

CPER LEGISLATIVE AND CASE LAW UPDATE

Since the final issue of *CPER Journal* appeared in May 2013, many important laws have been passed that affect public sector employment. Below are summaries of selected legislation, PERB decisions, and court cases that have gone into effect or have been decided since CPER last published its journal.

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PEPRA

The California Public Employees' Pension Reform Act (PEPRA), which took effect on January 1, 2013, is said to be the most comprehensive pension reform ever passed in California. Many amendments to the Act were adopted in 2013 and 2014. With some exceptions, PEPRA applies to all state and local retirement systems, and to their participating employers, including CalPERS, CalSTRS, the Legislators' Retirement System, the Judges' Retirement System I and II, county and district retirement systems created pursuant to the County Employees Retirement Law of 1937, independent public retirement systems, and individual retirement plans offered by public employers. The University of California Retirement Plan and charter-based retirement systems, including the City and County of San Francisco, the City of San Jose, the City of Fresno, the City of Los Angeles, and the City of San Diego, are exempted. The Act does not apply to multi-employer plans authorized by the Taft-Hartley Act if the employer participated in the plan prior to January 1, 2013, and the plan is regulated under the Employee Retirement Income Security Act of 1978.

PEPRA made significant changes in the way in which public employees' retirement formulas are calculated. The new formulas apply to "new members" beginning on January 1, 2013.

Figuring out who is a “new member” is somewhat complicated and differs depending on the retirement system. An employee who is new to an employer or new to a union’s bargaining unit is not necessarily considered a “new member” for PEPRA purposes.

PEPRA also changed the amount that employees must contribute toward retirement, as well as what is to be included in “pensionable compensation” and “creditable compensation. It set caps on pensionable compensation, provides for a 36-month final compensation period, banned the purchase of nonqualified service credit (“airtime”), and specifies the requirements for post-retirement employment, among other things.

The act is complex and confusing. Public employers and employees and their representatives would do well to become acquainted with its requirements. CPER’s *Pocket Guide to the Public Employees’ Pension Reform Act* by Kerianne Steele gives a detailed analysis and clearly explains the provisions of the Act. It can be ordered from the CPER website: <http://cper.berkeley.edu>.

Whistleblower Statutes

“Whistleblowers” are employees who report to their employer or government officials purported illegal or wrongful activities of the employer or fellow employees, or who themselves refuse to engage in such activities. Employers may not interfere with an employee’s right to report such wrongdoing and may not retaliate against whistleblowers, as long as the disclosure of information constitutes a protected activity and is not otherwise prohibited by law.

Various federal and state laws protect public employees’ whistleblowing rights by establishing procedures for reporting illegal or improper actions and by providing redress to employees who have been threatened, coerced, or subjected to reprisals for doing so. While the most obvious form of reprisal is discharge, it also may include more subtle actions, such as failure to promote, poor performance evaluations, other disciplinary action, or a significant change in duties or pay.

The protections appear in different statutes, applying to different types of employees and for different types of whistleblowing activities. California has provided its public employees with broad protections for reporting illegal or improper activities. Recent legislation has expanded those protections.

The primary sources of protection are described below.

California state employees

The Legislature enacted the California Whistleblower Protection Act (Gov. Code sections 8547 et seq.) to protect the right of state employees “to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.” Under the WPA, a “protected disclosure” includes either the reporting of a condition that may significantly threaten the health or safety of employees or the public or “improper governmental activities.” “Improper governmental activities” is defined to include violations of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, violations of an Executive Order of the Governor, a California Rule of Court, or any policy or procedure mandated by the State Administrative Manual or State Contracting Manual, or any disclosure of economic waste, gross misconduct, incompetency, or inefficiency. Employees are protected against retaliation for making such disclosures whether doing so is part of their job duties or not.

In order to gain redress under this act, a state employee who is subjected to intimidation, threats, coercion, or retaliation for whistleblowing may file a written complaint with the supervisor or manager, the state auditor, and the State Personnel Board within 12 months of the most recent act of reprisal complained about. Employees of the University of California and the California State University must file a written complaint with the supervisor, manager, or other individual designated for that purpose within 12 months of the alleged act of reprisal.

