement officers around the country, published a series of posts by the Department’s officers. Many were offensive to racial or religious minorities. Of the posts the Plain View Project published, 11 were attributed to Hernandez.

The Department launched an internal investigation through its Professional Standards Bureau, focusing on the four posts between 2013 and 2014. The Bureau concluded the posts violated the Department’s social media policy and “do not align with the distinguishing features, essential functions, and required knowledge as outlined in the City of Phoenix classification for a Police Sergeant.” The Department initiated discipline against Hernandez.

Hernandez faced discipline ranging from suspension without pay up to termination. Hernandez sued in federal court under 42 U.S.C. section 1983, and under Arizona law, alleging that any disciplinary action would violate his First Amendment rights. The district court granted summary judgment for the Department. The Ninth Circuit Court of Appeals addressed

Hernandez’s questions of whether the Department violated Hernandez’s right to free speech and whether its social media policy was facially overbroad.

The Court first addressed Hernandez’s First Amendment retaliation claim. The Court reiterated the standard for such claims drawn from the tests established in *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*¹ and *Mt. Healthy City Board of Education v. Doyle*². The five-part test assesses the following: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff’s protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. The Court determined that only the steps drawn from *Pickering* – the first, second, and fourth, were at issue.

Under *Pickering*, a government employee bears the initial burden of showing that he spoke on a matter of public concern, and that he did so in his capacity as a private citizen rather than a public employee. If the employee succeeds, the burden then shifts to the government employer to show it had an adequate justification for punishing the speech. To sustain its burden, the employer must show that “its own legitimate interests in performing its mission” outweigh the employee’s right to speak freely.

Here, there was no dispute that Hernandez spoke in his private capacity rather than a Department employee, or that he made the posts. Therefore, the Court analyzed whether the speech in question was on a “matter of public concern.” The Court determined that the speech did touch on matters of public concern, such as immigration and cultural assimilation, and emphasized that even though Hernandez’s expressed hostility, distasteful character alone does not strip speech of all First Amendment Protection.

The Court was unable to proceed to the next step of the *Pickering* balancing test as to the First Amendment retaliation claim because the district court dismissed the claim at the motion-to-dismiss phase, thereby limiting the factual record to the allegations of the amended complaint. The Court reversed and remanded for further development of the record, but stated that in remanding, the Court did not suggest that the Department faces a particularly onerous burden to justify disciplining Hernandez given the comparatively low value of his speech.

¹ (1968) 88 S.Ct. 1731.

² (1977) 97 S.Ct. 568.

Next, the Court addressed Hernandez’s facial challenge to the Department’s policy prohibiting social media posts “that are detrimental to the missions and functions of the Department, that undermine respect or public confidence in the Department, could cause embarrassment to the Department or City, discredit the Department or City, or undermine the goals and mission of the Department or City.” The analysis for such challenges in the public employment context is a modified *Pickering* balancing test that resembles the test for First Amendment retaliation claims.

First, the Court looks to see if the challenged restriction applies to an employee’s speech in a private capacity on matters of public concern. If so, the Court asks whether the government has an adequate justification to treat its employees differently from the general public.

The Court pointed out that the challenge in this context targets a prospective restriction on a broad category of expression, rather than specific instances of speech. Thus, the government bears a heavier burden to justify the scope of the restriction. The government must show that the combined First Amendment interests of the public and current and future employees are outweighed by the speech’s “necessary impact on the actual operation of the Government.”

In this case, the Department did not dispute that the challenged provisions of its policy applied to employee speech on matters of public concern an employee’s private capacity, outside of official duties. The Court noted that government employers have a strong interest in prohibiting speech by their employees that undermines the employer’s mission or hampers the effective functioning to the employer’s operations. That interest, the Court pointed out, justifies the policy’s restrictions on social media posts that are “detrimental to the mission and functions of the Department” or which “undermine the goals and mission of the Department or City.”

However, the Court reached a different conclusion with respect to the clauses of the Department’s policy that prohibited speech that would “cause embarrassment to” or “discredit” the Department. The Court stated that it is far from clear what the “embarrass” and “discredit” clauses add, beyond broadening the scope of the policy to authorize discipline for social media activity the Department may not have a sufficiently strong interest in prohibiting.

