

Public Sector Employment Law Update

IPMA-HR San Diego Chapter

Presented by Richard Whitmore

January 15, 2009

Public Sector Employment Law Update

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Richard Whitmore

Discrimination – Disability

- When a medical opinion says hearing aids will allow a laborer to perform in a promotional position, a city discriminates if it refuses to promote him after he has purchased the hearing aids.

Dept. Fair Empl. & Hous. v. City of Fullerton, California
(Feb. 26, 2008) Case No. E200405 T-1098-00pe;
Decision No. 08-05-P.

Discrimination – Disability

- A city retirement program that requires disability pensions (but not service pensions) to be offset by workers comp benefits does not constitute disability discrimination.

Brown v. City of Los Angeles (9th Cir. 2008)
521 F.3d 1238.

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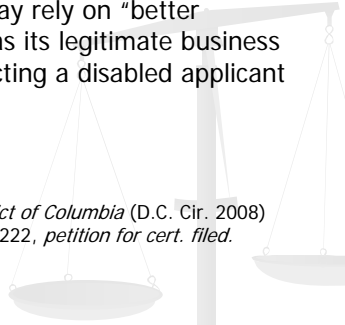
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Discrimination – Disability

- An employer may rely on “better qualifications” as its legitimate business reason for rejecting a disabled applicant under the ADA.

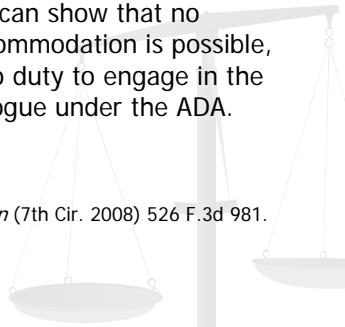
Adeyemi v. District of Columbia (D.C. Cir. 2008)
525 F.3d 1222, petition for cert. filed.



Discrimination – Disability

- If an employer can show that no reasonable accommodation is possible, then there is no duty to engage in the interactive dialogue under the ADA.

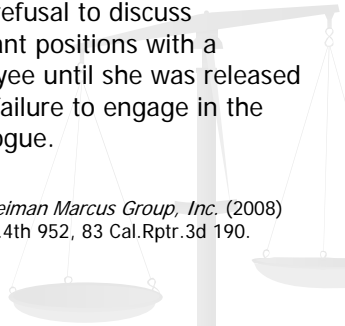
Dargis v. Sheahan (7th Cir. 2008) 526 F.3d 981.



Discrimination – Disability

- An employer’s refusal to discuss alternative vacant positions with a disabled employee until she was released to work was a failure to engage in the interactive dialogue.

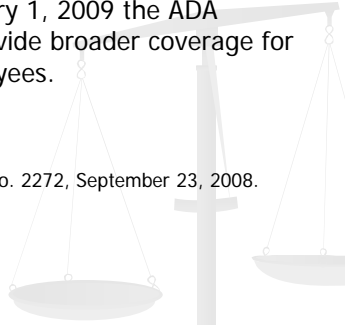
Nadaf-Rahrov v. Neiman Marcus Group, Inc. (2008)
166 Cal.App.4th 952, 83 Cal.Rptr.3d 190.



Discrimination – Disability

- Effective January 1, 2009 the ADA expands to provide broader coverage for disabled employees.

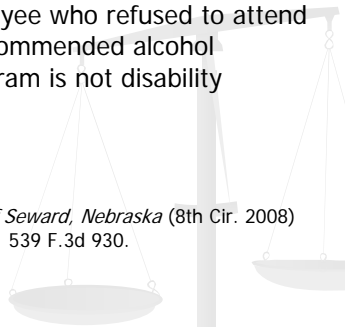
GERR Vol. 46, No. 2272, September 23, 2008.



Discrimination – Disability

- Firing an employee who refused to attend a medically-recommended alcohol treatment program is not disability discrimination.

