STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA FACULTY ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. SA-CE-422-H PERB Decision No. 2915a-H April 10, 2026

Appearances: Rothner, Segall & Greenstone by Julia Harumi Mass, Attorney, for California Faculty Association; Diva M. Sanchez Trevino, Labor Relations Representative, and Sloan Sakai Yeung & Wong by Jeffrey Sloan and Justin Otto Sceva, Attorneys, for Trustees of the California State University.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) for a second time. After we issued *Trustees of the California State University* (2024) PERB Decision No. 2915-H (*Trustees I*), Respondent Trustees of the California State University (CSU) filed a writ petition with the California Court of Appeal, Second Appellate District. The court then issued *Trustees of the California State University v. Public Employment Relations Bd.* (2026) 118 Cal.App.5th 90 (*Trustees II*), which partially affirmed and partially reversed *Trustees I*.

The court affirmed one central holding of *Trustees I*, finding that CSU's decision to relax its student vaccination policy had reasonably foreseeable impacts on faculty health and safety, thus requiring CSU to afford California Faculty Association (CFA)

an adequate opportunity to engage in good faith effects bargaining before CSU began implementing the decision. (*Trustees II*, *supra*, 118 Cal.App.5th at pp. 95 & 114.) However, the court reversed our conclusion that CSU breached its bargaining duty, setting aside *Trustees I* to the extent we found CSU liable for violating the Higher Education Employer-Employee Relations Act (HEERA).[1] (*Trustees II*, *supra*, at pp. 96 & 114.) The court further stated as follows: "[W]e set aside PERB's finding that CSU violated HEERA and remand the matter for the parties to engage in effects bargaining." (*Id*. at p. 96; see also *id*. at p. 102.)

Accordingly, we vacate the following portions of *Trustees I*, *supra*, PERB Decision No. 2915-H: the first full paragraph on page 3; Part I(B) and Part II of the Discussion; the Order; and the Appendix. Today's decision supersedes the vacated portions of *Trustees I* and sets forth amended factual findings and legal conclusions consistent with *Trustees II*, *supra*, 118 Cal.App.5th 90.

FACTUAL AND PROCEDURAL BACKGROUND

CFA represents CSU's Bargaining Unit 3. Although the unit includes lecturers, assistant professors, associate professors, full professors, coaches, counselors, and librarians, we use the term "faculty" to refer to all titles in Unit 3. The following facts gave rise to the current dispute.

I. CSU's Student Health Requirements Prior to February 2023

In December 1985, CSU's chancellor issued Executive Order 469 (EO 469), which required students to provide proof of immunization for measles and rubella

[1] HEERA is codified at Government Code section 3560 et seq. Further statutory references are to the Government Code.

unless they qualified for a medical or religious exemption. The requirement applied to students born after January 1, 1957, if they were enrolling for the first time or applying for readmission. The requirement also applied to continuing students—irrespective of their age—who lived in CSU dormitories, had attended school outside the United States, or were studying in programs involving interaction with patients or children. EO 469 barred non-complying students from registering for classes but specified that CSU's health centers would provide students with the required immunizations at no cost. The order also required campuses to develop appropriate immunization forms and to educate students about the dangers of measles and rubella.

In February 2000, the chancellor issued Executive Order 730 (EO 730), which superseded EO 469. Among other changes, EO 730 loosened deadlines for students to comply with the measles and rubella requirements, added a hepatitis B immunization requirement for first-time enrollees younger than eighteen (consistent with a new state law), and allowed exemptions for "personal beliefs" in addition to religious beliefs and medical reasons.

In February 2002, the chancellor issued Executive Order 803 (EO 803), which superseded EO 730. This initial version of EO 803, which we refer to as the 2002 Policy, stated that students could satisfy the policy's requirements by showing that they had enrolled in a California public school for seventh grade or higher at any time after June 30, 1999. The 2002 Policy also made other changes, such as requiring each campus to inform incoming students residing on campus about meningococcal disease and the availability of a vaccine for it, and thereafter to obtain from such

students a signed response indicating whether they had chosen to obtain the meningococcal vaccine.

