In One Year And Out The Other: Year In Review

2024 Public Sector Conference – May 10, 2024

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LABOR AND EMPLOYMENT LAW
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Agenda

1. New Legislation
2. Notable Case Law
3. Notable PERB Decisions

New Legislation

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A.B. 96 Public Transit Employers; Autonomous Vehicle Technology; Bargaining

Coverage:

- A “public transit employer” means any local governmental agency, including any city, county, city and county, special district, transit district, or joint powers authority, that provides public transit services within the state

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A.B. 96 Public Transit Employers; Autonomous Vehicle Technology; Bargaining

Requirements:

- **Notice**: Must give 10 months' written notice before "procurement process to acquire or deploy any autonomous transit vehicle technology for public transit services that would eliminate job functions or jobs of the workforce."

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A.B. 96 Public Transit Employers; Autonomous Vehicle Technology; Bargaining

Requirements (Cont'd):

- **Bargaining**: Upon written request, must bargain over:

  (1) Developing the new autonomous transit vehicle technology.
  (2) Implementing the new autonomous transit vehicle technology.
  (3) Creating a transition plan for affected workers.
  (4) Creating plans to train and prepare the affected workforce to fill new positions created by a new autonomous transit vehicle technology.

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A.B. 96 Public Transit Employers; Autonomous Vehicle Technology; Bargaining

Enforcement:

- File unfair practice charge with PERB, but only if PERB has jurisdiction.

S.B. 428/S.B. 553 – Temporary Restraining Orders; Employee Harassment

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S.B. 428 Requirements:

- Expands Workplace Violence TRO statute (CCP § 527.8) to harassment claims:
  - “Harassment” means knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. [It] would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress.
- More expansive than the prior standard of unlawful violence or credible threat of violence.

S.B. 428/S.B. 553 – Temporary Restraining Orders; Employee Harassment

S.B. 428 Requirements (cont'd):

- The employee for whom the employer or union are seeking the TRO may decline to be named in the order.
- These requirements operative January 1, 2025.

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S.B. 428/S.B. 553 – Temporary Restraining Orders; Employee Harassment

S.B. 553 Requirements:

- Requires employers to establish, implement, and maintain, at all times in all work areas, an effective workplace violence prevention plan containing specified information.
- Maintain a log of violent incidents and responses.
- These requirements operative July 1, 2024.

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A.B. 1484 - Temporary Employees in Bargaining Units

Coverage:

- MMBA employers
- Temporary public employees hired to perform same or similar work of permanent employees.

Requirements:

- Upon request of the union, temporary employees must be automatically included in the same bargaining unit as the permanent employees.

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A.B. 1484 - Temporary Employees in Bargaining Units

Requirements (Cont'd):

- If the labor contract is currently closed, the parties should include any terms they negotiate in an addendum.
- When the labor contract is open, they can move the terms into the main body of the labor contract.
- Must bargain seniority credits and hiring preferences for temporary employees who apply for permanent positions.
- When public employers hire new temporary employees, they must provide the worker and the union with the applicable job description, wage rates, benefits summary, anticipated length of employment, and procedures to apply for open permanent positions.

Notable Case Law

LABOR AND EMPLOYMENT LAW
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Snoeck v. ExakTime Innovations, Inc. (2023) 96 Cal.App.5th 908, reh'g denied (Oct. 25, 2023), review denied (Jan. 24, 2024).

Facts:

- Jury awarded Plaintiff $130,088 in damages for disability discrimination under FEHA
- Plaintiff sought $2,089,272.50 in attorney fees
- Court awarded $686,795 in attorneys' fees, which included a 0.4 negative multiplier to the adjusted lodestar calculation "to account for [p]laintiff's counsel's ... lack of civility throughout the entire course" of the litigation.

Holding:

- A court "… may consider an attorney's pervasive incivility in determining the reasonableness of the requested fees. A court may apply, in its discretion, a positive or negative multiplier to adjust the lodestar calculation—a reasonable rate times a reasonable number of hours—to account for various factors, including attorney skill."

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Raines v. U.S. Healthworks Medical Group (2023) 15 Cal.5th 268.