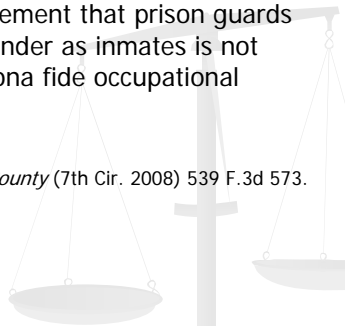
Kozisek v. County of Seward, Nebraska (8th Cir. 2008)
539 F.3d 930.



Discrimination – Gender

- A county requirement that prison guards be the same gender as inmates is not necessarily a bona fide occupational qualification.

Henry v. Milwaukee County (7th Cir. 2008) 539 F.3d 573.



Discrimination

- If an employee alleging discrimination voluntarily pursues an employer's administrative complaint procedure, the one-year FEHA statute of limitations is tolled during that procedure.

McDonald v. Antelope Valley Community College District
(2008) 45 Cal.4th 88.

Discrimination – Religion

- EEOC adopts standards for identifying religious discrimination and the duty to accommodate religious beliefs.

<http://www.eeoc.gov/policy/docs/religion.html>

Retaliation

- An assistant city attorney defending a city in an EEOC case is engaging in a protected activity and is entitled to protection from retaliation.

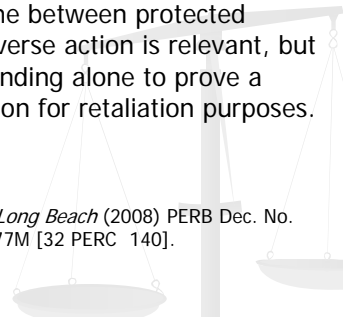
Kelley v. City of Albuquerque (10th Cir. 2008)
542 F.3d 802.

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Retaliation

- Proximity in time between protected activity and adverse action is relevant, but not enough standing alone to prove a causal connection for retaliation purposes.

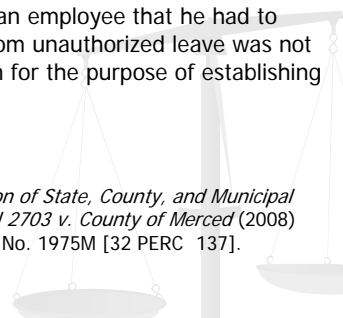
Montoya v. City of Long Beach (2008) PERB Dec. No. 1977M [32 PERC 140].



Retaliation

- A letter advising an employee that he had to return to work from unauthorized leave was not an adverse action for the purpose of establishing retaliation.

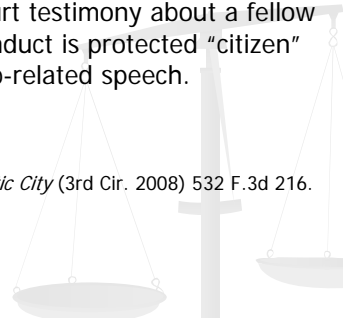
American Federation of State, County, and Municipal Employees, Local 2703 v. County of Merced (2008) PERB Dec. No. 1975M [32 PERC 137].



First Amendment

- An officer's court testimony about a fellow officer's misconduct is protected "citizen" speech, not job-related speech.

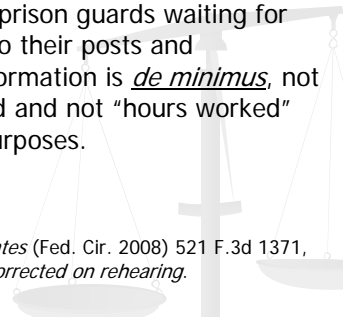
Reilly v. City of Atlantic City (3rd Cir. 2008) 532 F.3d 216.



Fair Labor Standards Act

- Time spent by prison guards waiting for keys, walking to their posts and exchanging information is *de minimus*, not directly ordered and not "hours worked" for overtime purposes.