Any persons who intentionally interfere with or retaliate against an employee are subject to damage claims, a fine and/or imprisonment. In addition, state civil service employees are subject to discipline for interfering with or retaliating against other employees for whistleblowing activity.

Local public employees

Local government and public school employees are granted similar protections by state law. (Gov. Code sections 5329 et seq.) Such employees are protected from retaliation for reporting “gross mismanagement or a significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” In order to be protected from retaliation, an employee must file a complaint with the local public agency within 60 days from the date of the act or event that is the subject of the complaint. If the local agency has an applicable internal administrative procedure, such as a grievance procedure or complaint procedure, the

employee first must attempt to seek redress through that procedure. Failure to make a good faith attempt to exhaust this administrative procedure may negate an employee's protection. In addition, in order to gain the protection under state law, the employee's reporting must be made "under penalty of perjury." Thus, any disclosure of misconduct referenced above does not insulate the employee from retaliation unless he or she certifies under oath to the disclosure.

Public officials, managers, or other employees who are found guilty of taking illegal reprisals against whistleblowers are subject to disciplinary measures, fines, and/or imprisonment. An aggrieved local government employee also may bring suit for damages if the interference or retaliation was done with malicious intent.

State and local employees protected by Labor Code sections 1102.5 et seq.

The California Labor Code's broad protection of an employee's right to report illegal or wrongful activities extends to employees of the state or its subdivisions, county, city, school district, the University of California, community college districts, and all public corporations. Employees may report violations to a hotline number (to be posted at each worksite) established by the Attorney General, who must keep the caller's identity confidential. (Labor Code sections 1102.5 et seq.) Amendments that became effective on January 1, 2014, expanded protections to those who report a suspected illegal activity (1) internally to "a person with authority over the employee" with the authority to "investigate, discover, or correct" the violation; and (2) externally to any "public body conducting an investigation, hearing or inquiry." The amendments now prohibit an employer from instituting any rule, regulation, or policy that prevents disclosure of reasonably believed violations of *local*, state, or federal laws, rules or regulations. Now both employers *and those acting on their behalf* may not retaliate against an employee for disclosing such information or because the employer *believes* the employee has disclosed or *may disclose* the information. The amendments also provide that whistleblower protection applies regardless of whether disclosing such information is part of the employee's job duties. In addition, Labor Code section 98.7 was amended to eliminate the requirement that an individual exhaust administrative remedies or procedures prior to filing suit under Labor Code section 1102.5.

Federal employees

The Civil Service Reform Act of 1978, strengthened by the Whistleblower Protection Act of 1989 (5 U.S. Code sections 1201 et seq.), establishes administrative procedures for federal civil service employees to disclose information that they reasonably believe demonstrates a

violation of law, gross mismanagement, gross waste of funds, abuse of authority, or substantial danger to public health or safety. Such disclosures may be made to the Special Counsel of the Merit Systems Protection Board (MSPB), the Inspector General of an agency, or to the employee's superiors.

Employees subjected to reprisals for making such disclosures may report the action to the MSPB. The board may stay any retaliatory action, reinstate a discharged employee, and take disciplinary action against the individuals responsible.

Other statutory protections

The federal False Claims Reform Act of 1986 added a whistleblower protection clause that provides a civil remedy for discrimination against an employee for participating in a lawsuit alleging fraud against the federal government. The act also protects employees who participate in investigations or simply disclose information regarding false claims. Remedies include double damages, reinstatement, and attorneys' fees.

In addition to these statutes that specifically protect whistleblowers, many environmental, workplace safety, public health, and civil rights statutes have provisions that protect employees who report violations of the statute or are retaliated against for raising claims that the employer has acted unlawfully. The remedies provided in these laws should be considered when disclosures fall within one of these categories.

