



# Labor and Employment Litigation Update

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# Labor and Employment Litigation Update Fall 2023

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## I. INTRODUCTION

In the last six months, California and Federal appellate courts decided cases that we believe will significantly impact California public employers. In addition, the California Legislature is presently in the process of evaluating a number of bills that will also impact public employers. Amongst the court decisions discussed herein are cases brought by public employees alleging retaliation and discrimination by employers. In addition, the past sixth months brought cases regarding religious accommodation, violation of the First Amendment, labor relations, and the reimbursement of employee expenses. The final section of this update highlights new and pending legislation in the state assembly that could significantly impact public employers.

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## II. CASES

### Chapter 1: Retaliation and Discrimination

#### ***People ex rel. Garcia-Brower v. Kolla's, Inc., 14 Cal.5th 719 (2023) - Cal Supreme Court Says Whistleblower Statute Protects All Employees Who Report Wrongdoing And Not Just The First Employee To Report***

From May 2010 to April 2014, a woman with the initials ACR worked as a bartender at Kolla's, a nightclub in Orange County. On April 5, 2014, ACR complained to the owner, Gonzalo Estrada, that she had not been paid wages owed for her previous three shifts of work. Estrada responded by threatening to report ACR to immigration authorities (hence the initials instead of her full name), terminating her employment, and telling her never to return.

In June 2014, ACR filed a complaint against Estrada and Kolla's with the California Division of Labor Standards Enforcement (DLSE), which opened an investigation. After determining that Estrada's immigration-based threats and termination of ACR violated California law, DLSE notified Estrada and Kolla's of proposed remedies, including payment of lost wages to ACR, reinstatement of ACR's previous position, and payment of civil penalties to ACR and DLSE. After Estrada and Kolla's declined to accept DLSE's proposed remedies, the Labor Commissioner sued them for violations of the Labor Code, including retaliation in violation of Section 1102.5(b).

The trial court granted judgment for DLSE but ruled against DLSE on the Section 1102.5(b) claim. The Court of Appeal upheld this ruling and the DLSE thereafter appealed to the California Supreme Court.

Labor Code Section 1102.5 prohibits employers from retaliating against employees for “disclosing information” concerning suspected violations of the law either internally or to government or law enforcement agencies. This is codified specifically for public employees in section (e), which states that a public employee's report to his or her own agency is a protected disclosure under section 1102.5, subdivisions (a) and (b).

The crux of this case revolved around what it means to “disclose” information as some California courts have held that the report of information that was already known to the employer does not constitute a protected disclosure because the ordinary meaning of the verb “to disclose” is to reveal something that was hidden and not known. It is for this reason that the trial court and Court of Appeal held against DLSE, i.e., they both opined that because Estrada was the owner of Kolla’s he already knew that he had not paid ACR and thus her telling him this was not a “disclosure” under Labor Code Section 1102.5(b).

On the other hand, other California courts have held that using this definition of “disclose” would defeat the legislative purpose of the law, which is to encourage and protect whistleblowing employees. If only the first employee to blow the whistle was protected (as prior case law had held), employees would be unwilling to report unlawful conduct for fear that another employee had already done so. The California Supreme Court adopted this view and held that the Court of Appeal’s definition of “disclose” was too narrow and would defeat the law’s purpose.

In reaching its holding, the Supreme Court first noted that some dictionary definitions of disclose include “to make openly known” and “to open up to general knowledge.” The Supreme Court also noted that the protections of Section 1102.5 covered internal employee “reports” because they are “disclosures,” in that the Legislature used the term “report” in section 1102.5(e) synonymously with “disclose” in section 1102.5(b). “A government employee who has made a disclosure to his or her employing agency is deemed to have made the disclosure to a government or law enforcement agency under section 1102.5(e).”

For all these reasons, the Supreme Court reversed the Court of Appeal (and the trial court) and held that Labor Code Section 1102.5 was intended to protect every employee, not just the first employee to report. Employees are now protected under California’s whistleblower statute even if they report widely known violations of local, state, or federal law, or disclosures previously reported by other employees. California’s whistleblower statute is now in accord on this issue with the federal Whistleblower Protection Act, which Congress amended to protect the disclosure of information regardless of whether it is already known to the recipient.

*This case makes it clear that the protections of Labor Code section 1102.5(b) extend to all reports of wrongdoing regardless of previous knowledge or whether another employee already reported the misconduct. Moreover, it should be noted Labor Code section 1102.5(e) specifically states that a public employee’s report to his/her own employer is a protected disclosure for purposes of Labor Code section 1102.5.*

***Hodges v. Cedars-Sinai Medical Center, 91 Cal.App.5th 894 (2023) - Employee Lacked Any Medical Condition That Exempted Her From Employer-Mandate Vaccination Policy***

Deanna Hodges began working for Cedars-Sinai Medical Center in 2000 as an administrator with no patient care responsibilities. In 2017, Cedars announced a new policy requiring all employees, regardless of their role, to be vaccinated by the beginning of flu season. This was the latest expansion to Cedars' longstanding efforts to limit employee transmission of flu, which had become more urgent following multiple patient deaths relating to flu.