The Court was unable to conclude that the plaintiffs’ facial overbreadth challenge as to those clauses fails as a matter of law, again due to the absence of a factual record. The Court held that the district court properly rejected plaintiffs’ facial overbreadth challenge, *except* as to the clauses prohibiting social media activity that: (1) would cause embarrassment to or discredit the

Department or (2) divulge any information gained while in the performance of official duties. This is comparable to the Brown Act provision forbidding a local government to regulate public comment in meetings merely because it is critical of government or public employees. (Gov. Code § 54954.3, subd. (c).)

Thus, the Court affirmed the district court’s dismissal of the facial overbreadth challenge, with the two caveats noted above. The Court affirmed the district court’s entry of partial summary judgment for the Department on plaintiffs’ facial vagueness challenge and separate municipal liability claim³. The Court reversed the district court’s dismissal of Hernandez’s First Amendment retaliation claim and his related claim under the Arizona Constitution.

Allen v. Santa Clara County Correctional Peace Officers Assoc. (9th Cir. 2022) 38 F.4th 68 – The “Good Faith” Defense to Employees’ Claim for Refund of Agency Fees

In 2018, the U.S. Supreme Court held in *Janus v. American Federation of State, County, & Municipal Employees, Council 31, et al.*⁴ that a union’s compulsory collection of agency fees violated the First Amendment. This holding overruled nearly 40 years of precedent.

In response to *Janus*, several public-sector employees filed a class action under 42 U.S.C. Section 1983 to recoup any agency fees the Santa Clara County Correctional Peace Officers Association and Santa Clara County had withheld from their salaries. The U.S. district court dismissed, holding the parties’ “good faith” reliance on pre-*Janus* law meant that they need not return the fees.

In a subsequent case, *Danielson v. Inslee*⁵, the Ninth Circuit held that private parties, including unions, may invoke an affirmative defense of good faith to retroactive monetary liability under Section 1983 if they acted in direct reliance on then-binding U.S. Supreme Court precedent and presumptively valid state law.

However, the question whether the “good faith” defense applied to municipalities remained open. The Ninth Circuit concluded that, because unions are entitled to a good faith defense under *Danielson*, and municipalities’ tort liability for proprietary actions is the same as

³ Hernandez asserted a third cause of action, which appeared to be a municipal liability claim under a failure-to-train theory. The Court did not disturb the district court’s dismissal of the municipal liability claim as Hernandez did not challenge dismissal of that claim on appeal, and regardless, the municipal liability claim was not adequately pleaded.

⁴ (2018) 138 S.Ct. 2448.

⁵ (2019) 945 F.3d 1096.

private parties, Santa Clara County was also entitled to such a defense to Section 1983 liability for collecting pre-*Janus* agency fees.

The Court noted that the County was only an intermediary collecting agency fees from the employees' paychecks for the Union at its request. Given the County's limited role, the court declined to hold the municipality to a different standard than the Union.

Moreover, the County's conduct to collect and transfer agency fees had been directly authorized under both state law and decades of U.S. Supreme Court jurisprudence. The very purpose of a "good faith" defense is to allow private parties to rely on binding judicial pronouncements and state law without concern that they will be held liable retroactively due to changing law.

The Ninth Circuit concluded that same principles of equity and fairness applied to municipalities. Accordingly, it affirmed the lower court's dismissal of the case.

Transgender Law Center. v. Immigration & Customs Enforcement, (9th Cir. 2022) 33 F.4th 1186 – Public Agency's Obligations Under the FOIA

This case highlights a public agency's obligations under the federal Freedom of Information Act ("FOIA"). The California Public Records Act ("CPRA") is modeled on the FOIA, and decisions interpreting FOIA are persuasive as to the reach of the CPRA. This decision reminds public agencies to conduct thorough searches for requested documents, and withhold only privileged or exempt documents or redact only privileged or exempt portions.

In 2018, a transgender woman named Roxsana Hernandez entered the United States seeking asylum. Hernandez died while being moved between U.S. Immigration & Customs Enforcement (ICE) facilities.

The Transgender Law Center (TLC), representing Hernandez's family and estate, filed two FOIA requests for government records about her detention and death. The first was directed to ICE and the second to the Department of Homeland Security (DHS).

