EDITORIAL
The Nature of the Game

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EDITORIAL

The Nature of the Game

The Great "Golden-State" Rivalry - Which City Can Claim the Worst District Attorney?

Harry S. Stern

When the Rolling Stones sang “all the cops are criminals and all the sinners saints” in their cynical and subversive hit “Sympathy for the Devil,” they may have assumed 1968 would be remembered as the nadir of social chaos. After all, by the (relatively) more tranquil 1980s, Jagger and Richards were penning superficial pop ditties like “Start Me Up” and “She’s So Cold.”

But with the recent combination of high-profile use of force incidents, the social backlash and unrest those incidents precipitated, along with the election of a slew of “progressive” prosecutors who openly view cops with suspicion and criminals with solicitude, the immediate future threatens to turn the Stones’ dark vision into dystopian reality.

San Francisco and Los Angeles, traditional rivals in everything from football to water rights, have seemingly entered a new competition: who has the worst district attorney?

Our guy here in S.F., Chesa Boudin, is a genuine ideologue, a true believer. Boudin’s parents were members of the Weather Underground, an infamous domestic terrorist organization whose affiliates were once ranked high on the FBI’s Most Wanted list. They were eventually convicted of killing, among others, two police officers in the course of an armored car robbery. During their imprisonment, when Boudin was still a minor, he was raised by Bill Ayers and Bernadine Dohrn, themselves notable figures in the pantheon of 1960s militancy, a defining feature of which was hostility to law enforcement in both theory and action. Nursed on such toxic ideas, and having already imported their precepts into his prosecutorial actions, it is clear to close observers that Boudin’s aggressive animus towards the police is sincere and not merely politically expedient, and thus is unlikely to abate short of his removal from public office.

The L.A. district attorney, George Gascon, on the other hand, is pursuing a similar anti-law enforcement agenda despite a personal background that is the antithesis of Boudin’s. He is an ex-cop and ex-Republican who appears to be driven by greed and blind ambition rather than explicit ideology.

With Boudin and Gascon setting the pace, a new practice of facilely charging peace officers with crimes – for merely doing their best under difficult circumstances – has begun across California. This frightening trend has not been limited to district attorneys overtly sympathetic to criminal defendants. Jurisdictions previously known for respecting the rule of law and due process have also filed charges against police officers that are short on evidence and long on politics – their thinking being, apparently, that they can satisfy the outrage warriors with a few “sacrifices tossed into the volcano.”

Regardless of the venue, some objective trends have emerged. The myth of rogue cops attacking innocent people for no reason isn’t supported by the facts. Without exception, the officers who are being prosecuted were responding to pleas for help from
The Nature of the Game (cont.)

citizens – you know, doing their jobs.

Boudin, for example, in a spasm of recent filings has charged cops in three separate incidents. In each situation, the officers were defending themselves against attack while responding to an in-progress felony crime. None of these cases is a close call from any objective perspective. The message from Boudin is clear: any action taken by the police may well result in the officer becoming a criminal defendant.

Gascon has prepared a hit list composed of officer-involved shooting “cold cases.” In so doing he has signaled his desire to surpass San Francisco as being the most pro-criminal and anti-safety county in the state.

The other emerging trend, of course, is the related but underreported avalanche of violent crime. “The year 2020 likely saw the largest percentage increase in homicides in American history,” according to noted policing expert Heather Mac Donald. Murder was up nearly 37% in a sample of 57 large and medium-size cities. A careful examination of the calendar refutes the convenient assertion that the crime wave is the result of the COVID pandemic.

Common sense and the statistics present a different explanation. De-policing. Is it any surprise that cops are reluctant to engage criminals when the slightest misstep could land them on the other side of the criminal justice system?

Is it any surprise that cops are reluctant to engage criminals when the slightest misstep could land them on the other side of the criminal justice system?

With the correlation between persecuting cops and a drastic increase in violent crime being so obvious, one wonders what sort of “progress” the progressive prosecutor movement has in mind. As the Stones suggested, “what’s puzzling… is the nature of [the] game.”

Nevertheless, this firm accepts the honor and challenge of defending cops targeted as trophy prosecutions during this ill-conceived social experiment.

About the author

Harry is the firm’s managing principal. His legal practice is focused on civil litigation and criminal defense, as well as complex administrative matters. Harry has successfully defended peace officers in a number of high-profile criminal trials.

FEATURED STORY

Freedom of Speech and Social Media - The First Amendment for Public Employees

On January 12, 2021, the Ninth Circuit Court of Appeals issued a published decision which reaffirms the rules governing the scope of the right of public employees to engage in free speech. Because the speech of public employees has increasingly attracted attention from the public (and therefore from employers), all public employees, but
Freedom of Speech and Social Media (cont.)

especially law enforcement officers, should know the basics of this important and dynamic area of the law.

The Court’s decision, *Moser v. Las Vegas Metropolitan Police Department, et al.* (9th Cir. 2021) No. 19-16511, is particularly instructive and relevant to today’s world, as it concerns public employee free speech rights in the context of social media. In addition to summarizing the *Moser* decision, including the law relied upon by that court, we will also provide some practical guidance on how public employees should approach their public speech activity in the social media age.

