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CONFIDENTIAL
CLIENT LABOR & EMPLOYMENT LAW UPDATE

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Hello everyone:

Following are brief reviews of recent labor and employment related cases and articles of interest. Click on the link of any case or article of particular interest for all the details, and feel free to contact us if you have any questions or comments.

I. DISCRIMINATION

1. **Disability Discrimination - Extended Leave** – The Ninth Circuit Court of Appeals held that an employer did not commit disability discrimination by firing a boutique manager who could not perform her essential job duties due to a five-month disability leave. The California Fair Employment and Housing Act holds that an employer may fire an employee who cannot perform her essential job duties even with reasonable accommodations. Since the manager's essential job duties included supervising sales staff, customer relations, inventory, and preparing sales reports, her prolonged disability absence made it impossible for her to fulfill those tasks.

   Lawler v. Montblanc North America, (January 11, 2013, Ninth Cir.) ___ F.3d ___.
   http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/11/11-16206.pdf

2. **Discrimination - Termination of At-Will Employee** – The California Court of Appeal held that an at-will manager could be fired for being uncooperative during an internal investigation against him for gender discrimination, even if the investigation concluded that he was not guilty of discrimination. Under California law, an at-will employee may be terminated for almost any reason, unless the reason violates fundamental public policy. The court concluded that being uncooperative or deceptive in an employer's internal investigation is not a protected activity under state or federal law.

   McGrory v. Applied Signal Technology, (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/H036597.PDF

II. WAGE/HOUR LAW

3. **"Pooling" Tips Allowed** – The California Court of Appeal held that a casino's policy of requiring dealers to contribute a set amount of their tips per hour into a tip pool for nondealer employees did not violate the California Labor Code. Although the Labor Code prohibits employers from collecting gratuities left for employees or deducting tips earned from employees' wages, there is no express prohibition on employer-mandated tip pooling. The court concluded that if the legislature intended to prohibit tip-pooling it could have easily done so.

   Avidor v. Sutter's Place, Inc., (2013) ___ Cal.App.4th ___.
   http://www.courts.ca.gov/opinions/documents/H037142.PDF

III. LABOR/UNION LAW

4. **State Supreme Court Permits Unions to Picket Store Entrance** – The California Supreme Court held that a labor union may picket outside the privately-owned entrance to a Ralph's grocery store during a labor dispute. After the opening of a new Ralph's store, the union picketed and passed out flyers by the store's entrance, advising customers not to shop there since the store's workers had not yet unionized. The court determined that union-friendly California statutes protected the "peaceful union picketing on a public sidewalk outside a targeted retail store during a labor dispute, and such picketing [is not] a trespass." Although the store entrance is private property and not a public forum, the court held that California statutes allow the peaceful picketing and patrolling of an area where a person can legally be.

   Ralph's Grocery Co. v. UFCW Union Local 8, (2012) ___ Cal.4th ___.
   http://www.courts.ca.gov/opinions/documents/S185544.PDF

5. **NLRB - "Facebook Firings"** – In ruling that an employer committed an unfair labor practice by firing employees for discussing their work performance on Facebook, the National Labor Relations Board emphasized its view of social media as a "virtual water cooler:" online employee discussions about wages, hours, and working conditions for mutual aid or protection are protected by the National Labor Relations Act. After being criticized by a coworker, the criticized employee wrote a Facebook status stating "a coworker feels that we don't help our clients enough . . . [m]y fellow coworkers how do you feel?" Other employees responded to the status in support of their criticized coworker. After the critical employee reported the Facebook comments to a supervisor, the criticized employee and the coworkers who responded to her Facebook status were terminated for "bullying and harassment." The Board held that the employees' activity was protected by the Act: the coworkers shared a common cause (responding to a fellow employee's criticism of their work) and their comments were made for mutual aid or protection.

   NLRB Does Not 'Like' Facebook Firings, LA Daily Journal (December 31, 2012), Eli Kantor.