Months later, having received no records from either agency, TLC sued to force them to conduct adequate searches for and release the requested records. The lawsuit prompted the agencies to begin disclosing records. However, the agencies also redacted numerous documents and claimed that others were entirely exempt. The agencies filed for summary judgment, arguing

that their production was complete and “adequate”. The District Court granted summary judgment and dismissed. TLC appealed the dismissal.

The Ninth Circuit considered whether ICE’s and DHS’s search and production were “adequate”; the agencies’ privilege logs (aka “*Vaughn* indexes”) were sufficient; and the agencies’ invocation of the deliberative process privilege was justified.

It held that the agencies’ search for documents was inadequate. An adequate search is reasonably calculated to uncover all relevant documents. The public entity conducting the search must prove its search meets this standard beyond a material doubt.

TLC had cited various email accounts it believed should have been searched. The agencies did not provide evidence they had searched those accounts. Instead, the agencies indicated that TLC had no way of proving whether they had searched because redactions of email addresses already produced meant that the email accounts may have already been searched. The Ninth Circuit found this insufficient, because the search was not diligent. The agencies did not appropriately respond to “positive indications of overlooked materials” and did not fulfill their duty to follow “obvious leads.” As the agencies controlled information about the searches, they could not defend by asking the plaintiffs to prove what they could not possibly know.

When withholding documents from a records request in a FOIA litigation, the withholding agency generally must provide a privilege log called a *Vaughn* index. This index lists the documents withheld, the basis for the withholding (generally a codified exemption or privilege), and a brief explanation of why the withheld document is subject to the exemption or privilege.

The Ninth Circuit requires agencies that withhold documents to provide as much of an explanation as possible without thwarting the exemption’s purpose. A withholder must also provide enough information so a requester can “intelligently advocate release of the withheld documents” and so that the court can “intelligently judge the contest”. The Ninth Circuit noted that many of DHS and ICE’s explanations were conclusory or boilerplate making the *Vaughn* index insufficient. This amounts to, “it’s privileged because we say so;” a standard the Court does not accept.

Finally, the Ninth Circuit also addressed the deliberative process privilege, which allows a document to be withheld if it is “predecisional” (made before the decision at issue was made or

a policy adopted) and “deliberative” (related to the process by which policies are formulated). (The same principle applies to CPRA requests.⁶)

ICE and DHS withheld documents that they had simply labeled as “drafts”, citing the deliberative process privilege.

Because the “draft” designation contained no references to any decision to which the document pertains, that designation did not suffice to establish the deliberative process privilege. Simply labeling a document as a “draft,” without connecting it to a deliberation or a decision, is insufficient to establish the deliberative process privilege.

Thus, the Ninth Circuit reversed and remanded.

California law does not squarely require a *Vaughn* index. However, practically, state trial courts require the same level of disclosure about withheld documents to allow plaintiffs a level playing field for litigation and to allow courts to meaningfully review agency conduct.

County of Sonoma v. Public Employment Relations Board (Sonoma County Deputy Sheriff’s Association) (2022) 80 Cal.App.5th 167 (review pending) – Court of Appeal Finds PERB Skipped Initial Analysis of Whether Measure P Had a Significant and Adverse Impact

In 2016, the County of Sonoma (County)’s Board of Supervisors enacted an ordinance creating the County’s Independent Office of Law Enforcement Review and Outreach (IOLERO) to independently review law enforcement policies and administrative investigations. Among other things, IOLERO could propose independent recommendations or determinations regarding administrative investigations of peace officer conduct.

In 2020, the Board of Supervisors saw a need to expand IOLERO’s powers and duties to enhance law enforcement transparency and accountability. The Board placed a measure on the ballot, known as Measure P, to effectuate the desired changes. Measure P proposed numerous changes to IOLERO’s enabling ordinance, including empowering IOLERO to independently investigate whistleblower complaints, Sheriff’s Office investigations of deaths in custody, and incomplete or otherwise deficient investigations. Measure P also authorized IOLERO to issue subpoenas to compel the production of documents or the attendance and testimony of witnesses. Measure P maintained restrictions on IOLERO from deciding “policies, direct[ing]

⁶ See *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

activities, or impos[ing] discipline on other County departments, officers and employees.” It is significant that Measure P did not alter the part of the ordinance that required IOLERO and the Sheriff to collaborate to create protocols to “further define and specify the scope and process providing for IOLERO’s receipt, review, processing, and audit of complaints and investigations in a mutually coordinated and cooperative manner.”

