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Employment Law Update 2015:
25 Questions

1. A conversation on Facebook between two youth center employees complaining about their jobs and exchanging banter about disregarding center rules and "raising hell" (such as playing loud music, not asking for permission before having events, not listening to supervisors, and throwing parties) was nonetheless protected activity under the National Labor Relations Act. (True or false?)

- True. Discussions between employees about working conditions, including advocating insubordinate behavior, are protected by the National Labor Relations Act.
- False. Employee statements advocating insubordination lose the protection of the National Labor Relations Act.

Answer: False.

Employee statements advocating insubordination lose the protection of the National Labor Relations Act.

- The NLRB held that the "pervasive advocacy of insubordination in the Facebook posts, comprised of numerous detailed descriptions of specific insubordinate acts," was egregious enough to lose protection. The NLRB found that the comments were too specific to be explained as jokes or hyperbole, and the employer was not obliged to wait for the employees to follow through on their misconduct.
- *Richmond District Neighborhood Center* (2014) 361 NLRB No. 74.

2. An employee commenting on Facebook that his boss was "an asshole" for incorrectly calculating his taxes was protected under the National Labor Relations Act, and another employee who "liked" the comment was also protected.

A. Both employees were protected, as employees have the right to communicate by social media to improve the terms and conditions of employment.

B. Neither employee was protected, as the employer's social media policy explicitly warned of discipline for "inappropriate" discussions about work.

C. Neither employee was protected since defamatory and disparaging comments are not protected.

Answer: A.

Both employees were protected, as employees have the right to communicate by social media to improve the terms and conditions of employment.

- The NLRB held that the employees were engaging in protected, concerted activity, and their comments were not "so disloyal" as to lose protection of the National Labor Relations Act. Furthermore, a social media policy banning "inappropriate" discussions is unlawfully overbroad when employees interpret it to encompass protected activity.
- *Three D, LLC d/b/a Triple Play Sports Bar and Grille* (2014) 361 NLRB No. 31.

3. Is an employer still required to engage in the interactive process before issuing a fitness-for-duty examination to an employee who has not sought accommodation for a disability?

A. Yes. FEHA requires that employers must initiate the interactive process to determine reasonable accommodation for an employee.

B. Yes. An examination cannot be job related and consistent with business necessity unless the employer uses the interactive process.

C. No. An employee has the burden of initiating the interactive process unless his disability is obvious.

Answer: C.

No. An employee has the burden of initiating the interactive process unless his disability is obvious.

- The Court of Appeal held that FEHA ties the interactive process to disability accommodations, not fitness-for-duty examinations. As the employee never admitted having a disability and did not provide any information to the employer about his disability, the interactive process was unnecessary.
- *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437.

4. An employee who was terminated for refusing to sign a disciplinary notice without first consulting his union representative is eligible to receive unemployment benefits. (True or false?)

- True. The employee's refusal to sign without union representation was a good faith error in judgment that was not so unreasonable under the circumstances to constitute misconduct.
- False. The employee was terminated for misconduct connected with work when he deliberately disobeyed his employer's lawful order to sign and is therefore disqualified from receiving benefits under the Unemployment Insurance Code.

Answer: True.

The employee's refusal to sign without union representation was a good faith error in judgment that was not so unreasonable under the circumstances to constitute misconduct.

- The California Supreme Court held that because the employee refused to sign without representation under the genuine, reasonable belief that it would be an admission of disputed allegations, refusal was not misconduct under the Unemployment Insurance Code.
- *Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal. 4th 551.

5. When may public employers first inquire about an applicant's criminal convictions?

A. On the initial job application.

B. After it has been determined that the applicant has met minimum qualifications.

C. It is impermissible after the passage of AB 218.

Answer: B.

After it has been determined that the applicant has met minimum qualifications.

- AB 218, effective July 1, 2014, amends Labor Code 432.9 to prevent public employers from initially inquiring about an applicant's conviction history. It does not apply to jobs where an agency is required by law to conduct a criminal background check or any position within a criminal justice agency. Furthermore, an employer may conduct a background check on those candidates who meet minimum qualifications.

6. Can a heterosexual male be subject to sexual harassment through homophobic slurs and actions by other heterosexual males who are unmotivated by sexual desire?