**The Moser Decision and the State of the Law.**

In 2015, the Las Vegas Metropolitan Police arrested a suspect who had shot a police officer. Moser was a member of the Department’s SWAT team, but was not involved in the incident. In a post to his personal Facebook account regarding news of the suspect’s capture, Moser commented: “It’s a shame [the suspect] didn’t have a few holes in him…”

During the ensuing internal affairs investigation, which had been prompted by an anonymous tip, Moser claimed the intent of his post was to express his frustration that the fellow officer who had been harmed “didn’t have a chance to defend himself.” Not convinced, the Department found that Moser’s comment demonstrated that he had become “a little callous to killing,” and that his conduct violated the Department’s social media policy. The Department punished Moser by reassigning him from his SWAT position to patrol, resulting in a loss of specialty pay.

Moser sued in federal court, alleging that the Department’s punitive action violated his First Amendment right to freedom of speech. The Department moved to dismiss the lawsuit, asserting that Moser’s comment eroded public trust in the Department and exposed it to legal liability, thereby giving it sufficient justification to punish his conduct. The district court agreed with the Department.

In its reversal of the district court’s decision, the Ninth Circuit outlined in detail the existing state of the law. To prevail on a free speech claim, the employee must establish: (1) the speech at issue was on “a matter of public concern”; (2) it was undertaken “as a private citizen rather than a public employee”; and (3) the speech “was a substantial or motivating factor in the adverse employment action.” If the employee demonstrates the existence of all three factors, the burden shifts to the employer to demonstrate either adequate justification for taking its action against the employee, or that it would have disciplined the employee even without the speech activity at issue. (*Pickering v. Bd. Of Education* (1968) 391 U.S. 563.) This analytical framework attempts to strike the appropriate balance between “the free speech rights of government employees” and “the government’s interest in avoiding disruption and maintaining workforce discipline.” (*Id.*)

Speech constitutes a “matter of public concern” “if it relates to any matter of political, social or other concern to the community,” or “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” (*City of San Diego v. Roe* (2004) 543 U.S. 77, 83-84.) The “content, form, and context of a given statement” must be analyzed in the context of the
Freedom of Speech and Social Media (cont.)

whole record, including “the employee’s motivation and the chosen audience.” (Connick v. Myers (1983) 461 U.S. 138, 147-148; Johnson v. Multnomah City (9th Cir. 1995) 48 F.3d 420, 425.) Speech is made as a private citizen where the employee “had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform.” (Eng v. Cooley (9th Cir. 2009) 552 F.3d 1062, 1071.)

When weighing the competing interests at stake, courts apply a “sliding scale in which the [employer’s] burden in justifying a particular [employment action] varies depending upon the nature of the employee’s expression.” (Connick, supra, 461 U.S. at 150.) Courts will “look to how the speech at issue affects the government’s interest in providing services efficiently.” (Kinney v. Weaver (5th Cir. 2004) 367 F.3d 337, 362.) Various factors are relevant to this analysis, including whether the speech “impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.” (Pickering, supra, 391 U.S. at 570-573.) Notably, courts have recognized that police departments specifically have heightened interests in “discipline esprit de corps,” “uniformity,” and a “special need [...] to avoid disruption to provide public safety.” (Byrd v. Gain (9th Cir. 1977) 558 F.2d 553, 554.)

In the Moser case, the Department did not challenge the fact that Moser’s statements were made as a private citizen on a matter of public concern, nor that its decision to transfer him out of SWAT was motivated by his speech activity. Rather, the Department argued that, because Moser’s speech “advocated unlawful use of deadly force,” his free speech interest in making that statement was low, while its interest in “efficiency and employee discipline” was high, and Moser’s speech threatened those interests by disrupting the operation of the Department.

Significantly, the Court found that the Department did not adequately demonstrate that Moser’s speech would have caused disruption within the Department or interfere with its ability to provide law enforcement services. Key to the Court’s reasoning was the fact that the Facebook post was not widely reported or condemned by the public, and nobody would have reasonably known that Moser was a police officer based on the content of his Facebook profile. These facts “lesse[n] the potential impact on the agency’s reputation or mission.” While the Court reversed the district court’s dismissal of the case, it nevertheless sent the case back to the lower court for further exploration of the facts, and to give the Department another opportunity to produce evidence demonstrating “a reasonable prediction of disruption” to its enterprise, as mere speculation that an employee’s speech will cause disruption is insufficient. (See Nichols v. Dancer (9th Cir. 2011) 657 F.3d 929, 933-934.) Thus, although Moser prevailed in the Ninth Circuit, the ultimate outcome of his free speech claim is far from certain.

Engaging in Public Speech Activity Without Inviting Discipline.

Now, more than ever, public employee speech activity is and will be subject to increasing public and employer scrutiny. In fact, in light of recent events at the United States Capitol, this firm is aware of many agencies, both big and small, engaging in efforts to “canvass” its employees’ social media activity – including on supposed “private” pages – looking for inappropriate speech. It is imperative to remember that nothing is truly private on social media – anything you post can be found.