Facts:

- FEHA defines "employer" to include "any person acting as an agent of an employer."
- Defendants conducted medical screenings for employers, which were alleged to have included impermissible and invasive questions.

Holding:

- Court distinguished *Reno v. Baird,* which held that individual employees who are not themselves employers could not be sued under FEHA for alleged discriminatory acts.
- Business-entity agents are more likely to have comparable bargaining power to the employer.
- Court held that FEHA permits business entities acting as agents of an employer to be directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances where the entity carries out FEHA-related activities on behalf of the employer.

Stone v. Alameda Health System (2023) 88 Cal.App.5th 84, review granted.

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Holding: Plaintiffs <u>can</u> pursue the following causes of action because…

There is no infringement upon sovereign governmental powers:

1. Failure to provide off duty meal periods
2. Failure to provide off duty rest breaks
3. Failure to keep accurate payroll records

Employer is not a "municipal corporation":

5. Unlawful failure to pay wages
6. Failure to timely pay wages

Don't need to prove employer is a "person" for statutory violations for which a civil penalty is specifically provided:

7. PAGA – valid for at least two of the causes of action

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Stone v. Alameda Health System (2023) 88 Cal.App.5th 84, review granted.

Holding: Plaintiffs cannot pursue the following cause of action because:

Employer is “any other governmental entity” and so is exempted:

4. Failure to provide accurate itemized wage statement

Krug v. Board of Trustees of California State University (2023) 94 Cal.App.5th 1158, review granted (Dec. 13, 2023).

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Facts:

- During COVID pandemic, CSU professor was denied access to his office to retrieve computer and printer. Professor replaced these items and asked CSU for reimbursement under Labor Code § 2802.
- Labor Code § 2802(a) states that "an employer shall indemnify [an] employee for all necessary expenditures…incurred…in direct consequence of the discharge of his or her duties."
- Trial court held that public entities are generally exempt from Labor Code statutes that do not expressly apply to public entities.

Krug v. Board of Trustees of California State University (2023) 94 Cal.App.5th 1158, review granted (Dec. 13, 2023).

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Presumption:

- Absent express words to the contrary, governmental agencies are not included within the general words of a statute.

- So…governmental agencies are not included within a general word such as “employer.”

Krug v. Board of Trustees of California State University (2023) 94 Cal.App.5th 1158, review granted (Dec. 13, 2023).

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- **Three-part test:**
  1. Does the statute contain "express words" referring to governmental agencies?

  2. If not, does the statute contain any "positive indicia" of a legislative intent to exempt the agency from the statute?

  3. If no such indicia appears, does applying the statute infringe upon sovereign governmental powers?

Krug v. Board of Trustees of California State University (2023) 94 Cal.App.5th 1158, review granted (Dec. 13, 2023).

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Application of Three-Part Test:

1. No express words referring to governmental agencies.
2. No “positive indicia” to exempt CSU from the statute’s reach.
3. Applying § 2802 to CSU in this case could infringe on CSU’s sovereign governmental powers.
   - Would limit the discretion vested in CSU under the Education Code to establish employee expenditure reimbursement policies.
   - If CSU were ever held liable under § 2802, it would potentially result in CSU having to divert funds from their limited education budget, to paying legal judgments and attorneys’ fees to outside parties. This would be an interference with the CSU’s ability to exercise its sovereign power to provide public education.

Ventura County Employees' Retirement Association v. Criminal Justice Attorneys Association of Ventura County, et al. (2024) 98 Cal.App.5th 1119, review granted (April 17, 2024).

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Background:

- In 2020, in *Alameda County Deputy Sheriff's Association, et al. v. Alameda County Employees' Retirement Association, et al.,* the California Supreme Court upheld the constitutionality of provisions of PEPRA.
- Following the *Alameda* ruling, many county retirement systems implemented the California Supreme Court's directives by passing resolutions redefining "compensation earnable" (i.e., the pensionable income of employees who are deemed "legacy" or "classic" employees under PEPRA).

Ventura County Employees' Retirement Association v. Criminal Justice Attorneys Association of Ventura County, et al. (2024) 98 Cal.App.5th 1119, review granted (April 17, 2024).

