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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/HARASSMENT

1. **Denial of Same Sex Domestic Partner's Health Benefits** – The Executive Committee of the Ninth Circuit Judicial Council held that the denial of health benefits for a former District of Oregon employee's same-sex domestic partner resulted in a deprivation of due process and equal protection and ordered the District of Oregon to compensate the employee for back pay plus interest. The court stated the employee and her partner were treated differently from similarly situated opposite-sex partners and same sex couples in other states within the circuit that were allowed to marry and receive spousal benefits under federal law.

In re Fonberg, (November 25, 2013, Ninth Cir.) ___F.3d___.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/11/25/13-002%20web.pdf>

2. **Hostile Work Environment Sexual Harassment - Employer Liability** – The Florida Southern District Court held that an employer may be liable for subjecting its employee to hostile work environment sexual harassment in violation of Title VII of the Civil Rights Act. The complaint listed several instances of sexual harassment including: Plaintiff touched what appeared to be semen in a unisex bathroom; a co-worker bragged in graphic detail about his sexual encounter with a woman claiming that he “rocked her all night,” while he simulated sexual intercourse; after eating lunch at a strip club, a co-worker placed his hands on Plaintiff's shoulder and asked her, “Do naughty girls need love too?”; co-workers made sexually explicit comments while looking at a photo of one worker's wife and step-daughter in front of Plaintiff; an intoxicated co-worker returned from lunch and removed his shirt, stating that it was “working in skins day”; two workers returned from lunch intoxicated and began dancing erotically and simulating sexual intercourse with each other, one of them declaring he was going to take his pants off; the

previous threat became a reality when co-workers played songs containing sexually explicit lyrics, prompting one co-worker to rip his pants off and walk around the office in his peach colored briefs. When Plaintiff asked him to put his pants back on, he replied “put that in your lawsuit.” The plaintiff complied with his demand after multiple failed attempts to have upper management rectify the situation. The court held that punitive damages may be assessed against the employer if their upper management’s inaction is seen as approval of the alleged misconduct, conveying reckless indifference or blatant disregard of their former employee’s rights.

Wonders v. United Tax Group, LLC, (S.D. Fla. 2013) ___ F. Supp. 3d ___.
<http://docs.justia.com/cases/federal/district-courts/florida/flsdce/9:2013cv80148/415114/46/0.pdf?1383130985>

II. WAGE /HOUR

- 3. New California Wage Law** – SB 7 was introduced after a recent California Supreme Court decision upheld charter cities’ rights to establish their own wage rules for locally funded projects. The bill, which takes effect in 2015, withholds state funds from cities that fail to comply with union-friendly wage rules. The state requires contractors to pay a minimum fee (“prevailing wages”) for the right to bid on local government projects. This requirement protects unionized workers’ jobs by preventing their employers from being underbid by contractors employing lower paid workers. The statute doesn’t require charter cities to maintain the “prevailing wage” requirement, but stops any state funding for their projects until they do so. There is concern over SB 7 setting a precedent allowing Sacramento to condition state funding on local compliance. Some opponents of SB 7 argue it is unconstitutional and are optimistic about ultimately prevailing in our state supreme court, which has set a precedent of striking down similar attempts by Sacramento to indirectly implement state policies by withholding state funds from cities refusing to comply with them.

After High Court Decision, New Wage Law Rankles Municipalities, LA Daily Journal (November 6, 2013), Paul Jones.

III. LABOR/UNION LAW

- 4. Unions Worry - Judge rules that Detroit is eligible for Bankruptcy** – Saying that “the city needs help,” U.S. Bankruptcy Judge Steven Rhodes ruled that Detroit is eligible for bankruptcy protection and can cut municipal employee pensions as it reorganizes its finances. The ruling is a blow for unions as the judge could allow the City to cut pension payments.