While public employees certainly maintain their Constitutional rights, the law makes clear that accepting public employment comes with some sacrifices. This is true for peace officers specifically. The extraordinary enforcement authority afforded to peace officers comes with a price, in numerous
Freedom of Speech and Social Media (cont.)

Remember that the public tends to see 'cops' as an opaque whole, with the actions of one reflecting the character and integrity of all of the profession's individuals.

ways, including this heightened scrutiny and regulation of what you publicly say, if such statements disrupt your employer’s ability to perform its public function.

This is not to say you cannot, or should not, engage in public speech activity. Far from it. But doing so requires some appreciation of the wider implications, and unintended consequences, of expressing your personal views on public platforms. If nothing else, think of how your statements will reflect on not only your employer, but on your coworkers. Remember that the public tends to see “cops” as an opaque whole, with the actions of one reflecting the character and integrity of all of the profession’s individuals.

For some practical guidance, we’d like to share the following common-sense “Ten Rules for Police Officer Social Media Posts.” These rules were crafted by Will Aitchison, a founding member of the Public Safety Labor Group (Portland, Oregon) and Labor Relations Information Service, in order to help employees avoid disciplinary action within the existing state of the law. We encourage all association leaders to pass along these rules to their members.

4. Before posting, ask yourself: if my employer receives a complaint about what I’m going to post, how will it react? If the answer is “not so well” or “they’ll start a disciplinary investigation,” is the post really worth it?

5. Be positive with your posts, not negative and critical.

6. If you have the slightest doubt about whether to post something, sleep on it. Ask a fellow officer, one you think of as responsible and serious, what he/she thinks.

7. Think: Who are your “friends”?

8. Ask yourself – can someone figure out that I’m a police officer from my social media profile or my prior posts?

9. Your credibility can be called into question by what you’ve posted online.

10. Think about your job, your family, and your safety.

Stay safe, and be smart!

LEGAL DEFENSE

SB 230: Law Enforcement Agencies Required to Establish Use of Force Guidelines

Your employer's compliance with SB 230 benefits everybody, including individual officers.

Maureen Okwuosa

As many peace officers are aware, AB 392 instituted changes to the law governing the use of deadly force. SB 230, which became effective January 1, 2021, stands as the counterpart to AB 392, requiring each law enforcement agency to establish and maintain a use of force policy, as well as guidelines for implementing such policy.
SB 230 adds section 7286 to the Government Code, specifically providing guidance to law enforcement agencies and their peace officers to ensure force is used only to effect arrests or lawful detentions, overcome resistance, or bring a situation under reasonable control. SB 230 sets forth 20 benchmarks that must be included in an agency’s use of force policy. Examples of these requirements include, but are not limited to, the following:

1. Utilizing de-escalation techniques and other alternatives to force when feasible;
2. Using force that is proportional to the seriousness of the offense or reasonably perceived resistance;
3. Duty to report perceived potential excessive force, imposing an obligation on officers to intercede when they observe another officer using unnecessary force;
4. Clear and specific guidelines in which officers may or may not draw or discharge a firearm;
5. Training on use of force procedures and guidelines, and;
6. Factors for evaluating and reviewing all use of force incidents.

SB 230 also adds section 13519.10 to the Penal Code pertaining to the Commission on Peace Officer Standards and Training (“POST”). Section 13519.10 requires the implementation of a course or courses of training for law enforcement agencies on the use of force, and the development and adoption of uniform and minimum guidelines for the use of force for law enforcement agencies. The guidelines must emphasize that an officer’s use of force is of vital concern to the community and that law enforcement should safeguard the life, dignity, and liberty of all persons. Such guidelines are to be used as a resource for each agency in creating or modifying a use of force policy.

In ensuring compliance with SB 230, each law enforcement agency should review the 20 requirements set forth in Government Code section 7286 and determine whether the adoption of new policies or the amendment of existing policies is necessary. Finally, pursuant to Government Code section 7286(d), associations should enforce their right to collectively bargain changes to workplace rules by demanding to “meet and confer” prior to the implementation of any new policy. Such demands should be made in consultation with legal representatives.

About the author

Marueen Okwuosa is a senior associate with the firm's Legal Defense Group. Maureen defends public sector employees in administrative investigations, critical incident investigations, and disciplinary appeals. She also represents public sector employees in grievances and restraining order matters.

LABOR

Remote Administrative Hearings

Is the expediency of proceeding remotely worth the conceivable risks?

Robert M. Wexler

As COVID-19 continues to ravage, its effects have been felt in all walks of life. Like others who have had to adapt to meet the needs of clients, labor lawyers have turned to technology to supplement
Remote Administrative Hearings (cont.)

our traditional means of delivering services. Ten months ago, few people knew of Zoom, and even fewer would have imagined it would so quickly morph into a widely used verb that permeates our daily vernacular (“Do you want to Zoom this afternoon?”). Similar products like Teams, WebEx, GoToMeeting and Google Meets have allowed parties to “meet” remotely, when in-person meetings are unadvisable. But what about conducting full-blown administrative evidentiary hearings using these remote meetings tools? Is it advisable? What are the pitfalls?