A. No. To qualify as sexual harassment, behavior must be because of a person's sex or perceived sexual orientation.

B. No. Sexual harassment must be motivated out of sexual desire.

C. Yes. Attacking a person's heterosexual identity is using sex as a weapon, creating a hostile work environment.

Answer. C.

Yes. Attacking a person's heterosexual identity is using sex as a weapon, creating a hostile work environment.

- The Court of Appeal held that even though the victim was heterosexual, which was known to the harassers, they subjected him to gay slurs and pranks. Such verbal harassment on his heterosexual identity, regardless of motivation by sexual desire, may constitute sexual harassment.
- *Taylor v. Nabors Drilling USA, L.P* (2014) 222 Cal.App.4th 1228.

7. When an employer discovers that an employee suing for disability discrimination misrepresented his immigration status on his job application, for what period can the employee seek damages for wrongful discharge?

A. The employee is barred from any recovery by the doctrines of unclean hands and after-acquired evidence.

B. The employee may recover for the period of time from the date of wrongful discharge to the date on which the employer acquired evidence of his wrongdoing.

C. The employee may recover damages for the entire period of time, as barring unauthorized workers from recovering lost wages is against fundamental state public policy.

Answer: B.

The employee may recover for the period of time from the date of wrongful discharge to the date on which the employer acquired evidence of his wrongdoing.

- The California Supreme Court held that an employee who falsified his employment status to obtain employment could seek compensation for loss of employment from the date of wrongful discharge to the date on which the employer acquired information of the employee's wrongdoing." To allow the doctrine of "unclean hands" to be a complete defense is against the public policy of FEHA by allowing employment discrimination with total impunity.
- *Salas v. Sierra Chemical Co.* (2014) 59 Cal. 4th 407.

8. A public employer violates the federal Family and Medical Leave Act ("FMLA") by requiring a District Attorney Investigator certified to return from medical leave for psychological issues and erratic behavior to undergo a fitness-for-duty examination. (True or false?)

- True. A fitness-for-duty examination would undermine her return-to-work certification, and under the FMLA, an employer cannot require a second opinion on a certification that an employee may be restored to her position.
- False. The FMLA permits an employer to conduct a fitness-for-duty examination that is job-related and consistent with business necessity, as a return-to-work certification does not preclude a finding of unfitness for duty.

Answer: False.

The FMLA permits an employer to conduct a fitness-for-duty examination that is job-related and consistent with business necessity, as a return-to-work certification does not preclude a finding of unfitness for duty.

- The Court of Appeal held that "the FMLA should be interpreted to render the employee's health care provider's opinion conclusive on the issue of whether the employee should be immediately returned to work, but to permit the employer to thereafter require [an examination] if it has a basis to question the employee's health care provider's opinion." It was appropriate to examine the employee given her previous erratic behavior and the fact she carried a firearm.
- *White v. County of Los Angeles* (2014) 225 Cal. App. 4th 690.

9. Is a deputy sheriff who reports alleged misconduct that has already been reported by another employee still a protected whistleblower?

A. No. By law, only the "first report" of misconduct to an employer is protected activity.

B. Yes. A whistleblower who is not the first to report alleged unlawful conduct is still protected from retaliation.

C. No. Revealing known information to an employer is not a protected disclosure.

Answer: B.

Yes. A whistleblower who is not the first to report alleged unlawful conduct is still protected from retaliation.

- The Court of Appeal held that only protecting the first whistleblower who discloses alleged unlawful acts would have a chilling effect on reporting misconduct, as employees would be afraid that someone had already reported it.
- *Hager v. County of Los Angeles*, (2014) 228 Cal.App.4th 1538.

10. Is a staffing company vicariously liable for an employee who poisoned a coworker's water bottle several weeks after a minor disagreement at work?

A. Yes. The incident occurred within the scope of employment.

B. No. Employers are not liable for employees' intentional torts.

C. No. Such unforeseeable behavior is highly unusual and startling and does not have a causal nexus to work.

Answer: C.

No. Such unforeseeable behavior is highly unusual and startling and does not have a causal nexus to work.

