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— *Labor & Employment Law* —

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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. **National Origin Discrimination – Scope of Allegations** – The California Court of Appeal held that although a Japanese American employee alleging discrimination by his supervisor could present evidence of anti-Asian animus, he could not present his broad theory that his supervisor discriminated against any employee who was not of Arab descent. Although the employee was allowed to present evidence that other employees of East Asian descent were subject to similar discrimination, he was not entitled to present evidence of discrimination against employees outside his protected class (those of East Asian descent). The court noted that the employee's complaint "was pled as an anti-Asian case, not as an Arab favoritism case."

Hatai v. Dept. of Transportation (2013) ___ Cal.App.4th ___.
<http://www.courts.ca.gov/opinions/documents/B236757.PDF>

II. RETALIATION

2. **Retaliation – Free Speech** – The Ninth Circuit Court of Appeals held that a police chief's delay in authorizing an officer's pay increase could be construed as unlawful retaliation for the officer's leading an earlier no-confidence vote by the police officers' union against the chief. For an officer to allege retaliation in violation of his First Amendment right of free speech, the officer must make the speech as a private citizen on a matter of public concern, not pursuant to his official duties. The court found that the officer's speech (leading the no confidence vote against the chief) involved a matter of public concern and that a jury could find that his union activity and speech were undertaken in his capacity as a private citizen.

Ellins v. City of Sierra Madre (March 22, 2013, Ninth Cir.) ___ F.3d ___.
<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/03/22/11-55213.pdf>

III. OTHER

3. **New Laws Expand Pregnancy Leave** – Recent changes to California law have expanded the protections that employers must provide pregnant employees. Now, not only are pregnant employees entitled to four months of pregnancy disability leave, they may also qualify for additional regular disability leave. Even if workers are not disabled by pregnancy, they are still entitled to an additional twelve weeks of unpaid “baby-bonding time.” Under the updated Pregnancy Disability Leave Law, employers must now offer pregnant employees longer term health insurance and will be closely scrutinized for not reintegrating employees returning from leave.

Employers’ Pregnancy Leave Obligations Increase, LA Daily Journal (March 25, 2013), Laura Hautala.

4. **Public Disclosure of Private Facts** – The California Court of Appeal held that an employee could sue her employer for public disclosure of private facts, even if this disclosure was by “word of mouth.” The employee, who suffered from bipolar disorder, alleged that her supervisor had informed her coworkers that she was bipolar, causing them to shun her. Although the employer unsuccessfully argued that the employee’s right to privacy could only be violated if the public disclosure was in writing, the court found that oral disclosure of private facts could be just as damaging as written disclosure.

Ignat v. Yum! Brands, Inc. (2013) ___ Cal.App.4th ___.

<http://www.courts.ca.gov/opinions/documents/G046343.PDF>

5. **Ninth Circuit Strikes Down Arizona Day Laborer Law** – The Ninth Circuit Court of Appeals ruled that an Arizona law banning the hiring of day laborers unreasonably restricted free speech. The bill, S.B. 1070, prohibited a motor vehicle occupant from hiring a person for work from a stopped car that impedes traffic, on the grounds that it would promote traffic safety. Although the state argued that day labor solicitation presented a unique safety concern that justified special treatment of such speech, the court determined that the law was a content-based restriction intended to suppress labor-solicitation speech rather than promote traffic safety. The court concluded that the bill’s restrictions on speech were more extensive than necessary to serve the state’s interest of promoting traffic safety.

Valle Del Sol Inc. v. Whiting (March 4, 2013, Ninth Cir.) ___ F.3d ___.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/03/04/12-15688.pdf>

IV. LABOR/UNION LAW

6. **Breach of Fiduciary Duty – Local Union** – In holding that the officials of a local union had breached their fiduciary duty by taking steps to weaken the union and form a rival union, the Ninth Circuit Court of Appeals recognized that union officials hold a duty to the union itself, not just to union members. After the Service Employees International Union (“SEIU”) placed United Health Workers (“UHW”), a local union affiliated with SEIU, in trusteeship after a dispute over long-term worker care, UHW officials took action to weaken UHW, and began to create a new union for their workers. Even if UHW officials thought they were acting in their members’ best interests, they also had to consider their actions “in relation to the interests of the union as an institution.”

Service Employees International Union v. National Union of Healthcare Workers (March 26, 2013, Ninth Cir.) ___ F.3d ___.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/03/26/10-16549.pdf>

7. **SEIU Seeks Los Angeles County Workers’ Contact Information** – The Supreme Court of California is weighing a request by the Service Employees International Union (“SEIU”) compelling Los Angeles County to provide the phone numbers and addresses of its 50,000 employees. In particular, SEIU seeks the contact information of approximately 15,000 non-member employees who it represents de facto. The County claims that it is protected from disclosing the information under the California Constitution, and that employees who have not disclosed their personal information to the union are entitled to notice and the opportunity to object. SEIU claims that it should have the ability to “impart certain crucial information” to employees and that “employees can’t tell the county not to provide their home addresses and phone numbers to the union.”

Court Weighs Unions’ Right To Public Employees’ Home Addresses, Phone Numbers, LA Daily Journal (March 6, 2013), Emily Green.

V. PUBLIC EMPLOYERS LAW

8. **State Wins Right to Sue Convicted Bell Officials** – The California Court of Appeal ruled that the state can sue corrupt former city of Bell officials for restitution of stolen public funds. The state filed the charges after learning of the officials’ corruption, including taking salaries three times the pay of a job in a similar-sized city. Although municipal authorities’ executive decisions are generally given immunity, the court found that immunity for legislative acts (the approval of their high salaries) is unavailable to public officials who acted outside their authority and state law.