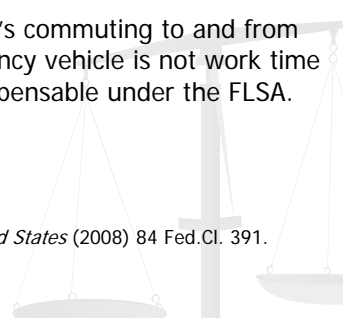
Carlsen v. United States (Fed. Cir. 2008) 521 F.3d 1371, as corrected on rehearing.



Fair Labor Standards Act

- An investigator's commuting to and from work in an agency vehicle is not work time and is not compensable under the FLSA.

Morgan v. United States (2008) 84 Fed.Cl. 391.



Fair Labor Standards Act

- DOL issues regulations on comp time, firefighter-medics, fluctuating workweeks and travel time.

<http://www.dol.gov/esa/whd/regulations/FLSA2008NPRM.pdf>

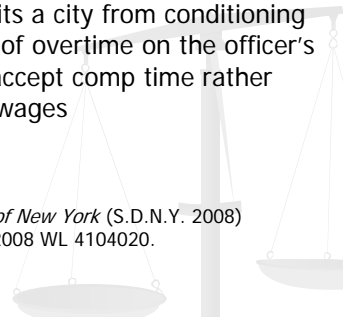


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Fair Labor Standards Act

- Nothing prohibits a city from conditioning an assignment of overtime on the officer's willingness to accept comp time rather than overtime wages

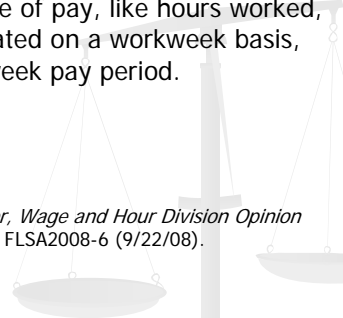
*Scott v. City of New York (S.D.N.Y. 2008)
2008 WL 4104020.*



Fair Labor Standards Act

- The regular rate of pay, like hours worked, must be calculated on a workweek basis, not on a two-week pay period.

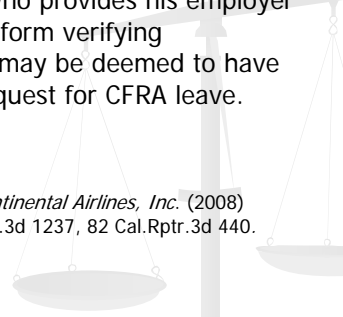
Department of Labor, Wage and Hour Division Opinion Letter, FLSA2008-6 (9/22/08).



CFRA

- An employee who provides his employer with a medical form verifying hospitalization may be deemed to have submitted a request for CFRA leave.

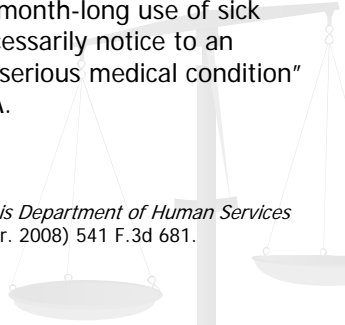
*Avila v. Continental Airlines, Inc. (2008)
165 Cal.Rptr.3d 1237, 82 Cal.Rptr.3d 440.*



Family and Medical Leave Act

- An employee's month-long use of sick leave is not necessarily notice to an employer of a "serious medical condition" under the FMLA.

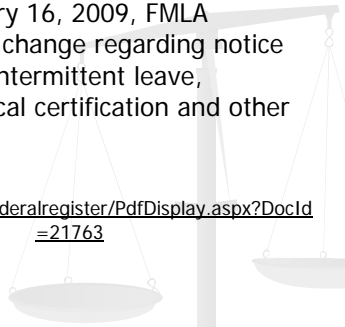
De la Rama v. Illinois Department of Human Services
(7th Cir. 2008) 541 F.3d 681.



Family and Medical Leave Act

- Effective January 16, 2009, FMLA regulations will change regarding notice requirements, intermittent leave, eligibility, medical certification and other provisions.