In March 2019, the chancellor issued a revised version of EO 803, which superseded the 2002 Policy. This revised version, which we refer to as the 2019 Policy, stated that it would apply to all students entering CSU "in or after fall 2020," and that the policy was "adopted from the California Department of Public Health (CDPH) IMMUNIZATION & SCREENING RECOMMENDATIONS FOR COLLEGE STUDENTS" (capitalization in original). The 2019 Policy further stated as follows: "Any revisions of the CDPH recommendations for colleges and universities as of February 1, each year, will be reflected in CSU requirements for the subsequent fall academic term."

The 2019 Policy no longer permitted students to satisfy the policy's requirements by showing that they had enrolled in a California public school, for seventh grade or higher, on or after July 1, 1999. And the 2019 Policy eliminated religious and personal belief exemptions, while continuing to allow medical exemptions. Absent a medical exemption, the policy required all students to prove that they had a current tuberculosis screening/risk assessment and were current in their immunizations for the following diseases:

> "A. Measles, Mumps and Rubella (MMR)
> "B. Hepatitis B (Hep B) [for students who are 18 or younger]
> "C. Varicella (Chickenpox)
> "D. Tetanus-Diphtheria-Pertussis (Tdap)
> "E. Meningococcal Disease (Serogroups A, C, Y, W-135)"

In contrast, the 2019 Policy encouraged, without requiring, the following immunizations:

“a. Hepatitis A (Hep A)
“b. Hepatitis B (Hep B) [for students who are 19 or older]
“c. Human papillomavirus (HPV)
“d. Influenza (Flu)
“e. Meningococcal B (Meningitis B)
“f. Pneumococcal
“g. Poliovirus (Polio)”

The 2019 Policy allowed campuses to require additional vaccines for groups with increased risk (including intercollegiate athletes, dormitory residents, and students traveling abroad), with exemptions for medical reasons. The policy required campuses to advise students how to obtain required vaccines and screenings through private providers. And it allowed campuses to continue providing such immunizations and screenings. However, it removed any requirement that campuses offer no-cost immunizations or, indeed, any immunizations.

Although the 2019 Policy stated that its requirements would take effect for students entering CSU in fall 2020, the COVID-19 pandemic disrupted that plan. As described further below, CSU repeatedly delayed implementing the 2019 Policy and then discarded and replaced it before it ever became mandatory.

In January 2021, CSU issued a memorandum entitled “Updated Implementation Timeline for Immunization Requirements (formerly Executive Order 803).” This memorandum provided a new implementation timeline for the 2019 Policy. Specifically, it encouraged campuses to implement the 2019 Policy by a “soft” deadline of fall 2021 while setting fall 2022 as a “hard” implementation date.

In July 2021, CSU issued a further memo, which delayed both the “soft” and “hard” dates by one year, as follows:

> "• Fall 2022 will be a 'soft' implementation date. Campuses that are prepared to implement an in-house or third-party solution for immunizations for the entering student cohort matriculating in Fall 2022 are encouraged to move forward as planned. For planning purposes, this means implementation must be initiated by Fall 2021 and completed by early Spring 2022.
>
> "• Fall 2023 will be a 'hard' implementation date. Campuses that are unable to comply with the immunization policy by Fall 2022 are required to be prepared to be in full compliance starting with the new student cohort matriculating in fall 2023. For planning purposes, this means implementation must be initiated by Fall 2022 and completed by early Spring 2023."

However, as discussed below, before the fall 2023 mandatory implementation date, CSU replaced the 2019 Policy with a new student health policy.

II. CSU's 2023 Policy on Student Health

On February 14, 2023, CSU revised EO 803.[2] This revision, which we refer to as the 2023 Policy, replaced the 2019 Policy. In the 2023 Policy, CSU eliminated the tuberculosis screening requirement and most vaccine requirements in the 2019 Policy, namely, the mandatory vaccines for measles, mumps, rubella, varicella, tetanus, and meningococcal disease (serogroups A, C, Y, W-135). The 2023 Policy converted each of these requirements into mere recommendations. This left only a single vaccine requirement, required by state law: the hepatitis B vaccine for students under age 18.

The 2023 Policy stated, in relevant part:

> "Immunization and Screening, Recommendations and Requirements are adopted from the American College Health Association (ACHA) Immunization Recommendations for College Students [hyperlink omitted],

[2] Except where otherwise noted, all further dates refer to 2023.

and the California Department of Public Health (CDPH) Immunization & Screening Recommendations for College Students [hyperlink omitted]

"**NOTE:** Any revisions of the CDPH recommendations for colleges and universities as of February 1, each year, will be reflected in CSU requirements for the subsequent fall academic term.