Detroit has not been contributing to its pension funds and by the end of the year, it will have deferred \$100 million in contributions. The City’s emergency manager has not said specifically how he would alter pension payments, but has said some adjustment would need to be made to deal with \$3.5 billion of unfunded liabilities. Unions say that could mean cutting pensions in half. The market value of the assets in the pension funds on June 30, 2012, was \$4.3 billion.

Unions worry that if pensions are cut back in Detroit, other cities and states across the country could soon follow suit.

Detroit 'Needs Help,' Is Eligible For Bankruptcy, Judge Rules. Los Angeles Times (December 3, 2013) Alana Semuels.

<http://www.latimes.com/nation/nationnow/la-na-nn-detroit-bankruptcy-judge-ruling-20131203,0,4413771.story#axzz2mROZnpjR>

5. **Bankruptcy Ruling Could Affect Union Pension Agreements in San Bernardino** – The decision in Detroit’s bankruptcy case allowing pension benefits to be cut could have a major impact on San Bernardino’s attempts to get out of insolvency. Judge Rhodes, as part of his ruling that Detroit was eligible for bankruptcy, decided that pensions can be altered just like any other contract, eliminating a protection that employee unions long have held to be ironclad. A spokesperson for the City of San Bernardino said the city has about \$160 million to \$180 million in unfunded liabilities because of pension benefits, mostly for police and fire, that it cannot afford. He also said the city’s intent is to be fair to its retirees and respect pensions as best it can. “The question always is what is fair,” he said. “What is fair has to be put up against the question of affordability. What is fair and what is affordable may be two different numbers.”

Bankruptcy Ruling Could Affect Union Pension Agreements, The Press-Enterprise (December 03, 2013), Imran Ghori

<http://www.pe.com/local-news/san-bernardino-county/san-bernardino-county-headlines-index/20131203-san-bernardino-bankruptcy-ruling-could-affect-union-pension-agreements.ece>

6. **Wisconsin Union Certification - State Mandated Annual Elections** – Wisconsin’s Republican Governor Scott Walker has placed collective bargaining restrictions on public worker unions, limiting their ability to bargain for anything other than base wage increases. Unions are also required to hold annual elections. To maintain state certification, the majority of each union’s eligible voters must elect for the organization to continue representing them. In 2012, Dane County Circuit Judge Juan Colas found the bargaining restrictions placed on any local public employee union unconstitutional. Despite the court’s ruling, the Wisconsin Employment Relations Commission (WERC) continued with their plans for re-certification elections for school district worker unions, resulting in the court issuing a contempt order in October. The state Supreme Court vacated the contempt order on appeal, but has yet to make a ruling on the merits of the 2012 decision. WERC officials have decided to proceed with their mandatory elections scheduled to begin this week. About 400 unions made requests to hold elections to WERC by the August 30 deadline, leaving their fate in members’ hands. The commission has automatically decertified all other unions that missed the deadline.

Wis. Officials Decide to Continue Union Votes, Yahoo Finance (November 26, 2013), Todd Richmond.

<http://finance.yahoo.com/news/wis-officials-decide-continue-union-120130222.html>

IV. **POLICE**

7. **Qualified Immunity - Probable Cause for Warrant** – The Ninth Circuit Court of Appeals held that peace officers were entitled to qualified immunity for executing a search warrant for an allegedly pornographic book that was later determined not to be indecent under a local ordinance prohibiting the distribution of indecent material to minors. Officers are entitled to qualified immunity if they believe that an invalid warrant is supported by probable cause. The plaintiff claimed that the officers violated his Fourth Amendment rights and should have known that their warrant applications failed to establish probable cause. However, the court concluded that officers had probable cause for believing the searches would turn up evidence related to the dissemination of indecent material: the officers consulted six prosecutors and obtained warrants from five judicial officials before executing the warrant.

Armstrong v. Asselin (November 1, 2013, Ninth Cir.) ___ F.3d ___.
<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/10/31/10-35777.pdf>.