Constitutional protection

Public employees disciplined for whistleblowing also may be protected by the First Amendment of the U.S. Constitution, which prevents a federal, state, or local government employer from interfering with public employees' freedom of speech for speaking out on a matter of public concern when engaging in such speech is not part of the employee's job duties.

For further information regarding whistleblower protections, including case law, see *Pocket Guide to Workplace Rights*, by Bonnie Bogue, Carol Vendrillo, Liz Joffe; updated by Michael McGill. It can be ordered from the CPER website: <http://cper.berkeley.edu>.

Disaster Service Workers

Did you know that under California law, all public employees, including all state, county, city, state agency, or public district employees, except for aliens, are “Disaster Service Workers” and may be called on to serve in the event of a disaster? Although this is not new legislation, we include it here as it may not be widely known and, given recent climate and other developments, may be implemented in the near future.

Government Code sections 3100 and 3101 provide:

3100. It is hereby declared that the protection of the health and safety and preservation of the lives and property of the people of the state from the effects of natural, manmade, or war-caused emergencies which result in conditions of disaster or in extreme peril to life, property, and resources is of paramount state importance requiring the responsible efforts of public and private agencies and individual citizens. In furtherance of the exercise of the police power of the state in protection of its citizens and resources, all public employees are hereby declared to be disaster service workers subject to such disaster service activities as may be assigned to them by their superiors or by law.

3101. For the purpose of this chapter the term “disaster service worker” includes all public employees and all volunteers in any disaster council or emergency organization accredited by the Office of Emergency Services. The term “public employees” includes all persons employed by the state or any county, city, city and county, state agency or public district, excluding aliens legally employed.

Disaster Service Workers are paid for work done as a Disaster Service Worker only if they have taken and subscribed to the Loyalty Oath set forth in Section 3 of Article XX of the Constitution of California.

The City of Los Angeles describes the program as follows:

The State of California Disaster Service Worker (DSW) Program includes all public employees impressed into service by a person having authority to command the aid of citizens in the execution of his or her duties during a state of war, a state of emergency, or a local emergency.

As public employees, City of Los Angeles employees are DSWs. Examples of emergencies for which City of Los Angeles employees may be called on to help as DSWs include fire, flood, earthquake, or public health emergencies. In an emergency, non-essential public employees

(those that are not required for continuity of operations) may be released from their usual duties so that they can be reassigned to assist any agency or organization carrying out its emergency response duties. Employees acting as DSWs will be assigned duties within their scope of training, skill, and ability. Examples of DSW responsibilities include:

- Registering people at a shelter or mass prophylaxis clinic
- Translating for non-English speaking individuals
- Acting as a messenger at a designated site
- Serving food to emergency staff or to vulnerable populations
- Answering phones

The roles and responsibilities for Disaster Service Workers are authorized by the California Emergency Services Act (Gov. Code sections 8550, 8551.)

New Dismissal Procedures for Certificated School Employees

In 2014, the Governor signed into law AB 215, which made the most significant changes in permanent certificated employee dismissal statutes since 1983. Among those changes, which went into effect on January 1, 2015, AB 215 does the following:

1. Adds “egregious misconduct” as a specific type of immoral conduct and defines the term;
2. Establishes two separate pre-hearing and hearing protocols: one where a school district alleges *only* egregious misconduct; and a second set of procedures where a district alleges any other basis alone or in combination with egregious misconduct;
3. Permits an immediate suspension to be contested before the full hearing and determined by an administrative law judge (in most cases);
4. Sets new timelines for filing charges and bringing cases to hearing;
5. Simplifies notice requirements for most cases;
6. Streamlines discovery procedures in most cases;
7. Provides a right to waive a Commission on Professional Competence and adapts new standards for CPC panelists.

AB 215 is fully explained in CPER’s *Pocket Guide to Dismissal Procedures Affecting Permanent, Certificated Employees*, by Dale Brodsky. It can be ordered from the CPER website: <http://cper.berkeley.edu>.