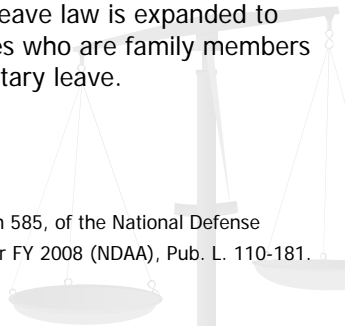
<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>



Family and Medical Leave Act

- Federal family leave law is expanded to cover employees who are family members of those on military leave.

HR 4986, section 585, of the National Defense Authorization Act for FY 2008 (NDAA), Pub. L. 110-181.

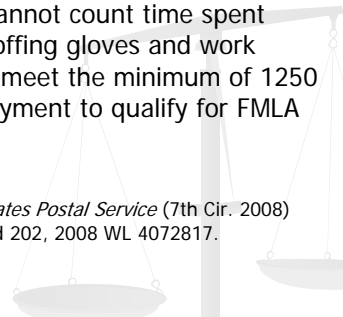


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Family and Medical Leave Act

- An employee cannot count time spent donning and doffing gloves and work shoes to try to meet the minimum of 1250 hours of employment to qualify for FMLA coverage.

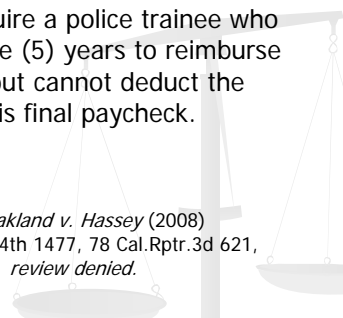
Pirant v. United States Postal Service (7th Cir. 2008)
542 F.3d 202, 2008 WL 4072817.



Employee Training Costs

- A city may require a police trainee who quits before five (5) years to reimburse training costs but cannot deduct the amount from his final paycheck.

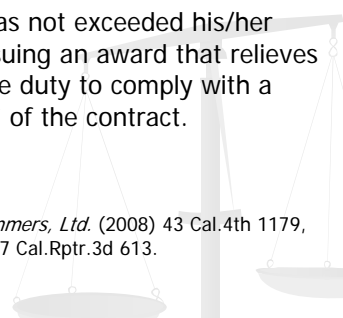
City of Oakland v. Hassey (2008)
163 Cal.App.4th 1477, 78 Cal.Rptr.3d 621,
review denied.



Arbitration

- An arbitrator has not exceeded his/her authority by issuing an award that relieves one party of the duty to comply with a "material term" of the contract.

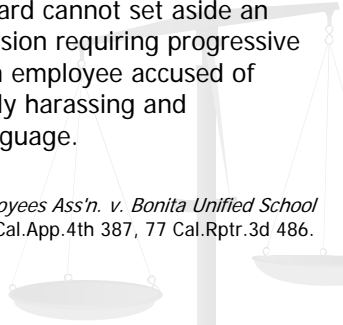
Gueyffier v. Ann Summers, Ltd. (2008) 43 Cal.4th 1179,
77 Cal.Rptr.3d 613.



Arbitration

- A governing board cannot set aside an arbitrator's decision requiring progressive discipline for an employee accused of abusive, sexually harassing and intimidating language.

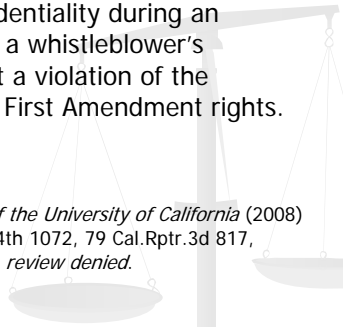
California School Employees Ass'n. v. Bonita Unified School District (2008) 163 Cal.App.4th 387, 77 Cal.Rptr.3d 486.



Whistleblowing

- Requiring confidentiality during an investigation of a whistleblower's complaint is not a violation of the whistleblower's First Amendment rights.