With the initial “stay at home” mandates, most pending hearings were temporarily postponed by weeks or months. But as reality set in, it became apparent that pending administrative trials, which routinely require multiple people be in one room – litigants, investigators, witnesses, lawyers, a court reporter and a hearing body – may need to be postponed indefinitely, especially if one or more of the necessary participants was deemed at “high risk” of succumbing to the worst effects of the virus. To address the growing backlog of pending cases, some hearing bodies began offering litigants the opportunity to conduct remote “virtual” hearings. Others, such as the Los Angeles County Civil Service System, have even attempted to mandate participation in remote evidentiary hearings.

In the case of Los Angeles County, that decision, made unilaterally and without acquiescence of the affected unions, is the subject of a legal challenge. Unions should know that any substantive changes to the administrative disciplinary appeal process is likely a mandatory subject of bargaining. (Phillips v. State Personnel Bd. (1986) 184, Cal.App.3d 651; Cerini v. City of Cloverdale (1987) 191 Cal.App.3d 1471.) Any mandate to participate in a remote hearing, where the rules either expressly or implicitly provide for an in-person hearing, is likely going to require the employer to meet and confer in good faith with the recognized employee organization and either reach agreement or exhaust the applicable impasse processes. Thus, an employee organization faced with an employer proposal to move to remote hearings should, minimally, avail itself of the opportunity to meet and confer, if for no other reason than to address the issues identified below.

Whether the labor union of an employee facing a disciplinary appeal hearing voluntarily agrees to a remote hearing is a matter that must be decided on a case-by-case basis, after consultation with legal counsel. However, serious consideration should be given to some of the limitations necessarily applicable to remote hearings, which could significantly compromise parties’ examination and cross-examination of witnesses and impact the outcome. Some of the issues that should be addressed, to the extent possible, are:

1. **Ensuring witness seclusion.** A witness who is testifying at a remote location is not improperly reading a script, accessing documents, or being coached remotely (e.g., text message) by someone else in the same room as the witness who is not visible on camera.

2. **Compelling “attendance” of a witness remotely.** Witnesses, especially adverse witnesses, must have the means to navigate the remote meeting program, have computer access with adequate internet bandwidth, and be willing and competent enough to overcome the myriad internet issues that could occur mid-hearing.

3. **Introducing evidence.** Planning how to introduce and share evidence when the witness, parties, hearing body and court reporter are each at separate, remote locations presents advocacy challenges. Mandating advance exchange of exhibits may address this issue somewhat, but doing
Remote Administrative Hearings (cont.)

so may significantly impact trial strategy and due process. For various reasons a party may not want to grant the hearing body advance access to evidence that is ultimately inadmissible, or may wish to withhold certain evidence until the hearing has begun. Also, there is no meaningful way to “surprise” an adverse witness on the stand with evidence on cross-examination if the evidence must be sent to the witness in advance of the hearing.

4. **Impeachment evidence.** Using impeachment evidence effectively is significantly impacted as there are limited ways to provide the impeachment evidence to all the relevant parties in the middle of a witness’s testimony, unless all participants agree to monitor their email during the hearing or documents can be displayed and shared on video screens.

5. **Attorney-client communications.** Attorneys and their clients must pre-plan how they will confer with each other during the hearing and out of earshot of the opposition or hearing body;

6. **Use of physical evidence.** Testimony sometimes requires the use of demonstrative, physical evidence (e.g., baton, handcuffs, gun), and sometimes witnesses must meaningfully “act out” physical actions. Both presentations of evidence are significantly impacted by a remote hearing.

7. **Witness credibility.** Lastly, and most critically, viewing a witness through a screen, when the witness’s face is front-and-center and appears larger than real life, can significantly impact a hearing body’s credibility assessments. Witnesses must be prepared to mind their presence and facial expressions more than ever.

The above list is not intended to suggest that remote hearings *per se* impair justice or should be avoided. To the contrary, this author has, in consultation with his clients, agreed to conduct certain hearings remotely. This article is meant only to advise associations of their right to meet and confer over mandates to utilize remote hearings and to suggest that they consider each of the above issues – at least – in determining whether the expediency of proceeding remotely is worth the conceivable impacts to a case.

**Be Safe!**

**About the author**

Robert Wexler is the managing partner of the firm’s Southern California practice. He has been representing public employee associations and their members for over 25 years and has represented some of the largest law enforcement and firefighter unions in California.

RLS partner Ken Yuwiler provided meaningful input for this article.

**LABOR**

**Grievance Procedures: Is Now the Time to Negotiate a More Fair Process?**

*Make sure your grievance process is designed to work as intended - a fair and efficient method of resolving employment disputes - and not solely to the benefit of the employer.*

**Jacob A. Kalinski**

Since the onset of the pandemic, many agencies have taken the position that they cannot provide compensation increases either because they are suffering from depleted funds or a heightened sense
Grievance Procedures (cont.)

of uncertainty. As a result, many unions whose contracts are expiring are considering or have been asked to “roll over” their contract – i.e., extend their contract with little or no compensation increases. Although each union must evaluate its particular situation individually, now may be a good time to propose non-economic changes.