"**Required Immunization**

"A. Hepatitis B (Hep B) – Ages 18 and younger as per California law [legal citation omitted], enrollees who are 18 years of age or younger are required to provide proof of full immunization against the hepatitis B virus prior to enrollment.

"**Immunization and Screening Recommendations**

"The CSU recommends that students [endnote omitted] are current for the immunizations listed below. Immunizations and screening recommendations, and immunization schedules are linked above. Campuses should link to this policy to provide students with detailed immunization and screening recommendations.

"**Recommended Vaccines to Reduce Outbreaks**

"A. Influenza Vaccine
"B. Measles, Mumps and Rubella (MMR) Vaccine
"C. Meningococcal Conjugate (Serogroups A, C, Y, W-135) Vaccine
"D. Serogroup B Meningococcal Vaccine
"E. Tetanus-Diphtheria-Pertussis (Tdap) Vaccine
"F. Varicella (Chickenpox) Vaccine

"**Other Vaccines Recommended for Adults**

"A. Hepatitis A (Hep A) Vaccine
"B. Hepatitis B (Hep B) Vaccine – Ages 19 and older
"C. Human Papillomavirus (HPV) Vaccine
"D. Pneumococcal Vaccine
"E. Polio Vaccine

"**Recommend Screening**

"A Tuberculosis Screen/Risk Assessment (TB)"

At the hearing in this matter, CSU's Systemwide Director for Student Wellness and Basic Needs, Carolyn O'Keefe, testified regarding CSU's decision to adopt the 2023 Policy. We credit her testimony as a fair summary of CSU's rationale, but we emphasize that the outcome of this case does not turn on the extent to which CSU's policymaking was prudent or imprudent from a health or education perspective. Rather, we review the parties' evidence and arguments about CSU's policymaking only to the extent they are relevant to assessing whether CSU had a duty to bargain over any reasonably foreseeable health and safety effects on faculty.

One of CSU's rationales is directly relevant to ascertaining if its policy change had reasonably foreseeable effects on faculty. Specifically, CSU relied on the fact that between 94 and 95 percent of CSU students attended school in California before college. Based on this factor, and particularly in the wake of legislative enactments intended to tighten immunization requirements in California K-12 schools, CSU believed that a "significantly high number" of incoming students "are already vaccinated for California law." O'Keefe also explained two additional rationales supporting CSU's policy change, though they are irrelevant to our liability inquiry: (1) the 2019 Policy, if implemented, would have unduly burdened students (by requiring them to produce records) and campus health centers (by requiring them to collect such records and place holds on students who did not produce the needed documentation); and (2) CSU leaders had "anecdotally" shared experiences that

students with certain backgrounds and socio-economic status had more difficulty in overcoming vaccination-based enrollment holds.

Although the 2019 Policy never became mandatory, certain campuses nonetheless instituted one or more of its requirements. And we infer that certain campuses continue to require immunizations that the 2023 Policy does not mandate.

III. CFA's Request to Bargain and CSU's Response

CSU did not provide CFA with notice before or after adopting the 2023 Policy. CFA discovered the policy change only because one of its members learned of the change and notified a CFA leader.

On February 23, CFA e-mailed CSU a letter stating as follows:

> "We have recently learned of a change to mandatory immunization policy for CSU students.
>
> "It appears that planning and implementation are proceeding without regard to the Collective Bargaining Agreement or our rights under HEERA. We were never notified of this policy or invited to meet and confer on it. Please cease implementation until we have had time to meet and confer over this policy change, which requires rescinding the policy until the union has had the opportunity to meet and confer on impact. We are already hearing from members that this change poses health and safety risks for immunocompromised faculty and/or their families.
>
> "The policy is likely to impact faculty rights in the areas of health and safety and perhaps other rights as well. In that context, CFA hereby requests to engage in the required bargaining."

On February 28, CSU Senior Director of Collective Bargaining Stefanie Gusha spoke with CFA Director of Representation and Bargaining Kathy Sheffield. Gusha told Sheffield that: (1) CSU had no duty to bargain with CFA over student health

requirements; (2) CSU had never done so in the past; and (3) CSU saw no foreseeable impacts that would be subject to bargaining with CFA.