- The Court of Appeal noted that although an employee's criminal acts may fall within the scope of employment, the act must have a causal nexus to the employee's work for the employer to be liable. The court found that the poisoning did not arise out of a work-related dispute but because of personal malice. If an employee substantially deviates from her duties for personal reasons, the employer is not vicariously liable.
- *Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th 1515.

11. Are peace officers who told a doctor that an arrestee was having a seizure (when they actually believed he was faking it) and to remove a baggie of cocaine from the arrestee's rectum without consent protected by the Fourth Amendment?

A. Yes. The doctor was a private citizen whose conduct is not imputed to the officers.

B. No. The officers' directions constituted cruel and unusual punishment.

C. No. The doctor's action may be attributed to the state if the state provided significant covert or overt encouragement to him.

Answer: C.

No. The doctor's action may be attributed to the state if the state provided significant covert or overt encouragement to him.

- The Ninth Circuit Court of Appeal noted that a reasonable jury could conclude that the officers gave false information to the doctor with the intent of inducing him to perform an invasive search, since there was evidence the officers knew he was faking the seizure. The court also included that such an invasive search for a baggie of drugs did not entitle the officers to qualified immunity.
- *George v. Edholm* (9th Cir. 2014) 752 F.3d 1206.

12. Under the National Labor Relations Act, an employee can use his work email account for union activity during non-work hours. (True or False?)

- True. Employees with access to an employer's email system may use it during non-working time to discuss terms and conditions of employment.
- False. Employees have no right to use work email accounts for union organizing and an employer may prohibit such use as long as the ban is applied indiscriminately.

Answer: True.

Employees with access to an employer's email system may use it during non-working time to discuss terms and conditions of employment.

- Overturning prior precedent, the National Labor Relations Board held that "the changing patterns of industrial life" have made email an important means of workplace communication essential to employees' rights to engage in concerted activity. The board also noted that email is less disruptive than bulletin boards, copy machines, public address systems, and telephones.
- *Purple Communications, Inc.* (2014) 361 NLRB No. 126.

13. May California employers may require salaried, exempt employees to use their annual leave hours when they are absent from work for portions of the day?

A. Yes, if the absence is greater than four hours.

B. Yes, regardless of the length of the absence.

C. No, employers may only deduct leave time for full-day absences.

Answer: B.

Yes, regardless of the length of the absence.

- The Court of Appeal held that regardless of whether an absence is as least four hours or for a shorter period, an employer may deduct hours from an exempt employee's vacation leave.
- *Rhea v. General Atomics* (2014) 227 Cal. App. 4th 1560.

14. Should a peace officer with ADHD, who is terminated for severe interpersonal problems with coworkers, be considered disabled and therefore protected under the Americans with Disabilities Act ("ADA") because he was substantially limited in his interactions with others?

A. No. ADHD is not protected a protected condition under the ADA.

B. Yes. The employee had difficulty getting along with his fellow employees, which is a substantial impairment of his ability to interact with others.

C. No. Failure to "get along" with other employees does not mean that an employee cannot interact with others.

Answer: C.

No. Failure to "get along" with other employees does not mean that an employee cannot interact with others.

- The Ninth Circuit recognized the difference between "getting along with others" (a normative concept) and "interacting with others" (a mechanical concept). The court found that the officer was able to engage in normal social interactions and only had interpersonal problems with his coworkers, not his supervisors. "A cantankerous person who has mere trouble getting along with coworkers is not disabled under the ADA."
- *Weaving v. City of Hillsboro* (9th Cir. 2014) 763 F.3d 1106.

15. Do California fire fighters have the right to wear union apparel such as hats and t-shirts (which conform to uniform specifications) while on duty at their station?

A. No, permitted union apparel is limited to buttons and pins.

B. Yes, public employees, including public safety employees, have the fundamental right to wear union insignias at work.

C. No, public safety employees are exempt from rules permitting display of union insignias.

Answer: B.

Yes, public employees, including public safety employees, have the fundamental right to wear union insignias at work.

- PERB held that wearing union logos (beyond buttons and pins) enables public employees to demonstrate their union solidarity and pride, and found the employer did not demonstrate any special circumstances (maintaining professional appearance or discipline) that would justify a blanket "no union logo" policy.
- *County of Sacramento* (2014) PERB Decision No. 2393-M.