One non-economic item that should be at the top of every association’s list is the grievance procedure. Although many grievance procedures include language stating that they are designed to informally resolve disputes at the earliest opportunity, they are, in reality, often traps for the unwary designed to reduce liability for the employer and discourage employees from exercising their rights.

This is so because many grievance procedures have very short deadlines, both for the initiation of the grievance and for moving the grievance to subsequent steps. The deadline for the initiation of the grievance procedure is nefarious because it can operate to shrink what would be a four-year statute of limitations for breach of a written contract to a period of mere days. Take, for example, a situation in which the employer fails to provide an agreed-upon item of compensation as set forth in the MOU. Without a grievance procedure, a union or employee would generally have four years to file a breach of contract lawsuit (but only one year to file a claim for damages pursuant to Government Code section 900, et seq.). However, if there is an applicable grievance procedure requiring the initiation of a grievance within ten days of knowledge of the violation, even if the employee ultimately prevails, he or she may not be able to obtain a remedy which goes back more than ten days before the initiation of the grievance. In the absence of that grievance procedure, the employee would likely obtain a remedy going back at least one year prior to the filing of a claim for damages. As a result, the existence of the grievance procedure saves the employer nearly a year’s worth of damages.

Grievance procedures also often have short windows for employees to receive a rejection or denial of the grievance at an early step and to move the grievance to the next level. If the employee misses the deadline, his or her grievance is dead. On the other hand – although grievance procedures often have deadlines for the employers as well – no calamity befalls the employer when these deadlines are missed. Rather, that situation generally just allows the employee to move to the next step. In fact, employees generally must be mindful of their employers’ deadlines, because the employee’s deadline to move to the next step is often triggered by the employer’s failure to meet a deadline.

Finally, and perhaps most importantly, many grievance procedures end with a final decision made by employer-controlled personnel – often the City Manager – who likely had an informal role in rejecting the grievance in the first place. The City Manager is highly unlikely to rule in favor of an employee at the final step of a grievance when doing so would expose the City to liability. Thus, after going through a long, arduous and sometimes expensive grievance procedure, the union or employee may then have to proceed with litigation in Superior Court or another forum.

Based on the substantial problems with grievance procedures, unions may wish to amend their grievance procedures to make them fairer in the following ways:

1. Create realistic time deadlines for the initiation of a grievance more in line with the rights an employee would enjoy in the absence of a grievance procedure;
2. Establish realistic time deadlines for moving grievances to the next step and remove deadlines which are triggered even if an employer fails to take action;
3. Seek binding decisions at the end of a grievance procedure made by a neutral hearing officer or arbitrator.
Grievance Procedures (cont.)

Finally, unions should consider eliminating grievance procedures altogether. While there are certainly many problems that can be resolved informally with the employer through the grievance process, the same is likely true of letters or informal meetings outside of a grievance process. And while moving straight to litigation may be too costly in many instances depending on the nature of the dispute, as a practical matter, grievances that really matter will likely end up in court anyway. At least you may be able to do so without artificially restrictive deadlines!

About the author

Jacob is the lead partner of the firm’s Labor Litigation Group in southern California, where he oversees the firm’s representation of employee associations and individual clients in various types of civil litigation. He is also a skilled negotiator, having negotiated numerous collective bargaining agreements to improve clients’ wages and working conditions.

LABOR

Retaliation Never Pays (For the Employer)

RLS wins full back pay award remedying an employer’s retaliation against an association president.

The employer placed an association president on unpaid administrative leave following his return from prolonged injury leave, a status that would remain until he completed an eight-week POST requalification course – without pay – by order of the employer. RLS Associate Vance Piggott immediately recognized that the employer’s order was in clear violation of the federal Fair Labor Standards Act, as well as applicable state law, and advised the president not to attend the requalification course without pay. In response to the president’s refusal to perform work without compensation, the employer directed the president to attend a few short training courses and agreed to pay him for his time and reimburse any expenses, though the employer was adamant that he must remain in an unpaid status while attending training.

In response, Vance commenced both a contract grievance pursuant to the MOU and an unfair practice charge with Public Employment Relations Board (PERB). The contract grievance alleged violations of several MOU provisions, including the employer’s failure to meet and confer prior to imposing its unpaid “requalification” order, something that had never been done before. The unfair practice charge asserted that the employer’s action constituted unlawful retaliation against the president due to his union activities, and asserted that the employer’s “order” constituted a unilateral change within the scope of bargaining, for which the employer never “met and conferred.”

The employer rejected the grievance at every level, ignoring the MOU’s plain language, and, in an attempt to justify its decision, focused instead on the amount of time the president had been off work due to his injury. Vance eventually pushed the grievance to advisory arbitration – and won. The award recommended sustaining the grievance, with a remedy including full back pay and benefits to the president for the entire time he was on unpaid administrative leave. Following the award, the employer sought to settle both the grievance and the unfair practice charge, as it knew it would likely
Retaliation Never Pays (For the Employer) (cont.)

receive a rebuke from PERB as well. Ultimately, the employer made the president whole by paying full back pay and benefits as recommended by the arbitrator, and agreed to pay the entire arbitrator’s fee, which, per the MOU, was to be split by the employer and association.