The day the Board placed Measure P on the ballot, the Sonoma County Deputy Sheriffs Association (DSA) and Sonoma County Law Enforcement Association (SCLEA; collectively “Associations”) requested the County meet and confer regarding the measure’s placement on the ballot. The County did not bargain with the Associations before placing Measure P on the ballot. The voters ultimately passed Measure P by a majority vote.

The Associations, representing officers and other employees working for the Sheriff, filed unfair practice charges with PERB. They alleged that the County violated the MMBA by placing the measure on the ballot or the effects of doing so. Informal attempts to resolve the dispute failed, and PERB reviewed the matter.

PERB concluded some of Measure P’s amendments were subject to mandatory bargaining and that all of it was subject to “effects” bargaining. PERB severed the mandatory subject amendments from Measure P, declaring them void and unenforceable as to employees the Associations represent. PERB also ordered the County not to enforce or apply those amendments to employees represented by the Associations, and to meet and confer with the Associations before placing any matter on the ballot that affects employee discipline and/or other negotiable subjects. The County appealed to the Court of Appeal.

On appeal, the County argued that PERB failed to make a preliminary assessment of whether the Board’s decision to place Measure P on the ballot significantly and adversely affected the Associations’ members’ working conditions. They contended that this failure caused PERB to erroneously conclude that bargaining was necessary before first determining whether the Measure was a matter within the scope of representation under the MMBA. The Court of Appeal agreed.

Both parties agreed that the decision to place Measure P on the ballot was a “fundamental managerial decision”. In *Claremont Police Officers Assn. v. City of Claremont*⁷, the California Supreme Court addressed “whether an employer’s action implementing a fundamental decision”

⁷ (2006) 39 Cal.4th 623.

was subject to the bargaining requirement under the MMBA, establishing a three-prong test. Under the first prong, if the management action does not have a significant and adverse effect on wages, hours, or working conditions of bargaining-unit employees, there is no duty to meet and confer. Only if there is a significant and adverse effect need the second and third prongs be considered.

In this case, however, PERB conceded that it did not apply the *Claremont* test to determine whether Measure P had a significant and adverse effect on wages, hours, or working conditions. Given that there were no provisions of Measure P that on their face impacted wages, hours, or working conditions, the Court of Appeal reasoned PERB erroneously skipped *Claremont*'s first prong and failed to establish whether the matter was even within the scope of representation under the MMBA.

Regarding effects bargaining, the Court noted there was no dispute that Measure P's provisions involving IOLERO directly accessing, reviewing, and publicly posting body-worn camera video footage; and being able to directly contact witnesses and subjects of investigations; had foreseeable effects on terms and conditions of employment that subjected them to the MMBA's effects bargaining requirements. The Court rejected the County's argument that PERB was conflating the firm decision date and the implementation date. The Court agreed with PERB that, in line with past precedent, the County was obligated to bargain those effects with the Associations before placing the Measure on the ballot, not just before implementing the subject amendments.

Finally, the Court concluded that PERB exceeded its authority through its remedial order declaring Measure P's provisions void and unenforceable as to the Associations' members. The Court remanded to PERB to strike its remedial order and determine whether Measure P was within the scope of representation under the MMBA.

LEGISLATION

While this year arguably brought more important developments via cases than legislation, there are some newly signed and pending bills worth tracking. If passed, these bills will likely have an important impact. Though the following is not an exhaustive list, these are among the more significant.

SIGNED LEGISLATION

SB 191 – Gives Public Employee Unions Increased Access Rights to Schedule In-Person Orientation Meetings at the Worksite; Requires up to 30 Minutes Paid Time to New Employees to Attend

Current law generally grants public employees the right to join employee organizations and to be represented by those organizations in their employment relation. Further, existing law requires specified public employers to provide exclusive employee representatives access to new employee orientations, as defined. Existing law also prescribes certain requirements in this regard, while providing that the structure, time, and manner of exclusive representative access be determined through mutual agreement of the employer and the exclusive representative.

In part, SB 191 now requires that an exclusive representative be entitled to schedule an in-person meeting at the worksite during employment hours, if a public employer has not conducted an in-person new employee orientation within 30 days.

SB 191 requires that newly hired employees be relieved of other duties to attend the meeting, during which an exclusive representative is authorized to communicate with newly hired employees in the applicable bargaining unit for up to 30 minutes of paid time.