Public Records Act

The Public Records Act applies to all government agencies in California, local and state, and generally requires that the records government generates in its work be available for public inspection. In 2014 California voters passed Proposition 42, a constitutional amendment that clarified that local governments must comply with requests for publicly available documents, and required local governments to pay the costs of those requests in full.

https://ballotpedia.org/California_Proposition_42,_Compliance_of_Local_Agencies_with_Public_Records_%282014%29

For the full text:

http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140SCA3

Other Recent Legislation

The Fair Pay Act

Effective 1/1/16, SB 358 amends California's Equal Pay Act in the following ways:

1. The old EPA prohibited employers from paying employees of the opposite sex in the *same establishment* for *equal work* on jobs the performance of which requires equal skill, effort, and responsibility and performed under similar working conditions unequally. SB 358 eliminates the *same establishment* loophole and changes “*equal*” to “*substantially similar work, when viewed as a composite of skill, effort, and responsibility.*”
2. It discourages pay secrecy by explicitly prohibiting retaliation or discrimination against employees who disclose, discuss, or inquire about their own or coworker's wages for purposes of enforcing their rights under the CA EPA.
3. It clarifies exceptions to the rule, preventing reliance on irrelevant and ill-defined “factors other than sex” to justify unfair pay differentials by including specific language. Under the new legislation, the exception is satisfied where the employer can show that the wage differential is based on a seniority system, a merit system, a system which measures earnings by quantity or quality of production or “*a bona fide factor other than sex, such as education, training or experience.*”
4. It prohibits employers from discharging, discriminating or retaliating against any employee for invoking or assisting in the enforcement of the act and creates a new private cause of action so that an employee can bring a civil action for reinstatement and reimbursement.

AB 987. Effective 1/1/16

Amends the Fair Employment and Housing Act to prohibit retaliation against an employee for the *act of* requesting a disability-related accommodation, regardless of whether the request was granted. Gov. Code section 12940(m)(2).

Healthy Workplaces, Healthy Families Act of 2014 (Paid Sick Leave Law). Effective 7/1/15

California employers must provide at least 3 days/24 hours of paid sick leave a year that can be used to take care of self or a family member, defined as parent, child, spouse, registered domestic partner, parent-in-law, grandparent, grandchild, and sibling.

SB 579 amended Kin Care Law. Effective 1/1/16

Prior law required employers to allow employees to use up to half of his or her annual accrual of paid sick leave to care for family members, defined as parent, child, spouse, or registered domestic partner. Amendments expand the definition to include parent-in-law, grandparent, grandchild, and sibling to harmonize with the definition of “family member” in the Paid Sick Leave Law.

AB 218. Effective 7/1/14

Prohibits public agencies from asking a job applicant to disclose criminal conviction history until the agency has determined that the applicant meets the minimum employment qualifications. Exception: any position where criminal background investigation is required by law.

SB 292 amended FEHA. Effective 1/1/14

Sexual desire is not required to demonstrate sexual harassment claim.

Some Recent PERB Decisions

Every year the Public Employment Relations Board issues rulings regarding the eight collective bargaining statutes covering California's public employees. PERB posts all of its precedential decisions on its website: <http://www.perb.ca.gov>. Here are short descriptions of some of the Board's 2014-15 rulings.

CSEA and its Chapter 32 v. Bellflower USD (2015) No. 2455

The district violated its duty to negotiate in good faith when it unilaterally eliminated holiday pay in the summer of 2012 for bargaining unit members in other than a 12-month assignment.

Orange County Water District Employees Assn. v. Orange County Water Dist. (2015) No. 2454-M: JUDICIAL APPEAL PENDING

The union proposed a Modified Agency Shop Agreement that only new employees would be required to pay agency fees while current employees would be exempt. The employer refused to agree. The union presented a petition for an election, the employer refused to consent, union filed unfair practice charge. PERB affirmed ALJ's decision that employer committed an unfair practice by refusing to consent to the election required by MMBA section 3502.5.

CSEA & its Capistrano Chapter 224 v. Capistrano Unified School Dist. (2015) No. 2440-E

PERB emphasizes expansive right to union representation. Right to representation under EERA section 3543.1 is "considerably broader" than under *Weingarten*. A supervisor's statement of the purpose of a meeting is not dispositive. Here even though supervisor said no discipline was contemplated, the Board found it to be investigatory and employee had right to union representation.