As required by law, Cedar's policy made exemptions for "valid medical or religious" reasons. Cedars established a very thorough exemption evaluation process through which a panel would grant an exemption only for a "recognized medical contraindication." Hodges did not want to get the flu vaccine, despite not having any contraindication to the flu vaccine. Hodges and her doctor merely stated on the exemption form that Hodges has a "History of multiple allergies post treatment for colorectal cancer with chemo radiation. Extreme unwell state results from injections and immunizations. No direct patient contact." Hodges' doctor stated in his deposition that he was not communicating that Hodges had a recognized contraindication to the flu vaccine.

After Hodges submitted her form, she was informed that her form was illegible and she would be suspended and terminated if she did not agree to get the flu vaccine. Her form was specifically reviewed by Cedars' internal Exemption Review Panel, and it denied her exemption request. The primary role of this panel was to determine whether an employee had a recognized contraindication to getting the flu vaccine. If an employee did not have a recognized contraindication but a closely related condition, like a moderate allergy to the flu vaccine, the panel would determine whether it was possible to help the employee get vaccinated in a way that accommodated the employee's concerns.

After the Cedars' internal Exemption Review Panel denied her exemption request, Hodges' doctor attempted to persuade her to receive the vaccine. Hodges steadfastly refused, and she was terminated effective November 9, 2017.

Hodges filed a lawsuit against Cedars alleging: 1) disability discrimination; 2) failure to engage in the interactive process; 3) failure to accommodate a disability; 4) retaliation; 5) failure to take reasonable steps to prevent discrimination, harassment, and retaliation; and 6) wrongful termination. Cedars received summary judgement and Hodges appealed to the California Court of Appeal.

After a thorough review of the evidence, including depositions, declarations, and exhibits, the Court of Appeal held that Hodges did not have a medically valid contraindication that constituted a disability. Even if she did, the Court of Appeal found that Cedars terminated Hodges for a legitimate nondiscriminatory reason, i.e., noncompliance with a bona fide employer policy aimed at protecting and saving lives.

*This case makes it clear that terminating an employee for refusing to get a flu shot is not prohibited by the FEHA as the FEHA does not prohibit implementing a vaccination policy recommended by the CDC. However, employers have an obligation to comply with the FEHA*

*when implementing a vaccine mandate. This includes engaging in an interactive process and reasonably accommodating employees and applicants with disabilities or religious beliefs if possible.*

***Hittle v. City of Stockton - No. 22-15485, 2023 WL 4985718 (9th Cir. Aug. 4, 2023) - For claims under Title VII and the California Fair Employment and Housing Act, a court hearing a motion for summary judgment/partial summary judgment may either use the McDonnell Douglas burden-shifting framework or the plaintiff may prevail on summary judgment by showing direct or circumstantial evidence of discrimination***

Plaintiff Ronald Hittle was an at-will employee of the City of Stockton, California and served as the City's Fire Chief from 2005 through 2011. During the latter part of his tenure as Fire Chief, the City became aware of potential misconduct and hired an outside independent investigator to investigate. In a 250-page report referencing over 50 exhibits, the investigator sustained almost all of the allegations of misconduct against Hittle.

The investigator's report specifically concluded that Hittle: (1) lacked effectiveness and judgment in his ongoing leadership of the Fire Department; (2) used City time and a City vehicle to attend a religious event, and approved on-duty attendance of other Fire Department managers to do the same; (3) failed to properly report his time off; (4) engaged in potential favoritism of certain Fire Department employees based on a financial conflict of interest not disclosed to the City; (5) endorsed a private consultant's business in violation of City policy; and (6) had potentially conflicting loyalties in his management role and responsibilities, including his relationship with the head of the local firefighters' union. The City Manager terminated Hittle based on these findings.

Hittle sued the City, former City Manager Robert Deis, and former Deputy City Manager Laurie Montes in the United States District Court claiming that his termination was in fact the result of unlawful employment discrimination in violation of Title VII and the FEHA. Hittle alleged that Deis and Montes terminated his employment as Fire Chief "based upon his religion." Specifically, Hittle alleges that he was fired for attending a religious leadership event.

Defendants moved for summary judgment seeking dismissal of all of Hittle's claims. Hittle subsequently cross-moved for partial summary judgment as to his federal and state religious discrimination claims. The District Court denied Hittle's motion and granted Defendants' motion as to all of Hittle's claims. Hittle timely appealed.

In affirming the District Court's rulings, the Ninth Circuit Court of Appeals held that a plaintiff suing under Title VII and the FEHA may either use the burden shifting framework announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, or alternatively a plaintiff can prevail merely by showing direct or circumstantial evidence of discrimination, i.e., he or she does not need to use the McDonnell Douglas framework at all.