SB 191 further requires employers to provide appropriate onsite meeting space within 7 calendar days of receiving a request from an exclusive bargaining representative. If the state or a local public health agency issues an order limiting the size of gatherings or prohibiting gatherings during the pandemic an exclusive representative may schedule meetings once the order is lifted or modified. Under SB 191, the employer and the exclusive representative are generally authorized, through mutual agreement, to waive or modify these and other specified requirements.

PENDING LEGISLATION

AB 2188 – Would Prohibit Employment Discrimination Based on Off-Duty Cannabis Use, Except in Specified Positions

FEHA currently protects the rights of all persons to seek, obtain, and hold employment without discrimination, abridgment, or harassment, on the basis of a protected class.

AB 2188 (Quirk, D-Hayward) would also make it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based on a person's use of cannabis off the job and away from the workplace, except for pre-employment drug screening, as specified, or upon an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their urine, hair blood, or bodily fluids. Language in AB 2188 clarifies that the proposed legislation does not prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalize a person based on scientifically valid pre-employment drug screening conducted through methods that *do not* screen for non-psychoactive cannabis metabolites.

Certain employees would be exempt from the provisions of this bill, including those in building and constructions trades, and applicants and employees requiring a federal background investigation clearance.

AB 2188, if enacted, specifies that it does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances as a condition of receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

AB 2229 – Would Require Peace Officer Psychologist Screening to Include Evaluation for Bias against Race, Ethnicity, Gender, Nationality, Religion, Disability, or Sexual Orientation

AB 2229 (Luz Rivas, D-Arleta; Irwin, D-Camarillo) would amend Government Code section 1031. Existing law requires California peace officers to meet specified minimum standards, including an evaluation by a physician and surgeon or psychologist, and they must be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer.

AB 2229, in relevant part, would expand those requirements and would require the evaluation to include a test for a bias against race, ethnicity, gender, nationality, religion, disability, or sexual orientation.

If passed, AB 2229 would take effect immediately as an urgency statute.

AB 655 - Would Require Peace Officer Background Check to Include Inquiry into Membership in Hate Groups, Participation in Hate Group Activity, or Advocacy of Public Expressions of Hate; Would Make Those Findings Disqualifying

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AB 655 (Kalra, D-San Jose) would change the background check process for peace officers. If passed, this bill would require background investigations to evaluate whether an applicant for certain peace officer positions was a member in a hate group, participated in any hate group activity, or advocacy of public expressions of hate, as specifically defined.

While existing law requires a public agency to have a procedure to investigate complaints against peace officers, AB 655 would require an agency to investigate any internal complaint or complaint made by a member of the public that alleges membership in a hate group, participation in any hate group activity, or advocacy of public expressions of hate.

AB 655 would also require that certain findings would make it mandatory for the employing agency to remove a peace officer from his or her appointment. Further, AB 655 would require the Department of Justice to adopt guidelines for the investigation and adjudication of such complaints.

AB 1947 – Law Enforcement Agency Hate Crime Policies

AB 1947 (Ting (S-San Francisco), Bloom (D-Santa Monica), Muratsuchi (D-Torrance): “Hate crimes” under the Penal Code are defined as criminal acts committed, in whole or in part, because of actual or perceived characteristics of the victim, including, race, religion, disability and sexual orientation.

The Commission on Peace Officer Standards and Training (POST) is currently required to develop guidelines and an instruction and training course for peace officers regarding hate crimes. Law enforcement agencies are also currently required to include specified information in hate crime policies including information on bias motivation. The Department of Justice (DOJ) collects that information and posts it on its website.

AB 1947 would require every local law enforcement agency to adopt a hate crime policy, with specifications. This bill, among other things, would require every state and local law enforcement agency to use specific definitions for “protected characteristics” and would require each agency to provide its policy to the DOJ. Each agency would be required to update its policy before specified deadlines or as otherwise directed. The DOJ would post information regarding the compliance or noncompliance of each agency. AB 1947 would also require POST to develop a model hate crime policy.

SB 960 – Peace Officers’ Citizenship Standards for Employment

SB 960 (Skinner, D-Berkeley): Currently, peace officers in California must meet specified minimum standards including, among other requirements, being at least 18 years of age, of good moral character, and either a citizen of the United States or a permanent resident who is eligible for and has applied for citizenship, except as prescribed.