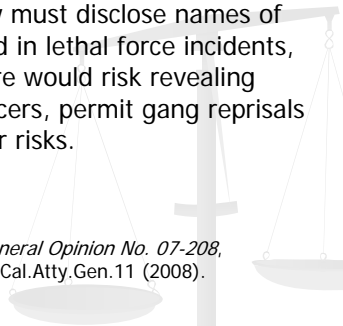
Jones v. Regents of the University of California (2008) 164 Cal.App.4th 1072, 79 Cal.Rptr.3d 817, review denied.



Public Records

- A public agency must disclose names of officers involved in lethal force incidents, unless disclosure would risk revealing undercover officers, permit gang reprisals or create similar risks.

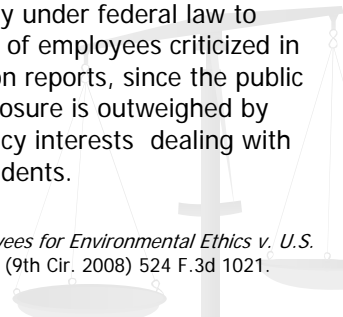
Attorney General Opinion No. 07-208, 91 Ops.Cal.Atty.Gen.11 (2008).



Public Records

- There is no duty under federal law to disclose names of employees criticized in fire investigation reports, since the public interest in disclosure is outweighed by employee privacy interests dealing with lethal force incidents.

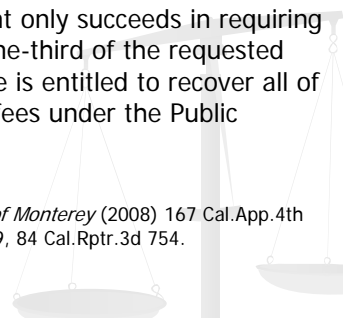
Forest Service Employees for Environmental Ethics v. U.S. Forest Service (9th Cir. 2008) 524 F.3d 1021.



Public Records

- Even if a litigant only succeeds in requiring disclosure of one-third of the requested documents, she is entitled to recover all of her attorney's fees under the Public Records Act.

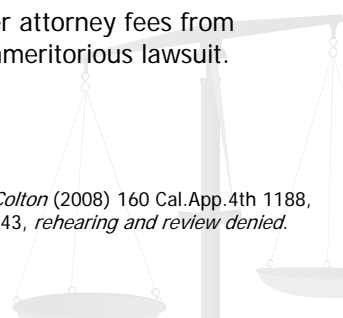
Bernardi v. County of Monterey (2008) 167 Cal.App.4th 1379, 84 Cal.Rptr.3d 754.



Attorney Fees

- City can recover attorney fees from employee in unmeritorious lawsuit.

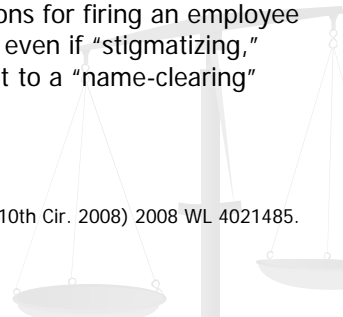
Villanueva v. City of Colton (2008) 160 Cal.App.4th 1188, 73 Cal.Rptr.3d 343, rehearing and review denied.



Due Process

- When the reasons for firing an employee are not public, even if "stigmatizing," there is no right to a "name-clearing" conference.

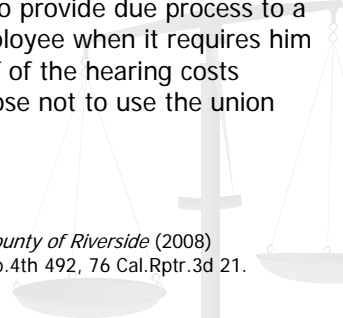
Sanchez v. Dubois (10th Cir. 2008) 2008 WL 4021485.



Due Process

- A county fails to provide due process to a disciplined employee when it requires him to pay one-half of the hearing costs because he chose not to use the union representative.