People ex rel. v. Rizzo (2013) ___ Cal.App.4th ___.

<http://www.courts.ca.gov/opinions/documents/B236246.PDF>

9. **Former CalPERS Executives Indicted** – The former Chief Executive and a former board member of the California Public Employees’ Retirement System (“CalPERS”) were indicted by federal prosecutors on charges of fraud and obstruction of justice. The federal investigation investigated the board member’s alleged “influence-peddling in winning lucrative contracts for private equity funds that wanted to do business with CalPERS.” The two former officials are also being sued by the Securities and Exchange Commission and state attorney general for other fraud claims.

Former CalPERS Officials Indicted On Fraud, Obstruction Charges, Los Angeles Times (March 18, 2013), Marc Lifsher.

<http://www.latimes.com/business/money/la-fi-mo-former-calpers-officials-get-federal-fraud-indictments-20130318%2c0%2c5452216.story>

10. **Administrative Decision – Standard of Review** – The California Court of Appeal held that when a trial court reviews an administrative board’s decision “that substantially impacts a fundamental vested right,” the trial court must examine the administrative record for errors of law and exercise its independent judgment of the evidence. In this case, an administrative board denied a deputy sheriff’s application for service-connected disability retirement after concluding that his employment did not substantially contribute to his disability. Although the trial court reviewed the board’s decision using the “substantial evidence” standard (where the court defers to the factual findings made by the board), the Court of Appeal held that this was an error, as the correct standard is the “independent judgment standard” (where the court does not defer to the board’s findings of fact).

Alberda v. Board of Retirement of Fresno County Employees’ Retirement Association (2013) ___ Cal.App.4th ___.

<http://www.courts.ca.gov/opinions/documents/F064017.PDF>

11. **Legislative Prayer** – The Ninth Circuit Court of Appeals held that the City of Lancaster’s policy of soliciting local congregations to deliver a prayer before city council meetings was not an unconstitutional establishment of religion. Although the city solicited volunteers regardless of religious belief to pray, and requested that the prayer “not be exploited as an effort to convert . . . or disparage any faith or belief,” one of the volunteers invoked the name of Jesus during the prayer. The court noted that as long as legislative prayer “does not proselytize, advance or disparage one religion, or affiliate government with a particular faith, it withstands scrutiny” and is not an unconstitutional establishment of religion. The court found that the City’s prayer policy did not advance a particular religious group, and noted that although the volunteer’s prayer mentioned Jesus, it did not serve to “proselytize, advance, or disparage a religion.”

Rubin v. City of Lancaster (March 26, 2013, Ninth Cir.) ___ F.3d ___.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/03/26/11-56318.pdf>

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

- 12. \$115,000,000 Potential Settlement – Confidentiality of Medical Information** – An umbilical cord blood bank reached a class action settlement (with a potential value of \$115 million) with clients over allegations that the bank failed to adequately protect their medical and personal information. The claims stemmed from the theft of a bank employee’s car, which contained a laptop, USB stick, and external hard drive holding unencrypted data regarding some clients’ names, social security numbers, and credit card information. The settlement agreement’s potential value depends on the number of class members who signed up for credit monitoring protection and sought reimbursement for any actual injury.

Johansson-Dohrmann v. Cbr Systems Inc., LA Daily Journal, Verdicts & Settlements (March 22, 2013), USDC – S.D. California Case No.: 3:12-cv-01115-MMA-BGS.

- 13. \$30,000,000 Settlement – Negligent Retention** – Several elementary school students and their parents received a \$30 million settlement from the Los Angeles Unified School District (“LAUSD”) following sexual abuse charges against a former teacher. The abuse and lewd acts took place inside the classroom.

Minors v. LAUSD, LA Daily Journal, Verdicts & Settlements (March 29, 2013), Los Angeles Superior Court Case No.: BC496663.

- 14. \$4,640,000 Verdict – Wrongful Termination** – A San Diego district court awarded \$4.64 million to a former building manager over her wrongful termination claims. The manager claimed that she was fired after expressing concerns to her supervisors that the defendant company’s staffing plan did not provide her workers with legally required breaks. After the manager voiced these concerns and cited a California statute in a meeting, the regional vice president told the manager’s direct supervisor to “get rid of her.”

Company To Pay \$4.64 Million In Employment Case, LA Daily Journal (March 26, 2013), Laura Hautala.

- 15. \$1,030,000 Settlement – Age Discrimination** – A Northern District jury awarded over \$1 million to a former Radio Shack manager for age discrimination and wrongful termination. The manager, 54, managed the store for twelve years before he was fired; his replacement was 23 years old. The former manager cited his exemplary performance while running the store, and that his replacement told him that the company sought an employee with “younger ideas.”

Allen v. Radio Shack Corp., LA Daily Journal, Verdicts & Settlements (March 22, 2013), USDC – N.D. California Case No.: 3:11-cv-3110.

16. \$402,896 Settlement – Failure to Prevent Harassment – An African-American employee received a \$402,896 arbitration award for his harassment and retaliation claims against his former employer. The employee claimed that he was terminated after complaining to management that he was called a derogatory name in Spanish by a coworker, overhead other employees using derogatory racial terms, and was exposed to racially-offensive graffiti on the bathroom walls of the premises. The employer unsuccessfully argued that it immediately terminated the worker who made the derogatory comment, removed the objectionable statements from the bathrooms and instituted regular vandalism “checks” by management, and held a facility-wide mandatory meeting addressing zero-tolerance for graffiti and racially incentive language.

Williams v. Leading Edge Aviation Services Inc., LA Daily Journal, Verdicts & Settlements (March 8, 2013), San Bernardino Superior Court Case No.: CIVVS1104276.

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

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