On March 8, CFA filed its charge in this matter. On the same date, Gusha e-mailed Sheffield a letter stating in relevant part:

> "As we discussed on February 28, 2023, the CSU's decision to modify the student Immunization Requirements is not within [the] scope of representation. These requirements are fundamentally a student policy, and only applies [sic] to undergraduate and graduate students, students matriculated in self-support degree programs and K-12 students participating in concurrent enrollment courses entering the California State University (CSU) in or after fall 2023. As such, the CSU does not see any foreseeable impacts that are bargainable with CFA. In addition, the CSU has no record of the parties ever negotiating with CFA over this student requirement, including the 2019 changes to the requirements.
>
> ". . . And while we do not believe we are required to meet and confer, we are willing to meet and discuss the Immunization Requirements with you, in order to allow you to explain why you believe there are impacts within your scope of representation. We are available on March 16th from 2 to 4 p.m. If that date and time does not work for you, please provide me with alternative dates and times."

On March 14, Gusha e-mailed Sheffield asking for a second time if CFA was available to meet on March 16 from 2:00 to 4:00 p.m. Later that day, Sheffield responded in relevant part:

> "Have you changed your position? On February 28, 2023, you told me on the phone that meeting and conferring 'was not required' over the elimination of mandatory vaccinations for students. You further told me that the change 'was not seen to have an impact of [sic] faculty.' . . .

> "I ask because we filed a PERB charge last week, and I need to know your response to my question posed above before agreeing to meet to discuss the matter. Discussing a policy change, after the fact, that deeply impacts the health and safety of our members does not satisfy your obligations and the union's rights under HEERA. If you need further clarification on the union's position, please review the PERB charge we filed last week."

On March 15, Gusha responded in relevant part: "As we stated in our March 8, 2023 letter, while we do not believe we are required to meet and confer, we are willing to meet and discuss the Immunization Requirements with you, in order to allow you to explain why you believe there are impacts within your scope of representation. Accordingly, I offered March 16th from 2 to 4 p.m. If you are not interested in meeting, please let me know."

Later that day, Sheffield responded:

> "The union is not interested in meeting under the terms you laid out. We disagree with your position that the union has no right to meet and confer formally, and we filed a charge with PERB for this very reason.
>
> "Elimination of vaccinations in the CSU puts faculty at risk, and the decision does not conform with any health guidance we know of. We shared news of this policy change with members last week, and we supplied the following links to information that I expect you are aware of as well:
>
> "Immunization Recommendations and Screening Requirements for California Colleges [hyperlink omitted]
>
> "Immunization Recommendations for College Students (acha.org) [hyperlink omitted]
>
> "Both the California Department of Public Health and the American College Health Association recommend requiring

vaccines in a way that is consistent with the CSU's past practice."

IV. Prior Negotiations Over Health and Safety Related Matters

The record does not reflect that CFA demanded to bargain, or that the parties did bargain, over the 2019 Policy or any pre-2019 changes to CSU's student health policies. In 2020 and ensuing years, the parties bargained over COVID-19 vaccination mandates, mask mandates, air filtration, sanitation protocols, accommodations for faculty with health concerns, and policies related to returning to campus during the COVID-19 pandemic. These negotiations typically involved requirements for students and faculty, among others.

V. Procedural History

CFA filed an unfair practice charge primarily alleging that CSU failed to afford CFA adequate notice and opportunity to meet and confer over CSU's decision to adopt the 2023 Policy and its reasonably foreseeable effects on faculty health and safety. PERB's Office of the General Counsel, after reviewing the charge and CSU's response, issued a complaint alleging that CSU violated HEERA by failing to bargain over its decision and/or the effects thereof, as well as by failing to provide CFA with information it requested. Thereafter, CFA withdrew its information request claim.