16. The City must meet and confer with the Union prior to implementing a planned reorganization of the Police Department. Agreeing to meet and confer only over the effects of the reorganization is insufficient. (True or false?)

- True. Parties must "meet and confer in good faith" prior to implementation.
- False. State law only requires that parties meet and confer over the *effects* of the reorganization.

Answer: True.

Parties must "meet and confer in good faith" prior to implementation.

- The City had refused to meet and confer regarding the decision to institute the reorganization plan, only the effects. Further, the City had insisted the reorganization would take place no matter what, and denied the union any opportunity to respond to the reorganization plan. The Court held that the City did not satisfy its meet and confer obligations because the City expressed a "predetermined resolve not to budge from an initial position" which is inconsistent with a good faith effort to meet and confer.
- *Santa Clara County Correctional Peace Officers Association v. County of Santa Clara* (2014) 224 Cal.App.4th 1016.

17. A nine-member peace officer union cannot collect attorney fees in a lawsuit over department reorganization and layoffs because such an action cannot affect a large class of people or the general public. (True or false?)

- True. To receive attorney fees, an action must convey a tangible benefit to a large group of persons or the general public.
- False. A significant benefit may be recognized from the effectuation of fundamental public policy, such as stabilizing labor relations between peace officers and their employer.

Answer: False.

A significant benefit may be recognized from the effectuation of fundamental public policy, such as stabilizing labor relations between peace officers and their employer.

- The Court of Appeal held that the litigation could benefit other employee unions within the city who were undergoing similar reorganizations, and litigation enforcing peace officers' procedural rights under POBR confers a significant benefit on the general public by helping maintain stable labor relations which in turn assures effective law enforcement.
- *Indio Police Command Unit Assn. v. City of Indio* (2014) 230 Cal. App. 4th 521.

18. Are there exceptions to the requirement to meet and confer when an employer's actions will have a significant effect on wages, hours or working conditions of bargaining-unit employees? (Yes or no?)

- Yes. When the employer's need for unfettered authority in making decisions, on balance, outweighs the benefits to employer-employee relations of bargaining about such decisions.
- No. The employer's need for unfettered authority in making decisions, on balance, never outweighs the benefits to employer-employee relations of bargaining about such decisions.

Answer: Yes.

When the employer's need for unfettered authority in making fundamental policy decisions, on balance, outweighs the benefits to employer-employee relations of bargaining about such decisions.

- The Court of Appeal noted that when a fundamental managerial decision significantly affects employees' wages, hours, or working conditions, a balancing test applies: the employer's need for unfettered authority in making decisions that strongly affect a firm's profitability is weighed against the benefits to employer-employee relations of bargaining about such decisions.
- *Indio Police Command Unit Assn. v. City of Indio* (2014) 230 Cal. App. 4th 521.

19. Can a police department have a blanket policy against disclosing the names of peace officers involved in shootings?

A. Yes. such individualized proof will impose an unfair and substantial burden on law enforcement agencies that want to protect their officers.

B. No. The names of officers involved in shooting cases can be withheld from disclosure only if there is specific evidence that their safety would be imperiled.

C. Yes. General safety concerns and a history of aggression against named officers justify a department's blanket rule against releasing names.

Answer: B.

No. The names of officers involved in shooting cases can be withheld from disclosure only if there is specific evidence that their safety would be imperiled.

- The Supreme Court held that as the department offered no evidence of a specific safety concern regarding any particular officer, it could not prove that the public interest in not disclosing officers' names was greater than the public interest in disclosing them.
- *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59.

20. The legislature intended that an arbitrator may rule upon a discovery motion for officer personnel records (Pitchess motion) when hearing an administrative appeal from discipline imposed on a correctional officer. (True or false?)

- True. The legislature intended for *Pitchess* motions to be brought during peace officer disciplinary hearings.
- False. The legislature intended that only judicial officers are authorized to rule on *Pitchess* motions.

Answer: True.

The legislature intended for Pitchess motions to be brought during peace officer disciplinary hearings.

