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– Labor & Employment Law –
Defending Employers Rights

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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. **"Hey, Hot Stuff – You're fired: Iowa Court Upholds Termination of Attractive Employee."**
The Iowa Supreme Court stood by its ruling that a dentist acted legally when he fired an assistant because he found her too attractive and worried he would try to start an affair. Coming to the same conclusion as it did in December 2012, the all-male court found that bosses can fire employees they see as threats to their marriages, even if the subordinates have not engaged in flirtatious or other inappropriate behavior. The court said such firings do not count as illegal sex discrimination because they are motivated by feelings, not gender. The ruling upholds a judge's decision to dismiss the discrimination lawsuit filed against the dentist, who fired the assistant, even while acknowledging she had been a stellar employee for 10 years. The dentist and his wife believed that his attraction to the assistant – two decades younger than him – had become a threat to their marriage.

Melissa Nelson Update: Iowa Supreme Court Upholds Ruling Of Dental Assistant Fired For Being 'Irresistible' (July 12, 2013)
http://www.ibtimes.com/melissa-nelson-update-iowa-supreme-court-upholds-ruling-dental-assistant-fired-being-irresistible
The opinion: http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20130712/11-1857.pdf

II. RETALIATION

2. **Offer / Acceptance / Termination** – The Seventh Circuit Court of Appeals held that an employee's statement "*Shove your proposal up your ass and fire me!*" was a valid offer which the employer legitimately accepted. The statement was made during a separate-room mediation of the employee's discrimination complaint. The employee barged into the room occupied by his employer's representatives and shouted, "You can take your proposal and shove it up your ass and fire me and I'll see you in court." The employer accepted his offer in less than an hour! The employee did get his day in court after he filed a subsequent lawsuit for retaliation. The court upheld the termination after concluding that he had been fired for misconduct during the mediation, and not for making and supporting his charge of discrimination.

   Benes v. A.B. Data, Ltd., (July 26, 2013, 7th Cir.) ___ F.3d ___.
   http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D07-26/C:13-1166:J:Easterbrook:aut:T:fnOp:N:1175491:S:0

III. WAGE /HOUR

3. **Truckers Sue Over Employment Classification** – Truck drivers making short haul deliveries within the state are suing for unpaid wages including hourly pay, overtime and rest breaks. The drivers allege that the companies hire them and bring them on as independent contractors, but that they really are functioning as employees. For example, some drivers are required to install and pay for the company's radio, are monitored by GPS and must accept the company's payment terms. The companies that contract with the drivers claim that the drivers want to keep their independent contractor status in order to maintain their flexibility to work with whomever, whenever they want and pick and choose their own assignments. The California Department of Labor Standards Enforcement (DLSE) has taken interest in the situation, and recently upheld a fine against a company that had misclassified short haul drivers by mislabeling them as independent contractors.

   Trucking Industry Under Fire Over Misclassification Claims, LA Daily Journal (July 26, 2013), Laura Hautala.

IV. LABOR/UNION LAW

4. **Unions Speak Loudly On Issues Impacting Court Systems** – Court Workers' Unions have introduced Assembly Bill 566, which will severely limit a court's ability to contract with third-party companies for services instead of using unionized staff. One of the proposed standards includes requiring a court to demonstrate an actual cost savings before contracting out to a third-party instead of a union member. One of the more ominous proposed standards will simply bar any contract with an outside company if it will result in loss of employment for court workers, whether or not it saves the court money. Finally, the bill could be made retroactive to July 2012, which could require courts to rehire staff. Court officials say the bill will hamper their ability to operate efficiently as they are struggling to absorb the $261 million in cuts from previous years.

Court officials claim the bill will block the very contracts that the court has been using to save money, and will also impact the court's ability to contract out for other tasks including human resources and business services.

Unions Take Big Stand On Court Issues - Workers' Efforts Include Bill That Would Curtail Use Of Outside Contractors, LA Daily Journal (July 16, 2013), Paul Jones.

