LBAEE
October 2024 News

UPDATES

- LBAEE appointed Annie Mosher to fill the role of Director of the newly created Group F.
  GROUP F (Energy Resources / Fire & Code Enforcement / Airport):

ANNIE MOSHER
Department: Energy Resources
Bureau/ Division: Oil Operations
Classification: Geologist I
Years with the City: 3 years
AEE previous involvement: Newly appointed

- According to our negotiated MOU, effective the first full pay period including October 1, 2024, all bargaining unit members shall receive a 1% general wage increase to the base hourly rate.

- The Association will conduct a meeting to outreach and reconnect in person with our members on Wednesday October 9th at Noon. Members will have an opportunity to learn more about the association's purpose and mission and to get more involved. Thanks to all who RSVP'd for the event.

- Both Charter Amendments: Civil Service and Human Resources (Measure JB) and Harbor and Public Utilities (Measure HC) are now in front of the City of Long Beach voters in the upcoming election. For more information go to https://www.longbeach.gov/cityclerk/elections/charter-amendments/

  The Association's position on the Civil Service amendment was included on the July Newsletter.

The California Labor Code and the Public Sector

The California Labor Code was first enacted in 1937. It assembled into one code various provisions of state law, including wage orders issued by the Industrial Welfare Commission (IWC). The Labor Code is generally more protective of employees than what other states provide. However, some of the protections do not apply to workers employed by the state or any county, city, or special district. This month, we look at to what extent various provisions of the Labor Code apply to local government employees.

The IWC: The IWC was a five-member panel established in 1913 to regulate wages and hours. As a general matter, the wage orders issued by the IWC provided greater protection to employees than the Federal Fair Labor Standards Act (FLSA). The IWC's authority was memorialized in Labor Code §1173. The IWC was later de-funded, effective July 1, 2004. The IWC wage orders remain in effect to the extent they do not conflict with the Labor Code or any other law. However, the IWC does not currently exist as an entity, nor does it issue any new wage orders. Most wage orders do not apply to public agencies.

The Labor Code: The Labor Code has numerous provisions that offer various protections for workers in California. These include:

- Provisions related to the payment of wages (§200 – §219),
- Payment upon termination of employment (§201 - §204, §227.3),
- Provisions related to deductions from wages (§221 - §224),
- Requirements for itemized wage statements (§226),
- Listing only the last four digits of Social Security Numbers on paychecks (§226(i)),
- Vacation vesting (§227.3),
- Family care leave (§233 - §234),
- Paid sick leave (§245 - §249),
- Lie detector tests (§432.2(a)),
- Disclosure of sensitive information on job applications (§432.7),
- Prohibition of audio or video recording of employees in restrooms, locker rooms, or changing rooms (§435),
- Overtime (§510),
- Meal and rest breaks (§512),
- Day's rest requirements (§550 - §554),

- Policy favoring formation of labor organizations (§923),
- Lactation breaks (§1030),
- Whistleblower protections (§1106),
- Minimum wage (§1182.11, §1182.12, §1182.15, §1197, and §1474),
- Child labor (§1285 - §1399),
- Private Attorneys General Act of 2004 (commonly known as "PAGA") (§2698),
- Reimbursement of uniform costs and other necessary business expenses (§2802),
- Workers' compensation (§3300)

What Do the Courts Say: The Labor Code and wage orders initially applied only to workers in the private sector. Various laws have since been enacted and added to the Labor Code. This has led to considerable ambiguity because some provisions expressly apply to public employers, some provisions expressly exempt public employers, and many provisions are silent as to whether they do or do not apply to public employers.