- The California Supreme Court found that Evidence Code section 1043 (1) expressly provides that *Pitchess* motions may be filed with an appropriate "administrative body;" and (2) uses language that reflects a legislative intent that administrative hearing officers be allowed to rule on these motions. This is also consistent with a peace officer's right to administratively appeal an adverse employment decision.
- *Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal. 4th 624.

21. In most cases may the police, without a warrant, search digital information on a cell phone seized incident to an arrest?

A. No. Cell phone data can neither endanger anyone nor be destroyed and does not justify warrantless search incident to arrest.

B. Yes. It is reasonable to search incident to an arrest when relevant evidence of the crime may be found nearby.

C. Yes. It is reasonable to search an arrestee for weapons or evidence that could be concealed or destroyed.

Answer: A.

No. Cell phone data can neither endanger anyone nor be destroyed and does not justify warrantless search incident to arrest.

- The US Supreme Court stated: "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."
- *Riley v. California*, (2014) 573 U.S. ___.

22. May peace officers who re-entered a mentally-disabled woman's room in a group home after learning of her disability and shot her when she brandished a knife be liable for excessive force?

A. No. Both entries into the woman's room were covered by the Emergency Aid exception of the Fourth Amendment.

B. No. The officers responded with reasonable force.

C. Yes. A jury could find that the officers acted unreasonably by failing to consider the woman's mental illness before re-entering.

Answer: C.

Yes. A jury could find that the officers acted unreasonably by failing to consider the woman's mental illness before re-entering.

- The Ninth Circuit Court of Appeal held that a reasonable jury could find that the officers' decision to force a confrontation was unreasonable. Although the victim needed assistance, the officers had no reason to believe that a delay in entering her room would cause her serious harm, especially when weighed against the high likelihood that a deadly confrontation would ensue if they forced a confrontation.
- *Sheehan v. City & County of San Francisco* (9th Cir. 2014) 743 F.3d 1211.

23. When alleged misconduct is discovered but the responsible officer is unknown, when does the one-year statute of limitations for investigating a police officer under POBR 3304(d)(1) commence?

A. When the department is alerted of the alleged misconduct.

B. When the identity of the officer is discovered.

Answer: A.

When the department is alerted of the alleged misconduct.

- The Court of Appeal noted that statute of limitations begins when the person authorized to initiate the investigation discovers an allegation of misconduct. The general rule is that ignorance of the identity of a wrongdoer does not delay the accrual of a cause of action because the identity of the wrongdoer is not an element of the cause of action.
- *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87.

24. A director of a community college program terminates an employee for being paid without reporting to work and later testifies under subpoena against the employee in a criminal case for mail fraud and embezzlement. The director is later terminated by the college president. Was his testimony protected by the First Amendment?

A. Yes. The director testified as a citizen on a matter of public concern and anyone who testifies in court bears an obligation to tell the truth.

B. No. Since the director acted in his official capacity when he fired the employee and testified against her he was not protected by the First Amendment.

C. No. An employee's speech is not protected if it stems from his professional duties and is a product of his employment.

Answer: A.

Yes. The director testified as a citizen on a matter of public concern and anyone who testifies in court bears an obligation to tell the truth.

- The US Supreme Court unanimously held that a public employee who provides truthful sworn testimony, compelled by subpoena, acts outside the scope of his ordinary job duties and is protected by the First Amendment. Public employees are uniquely qualified to comment on matters concerning government policies that are of interest to the public at large, and public policy dictates such sworn testimony is speech as a citizen. The director's testimony involved corruption and misuse of state funds, matters of public concern.
- *Lane v. Franks (2014)* 134 S. Ct. 2369.

25. Under POBR, a peace officer must be served a Notice of Intent to Discipline in what manner?

- A. By personal service within one year of the date of discovery of the alleged misconduct.
- B. By mail (constructive notice) sent within one year of the date of discovery of the alleged misconduct.

Answer: A.

By personal service within one year of the date of discovery of the alleged misconduct.

- The Court of Appeal held that although the Government Code allows for notice by either personal service or mail, POBR requires actual notice. Service by mail received more than one year after the date of discovery was insufficient.
- *Earl v. State Personnel Board* (2014) 231 Cal.App.4th 459.