Under the *McDonnell Douglas* framework, a plaintiff alleging that an employer engaged in discriminatory conduct adversely affecting the plaintiff's employment must establish a prima facie case by demonstrating that: (1) they are a member of a protected class; (2) they are qualified for their position; (3) they experienced an adverse employment action; and (4) similarly situated individuals outside their protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. Should the plaintiff set forth a prima facie case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged actions. If the defendant does so, the burden "returns to the plaintiff, who must show that the proffered nondiscriminatory reason is pretextual." A plaintiff meets their burden on pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

Under the alternate approach, a plaintiff can prevail merely by producing direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the employer. The amount of evidence needed is slightly different depending on federal vs. state law, however. Under Title VII, the plaintiff need only demonstrate that protected class was "a motivating factor" for any employment practice, even though other factors also motivated the unlawful employment practice. Under FEHA, a plaintiff must establish that protected class was "a substantial motivating factor" for the adverse employment action(s).

The Hittle case also has an interesting discussion on the quality of evidence needed to prevail on summary judgment using the alternate approach. Hittle had used the alternate approach in his summary judgment motion, and the Ninth Circuit Court of Appeals agreed with the District Court that the direct and circumstantial evidence Hittle submitted was insufficient to meet his burden of proof.

The Ninth Circuit held that while derogatory comments made by a decision maker are direct evidence of discriminatory animus and can create an inference of discriminatory motive, the comments made by the City Manager and Deputy City Manager were not sufficient. Hittle's examples of direct evidence of discriminatory animus included evidence that the Deputy City Manager referred to Hittle as being part of a "Christian coalition," and that both the Deputy City Manager and the City Manager said that Hittle was part of a "church clique" in the Fire Department. The Ninth Circuit held that these comments were not direct evidence of discriminatory animus because the Deputy City Manager and City Manager were simply referring to comments made by others. More specifically, the argued that the references came from the fact that a high-ranking Fire Department manager had complained that there was a "Christian coalition" within the Fire Department, and that Hittle improperly favored members of that so-called coalition. The Court held that the Deputy City Manager's repetition of other persons' use of pejorative terms does not provide evidence of her own animus, but rather shows concerns about other persons' perceptions. The Ninth Circuit also rejected Hittle's arguments that the Deputy City Manager engaged in discrimination by informing him that the City was not "permitted to further religious activities" or "favor one religion over another" because these were simply an expression of her legitimate concern that the City could violate constitutional prohibitions and face liability if it is seen to engage in favoritism with certain employees because they happen to be members of a particular religion. Thus, because the decision makers

did not use derogatory terms to express their own views, or focus on the religious aspect of Hittle's misconduct to express their own animus, the Court held that their terminology did not create a genuine issue of discriminatory animus.

The Ninth Circuit also rejected Hittle's argument that his notice of termination contained direct evidence of discrimination because of its repeated references to Hittle's attendance at a "religious event" and his approval of other Fire Department employees to attend because the undisputed record showed that these were merely findings in the investigation report, i.e., the investigator concluded that Hittle engaged in misconduct by attending a two-day religious event that did not benefit the City because it was not the sort of leadership conference aimed at public sector leadership. In other words, the Court held that attending a two day conference, at City expense, that had no connection to his public employment was a legitimate, non-discriminatory reason upon which to take disciplinary action.

*This case makes clear that there are at least two methods of pursuing summary judgment in discrimination claims, and if the direct or circumstantial evidence method is used the evidence must be specific, substantial and attributable to the actual decision maker(s). Because there was no evidence of the individual Defendants making any remarks demonstrating their own hostility to religion, the Court found that the Plaintiff failed to demonstrate that hostility to religion was even a motivating factor in his termination.*

***Brown v. City of Inglewood - 92 Cal.App.5th 1256 (2023) - An elected public official is not an "employee" who can state a whistleblower retaliation claim under Labor Code section 1102.5***

Wanda Brown, who had served as City treasurer since 1987, sued the city and the individual office-holders, claiming she was punished by the council and Mayor James T. Butts for revealing financial irregularities, including an alleged overpayment to a contractor in the amount of \$77,420. She complained of a September 2022 ordinance that removed auditing duties from her, shifting them to the city clerk, lowering to \$50,000 the maximum of funds she managed, and revising the city's investment policy. Brown also protested enactment the following month of a revised salary ordinance, slashing her pay by more than 80 percent from \$8,355 to \$1,404 per month.

Brown's Superior Court lawsuit alleged causes of action for (1) defamation; (2) violation of Labor Code section 1102.5, subdivisions (b) and (c) (which prohibit retaliation against an employee based on the employee reporting or refusing to participate in what the employee reasonably believes to be illegal activity by the employer); and (3) the tort of intentional infliction of emotional distress (IIED), based both on the alleged retaliation and the alleged defamation. The City and the individual defendants filed a joint special motion to strike the complaint as a strategic lawsuit against public participation, or SLAPP, under the anti-SLAPP statute (Code Civ. Proc., § 425.16). The trial court granted the motion in part, but denied it as to the section 1102.5 retaliation claim and the retaliation-based IIED claim against all defendants.



In the unpublished portion of the opinion, the Court of Appeal held that the retaliation-based claims against the individual defendants arose from protected activity under the anti-SLAPP statute, and as such the trial court should have stricken the retaliation-based IIED claim based on the second step of the anti-SLAPP analysis. In the published portion of the opinion, the Court of Appeal held that the trial court should also have stricken the section 1102.5 retaliation claim as well, because an elected official is not an “employee” for the purposes of that statute.