5. **Law Enforcement Agencies Responding to Union Protests Not Entitled to Damages** – The Ninth Circuit Court of Appeals held that compensatory damages could not be awarded to the various law enforcement agencies that responded to the scenes of the Union's protests because they were not parties to the underlying action. Here, the employer filed an action against the Union for engaging in protest activities. While the action was pending at the National Labor Relations Board (NLRB), the employer obtained a restraining order and injunction against the Union. When the Union continued its protest activities, the District Court found the Union in contempt and ordered it to pay compensatory damages to the NLRB, the employer, and the various law enforcement agencies who were involved. However, the Ninth Circuit reversed the award of damages to the law enforcement agencies because they were not parties to the original action.

   Ahearn v. International Longshore and Warehouse Union, Locals 21 and 4, (July 5, 2013, Ninth Cir.) ___ F.3d ___.
   http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/05/11-35848.pdf

6. **Company has Standing to File Suit Against Union Where Union Caused Financial Injury** – The Ninth Circuit Court of Appeals held that a company has standing to sue a union under the Labor Management Relations Act (LMRA) for damages resulting from certain unfair labor practices committed by the union. Here, the Ninth Circuit found that the company was not required to exhaust a petition to vacate the arbitration award itself prior to pursuing the damages caused by the union.

   American President Lines, Ltd. v. International Longshore and Warehouse Union, Alaska Longshore Division, Unit 60, (July 12, 2013, Ninth Cir.) ___ F.3d ___.
   http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/12/11-36080.pdf

V. POLICE

7. **Names of Officers Involved in the UC Davis Pepper Spray Incident Ordered Disclosed** – The California Court of Appeal held that the University of California must disclose the true identities of police officers named in a report regarding the infamous pepper spray incident UC Davis. The court held that a *Pitchess* motion was not required and that California Public Records Act (CPRA) does not permit redaction of the officers' names from the reports. The Court held that a police officer's identity and conduct while on the job are not private, intimate, personal details of the officer's life, and are matters with which the public has a right to concern itself. The Court reasoned, disclosing the names of officers involved in this highly visible,

highly publicized incident, without any information about disciplinary proceedings or disposition of citizen complaints, will not invade any officer's legitimate rights to privacy.

The Federated University POA v. Superior Court (LA Times), (2013) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/A136014.PDF

8. **Volunteer Reserve Officers are Not Employees for Purposes of FEHA** – The California Court of Appeal held that a Former LAPD volunteer police reserve officer was not an employee, and therefore could not maintain a cause of action against the City for disability discrimination under the California Fair Employment and Housing Act (FEHA). The Court held that while Police Reserve Officers are volunteers who serve gratuitously, the City deems them "employees" for the limited purpose of extending them workers' compensation benefits, to help to make them whole, in the event they are injured while performing their duties. The Court reasoned that the City's policy decision to extend workers' compensation benefits to these individuals, who voluntarily put themselves in harm's way on behalf of the community, does not transform their volunteer status to that of "employee" for purposes of FEHA.

Estrada v. City of LA, (2013) ___ Cal.App.4th ___.
http://www.courts.ca.gov/opinions/documents/B242202.PDF

VI. PUBLIC EMPLOYERS LAW

9. **Benefits Formula for Calculating Employees' Retirement Must Be Based On a Resolution or Ordinance** – The California Court of Appeal held that a settlement agreement's restrictive language precluded imposing any obligations on the county that had not been clearly expressed in the agreement. The parties previously had entered into a settlement agreement providing for the county board of supervisors to adopt by resolution a statutory service retirement formula. The agreement stated that it resolved all issues, that it was complete and final, that there were no additional unexpressed agreements or arrangements. The county applied an enhanced benefits formula after the chief deputy county counsel expressed an opinion that the agreement was intended to include enhanced benefits. Thereafter, the county concluded that it was not required to pay the enhanced benefits and voted to discontinue that practice. The court held that the enhanced benefits formula for disability retirement was not an implied term of the settlement agreement because the California Government Code requires contractual rights and obligations regarding county employees' compensation to be based on a resolution or ordinance.

