STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, Charging Party, v. CITY AND COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-1884-M PERB Decision No. 2846-M November 17, 2022

Appearance: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union Local 1021.

Before Banks, Chair; Shiners, Krantz, and Paulson, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Service Employees International Union Local 1021 (SEIU) from the partial dismissal of its unfair practice charge by PERB's Office of the General Counsel (OGC). The charge, as amended, alleged that the City and County of San Francisco (City)[1] violated the Meyers-Milias-Brown Act (MMBA), the Prohibition on Public Employers Deterring or Discouraging Union Membership (PEDD), and PERB Regulations by adopting a policy requiring employees to be vaccinated against COVID-19 and implementing various measures to enforce the

[1] The charge also named the City's Municipal Transportation Agency (SFMTA) as a respondent. All references in this decision to the City include SFMTA, except where indicated otherwise.

policy.[2] OGC dismissed the allegations that the City violated the MMBA and PERB Regulations by: (1) unilaterally deciding to adopt the mandatory COVID-19 vaccination policy; (2) requiring employees to disclose their vaccination status; and (3) refusing to allow employees to submit SEIU-created vaccination ascertainment forms in lieu of the City's form.[3]

SEIU appealed the partial dismissal, arguing that OGC erred in analyzing the decisional bargaining allegation regarding the mandatory COVID-19 vaccination policy. The appeal also argues the allegation that the City required employees to disclose their vaccination status adequately stated a prima facie case of both unilateral change and direct dealing violations. The appeal further argues that OGC erred in dismissing the allegation that the City interfered with MMBA-protected rights when it required employees to use a City-generated self-certification form instead of an alternate form SEIU created. The City did not file a statement in opposition to the appeal.

---

[2] The MMBA is codified at Government Code section 3500 et seq. PEDD is codified at Government Code section 3550 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[3] Concurrently, OGC issued a complaint alleging that the City violated the MMBA and PERB Regulations by adopting the vaccination policy without first meeting and conferring with SEIU over the policy's negotiable effects, bypassing SEIU by requiring employees to sign a form consenting to discipline for failure to comply with the vaccination policy, unilaterally adding a COVID-19 vaccination requirement to the minimum qualifications in job descriptions without effects bargaining, unilaterally changing its policy on implementing religious exemptions to the vaccination policy, and failing to provide SEIU with information about bargaining unit members' applications for and receipt of exemptions to the vaccination policy. Around this same time, SEIU withdrew without prejudice its PEDD allegations.

Based on our review of the entire case file, we affirm the dismissal of the direct dealing allegation, but reverse the dismissal of the remaining allegations and remand this matter to OGC to issue an amended complaint consistent with this decision.

FACTUAL ALLEGATIONS[4]

On or around June 11, 2021,[5] the City's Health Officer, Susan Philip, issued Order of the Health Officer No. C19-07x (Order), wherein she directed employees of businesses and governmental entities who regularly work in "High-Risk Settings" to be fully vaccinated with one of the COVID-19 vaccines within 10 weeks of the U.S. Food and Drug Administration's (FDA) final approval of such a vaccine. The only exemptions from this vaccination mandate were for employees who demonstrate that they have declined the vaccine based on "Religious Beliefs" or "Qualifying Medical Reasons" as defined in the Order.

On or around June 22, the City's Employee Relations Manager, Jonathan Wright, e-mailed representatives of all City employee organizations, including SEIU, attaching a "draft" vaccination policy and "draft" face covering policy (collectively referred to in the charge as the "Policy"). Wright wrote: "We're providing this in advance of issuing them city-wide in the morning."

On June 23, the City issued the Policy in final form to all City employees. The

---

[4] In the present procedural posture, we assume the charging party's factual allegations are true, and we view them in the light most favorable to the charging party. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 8 (*Cabrillo I*).) We recite here only alleged facts pertinent to the allegations dismissed by OGC.

[5] All dates are in 2021, unless otherwise indicated.

Policy states that, as a condition of employment, all employees must disclose their vaccination status to the City under penalty of perjury and provide proof of vaccination or eligibility for an exemption by July 29. Additionally, all employees must provide proof that they were fully-vaccinated no later than 10 weeks following final FDA approval of a COVID-19 vaccine. The Policy states that "[f]ailure to comply with the policy may result in discipline up to and including termination." That same day, the City issued a memorandum to department heads and department personnel officers explaining how to implement and enforce the mandate that employees report their vaccination status by July 29.

On July 8, Philip updated the Order[6] to give businesses and governmental entities until September 15 to ascertain the vaccination status of employees in High-Risk Settings and ensure those who routinely work onsite were fully vaccinated against COVID-19.[7] Under the Order, any employee who declined the vaccine for exempted reasons was required to submit to COVID-19 testing at least once a week.