This ambiguity has led to a long history of legal cases. In the earliest case, the court said Labor Code §923 does not apply to public employees. (*Nutter v. City of Santa Monica* (1946) 74 Cal. App. 2d 292, 301). Section 923 memorialized a state policy favoring freedom of employees to organize and engage in collective bargaining for their own protection. Although Section 923 did not expressly say if it applied to public employers, it did not expressly exclude public employers, either. The court in *Nutter* said "[t]he language of Section 923 is broad enough to include state and municipal government, but general language in a statute is not sufficient, of itself, to indicate an intention to make it applicable to government. Where a statute is not expressly made applicable to government, it is for the courts to determine whether the Legislature intended it to apply to government." (*Id.* at 300). The court then announced the standard for determining whether a statute should apply to public employers. "[T]he general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act." (*Id.* at 301). Legislation would later extend bargaining rights to public employees, starting with the Meyers-Milias Brown Act in 1968.

Labor Code Section 432.2(a), which prohibits employers from demanding or requiring an applicant or an employee to submit to a lie detector test, expressly excludes public employers. However, in *Long Beach City Employees Association v. City of Long Beach* (1986) 41 Cal. 3d 937, the California Supreme Court prohibited the use of involuntary

polygraph exams conducted by a city agency in connection with an internal theft investigation. The Court said the use of an involuntary polygraph examination inherently intrudes upon employees' constitutionally protected zone of individual privacy.

An appeals court has held that state law on meal breaks (§512) and overtime (§510) does not apply to water districts. (*Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729). Labor Code §510 requires time-and-one-half pay for hours worked over eight in one day and double-time for hours worked over twelve in one day. Labor Code §512 requires a meal period of not less than 30 minutes for those who work more than 5 hours per day, except that the meal period may be waived by mutual consent of both the employer and the employee for those who work a total of no more than 6 hours. Neither section expressly applies to public employers. The appeals court said these state laws on meal periods and overtime do not apply to employees of a local public agency. The appeals court said the Labor Code applies only to private sector employees unless the provision is specifically made applicable to public employees.

In *California Correctional Peace Officers' Association v. State of California* (2010) 74 Cal. App. 4th 646, 653-654, the appeals court rejected the peace officers' argument that Labor Code Section 226.7 applies to public employers. Section 226.7 says no employer shall require any employee to work during any meal or rest period mandated by an applicable order of the IWC. If an employer fails to provide an employee a meal period or rest period in accordance with applicable order of the IWC, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided. Section 226.7 does not expressly apply to public employers. The peace officers had argued that because the Legislature expressly excluded public employers from certain other sections of the Labor Code, this indicated a legislative intent to make the remaining sections applicable. The appeals court rejected that reasoning and said Section 226.7 does not apply to public employers.

In *Marquez v. City of Long Beach* (2019) 32 Cal. App. 5th 552, the appeals court held that the statewide minimum wage is generally applicable to both private and public employers. The appeals court said the Legislature may constitutionally exercise authority over minimum wages, despite the constitutional reservation of authority in charter cities to legislate as to their municipal affairs, because setting the minimum wage addresses the state's interest in protecting the health and welfare of workers by ensuring they can afford the necessities of life for themselves and their families.

The Stone Case: On August 15, 2024, the California Supreme Court decided *Stone v. Alameda Health System*. This opinion is consistent with the earlier cases that refused to extend the Labor Code provisions to public employees. This opinion is significant because it was decided in the state's highest court rather than a lower appellate court. The Court said one must examine the language, structure, and history of the particular statutes to determine if the Legislature intended to impose the requirements on public employers. Although interpretive maxims may aid in that analysis, the fundamental question is always one of legislative intent.

The *Stone* case concerned whether a hospital authority created by a county Board of Supervisors and authorized by the Legislature to manage the county's public health facilities could be liable for various Labor Code violations. Stone worked for a hospital facility that was operated by the Alameda Health System. The lawsuit alleged that the employer frequently denied or discouraged employees from taking meal and rest breaks and made deductions of ½ hour from each workday even when meal periods were not taken. The claims against the employer included:

- Failure to provide off-duty meal periods (§226.7, §512),
- Failure to provide off-duty rest breaks (§226.7),
- Failure to keep accurate payroll records (§1174, §1174.5, §1175),
- Failure to provide accurate itemized wage statements (§226, §226.3),
- Unlawful failure to pay wages (§204, §218.5, §218.6, §222, §223, §225.5, §510, §1194, §1194.2, §1198),
- Failure to timely pay wages (§204, §210, §218.5, §218.6, §222, §223, §225.5), and
- Civil penalties for these violations under the Private Attorney General Act (§2698).