Chisom v. Board of Retirement of County of Fresno Employees' Retirement Association, (2013) ___ Cal.App.4th ___.
http://scholar.google.com/scholar_case?case=10908313520132713222&hl=en&as_sdt=2&as_vis=1&oi=scholarr

VII. CIVIL RIGHTS

10. **Search and Seizure - Officers Lawfully Seize and Destroy 1,500 Pounds of Marijuana** – The California Court of Appeal held that officers lawfully seized and destroyed approximately 1,500 pounds of marijuana because it exceeded the reasonable amount needed for medical purposes. The owners of the gardens from which the cannabis was seized, were not arrested or charged, as they possessed physician's recommendations allowing them to cultivate approximately 45 pounds per year for personal medical use. They did, however, sue the County for damages, including physical and mental suffering, as well as the replacement value of the confiscated cannabis, which was estimated between $683,000 – $1.3 million. In affirming the judgment in favor of the County, the Court found that the owners' failure to proffer competent evidence that they had a legal right to possess the seized marijuana was fatal to their claims.

    Littlefield v. County of Humboldt, (2013) ___ Cal.App.4th ___.
    http://scholar.google.com/scholar_case?case=7698442873500856935&q=Littlefield+v.+County+of+Humboldt&hl=en&as_sdt=2,5&as_vis=1

11. **Court Improperly Granted Judgment in Favor of Officers in Excessive Force Case** – The Ninth Circuit Court of Appeals held that the District Court erred in concluding that the officers' conduct was not a substantial factor in causing the subject's death, and therefore erred in granting Defendants' motion for judgment as a matter of law. The Court of Appeals held that the District Court's analysis was infected by impermissible credibility assessments when it concluded that Defendants' conduct was not a substantial factor in the subject's death, that neither the pre- nor post-handcuffing conduct of the Defendants violated the subject's constitutional rights, and that no negligence occurred. The court record suggested that the judge's personal experience (as a former police officer), and not the testimony viewed in the light most favorable to the subject, lead the court to conclude that the officers actions were not excessive and were warranted under the circumstances.

    Krechman v. County of Riverside, et al., (July 25, 2013, Ninth Cir.) ___ F.3d ___.
    http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/25/12-55347.pdf

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

12. **$17,300,000 Settlement – Disability Discrimination** – A class of U.S. Postal workers alleging discrimination based on disability received a $17.3 million settlement from the USPS. The class alleged that the USPS discriminated against employees with disabilities by wrongfully placing them in permanent rehabilitation positions without following the legally required process.

    Edmond Walker v. United States Postal Service, LA Daily Journal, Verdicts & Settlements (July 19, 2013), U.S. Equal Employment Opportunity Commission, Case No.: 541-2008-00188X.

13. **$500,000 Settlement – Disability Discrimination/Wrongful Termination** – The Director of the Disability Resource Center at San Jose State University received a $500,000 settlement from the California State University. The director, a disabled person himself, alleged that he was terminated as part of the newly appointed Vice President for Student Affairs' effort to deemphasize programs for disabled students. California State University denied that it had ever lessened its ongoing commitment to serve the disabled community at San Jose State.

    Martin Schulter v. California State University, LA Daily Journal, Verdicts & Settlements (July 26, 2013), United States District Court, Northern District, Case No.: 3:11-cv-030904 JSW (JCS)

14. **Defense Verdict – Race Discrimination/Retaliation** – An Orange County jury returned a defense verdict in favor of the County of Orange Social Services Agency against allegations of racial discrimination, harassment and retaliation. The employee had received a probationary promotion after she made complaints claiming that she had not been promoted because of her race. The employee was later demoted after her probationary period expired. The employee alleged that the County demoted her in retaliation for her prior complaint. The County claimed that she was demoted after the probationary period on the basis that she did not meet the core expectations of her new position.

    Rochell Estes v. County of Orange Social Services Agency, LA Daily Journal, Verdicts & Settlements (July 26, 2013), Orange Superior Court, Case No.: 30-2011-00457543-CU-WT-CJC

As always, don't hesitate to contact any of our attorneys if you have any questions or comments.

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