Facts:

- Ventura County Employees' Retirement Association ("VCERA") adopted a resolution excluding compensation for "leave cashouts" of accrued but unused hours of annual leave that exceed employees' calendar year allowance.
- Resolution was based on VCERA's interpretation of a provision in PEPRA that defines "compensation earnable" as excluding "payments that [] exceed what is earned and payable in each 12-month period during the final average salary period regardless of when reported or paid."
- Employee organizations objected to the VCERA resolution because VCERA previously included leave cashouts straddling two our four years (12- or 36-month final compensation period).

Ventura County Employees' Retirement Association v. Criminal Justice Attorneys Association of Ventura County, et al. (2024) 98 Cal.App.5th 1119, review granted (April 17, 2024).

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Holding:

- Court ruled in favor of VCERA, finding that the retirement board was obligated to exclude compensation for unused leave exceeding the employee's calendar year allowances.
- The Court of Appeal nonetheless recognized the impact its ruling has on retirees.

Visalia Unified School District v. Public Employment Relations Board (2024) 98 Cal.App.5th 844, rev. den. (April 24, 2024).

LABOR AND EMPLOYMENT LAW
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Background:

- PERB Decision No. 2806-E held that: (1) the employee's status as a union officer is activity protected by the EERA; (2) the District retaliated against the officer for her union activity; and (3) the District failed to prove it would have terminated her notwithstanding an anti-union motive. The District petitioned for writ of review.

Holding:

- Court held PERB properly found that the District retaliated against the employee for her union activity, but erred in holding that the District failed to prove its affirmative defense that it would have terminated the employee for poor performance notwithstanding any protected activity.

Visalia Unified School District v. Public Employment Relations Board (2024) 98 Cal.App.5th 844 , rev. den. (April 24, 2024).

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Holding (Cont'd):

- Disparate treatment and disproportionate factors relied upon by PERB do not withstand scrutiny and are not supported by substantial evidence.
  - Disparate treatment: Because there was no evidence a similarly situated employee committed similar errors, PERB should have rejected this argument.
  - Disproportionate punishment: The Board:
    - (1) Improperly discounted all prior discipline that was imposed in her previous position;
    - (2) Failed to account for the gravity of errors at issue in the case;
    - (3) Failed to persuasively explain why, after numerous issues spanning several years, the District needed to continue to apply discipline short of termination; and
    - (4) Erred in finding that the District improperly cited, as justification, evidence that it was not permitted to based on the parties' previous settlement agreement.

Visalia Unified School District v. Public Employment Relations Board (2024) 98 Cal.App.5th 844 , rev. den. (April 24, 2024).

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Under Education Code section 45113(b) – which provides that "… the governing board's determination of the sufficiency of the cause for disciplinary action shall be conclusive" – once a school board determines it has cause to take disciplinary action against a permanent employee, PERB has no ability to override that determination for being retaliatory.

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LaMarr v. Regents of the University of California (2024) __ Cal.Rptr.3d __; 2024 WL 1735773 (Issued April 5, 2024).

Facts:

- Plaintiff was having performance issues under new supervisor.
- Manager sought to defuse the situation by transferring Plaintiff to another location.
- Plaintiff performed well in new role. Manager then offered Plaintiff the following choices: 1) remain at new job which is a lower-level position; or 2) return to the prior job. However, if returned to the prior job she might be subject to the pending action that was previously put on hold.
- Plaintiff responded that she did not want to return to a hostile environment that could lead to her dismissal; therefore, she would remain at the new job.
- Plaintiff brought action for denial of due process under *Skelly v. State Personnel Board,* arguing that her transfer was a demotion.

LABOR AND EMPLOYMENT LAW
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LaMarr v. Regents of the University of California (2024) __ Cal.Rptr.3d __; 2024 WL 1735773 (Issued April 5, 2024).

Holding:

- Court held that, "What *Skelly* requires is unambiguous warning that matters have come to a head, coupled with an explicit notice to the employee that he or she now has the opportunity to engage the issue and present the reasons opposing such a disposition. Moreover, the opportunity to respond must come after the notice of intention to dismiss."
- Court held that the Regents did not violate Plaintiff's due process rights because she was never notified of an intent to terminate and any demotion was voluntary.
- Although a demotion is an adverse result, due process is not required where an employee has voluntarily surrendered the property interest.
- Court acknowledged that Plaintiff was given a difficult choice; however, the court held that, "a difficult choice is not the same as an involuntary choice."