After holding a formal hearing and receiving the parties' post-hearing briefs, the assigned administrative law judge (ALJ) issued a proposed decision concluding that CSU violated HEERA when it began to implement its decision before affording CFA adequate notice and opportunity to bargain over the policy's reasonably foreseeable effects on faculty health and safety. The ALJ further found that CSU had no duty to

bargain over its decision to adopt the policy, as that decision involved a non-mandatory bargaining topic.[3]

CSU filed exceptions claiming that its policy had no reasonably foreseeable effects on faculty, and in the alternative that it complied with any bargaining duty it held and/or CFA waived its right to bargain. CFA responded to CSU's exceptions, urging us to affirm the proposed decision. However, CFA filed no material exceptions of its own, thereby acceding to the ALJ's finding that CSU had no duty to bargain over its decision. In *Trustees I*, *supra*, PERB Decision No. 2915-H, we affirmed the ALJ's liability conclusion while adjusting the proposed remedial order. CSU then appealed, leading to the appellate decision discussed at length below.

DISCUSSION

As the court explained in *Trustees II*, *supra*, 118 Cal.App.5th 90:

> "HEERA provides that CSU has a duty to meet and confer in good faith with employee organizations over matters within the 'scope of representation' (§ 3570)—i.e., over 'wages, hours of employment, and other terms and conditions of employment' (§ 3562, subd. (r)(1)). Employers are also required to bargain over the effects and implementation of changes that fall outside the scope of representation but have reasonably foreseeable impacts on issues within the scope of representation."

(*Id*. at p. 103; see also *id*. at pp. 96-97.) The appellate court elaborated as follows: "The first category is sometimes referred to as 'decision bargaining,' and the latter category as 'effects bargaining.'" (*Id*. at p. 97.)

[3] "Non-mandatory" describes topics about which parties need not bargain, although they may choose to do so. (*Oakland Unified School District* (2023) PERB Decision No. 2875, p. 3, fn. 4 (*Oakland*).)

The court later noted that:

> "If a proposal is outside the scope of representation and does not have negotiable effects, the employer may refuse to negotiate without committing an unfair practice. (*City of Pinole* (2012) PERB Dec. No. 2288-M, p. 7.) However, a party's refusal to discuss a proposal based on an incorrect belief that the proposal concerns a matter outside of the scope of representation is a per se violation of the duty to bargain. (*County of San Luis Obispo* (2015) PERB Dec. No. 2427-M, p. 26.)"

(*Trustees II*, *supra*, 118 Cal.App.5th at p. 104.)

Like the court of appeal in *Trustees II*, *supra*, 118 Cal.App.5th 90, we use the phrase "effects bargaining" as a shorthand for bargaining over both the effects and implementation of a decision. (*Id*. at p. 103; *Oakland*, *supra*, PERB Decision No. 2875, p. 10.) In fact, negotiations over implementation may include negotiations over potential alternatives or revisions that may mitigate or offset the impact of the decision on employees, even though the decision itself is not bargainable. (*Oakland*, *supra*, p. 11.) For example, as noted in *Trustees II*, *supra*: "our Supreme Court has said that an employer may have the right to decide unilaterally to lay off employees for financial reasons, but nonetheless may be required to bargain about 'the timing of the layoffs and the number and identity of employees affected.'" (*Id*. at p. 103, citing *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 64 and *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 634.)

The facts of this case raised three primary questions: (1) did CSU's decision to relax its student vaccine policy have reasonably foreseeable effects on faculty health or safety? (2) If there were such reasonably foreseeable effects, did CFA learn of the decision at an early enough time to allow good faith effects negotiations? (3) If so, did

CSU comply with its duty to bargain effects in good faith? We discuss each question in turn.

I. Reasonably Foreseeable Effects on Employee Health or Safety

Decisions with reasonably foreseeable impacts on employee health or safety are a quintessential example of decisions that trigger an obligation to engage in effects bargaining. (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 276-277; *Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, p. 19.) Indeed, "where human health and safety are involved," we should err on the side of finding a change is material enough to trigger bargaining even if it "will affect only a few employees." (*Solano County Employees' Assn. v. County of Solano* (1982) 136 Cal.App.3d 256, 262 (*Solano*).) Notably, *Solano* held this is true even when management seeks to make the workplace safer, over the union's objection. (*Ibid*.) The principle holds even more sway here, where it is the union that espouses the more cautious position.