6. **NLRB Increasing its Protection of Non-Union Employees** – Recent decisions by the National Labor Relations Board have extended the protection of the National Labor Relation Act to nonunionized workers' rights to engage in concerted activity (discussions concerning wages, hours, and other terms and condition of employment). (1) Concerning arbitration agreements, the Board invalidated a nonunion employer's policy of requiring employees to sign a binding arbitration agreement while waiving their right to participate in class arbitration. (2) The Board also determined that a nonunion employer violated the Act by making employees sign an employment agreement acknowledging that their at-will employment "could not be modified in any way." (3) The Board found that a nonunion employer's policy of discouraging employees participating in an internal investigation from discussing the investigation violated the Act, since it had the potential to dissuade employees from engaging in concerted activity. (4) Lastly, the Board limited employers' abilities to restrict off-duty employees from accessing business premises. The Board found that a hotel's policy of requiring off-duty employees to obtain their manager's approval before entering interior areas of the hotel was invalid, since it led employees to believe that their concerted activity was prohibited without management approval.

   Let's Review the NLRB's Incursion Into Nonunion Territory, LA Daily Journal (January 8, 2013), Marlene Muraco.

IV. PUBLIC EMPLOYERS LAW

7. **Healthcare – "Play or Pay" Mandate** – In response to recent health care reform, the IRS has released guidance for employers on whether or not they are subject to the impending "pay or play mandate" to provide health insurance for their employees. Beginning in 2014, employers must either "play" by providing employees with minimum essential health coverage, or "pay" a tax if they do not. This mandate applies only to "large" employers: those with an average of at least 50 full-time employees during the year. The number of full-time employees for a given month can be calculated by adding: a) the number of employees who are employed an average of at least 30 hours of service per week; and b) the total hours worked (up to 120 for each worker) by non-full-time employees divided by 120.

   Employers: Do You Know Whether You Should 'Pay or Play?', LA Daily Journal (January 10, 2013), Ann Murray.

8. **Reinstatement - Non-Dismissed Employee** – The California Court of Appeal held that an injured county employee could not sue for reinstatement when she was never fired. After a series of injuries, the employee, a deputy probation officer, was subject to permanent medical restrictions concerning the duties she could perform and the number of hours she could work. After the county concluded that her job as deputy probation officer could no longer accommodate her restrictions (and her application for disability retirement was denied), the county offered her an office assistant position, which she rejected since it paid less. Although California law holds that a county employee is entitled to reinstatement if she was dismissed because of her disability and her application for disability retirement was denied, the court

concluded that this law did not apply to the employee, since she was never dismissed from her employment.

Mooney v. County of Orange, (2013) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/G046262.PDF

9. **Rejection of MOU - Rationale** – The Public Employment Relations Board held that a city council is not required to provide reasons for rejecting a proposed memorandum of understanding ("MOU"). After union membership ratified a tentative agreement following negotiations with the city, the agreement was submitted to the city council for authorization. While the city council did not vote on the agreement, it directed city staff to continue negotiating with the union. Although the union argued that the city council was required by state law to issue a "determination" when presented with the proposed labor agreement, the Board concluded that the council made a "determination" by concluding that the tentative agreement was unsatisfactory and directing city staff to continue negotiations. The Board also noted that the city council was not required to clarify what it found unacceptable in the proposed MOU.

Stationary Engineers Local 39 v. City of Lincoln, (September 6, 2012), PERB Decision 2284-M.
http://www.perb.ca.gov/decisionbank/pdfs/2284M.pdf

V. POLICE

10. **Qualified Immunity - Warrantless Entry** – The Ninth Circuit Court of Appeals held that a police officer who injured a homeowner after kicking down the gate to her yard while pursuing a misdemeanor suspect was not entitled to qualified immunity. An officer's conduct is not protected by qualified immunity if the officer violates a constitutional right that was "clearly established" at the time. The court found that the homeowner's small, enclosed yard was clearly "curtilage" protected from warrantless entry by the Fourth Amendment, and the officer should have known that his warrantless entry was in violation of the Fourth Amendment. The court also determined that the officer's entry was not protected by an emergency or exigency exception to the Fourth Amendment, since misdemeanor offenses rarely justify a warrantless entry.

