



Liebert Cassidy Whitmore

# Labor and Employment Litigation Update

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Presented By:

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# The Big Picture

- In the last six months there have been a wide range of labor and employment case decisions that will greatly impact public agencies. Below are some of the significant outcomes and common themes that are noteworthy:
  - State whistleblower statute protects all employees who report wrongdoing and not just the first employee to report
  - The FEHA does not prohibit implementing a vaccination policy recommended by the CDC
  - Evidence used to prove a discrimination MSJ using the direct or circumstantial method must be specific, substantial and attributable to the actual decision maker(s)
  - An elected public official is not an “employee” who can state a whistleblower retaliation claim under Labor Code section 1102.5
  - Regarding pending legislation, there are a variety of pending bills that could have significant effects on both public and private employers



# Chapter 1: Retaliation and Discrimination



# Retaliation - *People ex rel. Garcia-Brower v. Kolla's, Inc.*

- Employee telling owner and operator that she had not been paid wages for her three previous shifts did not amount to a “public disclosure” as required under California’s Whistleblower Statute.
- A violation of Labor Code section 1102.5 turns on whether there was a “disclosure” rather than a “report” of wrongdoing.
- *People ex rel. Garcia-Brower v. Kolla's, Inc.*, 14 Cal.5th 719 (2023)

# Discrimination/Accommodation - *Hodges v. Cedars-Sinai Medical Center*

- Pre-Covid, hospital administrator refused to get flu vaccine, despite employer policy and her having no medical contraindication for it
- Plaintiff submitted a doctor's note: "Extreme unwell state results from injections and immunizations," but doctor later testified that he was saying she had a contraindication to the flu vaccine
- Court of Appeal held that Hodges did not have a medically valid contraindication that constituted a disability
- *Hodges v. Cedars-Sinai Medical Center*, 91 Cal.App.5th 894 (2023)

# Discrimination - *Hittle v. City of Stockton*

- Plaintiff alleged he was fired for attending a religious leadership event, sued for discrimination under Title VII and the FEHA. USDC granted summary judgment for City
- In affirming the USDC ruling, the Ninth Circuit held that a plaintiff suing under Title VII and the FEHA may either use the burden shifting framework announced in *McDonnell Douglas*, or alternatively a plaintiff can prevail merely by showing direct or circumstantial evidence of discrimination, without using the *McDonnell Douglas* framework at all
- *Hittle v. City of Stockton* - No. 22-15485, 2023 WL 4985718 (9th Cir. Aug. 4, 2023)



# Retaliation - *Brown v. City of Inglewood*

- Longtime City treasurer claimed retaliation against her for revealing financial irregularities
- Court of Appeal held that an elected official cannot pursue a whistleblower retaliation claim under Labor Code section 1102.5 because the statute only protects “employees” who engage in protected whistleblower activities
- *Brown v. City of Inglewood* - 92 Cal.App.5th 1256 (2023)

# Chapter 2: Religious Accommodation





# Religious Accommodation - *Groff v. DeJoy*

- Plaintiff USPS mail carrier was devout Christian and disciplined for refusing to work on Sundays
- Justice Alito’s opinion clarified that Title VII’s standard of “undue hardship” does not mean *de minimis*, as in “requiring an employer ‘to bear more than a *de minimis* cost’ to provide a religious accommodation is an undue hardship”
- An analysis of undue hardship on the conduct of an employer’s business specifically pertains to whether a particular religious accommodation request causes hardship on other employees
- *Groff v. DeJoy*, 143 S. Ct. 2279 (2023)

# Chapter 3: First Amendment



# First Amendment - *Roberts v. Springfield Utility Board*

- Employee under investigation issued gag order that he was restricted from discussing investigation with other employees
- Ninth Circuit applied *Pickering* test and held that the restriction on speech affected Roberts' personal ability to discuss only the investigation into his own alleged violation of SUB personnel policies governing time off and employee dishonesty. Thus, he was not speaking as a citizen on a matter of public concern
- *Roberts v. Springfield Utility Board*, 68 F.4th 470 (9th Cir. 2023)

# First Amendment - *Progressive Democrats for Social Justice v. Bonta*

- Plaintiffs sued to challenge Govt Code Sec. 3205(a) that prohibited local government employees from political fundraising from one another because it banned these solicitations among local, but not state employees
- Ninth Circuit held that sec. 3205's ban on just local employees' expressive rights was in violation of the First Amendment
- *Progressive Democrats for Social Justice v. Bonta*, 73 F.4th 1118 (9th Cir. 2023)