8. **Unfunded State Mandate: Police Officer Bill of Rights** – The recent economic recession has caused California to take funds cities traditionally relied on to balance the state’s budget, escalating the struggle between state and local governments over power and resources. The League of California Cities has been successful in obtaining the passage of laws such as Prop 1A in 2004 and Prop. 22 in 2010, protecting local government funds from the state. But these laws offer limited protection, allowing the Legislature and the Department of Finance to siphon remaining revenue left unprotected by the law. Examples include redevelopment funds raised through tax-increment financing and vehicle license fees (for cities incorporated after Prop. 1A passed in 2004). The state is adding fuel to the fire by passing mandates without state funding. For instance, the Police Officer Bill of Rights requires cities to implement a procedural infrastructure to discipline police officers, but offers no funding to assist with compliance.

Recession Fallout Worsens Friction Between Cities and State Over Funding, LA Daily Journal (November 6, 2013), Katie Lucia.

V. **FIRE FIGHTERS**

9. **Firefighter’s Right to Inspect Personnel File - Daily Logs** – The California Court of Appeal held that a firefighter must have the chance to review a captain’s daily logs for adverse comments about him. The captain kept daily logs (stored at the fire station) documenting the activities of firefighters, which he used to prepare evaluations. The logs were kept separate from firefighters’ personnel files. Based on these logs, the captain determined that the firefighter’s performance was substandard and placed him on a performance plan. The Firefighter Procedural Bill of Rights (which mirrors the Public Safety Officers Procedural Bill of Rights Act) provides that a firefighter shall not have an adverse comment entered in his personnel file “or any other file used for any personnel purposes . . . without the firefighter having first read and signed . . . the adverse comment.” The court held that since the daily logs were used for personnel

purposes, they were subject to the provisions of the Bill of Rights and the firefighter was entitled to review his captain's negative comments.

Poole v. Orange County Fire Authority (2013) ___ Cal.App.4th ___.
<http://www.courts.ca.gov/opinions/documents/G047691.PDF>

VI. Other

10. In-House Counsel Liability – The California Court of Appeal held that an employee could sue his employer's in-house counsel, who had concurrently represented the employee and employer without disclosing a conflict of interest or obtaining written consent, for eliciting deposition testimony that led to the employee's termination. The plaintiff alleged that the defendant's misconduct and the employer's subsequent actions combined to cause his harm - his termination. The court stated the test for causation in legal malpractice actions with concomitant factors that contribute to the harm: "A defendant's negligent conduct may combine with another factor to cause harm; if a defendant's negligence was a substantial factor in causing the plaintiff's harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff's harm; but conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." The court reversed the summary judgment granted to the defendant and found a triable issue of material fact regarding whether the defendant's misconduct was a "but for" cause of the plaintiff's termination.

Yanez v. Plummer, (2013) ___ Cal.App.4th ___.
<http://www.courts.ca.gov/opinions/documents/C070726.PDF>

11. Anti-SLAPP Statute – The California Court of Appeal granted an employee's special motion to strike their employer's malicious prosecution action pursuant to the anti-SLAPP statute. The employer claims that the former employee brought a meritless claim for unemployment insurance benefits after the claim was denied and the decision was upheld by the California Unemployment Insurance Appeals Board (CUIAB). A defendant seeking protection from the anti-SLAPP statute has the burden of showing that the lawsuit arises from conduct in furtherance of their right of petition or free speech in connection with a public issue. If this is established, the burden shifts to the plaintiff to show a probability of prevailing on the claim. The court held that a claim arising from the decision of the CUIAB is protected activity under the statute since it involves the litigation of a claim in an official proceeding authorized by law. The employer's malicious prosecution claim requires a showing that the prior action was terminated in plaintiff's favor. The court held the plain language of the CUIAB section 1960 clearly expresses the Legislature's intent to have the statute apply broadly and does not include an exception for malicious prosecution actions. Section 1960 prohibits the use of a finding of fact or decision of the CUIAB as evidence in any subsequent proceeding between an individual and their employer.

