LBAEE
June 2023 News

Dear Neighborhood Leaders and Urban Foresters --
I am happy to invite you and your organizations to come help plant **100 new street trees** in **West Long Beach** this month.

I Dig Long Beach Tree Planting
Saturday, June 10, 2023
9 a.m. – noon
Meeting Location: Heart Church Ministries of Los Angeles
1401 W. Spring Street
Long Beach, CA 90810
Meet at the corner of W. Spring Street & Delta Avenue

We will plant new street trees in West Long Beach from:

North – W. Spring Street

South – Willow Street

West – Delta Avenue

East – Gale Avenue

Volunteers are welcome to help plant and deeply water the trees at this tree planting event.

Professional Certification Incentive Program

Members possessing an authorized license or certificate can apply to receive a flat monthly incentive pay allowance.

The following criteria should be met:
1. License or certification is issued by the State or a nationally recognized professional organization that administers an examination recognized by the City.
2. The license or certification is applicable to the employee's classification over and above the basic job qualifications.
3. The license or certification must be renewed through additional testing or recertification
4. Licenses or certifications must be evaluated and approved by the Director of Human Resources.

Additional conditions and exceptions apply. For more details refer to the Personnel Policies and Procedures – Professional Certification Incentive Program (Number 3.7-Revised 9/12/20) available on the City's intranet.

Contract Negotiations Update

On May 31st, your bargaining team (Jason Rodriguez, Henry Corzo, Chris Sanatar, Jennifer Williams, Juan Arias, Tai Vu, William Stevenson, Robert Tinsley, Jorge Castillo, Dillon O'Donohue and CEA Attorneys Jeffrey Natke and Laura Holtan) met with management to begin formal negotiations with the City. Our ambitious first proposal aims to address your priorities and concerns, which includes:

- Multi-Year Term.
- Competitive Annual Cost of Living Increases.
- Equity Increases for positions under market.
- Additional Salary Step.
- Longevity Incentives.
- City-Match to Deferred Compensation Program.
- Increased Medical Benefits.

- Retiree Health Benefits.
- Expanded Telework.
- Better Certification and Skill Pay.
- Add Educational Achievement Incentive.
- Explore Title Changes for Enterprise-Specific Classifications.

As we continue to make progress, we will keep you informed. Feel free to reach out to the bargaining team with questions or suggestions. Thanks for your support!

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Recent Legal Changes Expand Worker Rights

The first half of 2023 ushered in important new legal protections for workers! This month, we look at a few of those protections and what the changes mean moving forward. If you have a specific question about how these changes might affect you, contact your representative.

Telework: The United States Department of Labor, Wage & Hour Division, published a field assistance bulletin (No. 2023-1) on February 9, 2023, titled "Telework Under the Fair Labor Standards Act and Family Medical Leave Act." It provides guidance to the division's field staff about how to ensure employees who telework get paid correctly under the Fair Labor Standards Act (FLSA), how eligibility rules under the Family Medical Leave Act (FMLA) are applied to employees who telework, and how to ensure mothers who telework get reasonable break time to express milk while teleworking.

Employees commonly take short breaks during the workday. For example, whether teleworking at home or working at the employer's facility, employees often take short breaks to go to the bathroom, get a cup of coffee, stretch their legs, and other similar activities. Short breaks reduce fatigue and help employees maintain focus and be more productive at work. When employees take short breaks (*e.g.*, ten minutes or less), the employer must treat such breaks as compensable hours worked regardless of whether the employee works from home, the employer's worksite, or some other location that is not controlled by the employer. In other words, the breaks must count as hours worked. These short breaks are different from meal and rest breaks under an employer's policy. For example, a policy might provide for a 30-minute unpaid meal period and two 15-minute unpaid rest periods. It is lawful for those breaks to be unpaid.

The FMLA provides employees the right to take job-protected leave, which may be unpaid or used concurrently with accrued paid leave, for specified family and medical reasons. The bulletin clarifies that employees who telework are eligible for FMLA leave on the same basis as employees who report to any other worksite to perform their job. For example, to be eligible for FMLA leave, an employee must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. For FMLA eligibility, the employee's personal residence is not a worksite. However, if an employee works from home or teleworks, their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made. The 75-mile radius includes all employees whose worksite is within that area, including those who telework and report to or receive assignments from that worksite.