In holding 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, the Court of Appeal relied on the statutory language of subdivisions (b) and (c), which “protect only ‘employee[s]’ from certain types of retaliation by ‘[a]n employer, or any person acting on behalf of the employer.’” The Court of Appeal also reasoned that the Legislature “did not reference elected officials as falling within the scope of the term ‘employee’ for the purposes of section 1102.5.” The Court contrasted this section with the language of the Workers’ Compensation Act that unambiguously includes “elected officials” in the definition of “employee” for purposes of workers’ compensation, but not within the definition of “employee” for purposes of section 1102.5. Accordingly, the Court held that Brown, as an elected official, was not an “employee” for the purposes of section 1102.5, and thus could not bring such a claim.

*This case makes clear that at least in this instance, the Court of Appeal considers the definition of “employee” provided by the legislature in the wording of statutes to be clear and unambiguous, and this definition does not include elected officials for the purposes of Labor Code section 1102.5.*

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## **Chapter 2: Religious Accommodation**

***Groff v. DeJoy, 143 S. Ct. 2279 (2023): Title VII of the Civil Rights Act of 1964 requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business***

Plaintiff Gerald Groff was an Evangelical Christian who worked as a mail carrier for the United States Postal Service (USPS) beginning in 2012. Initially, his position did not involve work on Sunday. However, this changed when USPS agreed to begin facilitating Sunday deliveries for Amazon. Groff was unwilling to work on Sundays because of his religious beliefs. He later received “progressive discipline” for failing to work on Sundays, and he eventually resigned. He brought suit under Title VII of the Civil Rights Act of 1964, asserting that USPS could have accommodated his Sunday Sabbath practice “without undue hardship on the conduct of [USPS’s] business.” 42 U. S. C. §2000e(j).

The District Court granted summary judgment to USPS. The Third Circuit affirmed based on this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, which it construed to mean “that requiring an employer ‘to bear more than a *de minimis* cost’ to provide a religious accommodation is an undue hardship.” The Third Circuit found

the *de minimis* cost standard met here, concluding that exempting Groff from Sunday work had “imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale.”

The unanimous United States Supreme Court opinion written by Justice Alito clarified Title VII’s standard of “undue hardship” does not mean *de minimis*. The Court applied a textualist approach by explaining that its intent is to clarify, rather than overrule *Hardison*. The Court held that lower courts gave undue weight to *de minimis* as the governing standard, and that the plain meaning of the words “undue” and “hardship” in Title VII’s text mitigates against using *de minimis* as the standard, because, citing the dictionary, “in common parlance, a ‘hardship’ is, at a minimum, ‘something hard to bear.’”

The Court continued that adding the modifier of “undue” means that this requisite burden must rise to an “excessive” or “unjustifiable” level. The Court reasoned that these words are very different than *de minimis*, which only requires a “very small or trifling” hardship. The Court further explained that EEOC guidance has warned against using administrative costs or an infrequent payment of premium wages as satisfying undue hardship, suggesting that the standard is great than *de minimis*.

The Supreme Court ultimately held that to establish an undue hardship defense in a Title VII religious accommodation case an employer “must show that the burden of granting an accommodation would result in substantial increased cost in relation to the conduct of its particular business.” The Court further held that the undue burden defense requires a case-by-case analysis, and that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer.

*This case clarifies that the 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. The Court clarified that employers must now assess how religious accommodation requests will impact other employees, assess how accommodation request with impact the “conduct of its business,” and assess whether such impact constitutes a “substantial increased cost.”*

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### **Chapter 3: First Amendment**

#### ***Roberts v. Springfield Utility Board, 68 F.4th 470 (9th Cir. 2023) - Gag Order to employee under investigation did not violate First Amendment***

Todd Roberts worked as a Safety and Environmental Coordinator for the Springfield Utility Board for over two years. During that time, the Springfield personnel policies stated that 1) employees were expected to keep unscheduled absences and tardiness to a minimum, 2) requests for time off had to be made in advance, and 3) dishonesty would generally result in immediate dismissal.

In August 2019, Roberts took unscheduled time off. He alerted Springfield that morning and stated “I will be out all today working on the kids school/sport registrations and such to ensure they are all ready for school next week.” Four minutes later, however, Roberts emailed a co-worker: “I’m looking at your boat’s slip right now headed to the Pig N Pancake.” Roberts later attempted to delete this email.

After discovering this possible misrepresentation, Springfield hired two attorneys to investigate the incident and provide legal advice. As part of this investigation, Roberts was admonished both in writing and orally that he was restricted from discussing the investigation into his misconduct with other employees while it was ongoing. Roberts was told in writing that “While this matter is being investigated, you are prohibited from engaging in communication in any form with any employees of SUB. ... Any contact with SUB employees, including your supervisor, regarding this matter will constitute gross insubordination and be subject to disciplinary action...”