SB 960 would remove the requirement that peace officers be either citizens of the United States or permanent residents eligible for, and who have applied for citizenship. Instead, SB 960 would require only that peace officers be legally authorized to work in the United States.

SB 1000 –Public Access to Police Radio Communications

SB 1000 (Becker, D-San Mateo) would add section 12675 to the Penal Code to require (among other provisions) a law enforcement agency, including the California Highway Patrol, municipal police departments, county sheriff’s departments, specified local law enforcement agencies, and college police departments, to, by no later than January 1, 2024, ensure public access to the agency’s radio communications.

However, SB 1000 would further require law enforcement agencies to ensure that any criminal justice or personally identifiable information obtained through the California Law Enforcement Telecommunications System (CLETS) is not broadcast to the public.

AB 2556 – Unions Could Charge Firefighters Who Opt Out of Membership

AB 2556 (O’Donnell, D-Long Beach) would amend section 3505.7 of the Government Code, and would add section 3503.1.

The law currently gives public employees the right to refuse to join unions or to participate in union activities, and provides that employees who are members of groups that hold conscientious objections to joining or financially supporting unions are not required to join or financially support them.

If passed, AB 2556 would allow unions to charge firefighters, covered by the Firefighters Procedural Bill of Rights Act, for the reasonable cost of representation in disciplinary matters and grievances, even if the firefighter has opted out of union membership.

AB 1949 – Would Amend CFRA to Provide a Statutory Right to 5 Days of Unpaid Bereavement Leave, Separate from the 12 Weeks of Regular CFRA Leave

The California Family Rights Act (“CFRA”), part of FEHA, makes it unlawful for an employer to deny a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period for to care for a family member or for personal medical leave.

AB 1949 (Low, D-Cupertino) would also make it unlawful for an employer to deny a request by an eligible employee to take up to 5 days of bereavement leave upon the death of a family member, as defined. AB 1949 would require that the leave be completed within 3 months of the date of death of the family member. This bill would require that leave be taken pursuant to any existing bereavement leave policy of the employer. In absence of an existing policy, bereavement leave would be unpaid – however, this bill would authorize an employee to use certain other leave balances otherwise available, including accrued and available paid sick leave.

AB 1949 would require, if an employer’s existing leave policy provides for less than 5 days of bereavement leave, a total of at least 5 days of bereavement leave for the employee. AB 1949 would also make it unlawful for an employer to discriminate against, interfere with, or retaliate against an individual’s exercise of the rights it confers. AB 1949 would require employers to maintain employee confidentiality relating to bereavement leave.

AB 1949 would not apply to an employee who is covered by a valid collective bargaining agreement that provides for prescribed bereavement leave and other specified working conditions.

RULES, REGULATIONS, AND UPDATES

EEOC Updates its COVID-19 and ADA Guidance Addressing Workplace Testing and Vaccination

On July 12, 2022, the Equal Employment Opportunity Commission (“EEOC”) updated its guidance concerning interaction between the COVID-19 pandemic and the equal opportunity employment laws under its jurisdiction, including, most notably, the Americans with Disabilities Act (“ADA”).

The updated guidance revises the EEOC’s prior advice to employers on a number of important subjects. While other entities, such as the California Department of Public Health (“CDPH”) and the California Division of Occupational Safety and Health (“Cal/OSHA”), routinely update their regulations and standards to provide guidance on topics like testing, close contacts, and isolation periods, the EEOC’s guidance is primarily concerned with ensuring that employers abide by the ADA and do not discriminate against employees with disabilities. In other words, this EEOC guidance helps employers lawfully execute workplace policies mandated and shaped by CDPH and Cal/OSHA regulations. The EEOC guidance also outlines related obligations such as disability accommodations and the interactive process for reasonably accommodating a disability.

Previously, the EEOC permitted employers to conduct mandatory COVID-19 testing under all circumstances where the employer needed to evaluate an employee’s initial or continued presence in the workplace. The EEOC provided that such COVID-19 testing always satisfied the ADA standard that mandatory medical testing be “job related *and* consistent with business necessity.”

Now, the EEOC provides that COVID-19 testing no longer necessarily satisfies the consistency “with business necessity” prong. Instead, the EEOC provides that such testing satisfies that requirement only if the mandatory testing is consistent with guidance from Centers for Disease Control and Prevention (“CDC”), Food and Drug Administration (“FDA”) or state or local public health authorities.