CSU claimed that changing its student health policy had no reasonably foreseeable impacts on faculty health or safety. CSU relied, in part, on a version of the rationale that O'Keefe delineated in her testimony: between 94 and 95 percent of CSU students attended school in California before college, meaning that a high percentage of CSU students have already met the state's student health requirements for K-12 schools. However, for the reasons we proceed to spell out, CFA presented sufficient

evidence to show that the 2023 Policy had a reasonably foreseeable impact on faculty health and safety.[4]

To begin, while both the 2019 Policy and the 2023 Policy include phrases suggesting that they are adapted from ACHA and CDPH guidance, the fact is that the 2019 Policy closely matched such expert guidance, while the 2023 Policy did not, since it made critical immunizations optional. For instance, ACHA's guidance indicates that colleges should require the MMR, meningococcal, varicella, and Tdap vaccines (among others) without allowing any exemptions for religious or personal beliefs. This is a far stricter requirement than the 2023 Policy, which allows students full discretion as to all vaccines (other than the hepatitis B vaccine for students under age 18), without the need to show any basis for an exemption. CDPH similarly urges colleges to make vaccines mandatory.

Most importantly, ACHA and CDPH both explain their guidance as protecting all members of the college community from outbreaks. ACHA states that its guidance is to protect "campus communities," and "is particularly important in preventing disease clusters and outbreaks on campus." CDPH, similarly, states that its guidance will reduce "the likelihood of requiring additional staff time during a disease-related

[4] In ascertaining if there are reasonably foreseeable effects, we consider the 2023 Policy as a change to two different aspects of the status quo that existed as of February 2023: (1) it changed the 2019 Policy, which had been formally adopted, was set to become mandatory as of the fall 2023 hard deadline, and therefore constituted an established expectation; and (2) it also changed the interim status quo that existed prior to the hard deadline—a status quo mainly set by the 2002 Policy. With respect to either comparator, the 2023 Policy lessened student immunization requirements, which is the key change we consider in ascertaining reasonably foreseeable effects.

outbreak." These expert sources make clear why a student vaccine policy can have a reasonably foreseeable impact on faculty health.

This general proposition applies at CSU despite the high percentage of students who attended school in California before college. While K-12 school immunization requirements reduce the risk of outbreaks at CSU, certain factors limit the extent of that reduction. First, K-12 school immunization requirements do not address meningococcal disease and tuberculosis, but the 2019 Policy addressed these diseases. Relatedly, we credit the testimony of Richard Pan, a physician and public health expert, who noted there have been recent deadly outbreaks of meningococcus in high schools and colleges, and that faculty at a college are therefore at risk.[5]

CSU's student body makeup—heavily weighted toward students who attended school in California before college—means that our inquiry is a closer call for those diseases which K-12 requirements do address. But even for those diseases, Pan explained why accepting 94 to 95 percent of students from within California does not necessarily lead to sufficient community immunity to suppress outbreaks. With respect to measles, for instance, effective community immunity requires a vaccination rate of at least 95 percent, but the 94 to 95 percent of CSU students who attended school in California includes those who did not receive vaccinations because they were home schooled, plus those who had exemptions. Indeed, exemptions pose a multifaceted problem, as medical exemptions increased when California outlawed personal belief

[5] Pan served in the California Legislature for 12 years. Among other roles that Pan held during this time, he first chaired the Assembly Committee on Health and later the Senate Committee on Health.

and religious exemptions. Furthermore, Pan noted that there are certain counties where K-12 vaccination rates are especially low. This means that one cannot extrapolate from statewide averages to assume no reasonably foreseeable effects at any campus.[6]

The foregoing considerations show that CSU's policy change had the reasonably foreseeable result of reducing community immunity. As Pan testified, this places certain faculty particularly at risk because they are immunocompromised and therefore do not receive adequate protection from their own vaccines. Such faculty rely heavily on community immunity.

CSU asserted that faculty safety has more to do with each faculty member's own vaccination status than that of students. This is true for most faculty but ignores immunocompromised faculty who do not obtain adequate protection from vaccines or for whom a vaccine may be contraindicated. CSU also argues that under any policy, faculty do not know whether their students received a vaccine exemption or are otherwise unvaccinated, and there is no evidence faculty would refuse to teach unvaccinated students. These arguments are meritorious up to a point but miss the fact that, as discussed *ante*, the 2023 Policy increases the risk of a future disease outbreak at a CSU campus. While it may not be possible to quantify that risk with any precision, Pan's testimony supported the ALJ's determination that the resulting increased risk is a reasonably foreseeable impact on faculty health and safety.