At the beginning of Roberts’ first interview, the investigating attorney stated “To protect the integrity of the investigation, you are restricted from discussing it with other employees of SUB while it is ongoing.” At the beginning of Roberts’ second interview, the investigating attorney stated “I’m going to instruct you not to communicate with any potential witnesses about the information that you’ve given . . . Do not communicate with potential witnesses we’ve discussed about the investigation or about the information you’ve provided in the investigation.” The attorney then clarified that the communication restriction applied only during the pendency of the investigation, did not apply to Roberts’ discussions with his wife, did not prevent Roberts’ attorney from contacting witnesses on Roberts’ behalf, and that Roberts would have the opportunity to contact potential witnesses when the investigation was complete.

Roberts was eventually terminated because of the findings of the investigation. He sued in the United States District Court for the District of Oregon under 42 U.S.C. section 1983 alleging that Springfield violated his First Amendment right to free speech by instructing him not to speak with other employees during the investigation. The District Court granted summary judgment for Springfield, it ruled that SUB's instructions limited Roberts' ability to speak on matters of public concern, but determined that the restriction was nonetheless permissible because it served SUB's legitimate interest in preventing interference with the ongoing investigation into his alleged misconduct. Roberts then appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit applied the *Pickering v. Board of Education* balancing test. This test first determines whether the employee spoke as a citizen on a matter of public concern. If not, there is no First Amendment issue. If the employee did speak as a citizen on a matter of public concern, then the court considers whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the public. Speech involves matters of public concern if it relates to any matter of political, social, or other concern to the community, or if it is a subject of legitimate news interest. Here, 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. Further undercutting

Roberts' claim, his attorney was not restricted from contacting any SUB employees about Roberts' alleged actions during the investigation.

Roberts also argued that the "gag order" was not limited to topics related to the investigation, but rather encompassed speech regarding alleged mismanagement and employer failings. The Ninth Circuit reviewed the various admonitions he was given, which on balance, showed that the restriction only pertained to communication with Springfield employees or other potential witnesses regarding the ongoing investigation into his alleged misconduct.

For all these reasons, the Ninth Circuit affirmed the District Court's grant of summary judgment for Springfield.

*This case differs from the PERB cases that prohibit employers from placing blanket gag orders on employees during an investigation, unless the employer can prove that an employee will fabricate or spoil evidence. (See Los Angeles Community College District (2014) PERB Dec 2404-E.) The PERB cases rely on the employee's collective bargaining rights to communicate with co-workers regarding wages, hours and working conditions. This Ninth Circuit case contains a First Amendment analysis only.*

***Progressive Democrats for Social Justice v. Bonta, 73 F.4th 1118 (9th Cir. 2023) - California Government Code Section 3205 is unconstitutional***

Plaintiffs Progressive Democrats for Social Justice ("PDSJ"), a political organization, and Krista Henneman and Carlie Ware, sued to challenge the constitutionality of Government Code section 3205. Section 3205(a) provides in part "An officer or employee of a local agency shall not, directly or indirectly, solicit a political contribution from an officer or employee of that agency...with knowledge that the person from whom the contribution is solicited is an officer or employee of that agency." Violation of the section is a misdemeanor.

Henneman and Ware were public defenders who wanted to solicit campaign contributions from other county employees for Sajid Khan, who was running for district attorney. They sought to solicit donations from other county employees, particularly other public defenders, outside of work hours and without using county resources or titles. However, they soon determined that individually soliciting donations from their coworkers would violate Section 3205.

Rather than risk breaking the law, Plaintiffs filed their lawsuit in the United States District Court for the Northern District of California challenging Section 3205 as unconstitutional. The complaint alleged that the law violated the First Amendment and Equal Protection Clause by banning political solicitations among local employees but not among state employees.

Plaintiffs then moved for a temporary restraining order enjoining the enforcement of Section 3205, which the District Court denied. The parties then cross-moved for summary

judgment on undisputed facts, including declarations from Henneman and Ware stating their desire to solicit their colleagues outside work hours and without using government resources, and the District Court granted the State's motion for summary judgment.

On PDSJ's First Amendment claim, the District Court determined that the balancing test set forth in *Pickering* provided the relevant framework. Weighing the “local employees’ First Amendment rights against the government's justification for treating them differently from members of the public,” the trial court found “adequate justification” for Section 3205’s restriction of local employees’ solicitation rights. With respect to PDSJ's Equal Protection claim, the trial court declined to resolve the parties’ dispute over the proper level of scrutiny. Rather, it held that section 3205 withstood PDSJ's challenge even under a “heightened standard,” because state and local employees were not “similarly situated” and, even if they were, the statute was closely drawn to support the important state interest of reducing the existence and appearance of corruption and workplace coercion.

On appeal, the Ninth Circuit considered what level of scrutiny applied to its review of section 3205, “closely drawn” scrutiny, as articulated in *McCutcheon v. FEC*, 572 U.S. 185 (2014), or the more deferential standard that applies to government employee speech under *Pickering*. Ultimately, a majority of the panel did not decide which standard was appropriate – because it found that Section 3205 would fail either level of scrutiny.