SEIU, Local 1021 v. Sonoma County Superior Court (2015) No. 2409-C: JUDICIAL APPEAL PENDING

Right to union representation under the Trial Court Act at interactive process meetings regarding accommodating employee's disability. Right independent from and broader than *Weingarten*. Triggered upon the request of the employee.

Wenjiu Liu v. Trustees of the California State University (East Bay) (2014) No. 2391a-H: JUDICIAL APPEAL PENDING

PERB will not defer unfair practice charges that allege retaliation for participating in PERB processes to arbitration.

United Teachers Los Angeles v. Los Angeles Unified School Dist. (2015) No.2438: JUDICIAL APPEAL PENDING

The district violated EERA by conditioning complying with the union's request for names and work locations of reassigned unit members on employee agreeing to release of information. Employees' privacy interests outweighed by union's need for information in order to adequately represent union members.

San Bernardino County Public Attorneys Assn. v. County of San Bernardino (2015) No. 2423-M: JUDICIAL APPEAL PENDING

Public defender's policy prohibiting the union from appointing deputy district attorneys to represent deputy public defenders in employer-initiated investigatory interviews and other personnel matters interferes with the right to representation.

SEIU United Healthcare Workers West v. Fresno County In-Home Supportive Services Public Authority (2015) No. 2418-M

MMBA contains right to strike and that right cannot be waived or limited when employer imposes LBFO.

Perez v. Los Angeles Community College Dist. (2014) No. 2404-E

Respondent violated EERA when it issued confidential letter placing him on administrative leave pending a fitness-for-duty examination, which directed him not to contact faculty members, staff, or students about the subject of the letter.

Sacramento Area Fire Fighters, IAFF Local 522 v. County of Sacramento (2014) No. 2393-M

County interfered with guaranteed employee's rights by implementing a blanket "No Union Logo" policy prohibiting displaying the union logo on public safety firefighter apparel (t-shirts and caps.)

Some Recent Court Decisions

Young v. UPS (2015) 135 S.Ct. 1338, 215 U.S. Lexis 2121

The Pregnancy Discrimination Act makes it clear that Title VII's prohibition against sex discrimination applies to discrimination based on pregnancy. Employers must treat women affected by pregnancy the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work. *McDonnell Douglas* framework applies.

EEOC v. Abercrombie & Fitch (2015) 135 S.Ct. 2028, 2015 U.S. LEXIS 3718

Title VII religious accommodation case. Title VII prohibits making a protected characteristic or the need for an accommodation (allowing her to wear a headscarf) "a motivating factor" in a hiring decision. It does not impose a knowledge requirement.

Dickson v. Burke Williams, Inc. (2015) 234 Cal.App. 4th 1307, 2015 Cal.App. LEXIS 209

No valid claim for failure to prevent sexual harassment where sexual harassment is not established.

Gallup v. Superior Court (2015) 235 Cal.App. 4th 682, 2015 Cal.App. LEXIS 271, mod. 2015 Cal.App. LEXIS 271

Superior court mediator must exhaust administrative remedies before bringing suit against her employer for whistleblower retaliation under Labor Code section 1102.5(b), citing *Campbell v. Regents of University of California*. [NOTE: The facts giving rise to this case occurred before Labor Code section 98.7 was amended by AB 263 doing away with the exhaustion of remedies requirement for cases brought for violations of Labor Code section 1102.5.]

Nigro v. Sears, Roebuck (9th Cir.2015) 784 F.3d 495, 2015 U.S.App. LEXIS 5837

Employee's testimony/declaration is admissible even if self-serving, as will often be the case in discrimination suits. FEHA disability discrimination case.

Sheridan v. Touchstone Television Prod. (2015) 241 Al.App.4th 508, 2015 Cal.App. LEXIS 920

Exhaustion of administrative remedies not required before suing for violation of Labor Code section 6310, retaliation for complaining about a battery.