[6] Pan also indicated that K-12 vaccination rates likely decreased further in the wake of the COVID-19 pandemic, though CDPH had not yet released such data at the time of hearing.

Finally, CSU claimed that it could address all relevant effects and implementation issues as part of accommodating individual faculty members with disabilities. As the court noted in *Trustees II*, *supra*, 118 Cal.App.5th 90:

> "While CSU does not dispute that there may be a duty to bargain effects even if such effects do not impact the entire bargaining unit, it urges that any theoretical health impacts the 2023 policy might have on immunocompromised faculty members were already fully addressed by CSU's obligations to reasonably accommodate those faculty members under the Americans with Disabilities Act (ADA; 42 U.S.C. § 12101 et seq. and the Fair Employment and Housing Act (FEHA; § 12900 et seq.)."

(*Id.* at p. 105.) The court rejected this argument, noting that "laws prohibiting discrimination do not preclude enforcement of the right to be free from discrimination through the collective bargaining process." (*Id*. at p. 106 [collecting cases].)

Accordingly, CFA established that the 2023 Policy had a reasonably foreseeable impact on faculty health and/or safety, and that CSU had a duty to afford CFA adequate notice and opportunity to engage in good faith effects bargaining before CSU began to implement the policy.

II. Adequate Notice

In *Trustees II*, *supra*, 118 Cal.App.5th 90, the court cited PERB precedent regarding the "actual notice" doctrine, which can excuse an employer's failure to provide notice of a non-bargainable decision that has bargainable effects, if the union learns of the employer's decision when there is still sufficient time for good faith negotiations before the employer begins implementation. (*Id*. at p. 108.) In such circumstances, the failure to provide notice has no legal import. (*Ibid*.) The court cited three PERB decisions, acknowledging that two had been overruled on other grounds.

(*Ibid*., citing *State of California (Department of Corrections & Rehabilitation, Avenal State Prison)* (2011) PERB Decision No. 2196-S, p. 8 (*Avenal*), overruled on other grounds by *County of Santa Clara* (2013) PERB Decision No. 2321-M; *County of Riverside* (2010) PERB Decision No. 2097-M, p. 12, overruled on other grounds by *County of Santa Clara*, *supra*, PERB Decision No. 2321-M; and *Regents of the University of California* (1987) PERB Decision No. 640-H, p. 22.)

The court then applied the actual notice doctrine to the current dispute:

> "Here, it is undisputed that CSU did not provide formal notice to CFA of the 2023 policy, but that CFA knew of the change at least by February 23—nine days after the policy's adoption—when CFA submitted its initial demand letter. CSU's failure to give formal notice therefore was not legally significant if, at the time CFA learned of the new policy, CSU had not yet begun implementing the policy and there was sufficient time for CFA to seek bargaining prior to implementation. (*City of Sacramento* (2013) PERB Dec. No. 2351-M, pp. 29–30; *County of Santa Clara*, *supra*, PERB Dec. No. 2321-M, pp. 30–31.)"

(*Trustees II*, *supra*, 118 Cal.App.5th at p. 108.)

The key PERB decisions underlying this analysis—*County of Santa Clara*, *supra*, PERB Decision No. 2321-M and *City of Sacramento*, *supra*, PERB Decision No. 2351-M—were landmarks in Board precedent. Indeed, as we proceed to discuss, *County of Santa Clara* overruled at least four decisions that had mistakenly faulted unions for failing to demand bargaining even though they obtained actual notice without sufficient time for good faith negotiations before implementation, and *City of Sacramento* explored these issues further. However, *County of Santa Clara* and *City of Sacramento* left one question unanswered: if the employer establishes that the union received actual notice, which party has the burden of proof as to the temporal

sufficiency or insufficiency of such notice? As detailed below, *Trustees II* answered that question. We therefore review governing precedent and clarify its application based on *Trustees II*.