The EEOC provides that, if an employer requires COVID-19 testing in a circumstance where such testing deviates from public health guidance, the employer must consider certain public health factors to determine whether such testing is “consistent with business necessity.” The EEOC provides the following eight (8) factors that employers should consider:

1. The level of community transmission;
2. The vaccination status of employees;
3. The accuracy and speed of processing for different types of COVID-19 viral tests;
4. The degree to which breakthrough infections are possible for employees who are “up to date” on vaccinations;
5. The ease of transmissibility of the current variant(s);
6. The possible severity of illness from the current variant(s);

7. What types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals); and
8. The potential impact on operations if an employee enters the workplace with COVID-19.

As a result, if an employer is going to require that its employees submit to COVID-19 testing, the employer should first consult applicable guidance from the CDC, FDA, CDPH, and the local county Health Officer or the state Department of Public Health. If none of these authorities recommends COVID-19 testing in the circumstance under consideration, the employer should review the above enumerated factors before deciding whether to proceed with the testing.

The EEOC also updated guidance concerning the screening of job applicants for COVID-19. The EEOC now provides that an employer may screen job applicants for symptoms of COVID-19 *after* making a conditional job offer, so long as the employer does so for *all* entering employees in the same type of job. The EEOC added that, if an employer screens everyone who enters the workplace for symptoms associated with COVID-19, the employer may permissibly screen pre-offer applicants who need to enter the workplace to complete their application for employment.

Thus, if an employer is going to screen **any** job applicants for a position for symptoms associated with COVID-19, the employer should screen **all** applicants for that position to ensure a standard and uniform approach to such screening.

Further, the EEOC updated its guidance to limit the circumstances under which an employer could permissibly rescind a job offer to an applicant who the employer needs to begin working immediately, but who must either isolate or quarantine due to a COVID-19 case, COVID-19 symptoms, or a close-contact exposure to someone with COVID-19. The updated EEOC guidance states that employers may only withdraw an offer if the employer is able to meet the following criteria:

1. The job requires that the employee start immediately;
2. The CDC guidance recommends an individual in the applicant's position *not* be in close proximity to others; and
3. The job requires that the employee in the position be in close proximity to others.

As a result of this limiting criteria, employers should seek to either delay the employee's start date or allow the employee to telework if they are confronted with a prospective employee

required to isolate or quarantine. Only if those options are unavailable, and the above three factors are satisfied, should an employer rescind a job offer.

Additionally, the EEOC updated its guidance concerning the use of personal protective equipment (“PPE”), such as face coverings. The updated guidance recognizes that employers may, at times, be subject to federal, state, or local laws including health orders that will require employees to observe certain infection control practices, including the use of PPE at work.

The EEOC provides that where such obligations exist, and when employees with a disability request a reasonable accommodation to comply with infection control practices, the employer should engage the employees in the interactive process and provide such employees a reasonable accommodation that allows the employee to continue to perform their job duties, so long as doing so does not cause the employer an undue hardship.

Finally, the EEOC updated its guidance regarding mandatory vaccination policies and when COVID-19 vaccination information can be shared.

First, the EEOC provides that employers *may* require an employee who has a qualifying disability under the ADA to meet a universally applicable workplace COVID-19 vaccination requirement if the policy satisfies the “job related and consistent with a business necessity” standard *as applied to that employee*. This clarifies the ambiguity in the prior guidance, which suggested that the policy must satisfy the standard when applied to all employees. In light of this new clarification, employers may require compliance with COVID-19 vaccination requirements so long as the policy requirement is consistent with business necessity. This will require a case-by-case analysis as to whether the requirements are appropriate for each position. If a particular employee cannot meet such a COVID-19 vaccination requirement because of a disability, the employer must be able to demonstrate that the employee’s continued performance of their job duties would pose a “direct threat” to the health or safety of the employee or others and, if not, must relax the vaccination requirement.

Second, under the ADA, employers must maintain the confidentiality of employee medical information, but the guidance clarifies that information about an employee’s vaccination information may be shared with employees who need the information to perform their job duties, such as supervisory employees who may be expected to enforce certain workplace health and safety policies that are dependent on the employees’ vaccination status. In such a scenario, the employee receiving the information is required to maintain its confidentiality. As a result of this guidance, employees should store information about an employee’s vaccine status in a

confidential file apart from his or her personnel file, akin to the storage of other medical and confidential information. This will ensure compliance with the Confidentiality of Medical Information Act, which requires employers to store medical information so as to preserve confidentiality.