On July 20, Philip amended the Order to add an October 13 deadline for businesses and governmental entities to identify and ascertain vaccination status for employees "who are not permanently stationed or regularly assigned to a High-Risk Setting but who in the course of their duties may enter or work in High-Risk Settings

[6] The updated Order changed to No. C19-07y, but will be referenced as the Order throughout.

[7] The Order defined "High-Risk Settings" as "certain care or living settings involving many people, including many congregate settings, where vulnerable populations reside out of necessity and where the risk of COVID-19 transmission is high, consisting of general acute care hospitals, skilled nursing facilities, residential care facilities for the elderly, homeless shelters, and jails."

even on an intermittent or occasional basis or for short periods of time."

On July 28, the City's Human Resources Director, Carol Isen, issued a memorandum titled "Condition of Employment: COVID-19 Vaccination Requirements," which said "COVID-19 vaccinations will be required as a condition of employment for all City and County of San Francisco employees working in high-risk settings, unless otherwise exempted." The memorandum also required all City employees to be fully vaccinated as a condition of employment 10 weeks after the FDA approves at least one COVID-19 vaccine.

On August 10, the City e-mailed SEIU that the City had issued a revised vaccination policy, and that it would issue notices of potential disciplinary action (or other employment action) to all employees who failed to report their vaccination status by August 12. The letter the City intended to send to non-compliant employees threatened "progressive disciplinary action, up to and including termination, or other employment action."

On or around August 13, SFMTA rejected an employee's submission of an SEIU-created self-attestation form. Unlike the City's self-attestation form, the form created by SEIU allowed employees to decline to state their vaccination status and thereby be treated the same as those disclosing that they were unvaccinated. SFMTA said the employee must "immediately report your vaccination status in conformity with the Vaccination Policy." SFMTA attached the Policy to this e-mail.

On August 23, Isen issued department heads a memorandum stating that the FDA had fully approved the Pfizer COVID-19 vaccine and set a November 1 deadline for all City employees to be vaccinated, or sooner for healthcare or High-Risk Setting employees.

On September 10, Philip issued an updated Order that extended the vaccination deadline for some employees in High-Risk Settings to September 30. The Order also stated: "Nothing under the Order limits the ability of a Business or governmental entity under applicable law to determine whether they are unable to offer a reasonable accommodation to unvaccinated Personnel with an approved exemption[.]"

On September 15, Isen sent SEIU an "Updated Vaccination Policy" that required employees "as a condition of employment [to]: (1) report their vaccination status to the City; and (2) be fully vaccinated and report that vaccination status to the City no later than either the applicable deadline under the San Francisco Health Order, if it applies, or 10 weeks after the Federal Food & Drug Administration (FDA) giv[es] final approval to at least one COVID-19 vaccine (November 1, 2021)." The Policy stated, "[f]ailure to comply with this Policy may result in disciplinary action, or non-disciplinary separation from employment for failure to meet the minimum qualifications of the job."

On or about September 29, SEIU learned that San Francisco International Airport management had required employees to sign an acknowledgement form stating: "I understand that failure to comply with the Policy will result in my separation from City employment."

On or about October 7, in response to SEIU's request for information, a representative of the City's Department of Public Health sent SEIU a template letter entitled "Notice of Proposed Employment Action and *Skelly* Meeting (*Skelly* Notice),"[8]

[8] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 requires that permanent

which the City intended to issue to unvaccinated healthcare employees.

On or about October 14, the City's Human Services Agency required an employee to sign a "COVID-19 vaccination discussion acknowledgement," which includes a paragraph stating: "I understand that complying with the City's Covid-19 Vaccine Policy is a requirement for my position and a condition of City employment. I understand that failure to comply with the Policy will result in my separation from City employment."

On October 22, Isen issued a letter to all City employees who had not yet reported their vaccination status or who had reported as unvaccinated. The letter, titled "October 18th Deadline to Receive Final Dose of COVID-19 Vaccine," provided:

> "You are receiving this notice because city records reflect that you have either not yet notified the city of your COVID-19 vaccination status or you have reported that you are unvaccinated. Pursuant to the City and County of San Francisco COVID-19 Vaccination Policy, all city employees are required to be fully vaccinated by November 1, 2021 (or on an earlier deadline if required by local health order). In order to meet the November 1, 2021 deadline, the final day to receive a final dose of any vaccine was Monday, October 18th.
>
> "If you have been vaccinated, recently updated your vaccination status, or believe you have received this notice in error, please confirm with your department's human

---

civil service employees be given notice of significant proposed disciplinary action, the reasons for the action, a copy of the charges and the materials upon which they are based, and an opportunity to respond to the charges either orally or in writing before discipline is imposed. (*Id*. at p. 215.) A "*Skelly* hearing" refers to the employee's opportunity to respond to the charges and essentially results in a determination of whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action. (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 545-546.)