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Muldrow v. City of St. Louis, Missouri (2024) 601 U.S. ____ (Issued April 17, 2024).

Facts:

- Plaintiff brought a Title VII suit to challenge a transfer on the basis that such employment action was discriminatory based on her gender.
- Court of Appeals for the Eighth Circuit affirmed trial court dismissal, holding that the employment decisions she alleged did not constitute "adverse employment action" and thus did not establish a prima facie case of gender discrimination under Title VII, nor were they "materially significant disadvantage[s]."

Holding:

- Supreme Court found that an employee challenging a job transfer under Title VII need only show some employment disadvantage resulting from the transfer but need not show a "significant'' disadvantage.
- Supreme Court resolved a circuit split regarding the threshold for harm necessary to maintain a Title VII claim related to a job transfer.

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McCormick v. CalPERS (2023) 90 Cal.App.5th 996 (Issued April 3, 2023).

Facts:

- Employee worked as an appraiser in a courthouse and developed certain medical symptoms that were seemingly caused by her office environment.
- After her employer denied her request for reasonable accommodation to work in a different location, and her protected leave was exhausted, her employer terminated her.
- She applied for disability retirement. CalPERS denied her disability retirement, finding that her condition did not prevent her from performing her job duties at a theoretical different location.

LABOR AND EMPLOYMENT LAW
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McCormick v. CalPERS (2023) 90 Cal.App.5th 996 (Issued April 3, 2023).

Holding:

- Government Code § 21156: "incapacitated for the performance of his or her duties…"
- Employees are eligible for CalPERS disability retirement when, due to a disability, employee can no longer perform their usual duties at the only location where their employer will allow them to work, even if they might be able to perform those duties at a theoretical different location.
- An employee does not need to request reasonable accommodation to be eligible for disability retirement.
- Plaintiff awarded attorneys' fees under Government Code § 1021.5.

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Cruz v. City of Merced **(2023) 95 Cal.App.5th 453 (Issued Aug. 23, 2023).**

Facts:

- Former police officer who allegedly conducted an illegal search, submitted a false police report, and committed perjury at a court hearing challenged the City's decision to uphold his termination and reverse the personnel board's decision recommending demotion.
- Superior court denied the officer's petition for writ of administrative mandamus and affirmed the City's decision. The officer appealed.

LABOR AND EMPLOYMENT LAW
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Cruz v. City of Merced (2023) 95 Cal.App.5th 453 (Issued Aug. 23, 2023).

Holding:

- Regarding illegality of search and his credibility: trial court erred in concluding that collateral estoppel applied, because the officer did not have a community of interest with the district attorney who was prosecuting the criminal defendants and the officer was not in control of the criminal prosecution.
- Court upheld some of the charges against the officer, but it “cannot affirm the judgment because the possibility remains that the trial court could conclude, in its independent judgment, that the surviving charges are insufficient to support the officer’s termination (i.e., that the termination decision was an abuse of discretion).”

Notable PERB Decisions

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City and County of San Francisco (2023) PERB Decision No. 2867-M (7/24/23), judicial appeal pending.

Facts:

- 1976 city-wide strike by municipal workers.
- Charter of the City and County of San Francisco (“City”) contains provisions prohibiting municipal workers from striking and that mandate termination of striking employees.
- Required acknowledgment and receipt form.
- City asserted: no-strike provisions were lawful because of home rule doctrine and the binding interest arbitration was a quid pro quo for not striking.
- The ALJ found that the Charter provisions conflict with the MMBA facially and as applied to the extent they prohibit striking, and that the City’s home rule power does not exempt it from MMBA compliance.

LABOR AND EMPLOYMENT LAW
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City and County of San Francisco (2023) PERB Decision No. 2867-M (7/24/23), judicial appeal pending.

Holding:

- The Board reaffirmed holding that the MMBA provides employees with a qualified right to strike.
- City's argument that right to strike was waived as part of interest arbitration process: Board held that contractual waiver will only be found based upon a bilateral agreement rather than a unilaterally implemented policy. Board found no evidence in record that the parties bilaterally agreed to implementing a permanent strike prohibition in the Charter.
- Charter provisions void and unenforceable.