“Because the statute’s discrimination against local employees is not justified under any arguably applicable standard,” Judge Berzon wrote, “we hold that Section 3205 is unconstitutional and reverse the district court.” She acknowledged that California has an interest “in combatting corruption and worker coercion,” but declared that “we cannot, applying First Amendment precepts, countenance California’s ‘second-class treatment’ of local employees, absent any plausible reason for the distinction.”

Judge Berzon continued, “Section 3205 precludes over a million local government employees from soliciting political contributions from co-employees....Although local government employees may engage in other forms of political speech under Section 3205—such as solicitations directed at the public at large—Henneman and Ware declare, without contradiction, that individualized solicitations are ‘much more effective’ than general solicitations. By banning targeted political solicitations among local government workers, California restricts a core form of political speech for ‘a vast group of present and future employees.’ ”

The Ninth Circuit acknowledged that Section 3205 addresses the State’s interests in (1) freeing government employees from co-worker coercion to support political campaigns, and (2) ensuring that the workplace is nonpartisan. But the majority struck down Section 3205 because it was not “properly tailored” – that is, it *only* applies to local government employees rather than State government employees. “The critical question...is whether Section 3205 is properly tailored to support the State’s interests, given its exclusive application to local government employees. In other words, California must demonstrate that Section 3205, despite its differential treatment of state and local employees, is a reasonable response to the State’s

posited and actual harms....After a review of the record before us, we cannot say that the State has met its burden of justifying the differential ban under the First Amendment.”

Judge Berzon quoted the appellants’ brief as pointing out “A law clerk in a state judge’s chambers may solicit political contributions for a judicial candidate from one of her two or three fellow clerks at a Friday happy hour and sit next to the other clerk the following week; meanwhile, a Los Angeles County janitor may not solicit contributions for a Presidential candidate from a Los Angeles County prosecutor at a barbecue that they both happen to attend with family, even though both are among approximately 100,000 county employees, and even though they may go to work more than 85 miles (and an hours-long drive in LA traffic) from each other.”

Thus, the Ninth Circuit held that section 3205’s ban on just local employees’ expressive rights was in violation of the First Amendment. The State had attempted to justify their distinction between local and State employees based on the relative ability of the State agencies to protect their employees from retaliation versus local agencies, but the government produced no evidence supporting this position. The Ninth Circuit reversed the district court’s grant of summary judgment to the State and remanded the case for further proceedings.

*More than one million local government employees in California were previously subject to Section 3205. With the law being declared unconstitutional, these employees can now engage in political fundraising for the 2024 election cycle with local, State and federal races. Time will tell if the Legislature will attempt to reinstitute the law to apply to both state and local employees. The Court has clarified that such a rule must apply to both.*

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#### **Chapter 4: Labor Relations**

##### ***SEIU v. Alameda Health System, PERB Dec. No. 2856-M 3/23/23 - Probationary employee was properly released despite his protected union activity, but board member’s comments constituted interference***

By March 2020, the COVID-19 pandemic began to overwhelm hospitals nationwide. One hospital within the Alameda Health System (AHS), Highland Hospital, quickly experienced a shortage of personal protective equipment (PPE). A supervisor at Highland Hospital began to worry that supplies of PPE would be exhausted and directed nurses to wear cloth gowns when tending to non-COVID-19 patients instead of the fluid-resistant gowns normally worn.

Many of the nurses, who are represented by the Service Employees International Union, Local 1021 (SEIU), felt uncomfortable about this change. Saber Alaoui was a probationary nurse in March 2020. During one of his shifts, Alaoui cut holes in a garbage bag and wore it as a makeshift fluid-resistant gown over his cloth gown.

At some point, an SEIU employee representative approached Alaoui and asked if he would share the picture of himself wearing the modified garbage bag. Alaoui agreed because SEIU was advocating about PPE issues, and seeking to improve access to isolation gowns. SEIU representatives put a version of Alaoui’s picture on Facebook, Instagram, and Twitter.

The post gained traction online and an article appeared in a local newspaper. Part of a Board of Trustees meeting focused on AHS's response to the pandemic. The Board discussed media reports of the nurse who wore a garbage bag as PPE. A Board member asked the AHS CEO if staff were being denied necessary PPE, and the CEO responded that they were not. The Board member then asked, "for the purpose of political theater, have you required staff to wear garbage bags?" The CEO responded, "no," and said that he happened to be visiting Highland Hospital when the nurse reported wearing a garbage bag. The CEO characterized the incident as an "unfortunate episode" and said that isolation gowns were available later in the day. The Board member responded, "that kind of political theater is not acceptable [in] a time of crisis and we need to keep our heads level and . . . our eyes on the . . . real problem."

Shortly thereafter, Alaoui's supervisors began discussing whether to release Alaoui from probation for performance reasons. Alaoui had failed to administer medication as required by the patient's treatment plan, and had improperly pulled medications for more than one patient at the same time. When counseled about these mistakes, Alaoui was recalcitrant and argumentative. AHS released Alaoui from his probationary employment.

SEIU filed an unfair practice charge (UPC) with the Public Employee Relations Board (PERB) against AHS, alleging that both Alaoui's release and the Board member's statement were improper interference with protected union activity under the Meyers-Milias Brown Act (MMBA).