> resources representative that your personnel record accurately reflects your vaccination status. If you have a pending exemption application, you should also confirm with your human resources representative that your personnel record reflects that you are currently unvaccinated.
>
> "More than 96% of your fellow City Employees are already vaccinated. Please don't wait any longer. The health and wellbeing of City employees, their families, and the public we serve are top priorities during our response to COVID-19. The City has repeatedly notified you of this vaccination requirement. You will receive additional communication from your department about the process for separation from your job if you do not comply with the City's COVID-19 Vaccination Policy." (Emphasis omitted.)

On October 27, the City issued an amended Policy stating that "[e]mployees who are not fully vaccinated by November 1, 2021 may not enter the workplace after that date," but allowing limited exceptions for partially vaccinated employees when necessary to "maintain continuity of City operations."

DISCUSSION

In resolving an appeal of a dismissal, we review OGC's decision de novo, applying the same legal standard OGC applied to the allegations in the charge. (*City and County of San Francisco* (2020) PERB Decision No. 2712-M, p. 2.) At this stage of litigation, "the charging party's burden is not to produce evidence, but merely to allege facts that, if proven true in a subsequent hearing, would state a prima facie violation." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13, fn. 8.) We thus assume the charging party's factual allegations are true, and we view them in the light most favorable to the charging party. (*Cabrillo I*, *supra*, PERB Decision No. 2453, p. 8; *Cabrillo Community College District* (2019) PERB Decision No. 2622, p. 4

(*Cabrillo II*).) We do not rely on the respondent's responses if they explicitly or implicitly create a factual conflict with charging party's allegations, even if the respondent's contrary responses are stated more persuasively or appear as if they may be backed up by more supporting evidence, when compared to charging party's allegations. (*Cabrillo I*, *supra*, PERB Decision No. 2453, p. 8; *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, p. 13.) Thus, at this stage of the case we generally do not resolve conflicting allegations, make conclusive factual findings, or judge the merits of the dispute. (*Cabrillo II*, *supra*, PERB Decision No. 2622, pp. 4-5; *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 12.) Rather, if there are one or more contested facts (or mixed questions of law and fact) that could affect the outcome, or there are contested, colorable legal theories, a complaint should issue, with the disputed issue(s) to be resolved at a formal hearing. (*County of Santa Clara* (2022) PERB Decision No. 2820-M, p. 2; *Salinas Valley Memorial Healthcare System*, *supra*, PERB Decision No. 2298-M, p. 13.)

I. Decision Bargaining Over Mandatory COVID-19 Vaccination Policy

SEIU's charge alleged that the City's decision to adopt the Policy constituted an unlawful unilateral change. To establish a prima facie case that a respondent employer made an unlawful unilateral change, a charging party union that exclusively represents a bargaining unit must prove: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the

union's request, until the parties reached an agreement or a lawful impasse. (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9 (*Bellflower*); *County of Merced* (2020) PERB Decision No. 2740-M, pp. 8-9 (*Merced*).)

OGC dismissed the allegation that the City's decision to adopt the Policy constituted an unlawful unilateral change on the ground that the decision was outside the scope of representation.[9] Before turning to whether dismissal of that allegation was proper, we clarify the scope of representation test under the MMBA.

A. MMBA Scope of Representation Test

MMBA section 3504 defines the scope of representation as:

> "[A]ll matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order."

The California Supreme Court has interpreted this provision in four critical cases. Despite repeatedly acknowledging that the Legislature intended section 3504 to incorporate into the MMBA the scope of representation jurisprudence under section 8(d) of the National Labor Relations Act (NLRA),[10] these decisions nonetheless have created confusion about the applicable test. We discuss the

[9] As noted *ante*, the complaint alleged that the City unlawfully implemented the mandatory COVID-19 vaccination policy without giving SEIU an opportunity to meet and confer over the policy's effects on subjects within the scope of representation.

[10] The NLRA is codified at 29 U.S.C. § 151 et seq. NLRA section 8(d) is codified at 29 U.S.C. § 158, subdivision (d).

evolution of this uncertainty before clarifying the scope of representation test in a way that harmonizes these decisions.