# Chapter 4: Labor Relations



# Labor Relations - *SEIU v. Alameda Health System*

- At the start of the pandemic, SEIU member nurse cut holes in a garbage bag and wore it as a makeshift fluid-resistant gown over his cloth gown. This went viral on social media, and employee was later released from probation for performance issues
- SEIU filed an unfair practice charge, alleging improper interference with protected union activity under the MMBA. PERB agreed, but also held that harm caused to the nurse was outweighed by employer's right to release nurse from probation
- PERB will recognize an employer's ability to release low-performing employees even if they have engaged in protected activity so long as that release is based on quality evidence and operational necessity.
- *SEIU v. Alameda Health System*, PERB Dec. No. 2856-M 3/23/23



# Chapter 5: Reimburse Employee Expenses



# Chapter 6: “Eye to the Future” – Pending California Legislation





# Reimburse Employee Expenses - *Thai v. International Business Machines (IBM)*

- IBM employee forced to work from home at start of the pandemic sued his employer for expenses he paid for services and office equipment necessary to work from home
- Court of Appeal held that Labor Code section 2802(a) required the employer to reimburse an employee for all expenses that are a “direct consequence of the discharge of [the employee’s] duties.” The state-issued stay at home order was the “but-for” cause, but did not exempt such expenses from the reimbursement obligation
- *Thai v. International Business Machines* - 93 Cal.App.5th 364 (2023)



# *Assembly Bill 524 (Wicks) – Amends FEHA re: Family Caregiver Status*

- Assembly Bill 524 (AB 524) would add “family caregiver status” to the list of protected classifications enumerated in the FEHA
- AB 524 would amend the FEHA to prohibit discrimination and harassment against an employee on the basis of their “family caregiver status,” meaning their status as “a person who is a contributor to the care of one more family members.”



# *Assembly Bill 933 (Aguiar-Curry) – Privileged Communications*

- AB 933 would amend the Civil Code to expand the definition of privileged communications to include a communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination, as defined, and would specify the attorney's fees and damages available to a prevailing defendant in any defamation action brought against that defendant for making that communication.



# *Assembly Bill 1484 (Zbur) – Temporary Employees in Bargaining Unit*

- AB 1484 would add to the Government Code by amending the Meyers-Milias-Brown Act to require public employers to include temporary employees who have been hired to perform the same or similar type of work that is performed by permanent employees represented by a recognized employee organization to be automatically included in the same bargaining unit as the permanent employees.



# *Senate Bill 399 (Wahab) – Employee Discipline re Political Communications*

- This bill, except as specified, would amend the labor code to prohibit an employer from subjecting, or threatening to subject, an employee to discharge, discrimination, retaliation, or any other adverse action because the employee declines to attend an employer-sponsored meeting or affirmatively declines to participate in, receive, or listen to any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matters.
- DLSE would have an enforcement mechanism

# *Senate Bill 497 (Smallwood-Cuevas) – Rebuttable Presumption for Retaliation Claim*

- This bill would amend section 1102.5(f) of the labor code to establish a rebuttable presumption in favor of an employee's retaliation claim if an employer engages in any disciplinary behavior, as specified, within 90 days of an employee engaging in specified protected activity and directs recovery of civil penalties for a violation of whistleblower protections to the affected employee.
- An employer found by the Labor Commissioner to have violated this section will be liable for a civil penalty up to \$10,000.00 per employee for each violation of this section.



# *Senate Bill 700 (Bradford) – Applicant Cannabis Use*

- This bill would amend the FEHA to make it unlawful for an employer to request information from an applicant for employment relating to the applicant's prior use of cannabis, as specified.
- Does not prohibit an employer from inquiring about an applicant's criminal history if otherwise permitted by law.
- Does not apply to applicants or employees hired for positions that require a federal government background investigation or security clearance in accordance with regulations issued by the United States Department of Defense, or equivalent regulations applicable to other agencies.



# Senate Bill 731 (Ashby) – Remote Work

- SB 731 would amend the FEHA to authorize an employee with a qualifying disability to initiate a renewed reasonable accommodation request to perform their work remotely if certain requirements are met.
- Under SB 731, a “qualifying disability” means “an employee’s medical provider has determined that the employee has a disability that significantly impacts the employee’s ability to work outside their home.”
- if enacted, would be a significant departure from the standard interactive process in which employers engage with employees seeking a reasonable accommodation.





# *Senate Bill 848 (Rubio) – Reproductive Loss Leave*

- SB 848 would make it an unlawful employment practice for an employer to refuse to grant a request by an eligible employee to take up to 5 days of reproductive loss leave following a reproductive loss event, as defined.
- SB 848 would require that leave be taken within 3 months of the event, except as described, and pursuant to any existing leave policy of the employer.
- SB 848 would make leave under these provisions a separate and distinct right from any right under the California Fair Employment and Housing Act.

# Thank you!

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