Sims v. Stanton, (December 3, 2012, Ninth Cir.) ___ F.3d ___.
http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/16/11-55401.pdf

11. **Performance of Essential Duties - Demotion** – The California Court of Appeal held that a correctional peace officer could be medically demoted to a non-peace officer position when an injury he suffered prevented him from performing essential job duties. Correctional peace officers are required to annually certify in the use of a baton; the officer was demoted to an administrative position after a serious automobile accident left him unable to certify in baton use. Although California law prohibits discrimination against an employee because of a disability, an employee may be discharged or demoted if he cannot perform essential job duties even with reasonable accommodation. The court determined that using a baton was an essential job duty

that the officer could not perform even with reasonable accommodations, and his demotion was reasonable, since he could fully perform the essential duties of his new administrative position.

Furtado v. State Personnel Board, (2013) ___ Cal.App.4th ___.
http://www.metnews.com/sos.cgi?0113//D059912

VI. "In the Trenches" (The Blow by Blow of Active Court Cases)

12. **$4.5 Million Verdict - Excessive Force** – A Kern County jury awarded $4.5 million in damages to the family of a man who died of a heart attack after being tased and pepper sprayed by Kern County Sheriff's deputies. After the deceased, who had been using methamphetamines and had mental health issues, called police to his home to report a friend's alleged murder, a confrontation developed, culminating with the deceased being tased and pepper sprayed several times. The jury determined that the heart attack was caused by the deputies' negligent actions, not by the combination of the deceased's methamphetamine use and exertion while resisting arrest.

    Lucero v. County of Kern, LA Daily Journal, Verdicts & Settlements (January 4, 2013), Kern County Superior Court Case No.: S-1500-CV-273050.

13. **$2,000,000 Settlement for Employees - Disability Discrimination** – Dillard's department stores settled a class action disability discrimination lawsuit with terminated employees for $2,000,000 over its sick leave policies. Dillard's had a long-established company practice of requiring all employees to disclose confidential personal medical information in order to receive sick leave. The employees claimed that they were fired after refusing to share their medical histories with Dillard's after being advised against disclosure by their personal physicians. The employees argued that Dillard's policy violated the Americans with Disabilities Act, which prohibits employers from making inquiries into employees' disabilities unless required for job-related reasons.

    U.S.E.E.O.C v. Dillard's Inc., LA Daily Journal, Verdicts & Settlements (January 11, 2012), USDC – S.D. California Case No.: 3-08-cv-01780-CAB-PCL.

14. **Case Dismissal - Free Speech** – A Los Angeles judge dismissed the claims of an at-will substitute teacher for the Los Angeles Unified School District ("LAUSD") who alleged wrongful termination and breach of implied contract for exercising her right to free speech. In an interview during an "Occupy Los Angeles" protest that was later posted on YouTube, the teacher stated "I think that the Zionist Jews who are running these big banks and our Federal Reserve . . . need to be run out of this country" and identified herself as an employee of LAUSD.

LAUSD successfully contended that public entities like the LAUSD are not subject to free speech claims or tort claims like wrongful termination, and that the teacher's employment was governed by statute, not by contract.

McAllister v. Los Angeles Unified School District, LA Daily Journal, Verdicts & Settlements (January 25, 2013), Los Angeles Superior Court Case No.: BC484767.

15. **Case Dismissal – Intentional Infliction of Emotional Distress** – A Central District judge dismissed a former suspect's civil rights and defamation lawsuit stemming from comments made by LAPD Chief Charlie Beck in the Bryan Stow beating case. After the plaintiff had been arrested in connection with the 2011 Dodger Stadium attacks, Chief Beck told reporters that he was "confident" that the suspect had been involved in the beating. However, the case against the suspect fell apart due to lack of evidence and two other men were later arrested in connection with the beating. Despite this, the court determined that the suspect suffered no violation of due process because he was not formally charged with a crime.

    Ramirez v. City of Los Angeles, LA Daily Journal, Verdicts & Settlements (January 25, 2013), USDC – C.D. California Case No.: 2:2012-cv-08138.

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