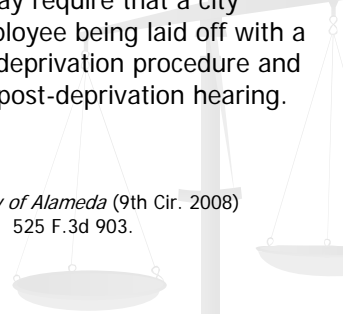
Soto v. County of Riverside (2008)
162 Cal.App.4th 492, 76 Cal.Rptr.3d 21.



Due Process

- Due process may require that a city provide an employee being laid off with a *Skelly*-like pre-deprivation procedure and an evidentiary post-deprivation hearing.

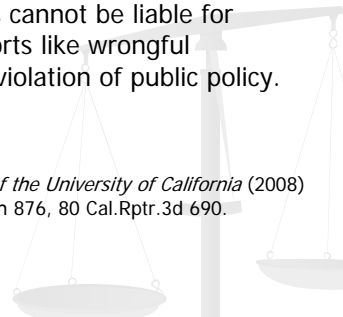
Levine v. City of Alameda (9th Cir. 2008)
525 F.3d 903.



Wrongful Termination

- Public agencies cannot be liable for common law torts like wrongful termination in violation of public policy.

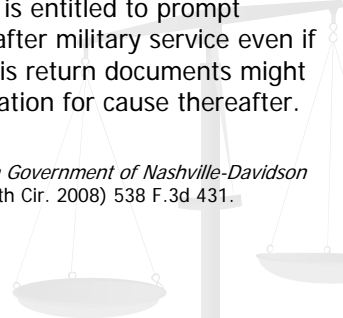
Miklosy v. Regents of the University of California (2008)
44 Cal.4th 876, 80 Cal.Rptr.3d 690.



Military Leave

- A police officer is entitled to prompt reinstatement after military service even if dishonesty in his return documents might warrant termination for cause thereafter.

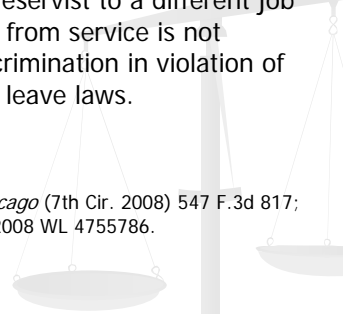
Petty v. Metropolitan Government of Nashville-Davidson County (6th Cir. 2008) 538 F.3d 431.



Military Leave

- Reassigning a reservist to a different job after his return from service is not necessarily discrimination in violation of federal military leave laws.

Maher v. City of Chicago (7th Cir. 2008) 547 F.3d 817;
2008 WL 4755786.



Labor Relations

- A county need not meet and confer with the union before issuing a directive that deputies in shooting cases shall not confer or meet jointly prior to departmental IA interrogation.

Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, Los Angeles County Sheriffs Department et al. (2008) 166 Cal.App.4th 1625, 83 Cal.Rptr.3d 494, as modified.

Labor Relations

- A union president who is on full time union-paid leave is not entitled to employer-paid release time while involved in negotiations for the union

Berkeley Council of Classified Employees v. Berkeley Unified School District (2008) PERB Dec. No. 1954 [32 PERC 73].

Labor Relations

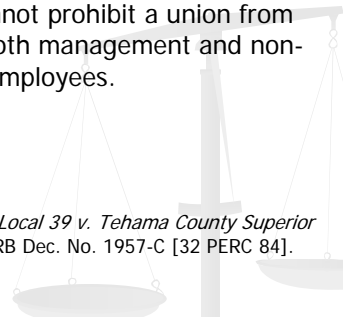
- A union may pursue an unfair labor practice charge alleging improper unilateral action even after a county has rescinded the challenged action.

Sacramento County Attorneys Association v. County of Sacramento (2008) PERB Dec. No. 1943-M [32 PERC 42].

Labor Relations

- A local rule cannot prohibit a union from representing both management and non-management employees.