Existing law also requires employers to provide employees with reasonable break time for a mother to express breast milk for her nursing child for 1 year after the child's birth. The break time applies each time the mother has the need to express milk. The mother must be allowed a private place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, for her to use to express milk. The bulletin clarifies that these protections also apply when she is teleworking from her home or another location. Employers are not required under the FLSA to compensate nursing mothers for breaks to express milk. But if an employee is not completely relieved from duty during these breaks, the time must count as hours worked. For example, if a remote employee attends a video meeting or conference call, even if off camera, the employee,

because she is participating in the video call, is working. Therefore, she must be paid for that time, even if she is also expressing milk during the meeting or call.

In short, employees can have the flexibility to work from home, or work away from a site managed or controlled by the employer and remain covered under the FLSA and FMLA.

Non-Compete Clauses: The Federal Trade Commission (FTC) recently announced a proposed rule that would prohibit employers nationwide from imposing or enforcing non-compete clauses on workers. The proposed rule will have a public comment window period of 60 days after publication in the Federal Register. The FTC may then issue a final rule, sometime after the comment period closes. The FTC's proposed rule is based on a 2021 Executive Order on Promoting Competition in the American Economy, which encouraged the FTC to exercise its statutory rule-making authority under the Federal Trade Commission Act to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." If adopted, the proposed rule would ban employers from entering into non-compete clauses with workers, require employers to rescind existing non-compete clauses with employees, and require employers to actively inform their employees that their non-compete agreements are no longer valid.

Non-compete agreements are already unenforceable under California law. California Attorney General Rob Bonta issued an alert in March, 2022, reminding employers and workers that non-compete clauses are prohibited and harm the economy by depriving employers of the opportunity to hire workers who may otherwise be available or qualified. They also harm workers by generally suppressing wages and furthering existing inequalities within the workforce. California Business and Professions Code Section 16600 says, "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The code goes on to identify exceptions, for example, when an owner sells a business or a business interest.

Non-compete agreements are often used in settlement agreements between an employer and an employee. Other common clauses found in severance agreements include confidentiality (with respect to trade secrets), and non-solicitation clauses, both of which may be enforceable, but only if they are limited in scope and duration, and do not amount to a "restraint in trade."

Confidentiality Clauses: Regarding confidentiality clauses, the National Labor Relations Board recently issued a decision in *McLaren Macomb* (2023) 372 NLRB No. 58, that returns to longstanding precedent holding that employers may not offer employees severance agreements that require employees to broadly waive their rights under the National Labor Relations Act.

In the *McLaren Macomb* case, the employer offered severance agreements to furloughed employees that prohibited them from making statements that could disparage the employer and from disclosing the terms of the agreement itself. The Board said offering employees a severance agreement that requires employees to broadly give up their rights under Section 7 of the Act violates Section 8(a)(1) of the Act. The Board further said the employer's offer is itself an attempt to deter employees from exercising their statutory rights, at a time when employees may believe they must give up their rights in order to obtain benefits provided for in the agreement. Chairman McFerran said "[i]t's long been understood by the Board and the courts that employers cannot ask individual employees to choose between receiving benefits and exercising their rights under the National Labor Relations Act. Today's decision upholds this important principle and restores longstanding precedent."

The California Public Employment Relations Board (PERB), which covers public employees in California, often looks to Federal precedent under the National Labor Relations Act in enforcing state bargaining laws, such as the Meyers-Milias-Brown Act (MMBA). The *McLaren Macomb* decision makes it more likely that PERB will invalidate nondisparagement and confidentiality clauses found in severance agreements, insofar as they restrict employees from engaging in protected activity under the state bargaining laws that PERB oversees.

Nondisparagement clauses in severance agreements have gained lots of publicity in recent months as major tech companies – Twitter, Facebook, and Google – continue to announce layoffs. The validity of these clauses will continue to be challenged in the courts.