The Health System argued that it could not be sued for these Labor Code violations because it was a public entity, and these Labor Code sections do not apply to local public agencies. The trial court agreed and dismissed the case, relying on the *Johnson* decision.

Stone appealed. The appeals court reversed. The appeals court said Alameda Health System was not a public entity. Therefore, the appeals court did not address the larger question of which Labor Code sections do or do not apply to public employers. However, the appeals court did address whether public entities are liable for PAGA penalties. The appeals court said that public entities are exempt from PAGA's *default* penalties but are not exempt from claims arising from statutes that impose *defined* penalties.

The California Supreme Court reversed and affirmed the *Johnson* precedent. The Court said that the Legislature intended to exempt public employers such as the hospital authority from the Labor Code provisions governing meal and rest breaks (§226.7, §512), and related sections on the full and timely payment of wages (§220(b)). Although the Labor Code is silent as to meal and rest break requirements applying to local government agencies, the *Johnson* case held that they do not. With respect to claims regarding the full and timely payment of wages, the Labor Code specifically says Sections 200-211 and Sections 215-219 do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation. (*Labor Code §220(b)*). The Court said this exclusion applies to the Alameda Health System. (Note - this exclusion does not apply to state employees; Sections 200-219 applies for state workers).

The Court also decided if PAGA penalties apply to public entities. PAGA authorizes an employee to pursue civil penalties on the state's behalf. 75% of the recovery is paid to the Labor and Workforce Development Agency (LWDA) and 25% is paid to the employee. The Court heard Stone's case in part to decide if public employers are subject to PAGA penalties, an issue of "statewide importance." Since 2004, public employers have argued they are exempt from PAGA. The Court held that public employers are *not* subject to *any* civil penalties under PAGA. According to the Court, the costs that public entities could incur if subject to PAGA suits are potentially quite large. In addition to penalties, which can be sizable in cases involving numerous employees or lengthy time periods, PAGA also provides that a prevailing plaintiff can recover attorneys' fees from the employer. Attorneys' fees in these complex lawsuits can be substantial. The Court said the Legislature can amend the relevant statutes or pass new legislation to provide for a different result. Unless the Legislature does so, it is now settled that public entities are not subject to PAGA lawsuits.

Summary: The *Stone* case did not provide a complete list of which Labor Code provisions do or do not apply to public employers. The Court decided only the sections that were before it. However, the Court did lend more clarity to this issue. A section that is silent on whether it applies to public employers may not apply unless it is clear from the statute or legislative history that the Legislature intended to impose the requirements on public employers. The below chart provides a summary. For items in the right column, there is case law that suggests these provisions may apply to local public agencies.

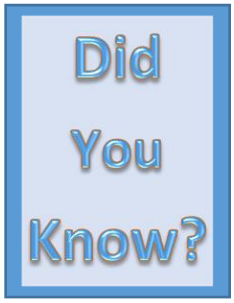
Provisions that Apply to Local Public Agencies	Provisions that Do Not Apply to Local Public Agencies	Provisions that are Silent as to Whether It Applies to Local Public Agencies
Listing only the last four digits of SSNs on paychecks (§226(i))	Provisions related to the payment of wages (§200 – §219)	Provisions related to deductions from wages (§221 - §224)
Family care leave (§233 - §234)	Requirements for itemized wage statements (§226)	Vacation vesting (§227.3)
Paid sick leave (§245 - §249)	Requirement to work during meal periods (§226.7)	Reimbursement of uniform costs and other necessary business expenses (§2802)
Disclosure of sensitive information on job applications (§432.7)	Lie detector tests (§432.2(a))	
Prohibition of audio or video recording of employees in restrooms, locker rooms, or changing rooms (§435)	Overtime (§510)	
Day's rest requirements (§550 - §555) (applicable to cities which are cities and counties)	Meal & rest breaks (§512)	
Lactation breaks (§1030)	Policy favoring formation of labor organizations (§923)	
Whistleblowers (§1106)	Child labor (§1285 - §1399)	
Minimum wage (§1182.11)	Private Attorneys General Act of 2004 (§2698)	
Workers' compensation (§3300)		