LABOR

CalPERS Restrictions on Disability Retirees Returning to Service

New additions to the Government Code have clarified existing restrictions on the ability of medical retirees to return to service.

Vance Piggott

Government Code section 21233 went into effect on January 1, 2020. This recent addition to the Public Employees’ Retirement Law clarifies existing restrictions on CalPERS disability retirees who return to work as retired annuitants and imposes significant penalties performing work in violation of the statute.

Section 21233(a) specifies that individuals receiving disability retirement benefits cannot be employed as a retired annuitant in the same position from which the individual retired, or in a position that includes duties or activities that the individual was previously restricted from performing at the time of the individual’s disability retirement.

Under section 21233(b), employers are required to provide CalPERS with information regarding the nature of an individual’s post-retirement employment and the duties and activities being performed by a disability retiree. CalPERS may contact the retiree for information about the retiree’s work. CalPERS then uses the information to make a determination as to whether the retiree is working in violation of section 21233.

If CalPERS determines that an individual receiving disability retirement benefits has been working as a retired annuitant in violation of section 21233, it will immediately reinstate the individual as an active employee retroactive to the date the individual began working in the position (as far back as January 1, 2020), and demand repayment of all retirement benefits paid to the individual during that period. If the retiree is receiving medical benefits through CalPERS, CalPERS will also retroactively cancel those benefits. In addition, the individual’s retirement account will be credited with additional service for the time of unlawful employment as a retired annuitant. The individual may then be eligible for a service retirement only. Such consequences can have a significant and lasting adverse impact on the individual’s retirement benefits.

For these reasons, disability retirees who are working for a CalPERS agency should immediately take steps to ensure they are not working in violation of section 21233. If CalPERS contacts a retiree about their post retirement employment with a CalPERS agency, the individual should immediately seek legal advice.

About the author

Vance Piggott is an associate with the firm’s Collective Bargaining and Legal Defense Groups, and has represented numerous clients in various retirement-related legal matters. Vance is based in the firm’s Sacramento office.
**WORKERS’ COMPENSATION**

**Work Comp Corner**

Laura Stornetta

*Work Comp Corner is a regularly occurring column that will provide insight into how workers’ compensation works and address frequently asked questions. It is not meant to be legal advice. Please contact an RLS workers’ compensation attorney should you have specific questions regarding your potential case.*

In the last edition we addressed the very commonly asked question about predesignation, i.e., the ability to have your personal doctor provide medical treatment when you have suffered an injury at work. This time, we would like to take a step back and outline some basic principles of the workers’ compensation system.

**Q: What is workers’ compensation?**

A: Workers’ compensation is the nation’s oldest social insurance program. California employers are required by law to have workers’ compensation insurance. The system represents a bargain between employers and employees – employees are entitled to receive medical treatment for on-the-job injuries or illness no matter who is at fault and, in return, they are prevented from suing their employers in response to an on-the-job injury or illness (in most, but not all, cases). The primary goal of the system is to get injured workers well and back to work.

**Q: What counts as a work injury or illness?**

A: Surprisingly, this can be a complicated issue. The most obvious type of injury is a specific injury, where you suffer physical harm because of one event. For example: hurting your arm in a defensive tactics class, breaking an ankle when jumping a fence during a foot pursuit, or suffering a burn while fighting a structure fire. More difficult is what we call cumulative trauma, or injuries that occur due to repeated incidents/exposures. This is where you may have pain or problems, but do not necessarily associate the issues with any one specific incident. For example: back pain associated with wearing a duty belt and sitting awkwardly in a patrol car for years, or shoulder pain from repeatedly lifting, carrying, pushing, and pulling heavy fire equipment.

Injuries are not always obvious, or physical. Occupational illness is defined to include “any abnormal condition or disorder caused by exposure to environmental factors associated with employment, including acute and chronic illnesses or diseases which may be caused by inhalation, absorption, ingestion, or direct contact.” (Labor Code section 6409.) Illness may be suffered in any number of bodily systems: blood, lungs, gastro-intestinal, emotional/psychological, etc. Occupational diseases have been found to include TB, hepatitis, lung injury from smoke or chemical exposure, hearing loss due to noise exposure, etc.

Death can also be related to situations experienced at work, whether specific or cumulative in nature.

**Q: What benefits are included in the workers’ compensation system?**

A: There are various benefits available within workers’ compensation, but not all benefits may be available in every case.

1. **Medical Treatment**: A core tenet of workers’ compensation is that injured workers are supposed to get all medical treatment that is reasonable and
Workers' Comp Corner (cont.)

necessary to cure or relieve the effects of their injury. This includes doctor visits, imaging, diagnostic testing, medicine, medical equipment, etc. Injured workers are also entitled to reimbursement of their travel costs for medical treatment. There are very specific rules and timelines for determining what treatment is appropriate.