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State of California (California Correctional Health Care Services) (2024) PERB Decision No. 2888-S (2/8/24), judicial appeal pending.

Facts:

- ULP alleged that the State of California (California Correctional Health Care Services) (CCHCS) violated the Dills Act by: (1) denying a request for union representation at November 4 meeting; and (2) terminating employee in retaliation for protected activities.
- Employee challenged his termination before the State Personnel Board which reduced his termination to a one-month suspension.
- PERB ALJ found that CCHCS violated the Dills Act both by denying employee union representation at the November 4 meeting and by terminating him in retaliation for protected activities.
- However, the ALJ partially agreed with CCHCS on its affirmative defense to the retaliation claim, finding that it would have suspended Kane for at least one month based on his proven misconduct, even had he not engaged in protected activities.

LABOR AND EMPLOYMENT LAW
CALIFORNIA LAWYERS ASSOCIATION

State of California (California Correctional Health Care Services) (2024) PERB Decision No. 2888-S (2/8/24), judicial appeal pending.

Holding:

- The Board reversed, in part.
- Regarding the request for union representation, the Board affirmed that, "… representational rights normally do not arise during a routine conversation in which a supervisor corrects work technique or gives instruction, assignment, direction, or training." In this case, the meeting in question initially arose because Kane's supervisor wanted to discuss routine work matters. During the course of the meeting the two of them began discussing information requests and eventually the supervisor accused Kane of behaving insubordinately. However, the Board held that Kane's supervisor never discussed the specifics of any information requests and therefore that discussion did not transform the meeting into an investigatory one.

LABOR AND EMPLOYMENT LAW
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State of California (California Correctional Health Care Services) (2024) PERB Decision No. 2888-S (2/8/24), judicial appeal pending.

Holding:

- Regarding termination, the Board held that claim preclusion does not apply when PERB resolves a Dills Act discrimination charge after SPB has already issued a final decision as to whether the state had adequate cause to issue discipline.
- However, the Board acknowledged that issue preclusion may apply in these situations.
- After examining the facts in this case, the Board held that while SPB considered whether Kane's conduct constituted adequate cause for discipline, and, if so, the appropriate remedy for such conduct, SPB did not consider whether Kane's protected activity under the Dills Act was a motivating or substantial factor in the decision to terminate him. Nor did SPB consider what CCHCS would have done in the absence of protected activity.
- Board held that the ALJ jumped too quickly to the conclusion that, absent protected activity, CCHCS would have suspended Kane for at least one month.

LABOR AND EMPLOYMENT LAW
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State of California (California Correctional Health Care Services) (2024) PERB Decision No. 2888-S (2/8/24), judicial appeal pending.

Remedy:

- Given the unique circumstances of this case, the Board ordered that this case first be referred to mediation with the State Mediation and Conciliation Service. Absent a settlement, the Board remanded the case to the ALJ to reopen the record on the limited issue of what level of discipline CCHCS would have issue absent Kane's protected activities.

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California Nurses Association and Caregivers & Healthcare Employees Union v. Palomar Health (2024) PERB Decision No. 2895-M, judicial appeal pending.

Facts:

- CNA and CHEU filed an unfair practice charge against Palomar Health alleging that Palomar violated the MMBA by: (1) maintaining an enforcing an unreasonable access rule via its Solicitation & Distribution Policy; (2) engaging in unlawful surveillance; (3) unilaterally changing its past policy or practice to disallow the Unions access to certain non-patient care areas by filing a lawsuit to enjoin the Unions from being present in these areas; and (4) interfering with protected rights by filing that lawsuit.
- The ALJ found in favor of the Unions on the first two claims, but dismissed the latter two allegations.

LABOR AND EMPLOYMENT LAW
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California Nurses Association and Caregivers & Healthcare Employees Union v. Palomar Health (2024) PERB Decision No. 2895-M, judicial appeal pending.