News Release - CPI Data!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

4.9% - CPI for All Urban Consumers (CPI-U) Nationally

4.9% - CPI-U for the West Region

3.8% - CPI-U for the Los Angeles Area

4.2% - CPI-U for San Francisco Bay Area

4.6% - CPI-U for the Riverside Area (from March)

5.3% - CPI-U for San Diego Area (from March)

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: I was recently called into a meeting with my supervisor and manager. I was not told what the meeting was about. When I showed up, they gave me a performance improvement plan. Basically, they told me that I do not complete my written projects fast enough, which is not true. They told me that if I do not improve within thirty days I will be fired. I have never had a bad performance evaluation and I have never received any kind of official discipline or coaching memos. Can they just arbitrarily give me this plan and tell me to shape up or ship out? It seems like my rights are being violated. I know people who have done far worse and were able to keep their jobs. What are my options?

Answer: First, check your MOU and personnel rules. You might find language on the use of Performance Improvement Plans ("PIP") in the evaluation or discipline policies. For example, the language might say that a PIP must be given only after a negative performance evaluation. This would mean that you must have first received a negative evaluation and a chance to improve before getting a PIP. If your contract or policy has language, and the employer is not complying with it, you may have a

grievance. A remedy might be to have the PIP rescinded and for the employer to follow the negotiated agreement, rules, or policy. Even if there is no language or procedure, you can still rebut any allegations made in the PIP or during the PIP process. If you have proof that the allegations are untrue, you can provide those to clear up any possible misunderstanding.

Regardless, the employer cannot terminate you at the end of the 30 days without giving you due process, assuming you are a permanent employee. Your employer must provide advanced notice of the proposed discipline, including the reasons therefore, and cite any policy or rule violations, and provide all the materials upon which the proposed discipline is based. They must give you an opportunity to respond at a pre-disciplinary "Skelly" meeting, and in the case of major discipline, a full evidentiary appeal hearing before a reasonably impartial third party. A PIP cannot be used to circumvent the disciplinary procedure or deprive you of due process.

You can argue during the disciplinary procedure that the employer failed to use progressive discipline if you never received any bad evaluations or prior discipline and they immediately moved to terminate you for poor performance. Many policies define the steps of discipline, and it is unlikely that a PIP is considered formal discipline. A PIP should not be used as a substitute for an actual disciplinary step, such as a reprimand, suspension, or demotion.

Finally, if this is the first time the employer has used a PIP as a performance tool for an employee in the bargaining unit, the employer must meet and confer with the employee organization before using PIPs. In *City of Davis* (2016) PERB Decision No. 2494-M, the Public Employment Relations Board said that the City violated the MMBA by issuing a PIP to a firefighter without first bargaining with his union. According to PERB, the PIP was a new disciplinary instrument or procedure because it threatened him with discipline if he did not conform to the requirements of the PIP. It also changed the evaluation procedure. PERB ordered the City to cease and desist from unilaterally implementing a policy of issuing performance improvement plans without first bargaining with the union.

Question: I'm having a bit of a problem with my supervisor and I'm not sure if what he is doing to me is considered

harassment or I'm being too critical. Hopefully, these questions I'm asking will help me navigate this dilemma. What are the criteria for filing a harassment claim on your immediate supervisor? What are the consequences for me with my employer if I file?

Answer: A harassment complaint sets forth what specifically is harassing, who is doing the harassment, who has been harassed, how frequently, and whether there are any witnesses to the harassment. Harassment is typically based on a protected characteristic, such as race, gender, age, disability, etc. This type of harassment is unlawful under both State and Federal Equal Employment Opportunity (EEO) laws. The word "harassment" under those laws is often different than our common understanding of the word. Management providing direction about how work is performed, or providing feedback about an employee's work performance, is typically not harassment.

California law requires employers to have and to share a written anti-harassment policy. This policy should specify who will receive complaints. Employers must have a procedure for employees to file complaints, and for the employer to investigate and remedy the alleged harassment. For example, California law requires that employers "take reasonable steps to prevent and correct wrongful (harassing, discriminatory, retaliatory) behavior in the workplace." (Cal. Govt. Code §12940(k)). Check with your Human Resources staff or review your MOU and personnel policies for the specific steps at your agency.

Even if conduct does not qualify as harassment, it may be worthwhile to report the actions. It might be covered under a workplace violence or bullying policy. It might be conduct that is unprofessional or inappropriate for the workplace. If you make a good faith complaint, you are protected from retaliation, even if the conduct does not rise to the level of actionable harassment.