The Court first considered section 3504 in *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608. There, the Court observed that section 3504 directly borrows from the NLRA in mandating negotiations over "wages, hours, and other terms and conditions of employment," and further noted that the second half of section 3504 borrows from "federal precedents under the NLRA." (*Id*. at pp. 615-616.)

The Court reiterated these points in *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651 (*Building Material*):

> "the phrase 'wages, hours, and other terms and conditions of employment' was taken directly from the [] NLRA (29 U.S.C. § 158(d)). Although the NLRA does not contain wording similar to the second key phrase in section 3504—which excepts the 'merits, necessity, or organization' of government services from the scope of representation—this phrase was added by the Legislature to incorporate the limitations on the scope of mandatory bargaining that had been developed by the federal courts. Thus, because the federal precedents reflect the same interests as those underlying section 3504, they furnish reliable authority in construing that section."

(*Building Material*, *supra*, 41 Cal.3d at p. 658, citations omitted.)

In setting forth the MMBA's scope of representation test, *Building Material* cited with approval *First National Maintenance Corp. v. NLRB* (1980) 452 U.S. 666 (*First National*). (*Building Material*, *supra*, 41 Cal.3d at p. 660.) There, the United States Supreme Court delineated three categories of employer decisions for purposes of determining whether a decision is within the NLRA's scope of representation:

> "Some management decisions, such as choice of advertising and promotion, product type and design, and

> financing arrangements, have only an indirect and attenuated impact on the employment relationship. [Citation.] Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively 'an aspect of the relationship' between employer and employee. [Citation.] The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only [economic profitability of a contract], a concern under these facts wholly apart from the employment relationship."

(*First National*, *supra*, 452 U.S. at pp. 676-677.) Following this framework, *Building Material* held that if an employer decision falls in the third category, the employer must bargain the decision (rather than merely the effects thereof) only if its "need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (*Building Material*, *supra*, 41 Cal.3d at p. 660.)

Notably, *Building Material* involved a transfer of work from bargaining unit employees to non-unit employees. Citing federal transfer-of-work cases, the Court observed that "[i]t is clear that the permanent transfer of work away from a bargaining unit often has a significant effect on the wages, hours, and working conditions of bargaining-unit employees." (*Building Material*, *supra*, 41 Cal.3d at p. 659.) The Court went on to note that, under this same federal transfer-of-work precedent, "[t]he employer is required to bargain . . . only if the work transfer adversely affects the bargaining unit in question." (*Ibid*.)[11] The Court then discussed several cases where it

[11] For the adverse effect requirement, the Court cited *Road Sprinkler Fitters Local Union No. 669, United Ass'n of Journeymen and Apprentices of the Plumbing*

was necessary to determine whether a transfer of bargaining unit work to non-unit workers adversely affected the bargaining unit. (*Id*. at pp. 660-662.) The Court ultimately concluded that the transfer of work in the case before it adversely affected the bargaining unit and that the employer failed to show the decision to transfer the work was a fundamental policy decision that would exclude it from the scope of representation. (*Id*. at pp. 662-664.)

In its third decision interpreting section 3504, *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623 (*Claremont*), the Court reiterated that *Building Material* defined the "applicable test" under *First National*'s third category, i.e., when "a fundamental decision significantly affects the terms and conditions of employment." (*Id*. at pp. 635-637.) The Court then summarized the test it would apply to the category three decision before it:

> "First, we ask whether the management action has 'a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.' . . . If not, there is no duty to meet and confer. . . . Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then . . . the meet-and-confer requirement applies. . . . Third, if both factors are present . . . we apply a balancing test. The action 'is within the scope of representation only if the employer's need for

---

and Pipefitting Industry of the U.S. and Canada, AFL-CIO etc. v. NLRB (D.C. Cir. 1982) 676 F.2d 826, 833-834 [addressing transfer of work from bargaining unit to employer's non-unionized workers]; *Office and Professional Emp. Intern. Union, Local 425, AFL-CIO v. NLRB* (D.C. Cir. 1969) 419 F.2d 314, 321 [transfer of auditing work to non-unit workers]; and *International Union, United Auto., Aerospace and Agr. Implement Workers of America v. NLRB* (D.C. Cir. 1967) 381 F.2d 265, 266 [contracting out "had an adverse impact on the bargaining unit since it diminished by six the whole number of jobs performed by its members"].)

> unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.'"

(*Id*. at p. 638, citations omitted.)