Holding:

- First, the Board held that Palomar's Solicitation & Distribution Policy was unreasonable both facially and as applied. The policy specified that "[p]ersons not employed by the Palomar Health may not solicit or distribute literature or written material on Palomar Health property at any time for any purpose."
- While Palomar's policy is neutral – in that it bans all solicitation and distribution, whether union or otherwise – the Board found it unlawful because it is not limited to patient care areas and prohibits union representatives from engaging in solicitation and distribution in nonwork areas and during nonwork times.

LABOR AND EMPLOYMENT LAW
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California Nurses Association and Caregivers & Healthcare Employees Union v. Palomar Health (2024) PERB Decision No. 2895-M, judicial appeal pending.

Holding:

- Second, the Board found that Palomar made an unlawful unilateral change to its access policies when it deviated from the status quo by changing past practice and/or by enforcing an existing policy in a new way.
- The Board found that the Unions regularly engaged in protected conduct in the areas they had previously been permitted to access, and that the past practice was sufficiently "regular and consistent (or alternatively 'historic and accepted') to constitute an established practice." Even if the record did not establish such a past practice, the Board explained, "Palomar created a new policy or applied or enforced policy in a new way when it for the first time sought to block the Unions from non-patient areas."

LABOR AND EMPLOYMENT LAW
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California Nurses Association and Caregivers & Healthcare Employees Union v. Palomar Health (2024) PERB Decision No. 2895-M, judicial appeal pending.

Holding:

- Third, the Board found that Palomar interfered with protected rights via its unlawful surveillance, where: (1) Palomar security employees photographed union representatives leafletting in front of the main entrance to the medical center; and (2) a Palomar security officer placed a two-way radio on a table during a union meeting.
- The Board relied on NLRB case law in assessing the lawfulness of employer surveillance of protected activity. NLRB caselaw provides that an employer engages in unlawful surveillance when it photographs or videotapes employees or openly engages in recordkeeping of employees participating in union activities; however, the mere observation of open, public union activity on or near the employer’s property does not constitute unlawful surveillance.

LABOR AND EMPLOYMENT LAW
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California Nurses Association and Caregivers & Healthcare Employees Union v. Palomar Health (2024) PERB Decision No. 2895-M, judicial appeal pending.

Holding:

- Fourth, the Board found that Palomar interfered with protected rights when it filed its lawsuit because the entirety of the lawsuit was without any reasonable basis and for an unlawful purpose.
- Where an interference or retaliation allegation is based upon litigation-related conduct, the Board explained that PERB applies the principles articulated in *Bill Johnson's Restaurants, Inc. v. NLRB* (1983) 461 U.S. 731 and thereby follows "a qualified litigation privilege that preserves parties' ability to litigate colorable legal rights while disallowing baseless, bad faith conduct that tends to harm protected labor rights." Under those principles, the charging party must prove that the respondent acted without any reasonable basis and for an unlawful purpose or with a retaliatory motive.

LABOR AND EMPLOYMENT LAW
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County of Santa Clara (2023) PERB Decision No. 2876-M (10/17/23), judicial appeal pending.

Facts:

- Disaster Service Work assignments in a private sector skilled nursing facility and privately-owned motel.
- The County argued that the pandemic suspended its duty to afford the Unions notice and an opportunity to bargain regarding emergency measures.

LABOR AND EMPLOYMENT LAW
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County of Santa Clara (2023) PERB Decision No. 2876-M (10/17/23), judicial appeal pending.

Holding:

- The Board concluded that: (1) the County could take necessary measures to save lives without first reaching an impasse or agreement with the Unions, but it nonetheless had a duty to provide notice and an opportunity to bargain in good faith to the extent practicable in the particular circumstances; and (2) the County failed to comply with this duty.

- Thus, "an employer facing a true emergency can take emergency measures without first reaching agreement or impasse, but the duty to afford notice and to bargain in good faith continues as much as is practicable, both before and after the employer implements emergency measures."

- Duty to provide notice and bargain over Disaster Service Work-related decisions.

LABOR AND EMPLOYMENT LAW
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County of Santa Clara (2023) PERB Decision No. 2876-M (10/17/23), judicial appeal pending.