Question: My husband and I both work for the same employer. I'm an assistant and I applied for an open recruitment for an analyst. My husband is a construction coordinator and he applied to be a system operator. These are both promotional opportunities for us. We currently work for the same Director under the organizational chart, but we report to different supervisors and managers. That would not change if either of us got the new roles. In fact, if my husband got the job, we would even

fall under different Directors. I got a call from HR yesterday that they would not be moving forward with my application due to our nepotism policy and wanting to remain consistent. I do not understand what the conflict or potential conflict is. I am highly qualified and would like to move up. What can I do about this?

Answer: First, review your employer's nepotism policy. Most nepotism policies prohibit spouses from working within the same line of supervision and/or reporting to the same supervisor or manager, for example. However, some nepotism policies are broader and do not allow spouses to work in the same department or under the same Director. You need to determine whether and how the nepotism policy applies to your situation.

Based on your description, it is not likely that this scenario would be prohibited under a typical nepotism policy. If that's the case, consider following up with HR and asking for a more specific explanation as to why the nepotism policy or the desire to remain consistent prevents you from a promotional opportunity. If you can provide examples of others that were hired or promoted despite being related/married to each other under similar circumstances, that may help demonstrate that you are being treated differently. Contact your professional staff if you need help. This may qualify for a grievance.

Question: About a month ago, I informed my supervisor and HR that I may possibly be going on leave, as a courtesy, because of a medical problem. The HR manager notified my manager of the possible leave of absence but did not disclose why. My manager called my supervisor to ask her why I was going on leave. My supervisor told my manager that it's private and that she would have to ask me directly. So, the next time I saw my manager, I told her why, but I also explained that it would only be 2 weeks to 4 weeks max of me being on leave. Fast forward to this past week, I have been told by two separate employees, at different times, that a temporary employee told them that she was approached and asked if she was familiar with software we use because I was going on an extended leave of absence due to an illness. This temp employee has been asking other employees about me and my medical situation and the status of my long-term employment. I work remote most of the time so when I'm onsite, the little bit of time that I'm there, it makes me uncomfortable to hear that these

conversations are happening. Was my privacy violated? I do not want to ruffle any feathers. I just want management to know that my medical information is not something I appreciate them discussing with other employees.

Answer: As long as the employer is not sharing anything about your medical situation, it is not likely that the employer violated your right to privacy. The California Confidentiality of Medical Information Act (CMIA) limits the information the employer can obtain or disclose about an employee's medical status. To violate the CMIA, there would have to be some disclosure about the underlying medical situation, not just the supervisors and managers identifying your need for leave. Asking other employees about their ability to perform your tasks in your absence is permissible. It sounds as though the employer disclosed to the temporary employee that you would be going on an extended leave of absence, and that the communication was focused on whether the temporary employee could perform some of your tasks in your absence. Without more specifics about the illness or the condition, the disclosure probably does not rise to a violation.

Also, under the Family Medical Leave Act (FMLA) and California Family Rights Act (CFRA), the employer is allowed to disclose your leave or need for leave to your supervisors and managers if they are not sharing specifics about your condition or medical history. If you think more information was disclosed than necessary, or that information was shared with people who do not have a need to know, you can raise it with Human Resources. They can investigate to determine what was shared, with whom, and provide training to supervisors and managers about how to handle sensitive requests like this in the future.

You also do not have to voluntarily share your condition or history with your manager. You can simply be vague about your need for leave and refer your manager to HR for more information.

Question: Our Department has been informed that they are bringing back annual performance evaluations (city-wide). In the past, the evals were conducted for staff members who still had potential for step increases. However, if a staff member reaches their top step, the performance evaluation would not be conducted unless requested. Per Rules and Regulations, the City Manager can request a performance evaluation at

any time. If I am at my top step, what incentive is there for me to get a performance evaluation?

Answer: In many agencies, management does not conduct annual performance evaluations for employees who are at the top of their salary range. If management does give you one, it may be because they want to identify goals or areas where they think you can improve your performance. In terms of incentives, sometimes people want their good performance acknowledged. Some may want a good evaluation to help them advance, either internally or at another employer (particularly another public agency). In some places, there might be a merit pay or longevity pay program where those at the top step get a bonus depending on their overall score. If not, this may be something to consider in the next MOU negotiation. But unless you plan on using the evaluation to help you promote internally or get a higher-level job at another employer, there may not be an incentive to request one.