Unlike *Building Material*, *Claremont* was not a transfer-of-work case. Rather, it involved a requirement that police officers fill out a pre-printed form with questions about the driver's "race/ethnicity" after each traffic stop. (*Claremont*, *supra*, 39 Cal.4th at p. 629.) Although federal precedent requires consideration of whether a decision has a significant and adverse effect on the bargaining unit only in transfer-of-work cases, *Claremont*, without explanation, imposed a "significant and adverse effect" requirement on *all* third category decisions. (*Id*. at p. 638.)[12]

Five years after *Claremont*, the Court issued its most recent decision interpreting section 3504, *International Assn. of Fire Fighters, Local 188, AFL-CIO v.*

---

[12] *Claremont*'s "significant and adverse effect" requirement is anomalous because no other California public sector labor relations statute requires the finding of such an effect before balancing the union's and employer's interests. (Compare *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 858-859 [affirming PERB's test for determining whether unenumerated subjects are within the scope of representation under the Educational Employment Relations Act (Gov. Code, § 3540 et seq.): "[A] subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission"].) This is just the type of anomaly the California Supreme Court has recognized should not be part of "a coherent and harmonious system of public employment relations laws." (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089-1090.)

Public Employment Relations Bd. (2011) 51 Cal.4th 259 (*Richmond Firefighters*). The Court reiterated that *First National* defines how to approach the three categories of employer decisions:

> "In relation to mandatory subjects of bargaining under the federal NLRA, the United States Supreme Court has identified three categories of management decisions. [citing *First National*, *supra*, 452 U.S. at pp. 676–680.] In the first category are decisions that 'have only an indirect and attenuated impact on the employment relationship' and thus are not mandatory subjects of bargaining. (*Id*. at p. 677[].) Examples of decisions in this category are 'choice of advertising and promotion, product type and design, and financing arrangements.' (*Id*. at pp. 676–677[].)
>
> "In the second category are decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls. Decisions in this second category are always mandatory subjects of bargaining. [citing *First National*, *supra*, 452 U.S. at p. 677.]
>
> "In the third category are management decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.' [citing *First National*, *supra*, 452 U.S. at p. 677.] Bargaining is not required for decisions in this category if they do not raise an issue that is 'amenable to resolution through the bargaining process' (*id*. at p. 678 []), although the employer is normally required to bargain about the results or effects of such decisions (*id*. at p. 677 []). To determine whether a particular decision in this third category is within the scope of representation, the high court prescribed a balancing test, under which 'in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of

> employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.' (*Id*. at p. 679 [].)"

(*Richmond Firefighters*, *supra*, 51 Cal.4th at pp. 272-273.) The Court did not, however, attempt to reconcile the *First National* framework with *Claremont*, instead citing *Claremont* only for general propositions about the MMBA's duty to meet and confer over subjects within the scope of representation. (*Id*. at pp. 271-272.)

Against the backdrop of the California Supreme Court's four decisions interpreting section 3504, we decided *County of Orange* (2018) PERB Decision No. 2594-M (*Orange*). There, we noted that *Richmond Firefighters* and decades of labor law precedent contextualize *Claremont*, dictating that its "significant and adverse" standard applies only as part of the balancing test in category three cases, because category two decisions—those that "directly defin[e] the employment relationship"—must be bargained even if they are not adverse to bargaining unit members. (*Id*. at p. 19 [for example, an employer cannot increase wages or benefits without bargaining, even though such a change has no adverse impact on employees], citing *NLRB v. Katz* (1962) 369 U.S. 736, 743; *Ruline Nursery Co. v. Agricultural Labor Relations Bd.* (1985) 169 Cal.App.3d 247, 266; *Modesto City Schools* (1983) PERB Decision No. 291, pp. 47-48.) Although we recognized this limitation on *Claremont*'s application, we did not explicitly delineate a post-*Richmond Firefighters* scope of representation test.

Earlier this year, *County of Sonoma v. Public Employment Relations Board* (2022) 80 Cal.App.5th 167 (*Sonoma*) considered an employer's duty to bargain over decisions falling into the third *Richmond Firefighters* category. The *Sonoma* court

remanded the matter to PERB to apply the balancing test that governs category three decisions, including to assess whether the charging parties had proven that one or more of the changes significantly and adversely affected bargaining unit members' wages, hours, or other terms or conditions of employment. (*Sonoma*, *supra*, 80 Cal.App.5th at pp. 185, 193.) To the extent *Sonoma* suggested that *Claremont* applies to category two decisions—those that "directly defin[e] the employment relationship"—any such suggestion was dicta as neither party challenged on appeal PERB's conclusion that the changes at issue fell within category three.[13] In any event, we are bound to follow the California Supreme Court's latest formulation of the MMBA scope of representation test in *Richmond Firefighters*, which unequivocally declares that all category two decisions fall within the scope of representation.

