

Labor and Employment Litigation Update

League of California Cities 2022 Annual Conference | September 9, 2022

Presented By: Geoffrey S. Sheldon and Elizabeth Tom Arce

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The Big Picture

- 2022 updates may be small but mighty
- This year was case-heavy, with fewer legislative changes impacting labor and employment
- Little changes over time can = big changes in the long run
- Important for public agency attorneys to stay ahead of the curve
- **DO** “sweat the small stuff”

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Cases



Retaliation – *Vatalaro*

- Plaintiff has the initial burden to establish “by a preponderance of the evidence that an activity proscribed by section 1102.5 was a contributing factor in the alleged prohibited action against the employee.”
- If plaintiff meets this initial burden, the burden then shifts to the defendant to show by “clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in the protected activity.”
- *Vatalaro v. County of Sacramento*



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First Amendment - *Kennedy*

- The 2022 “School Prayer” Case
- U.S. Supreme Court held that School District violated football coach’s First Amendment rights when it prohibited coach from kneeling in silent prayer at 50-yard line after games
- Coach’s prayers were “private speech”
- *Kennedy v. Bremerton School District*



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First Amendment - *Shurtleff*

- Flag raising, even on City property and on City flagpoles can be “private speech”
- Public agencies need to exercise caution when dealing with free speech issues, including with public employees
- *Shurtleff v. City of Boston*



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First Amendment - *Hernandez*

- Government employers can't prohibit speech just because it is embarrassing or critical
- Social media policies regarding free speech can present issues for employers. Proceed with caution!
- *Hernandez v. City of Phoenix*



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"Good-Faith" Defense

- In response to *Janus* decision in 2018, several public sector employees filed a class action seeking to retroactively cover any agency fees that were taken from their salaries
- County relied on then-binding law and used the "good-faith" defense
- **Ninth Circuit agreed; County was entitled to good-faith defense**
- *Allen v. Santa Clara County Correctional Peace Officers Assoc.*



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Freedom of Information Act

- Directly related to the CPRA; FOIA cases can help us understand how to approach CPRA requests
- Agencies must conduct thorough searches of records and only redact portions that squarely fit within particular exemptions from disclosure
- *Transgender Law Center v. Immigration & Customs Enforcement*



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PERB

- PERB skipped initial analysis of whether a ballot measure had significant and adverse impact on Association members' working conditions
- Court concluded PERB exceeded its authority through its remedial order declaring ballot measure's provisions void and unenforceable as to Association members
- *County of Sonoma v. Public Employment Relations Board (Sonoma County Deputy Sheriff's Association)*



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Legislation



Signed – 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 for new employees to attend
- Employers must provide appropriate onsite meeting space within 7 calendar days of receiving request from union representative



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Pending – AB 2188

- Would prohibit employment discrimination based on off-duty cannabis use, except in specified positions
- Certain employees would be exempt from the provisions of this bill including those in building and construction trades and applicants requiring federal background investigation and clearance.

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Pending – AB 2229

- Would require peace officer psychologist screening to include an evaluation for bias against:
 - Race
 - Ethnicity
 - Gender
 - Nationality
 - Religion
 - Disability
 - Sexual orientation

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Pending – AB 655

- Would require peace officer background check to include an inquiry into membership into hate groups, participation in hate group activity, or advocacy of public expressions of hate
- Would make those findings disqualifying



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Pending – AB 1947

- Mandates hate crime policies for law enforcement agencies
- Would require every law enforcement agency to provide its policy to the DOJ



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Pending – SB 960

- Changes citizenship requirements for peace officers
- Removes requirements that peace officers be either citizens or permanent residents who are eligible for, and have applied for citizenship
- Would require only that peace officers be legally authorized to work in the U.S



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Pending – SB 1000

- Would require public access to law enforcement agencies' radio communications
- However, would require law enforcement agencies to ensure any criminal justice or personally identifiable information obtained through CLETS is not broadcast to the public



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Pending – AB 2556

- Would allow unions to charge firefighters for the reasonable cost of representation in disciplinary matters and grievances
- Unions could charge even if firefighter has opted out of union membership



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Pending – AB 1949

- If passed, would amend the CFRA to provide a statutory right to 5 days unpaid bereavement leave
- This leave would be separate from the 12 weeks of regular CFRA leave



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Rules and Regulations



EEOC

- EEOC Updates its COVID-19 and ADA Guidance addressing workplace testing and vaccination
- This revised guidance helps provide clarity for employers navigating issues such as mandatory COVID-19 testing, vaccinations, and job screening for applicants in order to ensure compliance with the ADA



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CAL/OSHA

- Cal/OSHA is considering a permanent COVID-19 Regulation updating protocols regarding face coverings, investigations/notifications of COVID-19 exposure, excluding employees from workplace, and ventilation requirements (among other updates)
- If approved, this regulation will change the way employers must respond to COVID-19 issues going forward
- The current standard is set to expire on January 1, 2023



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AG ALERT - *Bruen*

- Supreme Court recently held in *N.Y. State Rifle & Pistol Assn. v. Bruen* that New York's law requiring "proper cause" before obtaining a concealed carry permit was unconstitutional
- CA has an analogous law, requiring a demonstration of "good cause" on concealed carry permits
- **Relevant for public agency attorneys advising law enforcement agencies how to implement new guidance**



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Thank You!

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