Cal/OSHA Considering Permanent COVID-19 Regulation

The Department of Industrial Relations (“DIR”) published an initial draft of a regulation in June 2022 that, if adopted by the Occupational Safety and Health Standards Board (“Board”) would replace the Cal/OSHA COVID-19 Emergency Temporary Standard, which is set to expire January 1, 2023. The new regulation includes updated protocols regarding face coverings, investigations and notifications of COVID-19 exposure, excluding employees from the workplace, and ventilation requirements, among others. If approved, the new regulation will govern workplace responses to COVID-19 prospectively.

The Board has not yet started the Administrative Procedures Act’s rulemaking process, which requires the Board take a number of steps before it takes final action to adopt the regulation.

First, the Board will issue notice of the proposed rulemaking for the permanent Cal/OSHA COVID-19 Regulation. The Board must provide this notice at least 45 days before the close of the public comment period and hearing on the adoption of the regulation.

After hearing public comment and holding the hearing, the Board may act on the draft regulation and submit it to the Office of Administrative Law (“OAL”) for review.

OAL has 30 days to approve or reject the regulation.

If the OAL approves the regulation, the Board will file it with the Office of the Secretary of State. After the regulation becomes effective, the Office of the Secretary of State will codify the regulation in the California Code of Regulations, after which the regulation will become effective.

Office of the California Attorney General Legal Alert No. OAG 2022-02

On June 24, 2022, the California Attorney General’s Office released a Legal Alert regarding the recent U.S. Supreme Court opinion in *N.Y. State Rifle & Pistol Association v.*

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Bruen. In *Bruen*, the Supreme Court concluded that the State of New York’s requirement that “proper cause” be demonstrated to obtain a permit to carry a concealed weapon in most public places violated the Second and Fourteenth Amendments of the U.S. Constitution. Importantly, the Court identified California as a state that has an analogous law. The Attorney General’s guidance is instructive to public agency attorneys advising law enforcement agencies how to proceed when issuing licenses to carry firearms.

Under California Penal Code sections 26150 and 26155, local law enforcement officials (sheriffs and chiefs of police) are permitted to issue licenses allowing license holders to “carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.” In counties where the population is less than 200,000, local officials are also authorized to issue licenses permitting open carry only in that jurisdiction. (Penal Code sections 26150, subd. (b)(2); 26155, subd. (b)(2).) These licenses, whether for concealed or open carry, exempt the holders from many generally applicable restrictions on carrying firearms in public. Local officials are only authorized to issue such licenses under the Penal Code upon proof that: (1) the applicant is of good moral character; (2) good cause exists for issuance of the license; (3) the applicant is a resident of the relevant county or city (or has their principal place of business or employment in that county or city); and (4) the applicant has completed a course of training.

Under *Bruen*, however, the California Attorney General has found that the “good cause” requirements in California Penal Code sections 26150 and 26155 are now unconstitutional and unenforceable. Therefore, permitting agencies should no longer require a demonstration of “good cause” on concealed carry permits. The Attorney General instructs that local officials can, and should, continue to apply and enforce all other aspects of California law regarding public-carry licenses. In particular, the requirement that a public-carry license applicant provide proof of “good moral character” remains constitutional.

The investigation into whether an applicant satisfies the “good moral character” requirement should go beyond the determination of whether any “firearms prohibiting categories” apply, such as a mental health prohibition or prior felony conviction. As an example of a helpful model policy on assessing good moral character, the Attorney General cited Riverside County Sheriff’s Department’s Policy, which provides, “Legal judgments of good moral character can include consideration of honesty, trustworthiness, diligence, reliability, respect for the law, integrity, candor, discretion, observance of fiduciary duty, respect for the rights of others, absence of hatred and racism, financial stability, profession-specific criteria such as pledging to honor the Constitution and uphold the law, and the absence of criminal conviction.”

The Attorney General advised that law enforcement agencies that issue licenses to carry firearms in public should consult with their own counsel, carefully review the decision in *Bruen*, and continue to protect public safety while complying with state law and the federal Constitution.