To establish a *prima facie* interference case, a charging party must show that an employer's conduct tends to or does result in some harm to protected union and/or employee rights. A charging party need not prove an employer acted because of an unlawful motive. If the union establishes a *prima facie* case, the burden shifts to the employer. The degree of harm triggers the weight of the employer's burden. If the harm is "inherently destructive" of protected rights, the employer must show that the interference resulted from circumstances beyond its control, and that no alternative course of action was available. For conduct that is not inherently destructive, the employer must show that it narrowly tailored its conduct based on an important operational necessity.

PERB found that Alaoui's release from probation was for legitimate business reasons, namely, poor performance, and was not inherently destructive. PERB found that the photo of Alaoui wearing the garbage bag gown was protected activity because it drew attention to employee safety concerns. Releasing Alaoui from probation shortly afterwards tended to harm protected rights. But, PERB held that the harm caused by releasing Alaoui from probation shortly after the protected activity was outweighed by AHS's right to release an employee from probation for serious work performance issues, and therefore PERB dismissed this part of the charge.

PERB next examined the claim of interference based on the Board member's statement that "political theater is not acceptable." In an interference case involving employer speech, PERB looks at the circumstances to determine if an employee or union representative had an objective reason to feel that the employer's communication coerces, restrains, or otherwise

interferes with protected rights. Generally, an employer has a safe harbor from an interference violation if it expresses its views, arguments, or opinions on employment matters, unless its expression contains a threat of reprisal or force, or a promise of benefit. This safe harbor for employer speech does not apply, however, “to ... urging employees to participate or refrain from participation in protected conduct, statements that disparage the collective bargaining process itself, implied threats, brinkmanship, or deliberate exaggerations.”

PERB first decided that the actions the Board member described as “political theater,” in context, were protected activities because the statement occurred amidst union and employee actions around safety and PPE shortages. But, PERB further held that an employee listening to the statements could reasonably infer a threat because a reasonable employee would understand “not acceptable” to mean “prohibited.” Thus, PERB concluded that the Board member’s comments that “that kind of political theater is not acceptable” constituted interference in violation of the MMBA.

*This case illustrates how careful management must be with any communications that relate in any way to protected activity. This case also demonstrates that 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.*

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## **Chapter 6: Reimburse Employee Expenses**

***Thai v. International Business Machines - 93 Cal.App.5th 364 (2023) - The plain language of Labor Code section 2802(a) requires the employer to reimburse an employee for all expenses that are a direct consequence of the discharge of the employee’s duties and the obligation does not turn on whether the employer’s order was the proximate cause of the expenses***

In March 2020, lead Plaintiff Paul Thai was employed by Defendant IBM when Governor Newsom issued the stay at home order in response to the COVID-19 pandemic. After the order took effect, IBM directed Mr. Thai and several thousand other IBM employees to continue performing their regular job duties from home. Mr. Thai and his coworkers personally paid for the services and equipment necessary to do their jobs while working from home, such as internet access, telephone service, a telephone headset, and a computer and accessories. IBM provided these items to its employees in its offices as well; however, IBM never reimbursed its employees for the at home expenses despite knowing that its employees incurred them.

The lead plaintiff and another employee sued seeking penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA), Labor Code section 2698 et seq., for alleged violations of Labor Code section 2802, subd. (a), which requires an employer to reimburse an employee for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties. Plaintiffs contended that IBM failed to reimburse them for the expenses necessarily incurred to perform their work duties from home, i.e., the cost of internet and phone service, a computer, etc. The trial court sustained defendant's demurrer, concluding the Governor's order was an intervening cause of the work-from-home expenses that absolved IBM from liability under section 2802. However, the Court of Appeal held that the trial court’s conclusion was inconsistent with the statutory language and reversed.



The elements of a section 2802(a) cause of action, as delineated by the statutory language, are: (1) the employee made expenditures or incurred losses; (2) the expenditures or losses were incurred in direct consequence of the employee's discharge of his or her duties, or obedience to the directions of the employer; and (3) the expenditures or losses were "necessary." The Court stated that only the second element was at issue in the appeal.

IBM argued that the Plaintiffs only incurred work from home expenses because the government required him to stay at home, and thus the government's order was an intervening cause and IBM was not the direct cause of any expenses. Plaintiffs argued that IBM's assertion was rejected in a very similar case, i.e., *Williams v. Amazon.com Services LLC* (N.D.Cal. June 1, 2022, No. 22-cv-01892-VC) 2022 U.S. Dist. Lexis 97920. The federal district court in *Williams* rejected Amazon's argument that they were not liable for the employee's work from home expenses because the expenses "were the result of government stay-at-home orders, not any action by Amazon." The court reasoned that, even if that were true, it did not absolve Amazon of liability because "[w]hat matters is whether [the plaintiff] incurred those expenses 'in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer.'"

Here, the Court of Appeal agreed with the *Williams* court's reasoning, stating that the trial court and IBM read the statute as if it required reimbursement only for expenses directly caused by the employer. But the Court stated that this analysis of the statute was a tort-like causation inquiry not rooted in the statutory language.