(2) Temporary Disability: If your claim has been accepted, these payments issue when you are losing wages because your injury prevents you from doing your usual job while you recover. Payments may flow where you have a total loss of income or a partial loss of income, but this benefit is not intended to be a total wage replacement. As a general rule, this benefit pays 2/3 of your gross (pre-tax) base salary subject to a statutory maximum that varies depending upon the year of your injury. These payments are not taxable. There are requirements to obtain this benefit and it is available for limited periods of time.

This benefit may be enhanced by statutes that apply to specific segments of the workforce (e.g., Labor Code section 4850 benefits for law enforcement officers and firefighters) or as a result of a collective bargaining agreement (e.g., MOUs may offer options to supplement the difference between temporary disability and full earnings).

(3) Permanent Disability: If you are unable to recover fully after an injury, your ongoing problems may entitle you to a finding (and payment) of permanent disability. This is not related to your ability to work, is not compensation for past or future wages, and is not payment for pain and suffering – this benefit is unique to workers’ compensation. There is a prescribed method doctors must use for assessing the permanent residuals suffered as a result of a work injury. The results of that assessment will be set forth in terms of impairment. A formula which considers age and occupation, amongst other factors, converts the finding of impairment into a percentage of permanent disability. The state has a monetary table that associates every percentage of disability with a monetary value.

If your injury does not allow you to return to your usual position and/or your employer is unable to offer you ongoing employment within certain parameters, you may be entitled to a Supplemental Job Displacement Benefit.

Additionally, there are separate Death Benefits that may flow to your spouse, children, or other dependents if you die from an occupational injury or illness.

While many workers’ compensation cases proceed without any problems, it is not uncommon for disputes to arise over whether an injury was sustained on the job, the speed and nature of medical care being provided, or the amount of monetary benefits to which an injured worker is entitled. These are topics for future issues. In the meantime, if you have suffered an injury at work or if you are not being provided with the full scope of benefits available to you, we recommend you call our office for a full discussion that contemplates your specific scenario.

About the author

Laura Stornetta is an associate with the Injury Resource and Litigation Group, specializing in representing clients in workers’ compensation claims.
Victories, Verdicts, and Settlements

Driver Suffers Neck Injury from Rear-ender

 Plaintif L.K. v. Doe Defendant

Arbitration Award: $2,897,346

RLS Attorneys
Ramona H. Atancio
Joseph R. Lucia
Eustace de Saint Phalle

Plaintiff L.K. was stopped for a red light when she was rear-ended by a cargo truck. The impact pushed her car into the vehicle in front of her. L.K. immediately complained of neck pain after the accident was taken to an emergency room by her mother.

L.K. claimed she sustained tearing of the posterior ligaments surrounding the C4-5 facet joint of her cervical spine, resulting in increased subluxation over time and cervicogenic headaches. She underwent a cervical fusion, and follow-up with a pain management physician and an orthopedic surgeon, both of whom she continues to follow-up with as of the date of the arbitration.

Despite the fusion procedure and treatment, the plaintiff continued to suffer from chronic neck pain, forcing her to leave her job. Her injuries limited her in certain activities, such as cooking, water skiing, boating, swimming, and spending time with her family and friends. As a result of her continued pain, she may require injections and a possible fusion surgery. Thus, Plaintiff requested $5.1 million in total damages for past and future medical costs, past and future loss of earnings, past and future loss of household services, and past and future pain and suffering.

Defense counsel disputed the nature and extent of L.K's injuries and damages. He argued that the force of the accident wasn't enough to cause the injuries claimed by L.K. and that, at worst, the plaintiff suffered cervical strains/sprains with up to four months of symptoms. He further argued that L.K.'s headaches predated the accident, and that any neck pain claimed beyond four months was from age- and work-related degenerative symptoms, rather than acute trauma-related pathology.

Defense counsel also argued that L.K. had a 15-month gap in treatment and that she left work due to a subsequent knee injury, not because of her short-lived neck pain. Furthermore, counsel contended that the accident had no long-term residual impact on L.K. and that her wage loss claim was overstated since she was able to return to work.

Thus, defense counsel asked the arbitrator to award $40,000 in total damages.

In the end, an Arbitrator awarded L.K. $2,897,346 in total damages. However, the award was ultimately reduced to the stipulated amount of $476,454.87, based on offsets and the amount of coverage available under the UIM policy.

Arbitration Award

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Past medical costs:</td>
<td>$109,053</td>
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<tr>
<td>Future medical costs:</td>
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<tr>
<td>Past lost earnings:</td>
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<tr>
<td>Future lost earnings:</td>
<td>$450,000</td>
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<tr>
<td>Loss of household services:</td>
<td>$155,000</td>
</tr>
<tr>
<td>Pain and suffering:</td>
<td>$1,000,000</td>
</tr>
<tr>
<td><strong>TOTAL:</strong></td>
<td><strong>$2,897,346</strong></td>
</tr>
</tbody>
</table>
Answering the Call to Serve

RLS’s culture of dedication to first responders is rooted in their own decades of public service.

Whether in the courtroom, at the bargaining table or in the media, Rains Lucia Stern St. Phalle & Silver, PC (RLS) has been committed to its mission of representing those who protect and serve since its inception in 1999. The firm has cultivated a strong reputation among peace officers and police labor associations for being one of the leading voices on the legal, political and tactical challenges facing the profession. And PORAC members have been clients since day one.