Kurz v. Syrus Systems, (2013) ___ Cal.App.4th ___.
<http://www.courts.ca.gov/opinions/documents/H038694.PDF>

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

12. **\$7,500,000 Settlement - Wage Violation** – A company managing retirement communities and homes settled with a class of employees designated as “Community Co-Managers” for \$7,500,000 over alleged wage violations. The employees were misclassified as “salaried executive, administrative, or professional employees” exempt from overtime pay.

Cwik v. Harvest Management Sub LLC, LA Daily Journal, Verdicts & Settlements (November 22, 2013), US District Court – C.D. California Case No.: 2:12-cv-8309-DMG-JC.

13. **\$9,750,000 Settlement - California Municipalities** – 10 former officers and executives of Lehman Brothers Holding Inc. settled with a group of California municipalities for \$9.75 million without admitting wrongdoing in exchange for the plaintiffs dropping all claims. The plaintiffs filed the lawsuit in 2009 alleging that the defendants misled investors prior to the financial crisis and Lehman’s collapse, which caused plaintiffs to suffer large financial losses. The settlement will be divided amongst the plaintiffs based on their loss and damages claims.

State Municipalities Settle With Lehman Bros. Officials, LA Daily Journal (November 6, 2013), Hadley Robinson.

14. **\$900,000 Settlement - Wage Violation** – Philips, a large electronics company, settled with a class of employees for \$900,000 over alleged wage and hour violations. The employees claimed that the company failed to pay all overtime wages owed and failed to pay all wages due upon termination of employment. The employees also alleged that Philips did not provide legally mandated rest and meal periods or proper itemized statements.

Nguyen v. Philips Electronics North American Corp., Philips Lighting Electronics Company, LA Daily Journal, Verdicts & Settlements (November 15, 2013), US District Court – C.D. California Case No.: 2:12-cv-02427-JFW-SS.

15. **\$1,620,420 Settlement - Retirement Fund Misappropriation** – Sunkist Grower’s Inc. and other affiliated companies settled with the U.S. Department of Labor for \$1,620,420 over charges of retirement fund misappropriation. The defendants allegedly sent invoices seeking reimbursement for expenses related to the company’s benefit pension plan administration costs which improperly included the salary of various company officers. This caused the company to be reimbursed for the cost of employing these officers, violating the Employee Retirement Income Security Act (ERISA).

Labor v. Sunkist Growers Inc., LA Daily Journal, Verdicts & Settlements (November 15, 2013), US District Court - C.D. California Case No.: 2:13-cv-07116-PA-MRW.

16. **\$2,000,000 Settlement - Wage violation** – Specialty’s Café and Bakery settled with a class of employees for \$2,000,000 over alleged violations of the Labor code and California’s Unfair Competition Law. The employees claim Specialty’s failed to pay minimum wage, pay overtime,

pay wages upon termination, provide accurate pay stubs/payroll time records, provide rest periods or provide meal periods. Employees also alleged improper wage deductions, failure to reimburse business expenses, and other unfair business practices.

Nicole Covillo, Troyreac Henry, and John Chisholm v. Specialty's Café and Bakery Inc., LA Daily Journal, Verdicts and Settlements (November 15, 2013), US District Court – N.D. California Case No.: 4:11-cv-00594-DMR.

- 17. \$525,000 Settlement - Clothing Purchase Requirement** – Radio Shack settled with a class of employees for \$525,000 over alleged violations of Labor Code Sections 1198 and 2698. The employees contended that their employer required them to wear “docker-style” khaki pants or skirts without providing the clothing or reimbursing them for their purchase. They also claim RadioShack failed to provide suitable seats in violation of Wage Order 7.

Marcus Becerra v. RadioShack Corporation., LA Daily Journal, Verdicts and settlements (November 8, 2013), US District Court – N.D. California Case No.: 4:11-cv-03586-YGR.

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

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