Conclusion: Although some provisions of the Labor Code might not apply, local government employees may still be protected through their union contract or employer policies. If such protections currently exist in the MOU or personnel policies (or there is an enforceable past practice), the employer cannot change or eliminate those protections

without first providing the employee organization notice and the opportunity to negotiate prior to making the change. If you have any questions or concerns about your rights on the job, contact your employee organization leaders for assistance. Although you might not be able to file a Labor Code claim with the Labor Commissioner, you might have an individual grievance, or an unfair labor practice claim the employee organization can file.

Time Off to Vote

Election day is November 5, 2024. California law grants employees the right to take up to two hours off to vote, without loss of pay, if you are scheduled to be at work during that time and you do not have sufficient time outside of working hours to vote at a statewide election. (*California Elections Code § 14001*). You may take as much time as you need to vote, but only two hours of that time will be paid. Your time off for voting can be only at the beginning or end of your regular work shift, whichever allows the most time for voting and the least time off from your regular working shift, unless you make other arrangements with your employer. If you think you will need time off to vote, you must notify your employer *at least two working days prior* to the election.



The intent of the law is to provide an opportunity to vote for workers who would not be able to do so because of their jobs. Polls are open from 7:00 am to 8:00 pm on Election Day. California law also requires employers to post a notice advising employees of their right to take paid leave for the purpose of voting in statewide elections. It must be posted conspicuously at the workplace, if practicable, or elsewhere where it can be seen as employees come and go to their place of work. It must be posted not less than 10 days before every statewide election. Individuals can call the Secretary of State's Voter Hotline (800) 345-VOTE (8683) for more information.

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.

2.5% - CPI for All Urban Consumers (CPI-U) Nationally

2.2% - CPI-U for the West Region

2.9% - CPI-U for the Los Angeles Area

2.7% - CPI-U for San Francisco Bay Area

2.8% - CPI-U for the Riverside Area (from July)

3.5% - CPI-U for San Diego Area (from July)

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: The City is planning on making some seating assignment changes for staff in our building. We do not have enough cubicles for our current staff if everyone is here at the same time. However, not everyone is here at the same time. We have people on 9/80 or 4/10 work schedules with alternating days off, and we have people who work remotely one day each week. I am not comfortable with "shared workspaces" especially if it is not needed. Does the City have to provide me with my own desk space and drawers? What recourse do I have if they move forward with this?

Answer: There is no law that requires the City to give you your own desk space or your own individual cubicle. Many office-based positions will have designated workspaces, but the specifics can vary depending on the nature of the job.

California public employers have a responsibility to provide a safe workplace under the Occupational Safety and Health law. The shared workspace concept may be an issue for some employees as it relates to COVID and to privacy concerns. For example, although an employer generally has the right to search desks, offices, and lockers as those items are City property, it may be burdensome if one or more individuals are using the same space, and an issue can arise regarding workplace privacy.

This may also constitute a change in working conditions. If that is the case, the City must notify your employee organization and allow for negotiations prior to making the change to a shared workspace plan. Your employee organization could propose an arrangement where employees who work remotely use shared workspaces

when they are on-site, but the City assigns designated desks for those who are on-site the full week. Other ideas include offering shared workspaces on a voluntary basis or allowing for a hardship exception. There may be enough interest that it is not necessary to have someone share a desk who does not want to. You might also check your MOU and City policies to see if there is language that requires individual workspaces.