Holding:

- The County violated the MMBA by wrongly asserting, throughout the relevant timeframe, that it had no duty to engage in good faith to the extent practicable in the particular circumstances.
- Other California public entities found it possible to bargain and reach agreements during the early months of the pandemic and the record fails to establish adequate reasons why the County was any different.
- While the County met with the Unions several times during the pandemic's early weeks, it refused to engage in negotiations and instead characterized the meetings as an opportunity for the Unions to "voice concerns and suggestions." "[A] party cannot satisfy its duty to bargain by denying it has such a duty while agreeing to meet as a courtesy."

Kern County Hospital Authority v. Public Employment Relations Board (2022) PERB Decision No. 2847-M (2024), affirmed in 100 Cal.App.5th 860 (2024).

Facts:

- Service Employees International Union, Local 521 (“SEIU”) filed an unfair practice charge against Kern County Hospital Authority (“Authority”) alleging that the Authority’s refusal to allow SEIU’s motion to amend a grievance to make it a class grievance amounted to a unilateral change from the parties’ past practice.
- PERB held that by declaring that the MOU bars group or class grievances and granting itself unilateral authority to refuse to consolidate grievances, the Authority violated the MMBA by unilaterally adopting a new policy, or applying or enforcing existing policy in a new way, without affording SEIU notice and an adequate opportunity to bargain.
- Board affirmed that a union has a statutory right to initiate grievances on its own behalf and on behalf of named and/or unnamed employees in the bargaining unit and found that the MOU did not clearly and unmistakably reflect a waiver of this right by SEIU.

LABOR AND EMPLOYMENT LAW
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Kern County Hospital Authority v. Public Employment Relations Board (2022) PERB Decision No. 2847-M (2024), affirmed in 100 Cal.App.5th 860 (2024).

Holding:

- The Board made a narrow determination to the effect that the MOU was ambiguous and there was no clear rule or policy prior to the Authority's refusal to allow SEIU's motion to amend a grievance to make it a class grievance.
- The Board rejected the Authority's argument that the MOU implicitly disallows group and class grievances by defining a grievance as a "complaint by an employee" and using other similar singular phrasing. The Board reasoned that only clear and unambiguous MOU language can bar a union from pursuing collective relief through a grievance, and an MOU does not satisfy that standard where it merely defines the grievant as a singular "employee" and does not explicitly exclude group and class grievances.

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Mt. San Jacinto Community College District (2023) PERB Decision No. 2865-E (6/28/23).

Facts:

- PERB ALJ found that a community college district ("District") removed two faculty members as chairs of the Chemistry Department, refused to recognize their subsequent reelection as chairs, reassigned them to teach lower-level classes for the Fall 2020 semester, and issued two counseling documents, each in retaliation for protected activities including raising safety concerns and alleging that their removal as chairs was retaliatory.
- The District filed exceptions, which included arguments that: (1) the faculty members' conduct was not protected by EERA; and (2) removal as chairs, refusal to reinstate as chairs, and assignment of Fall 2020 classes were not adverse actions.

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Holding:

- Where an employer claims that speech was so flagrant or insubordinate flagrant as to cause substantial disruption in the workplace, PERB conducts a fact-intensive inquiry that considers all relevant circumstances, including but not limited to: (1) the place of discussion; 2) subject matter 3) nature what occurred; and 4) extent which speech or conduct at issue can fairly be said have been provoked by employer.
- PERB has also held that when speech occurs by text message, e-mail, social media, or in another manner other than face-to-face, there tends less likelihood of disruption.
- Here, the Board found that each of these factors favor the protected nature of emails at issue.

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Holding:

- First, the safety concerns were sent via e-mail where they were unlikely to cause disruption. The subject matter was both the retaliatory reassignments and the change in schedule that negatively affected both faculty members and adjunct coworkers.
- Because the new schedule included changes to long-standing schedules, and to the typical faculty input into such changes, they were likely to engender strong feelings.
- Finally, the Board found that none of the statements at issue were insubordinate or disruptive on their face, or in context.

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Remedy: Spoken notice

Two employees not reinstated as chairs, due to concern for innocent incumbents.

So a “non-standard remedy” is needed. Notice reading necessary to blunt the impact of the District’s unlawful conduct.

No particular reader ordered, but must reach the most employees possible and an Association representative must be present.

Questions