“RLS has been representing PORAC members for 21 years, but our roots go much deeper, to the very dawn of the police labor movement,” the firm’s managing principal, Harry S. Stern, says. “Some of my partners — including Mike Rains, Steve Silver and ‘Rocky’ Lucia — have been representing PORAC and its members for many decades.” (Indeed, it could be said that seeds of RLS’s relationship with PORAC were planted in the 1970s, when Rockne “Rocky” A. Lucia Jr., one of the firm’s founding principals, started his labor relations career.)

Harry S. Stern, left, and Michael L. Rains, right, served as peace officers with the Berkeley P.D. and Santa Monica P.D., respectively. Nicole Pifari, bottom, served as a K-9 handler with the Missoula P.D.
career working on peace officer legislation with PORAC.)

Stern, who has been with RLS since the very beginning, says the firm believes that “service to our clients is our highest calling.” Coming from him, those words carry extra weight. Long before representing peace officer clients in the courtroom, Stern was on the other side of the justice system, protecting and serving the public as an officer with the Berkeley Police Department. He was also a member of the board of directors for the Berkeley Police Association. And surprisingly, he’s not the only one at RLS who has walked the beat. Michael L. Rains, one of the firm’s principals and a founding member, served as an officer with the Santa Monica Police Department and as the president of the Santa Monica Police Officers’ Association. A number of other attorneys and team members have backgrounds in public safety. For example, Principal Timothy Talbot was a firefighter and partner Russell Perry worked as a probation officer.

"We protect the livelihoods, working conditions and even the freedom of the men and women who make society safer and better — we live to serve."

- Harry S. Stern, Managing Principal

These unique, firsthand experiences with law enforcement have undoubtedly laid the foundation for the firm’s understanding of the complex and dangerous nature of the

RLS’s Senior Labor Relations Representative John Noble in his Santa Rosa police uniform.

Damian Stafford served with the Costa Mesa P.D. before joining RLS as a labor relations representative.
Vocal segments of the public, the media, and certainly politicians seem to be on ... an unhinged rampage against cops. This often purely emotional response has manifested itself in ... calls to defund the police.

profession, as well as the challenges officers face in today’s world.

This firm’s mission and definition of success is built on this dedication and connection to law enforcement. “We protect the livelihoods, working conditions and even the freedom of the men and women who make society safer and better — we live to serve,” Stern says. “Success in our chosen field isn’t measured in dollars and cents. Helping good people in tough times is by far the most rewarding career one could have. It is a calling, not a job.”

With that mindset, RLS has excelled in its work for PORAC members and the several hundred police labor associations it represents throughout California and central Nevada. The firm handles numerous cases in the practice areas of labor representation, criminal defense, administrative defense, personal injury, civil litigation and workers’ compensation. The key to the firm’s many successes over the years, Stern says, is the staff’s dedication to the mission and willingness to collaborate.

“In a given case, we might tap resources from our seasoned criminal defense lawyers, have the labor litigation team work on a distinct Public Safety Officers Bill of Rights Act (POBRA) aspect of the case, get strategy input from the experienced trial attorneys in the personal injury group and even consult with the

RLS Principal Timothy K. Talbot served as a Stockton firefighter and paramedic.

RLS Partner Russell M. Perry served as a probation officer for San Bernardino County.
workers’ compensation team about potential claims,” he says. “When you have tremendous trial lawyers like Michael Schwartz and Eustace de St. Phalle to talk strategy with, it’s a huge advantage on any type of case.”

The high-quality service that RLS provides gives its clients peace of mind, which is especially comforting in a time when working in law enforcement is difficult and the profession is seemingly being attacked from all sides. “Peace officers are facing a dramatic crisis in confidence that is both external and internal,” Stern explains. “Vocal segments of the public, the media and certainly politicians seem to be on what can only be described as an unhinged rampage against cops. This often purely emotional response has manifested itself in draconian revisions to laws governing use of force, the sanctity of personnel files and, of course, calls to defund the police.”

These challenges signal why it’s important for peace officers to have legal representation and resources available to them at all times. “Not only is it crucial to their economic protection and freedom, but peace officers are frequently subjects of complaints — more than any other profession,” says Stern, who notes that due process rights, as well as the legal representation PORAC offers its members, are essential.

On top of providing legal support, Stern says the ultimate goal of RLS is to be an unwavering advocate of the law enforcement profession and the officers who work in it.

“I am absolutely certain that our firm plays an important role in making society safer and saner by supporting the police,” he says. “Frankly, without us keeping prosecutors and other politicians honest, many would run roughshod over cops, which would, in turn, cause further societal chaos and decay.”
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Acquittal State Excessive Force Charges

Acquittal Federal Excessive Force and Conspiracy Charges

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Acquittal State Manslaughter Charges

Successful Defense State Murder Charges

Acquittal State Murder Charges

Acquittal State Manslaughter Charge

Acquittal Federal Excessive Force and Obstruction Charges

THESE NOTEWORTHY CASES ARE JUST A FEW OF THE MANY RLS SUCCESSES.

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