Question: The City notified our employee organization that they would like to downgrade one of our positions, and then open it for recruitment. We recently had two members in the classification, and both promoted one level higher. That leaves two vacancies, and the City wants to downgrade one of those positions to a "Senior" level, which is one level below the current level. This is more in line with what we have had historically, and it does not result in our employee organization losing a position. But ultimately any new hire would come in at a lower level than what we have at present. Is this something our employee organization can or should oppose? How should we respond to the City's request?

Answer: Management does have the right to re-organize how work is performed in the Department. This can frequently occur when there are multiple vacancies. However, the employee organization has the right to negotiate over any changes to the job specs, including the duties and pay. The job description for the classification should represent the scope of work. For example, a new hire should not be responsible for performing the same duties and responsibilities at a lower wage than employees had earned previously.

Your employee organization can discuss various strategies with the City such as removing some of the responsibilities previously associated with the position before a downgrade is implemented. Your employee organization can also ask what the City's need or reasoning is for downgrading one of the vacancies. If downgrading one of them makes sense, and this is how it was structured historically, and the employee organization is not losing the work or a position because of the reorganization, then it may not be worth opposing.

Question: I work an alternate work schedule, and I need to take bereavement leave. Do they have to grant 5 days? Or only 40 hours? Five

days for me would be 50 hours. I'm told I can only get 40 hours per the state law.

Answer: Under state law (AB 1949), Government Code §12945.7, you are entitled to five unpaid "days" of bereavement leave. It is not designated by hours. Therefore, if you work a 4/10 work schedule, you are entitled to 5 days (50 hours) of unpaid bereavement leave.

However, check your MOU or employer policies. Most public employers have a paid bereavement leave policy. If that is the case, the law requires employers to provide paid bereavement leave according to the policy. For example, if the MOU provides for 40 hours of paid bereavement leave, you are entitled to take 40 hours of paid bereavement leave under the MOU and to use your own accrued paid leave for the remaining 10 hours consistent with state law.

Question: I've had a qualifying event and need to change my medical from single party coverage to family coverage (spouse and dependent). I know I can add them, but does the qualifying event allow me to switch medical plans? Or just enroll my spouse and dependent on my current medical plan? I'd like to switch medical plans altogether and I don't want to wait until the new coverage year starts. Please advise.

Answer: Yes. You can change medical plans if you have a qualifying event. You are not limited to simply enrolling dependents on your existing plan. A qualifying event makes you eligible for a special enrollment period and you can make all the changes you can make during the normal open enrollment. A qualifying event includes getting married, having a baby, or getting a divorce or legal separation. During this thirty-day period, an employee can make whatever health insurance plan selections and changes as they like.

Question: My supervisor told me I had to turn off my "Christian music" that I was playing while working outside at city hall. I'm not aware of a city policy on playing music at work. I will inquire about that. But my supervisor made it sound like it was the type of music more than the music itself that was causing the issue. Is that allowed?

Answer: Religious discrimination is illegal under federal and state laws. Employers may not make personnel decisions or treat employees differently based on an employee's religious beliefs or lack thereof. Notify human resources

if you feel your supervisor discriminated against you or singled you out based on your religious beliefs.

Your right to listen to music at work can be affected by several factors, including workplace policies and the potential operational impact, such as on your colleagues or the public. Many employers have policies regarding the use of personal devices and playing of music during work hours. The policies are designed to ensure a productive and respectful workplace environment for all.

Because you were listening to music outside of city hall, the City may be concerned that this could be perceived as representing a religious preference by the City. It could also be that coworkers complained about the music being disruptive. Headphones may be a solution if the headphones do not inhibit your ability to perform your job duties.

In short, you may generally have the right to listen to religious music at work, but it may need to be done in a time, place, or manner that does not cause operational disruptions. Review your MOU and city policies and notify human resources if you need further assistance with being able to listen to religious music while at work.