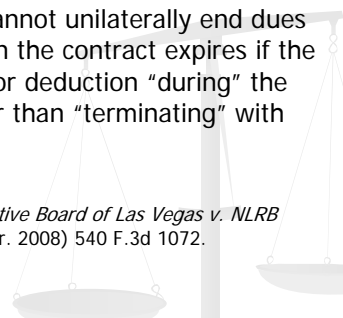
Stationary Engineers Local 39 v. Tehama County Superior Court (2008) PERB Dec. No. 1957-C [32 PERC 84].



Labor Relations

- An employer cannot unilaterally end dues deduction when the contract expires if the contract calls for deduction "during" the contract, rather than "terminating" with the contract.

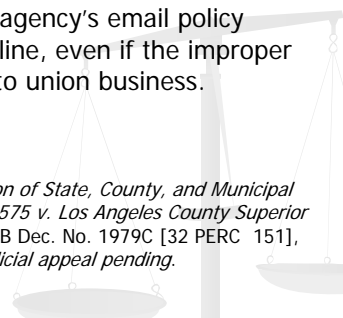
Local Joint Executive Board of Las Vegas v. NLRB (9th Cir. 2008) 540 F.3d 1072.



Labor Relations

- Violation of an agency's email policy warrants discipline, even if the improper emails related to union business.

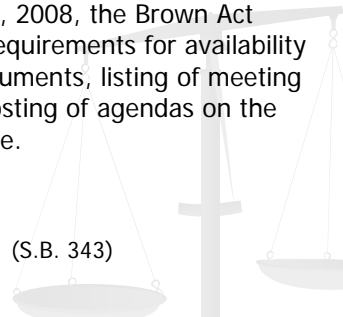
American Federation of State, County, and Municipal Employees, Local 575 v. Los Angeles County Superior Court (2008) PERB Dec. No. 1979C [32 PERC 151], *Judicial appeal pending.*



Public Meeting Law

- Effective July 1, 2008, the Brown Act imposes new requirements for availability of meeting documents, listing of meeting address and posting of agendas on the agenda web site.

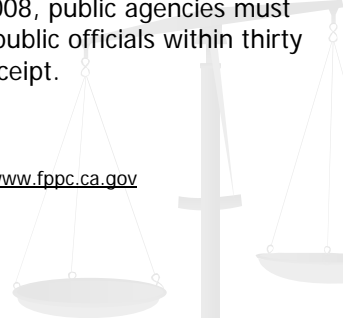
(S.B. 343)



Conflict of Interest

- As of July 1, 2008, public agencies must report gifts to public officials within thirty (30) days of receipt.

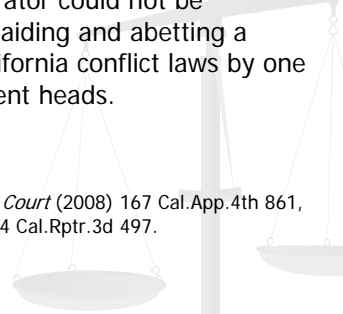
www.fppc.ca.gov



Conflict of Interest

- A city administrator could not be prosecuted for aiding and abetting a violation of California conflict laws by one of his department heads.

D'Amato v. Superior Court (2008) 167 Cal.App.4th 861,
84 Cal.Rptr.3d 497.



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Workers Compensation

- A SWAT officer is entitled to workers comp benefits when he is injured while jogging on vacation, since he reasonably believed the department expected him to train on vacation.

Tomlin v. Workers' Compensation Appeals Board (2008)
162 Cal.App.4th 1423, 76 Cal.Rptr.3d 672,
review denied.

Workers Compensation

- A county violates Labor Code Section 132a when it fails to treat post-4850 vacation cash out as PERS-able, since other cash outs are deemed PERS-able.

Los Angeles County Professional Peace Officers' Ass'n v. County of Los Angeles (2008) 165 Cal.App.4th 63,
80 Cal.Rptr.3d 572.