Salas v. Sierra Chemical Co. (2014) 59 Cal.407, 2014 Cal.LEXIS 4506

Federal immigration law does not preempt FEHA, even if employee used false documents to get the job.

Kao v. University of San Francisco (2014) 229 Cal.App.4th 437, 2014 Cal.App. LEXIS 790

Employer not required to engage in interactive process before requiring employee submit to fitness-for-duty evaluation if examination is job-related and consistent with business necessity.

Thomas v. County of Riverside (9th Cir.2014) 763 F.3d 1167, 2014 U.S. App. LEXIS 15866, amended (9th Cir. 2015) 776 F.3d 1020, 2015 U.S.App. LEXIS 5520

Teacher alleging First Amendment retaliation presented adverse employment actions that a jury might reasonably find deterred free speech.

Taylor v. Nabors Drilling (2014) 222 Al.App.4th 1228, 2014 Cal.App.LEXIS 20

Under the FEHA sexual harassment does not require that the harasser have sexual motive, i.e., sexual desire or intent to be actionable.

Haro v. City of Los Angeles (9th Cir. 2014) 745 F. 3d 1249, 2014 U.S.App. 5094

Fire department dispatchers and aeromedical technicians are not “engaged in fire protection” and so were wrongfully denied standard overtime.

White v. County of Los Angeles (2014) 225 Cal.App.4th 690, 2014 Cal.App. LEXIS 336

When an employee takes leave under the FMLA he/she is entitled to be restored to employment upon certification from the employee’s health care provider. The employer cannot seek a second opinion prior to restoring the employee to work, but then may seek its own evaluation of the employee’s fitness for duty at its own expense.

Swanson v. Morengo USD (2014) 232 Cal.App.4th 954, 2014 Cal.App. LEXIS 1183

Elementary school teacher with cancer was assigned over her objection because of her weakened state to teach a kindergarten class. Her contract was not renewed allegedly for poor work performance. Teacher demonstrated that the district’s stated reasons may be shown to be pretextual because its conduct set her up for failure.

University of Texas Southwestern Medical Ctr. v. Nassar (2013) 133 S.Ct. 2517, 2013 U.S.LEXIS 4704

U.S. Supreme Court. Retaliation claims under Title VII must be established using a “but-for” causation standard rather than the “motivating factor” test.

Vance v. Ball State University (2013) 133 S. Ct. 2434, 2013 U.S. LEXIS 4703

U.S. Supreme Court. Employer's obligation to prevent and remedy supervisor harassment (here racial) only applies when the supervisor has the power to hire, fire, or take other tangible employment action against the employee.

County of Los Angeles v. Los Angeles County Employee Relations Commission (2013) 56 Cal.4th 905, 2013 Cal.LEXIS 5959

Employer must provide exclusive representative "presumptively relevant" information regarding all employees, here telephone numbers and addresses of all employees, including nonmembers.

Sanchez v. Swissport Inc. (2013) 213 Cal.App.4th 1331, 2013 Cal.App.LEXIS 131

Rights to leave under the Pregnancy Disability Leave law are in addition to the rights provided by the FEHA to women with a pregnancy-related medical condition.

Volpei v. County of Ventura (2013) 221 Cal.App.4th 391, 2013 Cal.App.LEXIS 903

Union member filed a complaint in court alleging sexual harassment under the FEHA. County tried to compel arbitration under the MOU. Court held that when an employee wants to litigate statutory claims, the arbitration provision has to be "particularly clear." Only if a union "clearly and unmistakably" waived an employee's right to sue, will that employee be required to arbitrate his statutory claims. See also *Mendez v. Mid-Wilshire Health Care Center* (2013) which says the same thing.

Dahlia v. Rodriguez (9th Cir. 2013) 735 F.3d 1060, 2013 U.S.App. 17489

Police officer who spoke out against wrong-doing in his department and was put on administrative leave may be protected by the First Amendment. In determining whether his reporting was part of his official duties, in which case it would not be protected speech, it is not dispositive that it was a task listed in his job description or made at work.