In light of the confusion the above decisions engendered, we clarify the scope of representation test under the MMBA. In determining whether an employer's decision is within the scope of representation under MMBA section 3504, we first determine which of the three categories of managerial decisions identified in *Richmond Firefighters* the decision falls into: (1) "decisions that 'have only an indirect and attenuated impact on the employment relationship' and thus are not mandatory subjects of bargaining," such as advertising, product design, and financing; (2) "decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls," which are "always mandatory

[13] The same is true of other post-*Richmond Firefighters* decisions applying *Claremont* to category three changes. (E.g., *Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29, 40-46.)

subjects of bargaining"; and (3) "decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (*Orange*, *supra*, PERB Decision No. 2594-M, p. 18, quoting *Richmond Firefighters*, *supra*, 51 Cal.4th at pp. 272-273.)

When a decision falls into the third category, we first determine whether the decision has "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees" that "arises from the implementation of a fundamental managerial or policy decision."[14] (*Claremont*, *supra*, 39 Cal.4th at p. 638; *Orange*, *supra*, PERB Decision No. 2594-M, pp. 19-20.) If both requirements are met, we determine whether "the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (*Claremont*, *supra*, 39 Cal.4th at p. 638; *Orange*, *supra*, PERB Decision No. 2594-M, pp. 17, 19-20.)[15]

---

[14] In most cases, the considerations that lead to placing the decision in category three will easily satisfy these requirements. (See *Claremont*, *supra*, 39 Cal.4th at p. 637, quoting *First National*, *supra*, 452 U.S. at p. 677 [recognizing that category three decisions have "a direct impact on employment" though the decision is "'not in [itself] primarily about conditions of employment. . . . '"].) Nonetheless, there may be cases where one or both requirements are not obviously satisfied and the analysis will need to be conducted.

[15] Like federal precedent, we continue to apply subject-specific standards for subcontracting, a recurrent category three decision. (*City of Glendale* (2020) PERB Decision No. 2694-M, pp. 44-45 & fn. 22.) These subcontracting standards implement the overall balancing test by defining when the benefits of bargaining outweigh the burden placed on management, including by defining when a change reduces a unit's

By harmonizing *Richmond Firefighters* and *Claremont* in this way, we preserve longstanding precedent requiring negotiations over changes that directly define the employment relationship regardless of whether the change is detrimental or beneficial to bargaining unit employees, while giving effect to the California Supreme Court's decisions interpreting MMBA section 3504.

B. The City's Mandatory COVID-19 Vaccination Policy

Here, absent an evidentiary record, we cannot determine the outcome of the MMBA scope of representation test outlined *ante*. This is true, in part, because our precedent to date does not include any categorical rule covering all employer decisions regarding vaccination.

In *Regents of the University of California* (2021) PERB Decision No. 2783-H (*Regents*), we found that a mandatory influenza vaccination policy issued before a COVID-19 vaccine was available was not within the scope of representation. In dismissing SEIU's decision bargaining allegation, OGC found the City's Policy similarly outside the scope of representation. In the partial dismissal letter, OGC highlighted that the *Regents* Board reached this conclusion because "the need to protect public health was not amenable to collective bargaining or, alternatively,

---

bargaining power and thereby significantly and adversely affects wages, hours, or terms and conditions of employment. (*Ibid*.) Like the National Labor Relations Board, we have noted that these standards promote consistency and predictability by obviating the need to "reinvent the wheel" and assess what types of facts are important each time we resolve a subcontracting case. (*Id*. at p. 45, fn. 22.) The same is true for PERB's subject-specific test that applies when an employer transfers work from one group of its employees to another such group. (*Id*. at pp. 38-39, fn. 19.) Absent such consistent standards, employers would not know in advance whether the law requires it to bargain a decision.

outweighed the benefits of bargaining over the policy as to University employees." (*Id*. at pp. 2-3.) OGC found this "same reasoning applies with equal, if not greater, force in the present case over a COVID-19 vaccine mandate."