IBM did not dispute that the expenses at issue were the types of expenses that they paid for at its offices. IBM admitted that, prior to the pandemic, they provided their employees with office space and all the other tools that formed the basis of Plaintiffs' claims.

The Court ultimately reasoned that the circumstances that the expenses were being incurred at employees' homes following the March 2020 stay at home order did not change IBM's reimbursement obligation. The Court held that the language of 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." This obligation did not turn on whether the expenses were actually due to performance of the employee's duties. While the Court found that it may have been true that the stay at home order was the "but-for" cause of certain work from home expenses, "nothing in the statutory language can be read to exempt such expenses from the reimbursement obligation. Effectively, section 2802(a) allocates the risk of unexpected expenses to the employer, which is consistent with the Legislature's intent in adopting the statute."

*This case still leaves open the question of how section 2802(a) applies where an employer allows employees to work from home per a post-pandemic remote work policy. The first part of the second element "the expenditures or losses were incurred in direct consequence of the employee's discharge of his or her duties" is not dependent on "obedience to the directions of the employer." As such, another court could say that the expenditures of working at home voluntarily are the direct consequence of the discharge of their duties. But if an employer provides all of the equipment an employee needs at their office, and remote work is at the employee's choice, the opposite result is very possible. This case only provides guidance when an employee's remote work is the result of a stay at home order or other similar intervening cause.*

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### **III. LEGISLATION**

We are highlighting a few bills that have been introduced that could significantly impact California employers if they become law and should be on an agency's radar. Some or all of these bills could undergo substantial amendment as they work their way through the Legislature, or they might not be passed at all, but we are highlighting them for you here so your agencies can track them. We have also highlighted some bills that have passed and become law, and some that were not passed.

#### ***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 Fair Employment and Housing Act (FEHA), which also includes race, sex, sexual orientation, and others.

Specifically, 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.”

The bill defines the term “family member” broadly to include an employee's spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or “any other individual related by blood or whose association with the employee is the equivalent of a family relationship.” This bill is currently pending in the Senate Appropriations Committee.

#### ***Assembly Bill 933 (Aguilar-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. The bill is currently pending on the Senate Floor. (As of August 6, 2023)

#### ***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. The bill would also require a public employer to, upon hire; provide each temporary employee with their job description, wage rates, and eligibility for benefits, anticipated length of employment, and procedures to apply for open, permanent positions.

This bill would provide that no reimbursement shall be made pursuant to these statutory provisions for costs mandated by the state pursuant to this act, but would recognize that a local agency or school district may pursue any available remedies to seek reimbursement for these

costs. The bill is currently pending in the Senate Appropriations Committee (As of August 6, 2023).

***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.

The bill would require the Division of Labor Standards Enforcement, upon the filing of a complaint by an employee, to enforce the bill's provisions. The bill would also authorize any employee who the employer has subjected, or threatened to subject, to adverse action on account of the employee's refusal to attend an employer-sponsored meeting to bring a civil action, as specified, and to petition for injunctive relief. The bill is currently pending in the Assembly Appropriations Committee.

***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. The bill is currently pending in the Assembly Appropriations Committee.

***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. It does not prohibit an employer from inquiring about an applicant's criminal history if otherwise permitted by law. It also 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 pursuant to Part 117 of Title 32 of the Code of Federal Regulations, or equivalent regulations applicable to other agencies. The bill is currently pending in the Assembly Appropriations Committee.

### ***Senate Bill 731 (Ashby) – Remote Work***

Senate Bill 731 (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 an employee who has such a qualifying disability renews a previous request to work remotely, the employer would be required to grant that request if all of the following requirements are satisfied: (1) the employee requested and was denied remote work as a reasonable accommodation before March 1, 2020; (2) the employee performed the essential functions of their job remotely for at least 6 of the 24 months preceding the renewed request; and (3) the employee’s essential job functions have not changed since the employee performed their work remotely. However, the employer is not required to provide remote work as a reasonable accommodation if the employee can no longer perform all of their essential job functions remotely.

SB 731, if enacted, would be a significant departure from the standard interactive process in which employers engage with employees seeking a reasonable accommodation. Employers are currently not obligated to choose any particular accommodation or the accommodation preferred by the employee. The bill is currently pending in the Assembly Appropriations Committee.

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

This bill would additionally 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. The bill 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. The bill would provide that if an employee experiences more than one reproductive loss event within a 12-month period, the employer is not obligated to grant a total amount of reproductive loss leave time in excess of 20 days within a 12-month period. Under the bill, in the absence of an existing policy, the reproductive loss leave may be unpaid. However, the bill would authorize an employee to use certain other leave balances otherwise available to the employee, including accrued and available paid sick leave. The bill would make leave under these provisions a separate and distinct right from any right under the California Fair Employment and Housing Act.

The bill would make it an unlawful employment practice for an employer to retaliate against an individual, as described, because of the individual’s exercise of the right to reproductive loss leave or the individual’s giving of information or testimony as to reproductive loss leave, as described. The bill would require the employer to maintain employee confidentiality relating to reproductive loss leave, as specified. The bill is currently pending in the Assembly Appropriations Committee.