SEIU points to several reasons why OGC should not have dismissed the decision bargaining allegation based on *Regents*, *supra*, PERB Decision No. 2783-H. First, SEIU contends *Regents*' holding was based on the particular facts of that case and did not hold that mandatory vaccination policies are always outside the scope of representation. SEIU points to the "unprecedented circumstances" that existed at the time, including the lack of COVID-19 vaccines, and a "potential confluence of the COVID-19 global pandemic and an outbreak of the influenza virus [that could cause] catastrophic outcomes and needless loss of life." (*Regents*, *supra*, PERB Decision No. 2783-H, p. 25.)[16]

Second, SEIU notes that the mandatory vaccination policy at issue in *Regents* was more than a mere work rule because it applied not only to employees but to "all individuals who work, live, or study on University premises." (*Regents*, *supra*, PERB Decision No. 2783-H*,* p. 26.) Here, although parts of the Policy tracked the various iterations of the Health Officer's Order (which applied to both private and public

[16] In *Regents*, the Board had the benefit of expert witness testimony which gave insight into the rationale behind the decision, in particular the potential for significant negative impacts on public health if COVID-19 and influenza patients overwhelmed the University's healthcare facilities. (*Regents*, *supra*, PERB Decision No. 2783-H*,* p. 25.) This evidence supported the conclusion that "requiring the University to negotiate the decision to require influenza vaccination would abridge its right to determine public health policy during a pandemic." (*Ibid*.)

employers within the City), other parts of the Policy were unique to City employees.[17]

Third, SEIU argues that, unlike in *Regents*, the City adopted its Policy once COVID-19 vaccines became widely available. As courts have recognized, "the [COVID-19] pandemic has been 'dynamic' and constantly evolving." (*Western Growers Assn. v. Occupational Safety and Health Standards Bd.* (2021) 73 Cal.App.5th 916, 940.) Thus, while the City adopted its Policy only one year after the University's adoption of the policy in *Regents*, SEIU asserts that circumstances may have changed significantly enough in that year to warrant a different conclusion on the scope of representation issue.

Based on the facts alleged in the charge, we cannot say as a matter of law that SEIU cannot overcome *Regents*. Rather, these arguable legal and factual disputes weigh in favor of issuing a complaint on the decision bargaining allegation. (See *County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 2 [if there are one or more contested facts (or mixed questions of law and fact) that could affect the outcome, or there are contested, colorable legal theories, a complaint should issue, with the disputed issue(s) to be resolved at a formal hearing].)

---

[17] SEIU argues that the decision was within the scope of representation because the City used the threat of discipline to enforce compliance with the Policy. As we found in *Regents*, *supra*, PERB Decision No. 2783-H, the disciplinary consequences of failure to comply with a mandatory vaccination policy are negotiable as effects, even if the underlying decision itself is outside the scope of representation. (*Id*. at p. 28; see *County of Santa Clara* (2021) PERB Decision No. 2799-M, pp. 18-22 [rules that are primarily about investigation and discipline are subject to decision bargaining, but even when a rule is primarily about public safety, such as one involving law enforcement officers' use of force, disciplinary issues are still subject to effects bargaining].)

Additionally, although not addressed in the partial dismissal letter, by alleging in the complaint that the City failed to bargain over the effects of adding COVID-19 vaccination to the minimum qualifications in City job descriptions, OGC implicitly dismissed the allegation that the City was obligated to meet and confer over the decision to make that change. Changes to job specifications, including qualifications, "are within the scope of representation unless the changes at issue do no more than is required to comply with an externally-imposed change in the law." (*County of Sacramento* (2020) PERB Decision No. 2745-M. p. 17; see *County of Orange* (2019) PERB Decision No. 2663-M, p. 15 [minimum qualifications are typically within the scope of representation].) Based on the allegations in the charge, it is not clear that this change was necessary "to comply with an externally-imposed change in the law." A complaint therefore should issue on this allegation as well.

II. Mandatory Disclosure of COVID-19 Vaccination Status as Unilateral Change

SEIU's charge alleged that, on June 23, the City issued its final Policy that required employees to disclose "their vaccination status under penalty of perjury" by July 29. In listing the remedies sought, SEIU said "PERB should order the City and SFMTA to cease and desist from in anyway enforcing its *unilaterally adopted* July 29, 2021 mandate to disclose one's vaccination status." (Italics added.) OGC dismissed this allegation on the grounds that PERB does not enforce laws governing employees' privacy and that questions about employees' vaccination status do not implicate their rights under the MMBA. On appeal, SEIU argues that OGC misconstrued this allegation and should have analyzed it as a unilateral change. We agree.

There are three primary types of policy changes that may constitute an unlawful unilateral change: (1) a deviation from the status quo set forth in a written agreement

or written policy; (2) a change in established past practice; and (3) a newly created policy or application or enforcement of existing policy in a new way. (*Merced*, *supra*, PERB Decision No. 2740-M, p. 9.) Prior to July 29, the City did not require employees to disclose whether or not they were vaccinated against COVID-19. On and after July 29, employees were required to disclose their vaccination status under threat of discipline. SEIU's charge thus clearly alleged that the City changed or deviated from the status quo by creating a new policy requiring employees to reveal their vaccination status where previously there had been no such policy. (*Bellflower*, *supra*, PERB Decision No. 2796, p. 10.) Further, in light of our conclusion that there are contested, colorable legal theories as to whether the Policy falls within the scope of representation, the same is true of the City's disclosure requirement.[18] From the charge allegations, it is clear that this new policy had a continuing impact on bargaining unit members and that the City did not give SEIU notice or an opportunity to meet and confer before adopting the policy. Because the charge established a prima facie case of a unilateral change violation, a complaint must issue on this allegation.

III. Direct Dealing with Employees Regarding Mandatory Disclosure of COVID-19 Vaccination Status

SEIU's appeal argues that the City's decision to require employees to disclose their COVID-19 vaccination status also constituted unlawful direct dealing with employees. While SEIU did not plead this particular legal theory in its charge, "OGC

[18] As discussed at footnote 17 *ante,* even if a vaccination requirement is ultimately deemed outside the scope of representation, disciplinary issues are still subject to effects bargaining.

must issue a complaint based on all legal theories for which the alleged facts state a prima facie case, even if a charging party has neglected to assert one or more colorable theories." (*County of Santa Clara*, *supra*, PERB Decision No. 2820-M, p. 2, fn. 2.) The charge allegations, however, do not establish a prima facie case of direct dealing with regard to mandatory disclosure of vaccination status.

There are two alternate means of establishing a direct dealing or bypassing violation. (*County of Santa Clara* (2021) PERB Order No. Ad-485-M, p. 14 & fn. 9.) First, an employer violates the duty to bargain in good faith if it directly approaches employees to effect a change in terms or conditions of employment within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 4.) Thus, a charging party may demonstrate unlawful bypassing by showing that the employer dealt directly with its employees (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (*Id*. at p. 6.) Second, an employer may not communicate directly with employees to undermine or derogate a union's exclusive authority to represent unit members. (*Muroc Unified School District* (1978) PERB Decision No. 80, pp. 19-20.)

The charge does not allege that the City approached any employees to obtain a waiver or modification of an existing policy. Nor does it allege that the City approached employees with a proposal for a new vaccination disclosure policy without first presenting such a proposal to SEIU. (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 31.) Rather, the charge allegations show that the City presented the new vaccination disclosure policy to employees (and to SEIU) as a fait accompli. Therefore, the allegations in the charge

fail to establish a prima facie case of direct dealing and we affirm the dismissal of this allegation.

IV. Interference with Protected Activity

SEIU's charge alleged that the City interfered with MMBA-protected rights when it insisted that employees use only a City-created vaccination ascertainment form and refused to accept an SEIU-created alternate form. A prima facie case of interference, coercion or restraint exists where the respondent's conduct would reasonably tend to or did in fact result in at least slight harm to protected rights. (*City of Commerce* (2018) PERB Decision No. 2602-M, p. 3; *Santee Elementary School District* (2006) PERB Decision No. 1822, pp. 10-11.) Under this test, a violation may only be found if the pertinent PERB-administered statute, in this case the MMBA, guarantees the right(s) allegedly interfered with. (*Hartnell Community College District* (2018) PERB Decision No. 2567, p. 5; *Regents of the University of California* (2006) PERB Decision No. 1804-H, adopting warning letter at p. 5.)

The MMBA grants employees "the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (§ 3502.) While employees' use of a vaccination ascertainment form created by their union may qualify as MMBA-protected activity, SEIU's appeal states that the outcome of its interference claim turns on whether the City took unilateral action on a matter within the scope of representation. We therefore find it amounts to a derivative interference claim. (*County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 18 [PERB finds an interference claim to be "independent" or "derivative" depending on whether a charging party can prove it without proving any other claim].)

In the complaint, OGC alleged that the City did not complete effects bargaining before it issued "various mandates" in June through October 2021, and that this conduct violated the duty to meet and confer in good faith and derivatively interfered with protected rights. Once OGC amends the complaint to allege a failure to bargain over these decisions, it will adequately address SEIU's derivative interference claim.

ORDER

The Board AFFIRMS in part and REVERSES in part the Office of the General Counsel's partial dismissal in Case No. SF-CE-1884-M, and REMANDS the case to the Office of the General Counsel for issuance of an amended complaint consistent with this Decision. All other allegations in Case No. SF-CE-1884-M that are not included in the amended complaint arising from this Order are DISMISSED WITHOUT LEAVE TO AMEND.[19]

Chair Banks and Members Krantz and Paulson joined in this Decision.

[19] To be clear, we intend that the amended complaint include both the allegations remanded by this Decision and the allegations contained in the original complaint.