In *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, we began with a long-settled principle. Specifically, for employer decisions falling within the scope of representation (sometimes called the "scope of bargaining"), a union need not demand to bargain if it first learns of the decision as a fait accompli. (*Id*. at p. 24.) We then explained that the same principle applies to a non-bargainable decision with bargainable effects, if the employer has begun implementation as of the date the union first learns of the decision. (*Id*. at pp. 24-30.) Next, we noted that the Board had sometimes overlooked this principle. (*Ibid*.) We partially overruled such decisions (*ibid*.), including *Avenal*, *supra*, PERB Decision No. 2196-S; *County of Riverside*, *supra*, PERB Decision No. 2097-M; *State of California (Department of Corrections)* (2006) PERB Decision No. 1848-S; and *Sylvan Union Elementary School District* (1992) PERB Decision No. 919.[7]

The appellate court was thus correct to note that *County of Santa Clara*, *supra*, PERB Decision No. 2321-M had overruled *Avenal* and *County of Riverside* "on other grounds," leaving the actual notice doctrine intact but limited to a specific factual scenario. (*Trustees II*, *supra*, 118 Cal.App.5th at p. 108.) Indeed, *Trustees II* similarly

[7] We found no need to overrule *Regents of the University of California*, *supra*, PERB Decision No. 640-H, because in that case "it was undisputed that the union received notice of a reorganization plan prior to the challenged implementation," and "those aspects of the reorganization plan which had been implemented had no negotiable effects." (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 28.)

held that actual notice only substitutes for formal notice if there is still sufficient time to bargain before the employer begins to implement its decision. (*Ibid*.)

County of Santa Clara, *supra*, PERB Decision No. 2321-M also explained that in an important early decision, *Victor Valley Union High School District* (1986) PERB Decision No. 565 (*Victor Valley*), "the Board articulated its 'actual notice' standard as an element of the affirmative defense of waiver." (*County of Santa Clara*, *supra*, p. 28.) Elaborating on this point further, *County of Santa Clara* quoted *Victor Valley* in relevant part:

> "Notice of a proposed change must be given to an official of the employee organization who has the authority to act on behalf of the organization. The notice must be communicated in a manner which clearly informs the recipient of the proposed change. Even in the absence of formal notice, proof that such an official had actual knowledge of the proposed change will suffice. Notice must be given sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate. What constitutes a 'reasonable amount of time' necessarily depends upon the individual circumstances of each case. As waiver is an affirmative defense, an employer asserting a waiver of the right to bargain properly bears the burden of proving that the exclusive representative failed to request bargaining despite receiving sufficient notice of the intended change."

(*County of Santa Clara*, *supra*, p. 29, quoting *Victor Valley*, *supra*, pp. 5-6.)

Five months after deciding *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, we provided further guidance in *City of Sacramento*, *supra*, PERB Decision No. 2351-M. We began by integrating precedent regarding an employer's notice obligation in advance of decisions falling within the scope of representation and

decisions outside the scope of representation having bargainable effects. As we summarized: "An employer violates its duty to bargain in good faith when it fails to afford the employees' representative reasonable advance notice and an opportunity to bargain *before* reaching a firm decision to establish or change a policy within the scope of representation, or *before* implementing a new or changed policy not within the scope of representation but having a foreseeable effect on matters within the scope of representation." (*City of Sacramento*, *supra*, p. 28 [emphasis in original].)[8]

Further integrating past decisions, we held that irrespective of whether an employer provides formal notice or relies on actual notice, such notice is only adequate (sometimes referred to as "sufficient" or "reasonable") if: (1) the person receiving formal notice or obtaining actual notice is a union official with authority to act on behalf of the organization on the matter in question; (2) the union official recognizes, or reasonably should recognize, the change in or potential impact on a bargainable topic; and (3) there remains sufficient time for the union to consult with bargaining unit members, formulate a plan of action, draft information requests and receive responses, craft counterarguments and/or proposals, and bargain in good faith to impact or agreement before the employer reaches a firm decision (for bargainable decisions) or begins implementation (for decisions outside the scope of representation that have bargainable effects). (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 28-30, 37, 39-40.) Thus, the amount of notice that is sufficient will

[8] *City of Sacramento*, *supra*, PERB Decision No. 2351-M noted that there can be an exception in certain urgent circumstances. (*Id*. at p. 17.) As discussed in *Trustees I*, *supra*, PERB Decision No. 2915-H, CSU pursued such an argument at one stage of this case before waiving it in later litigation stages. (*Id*. at p. 15 & fn. 4.)

"necessarily depend on the circumstances of each case" (*id*. at p. 29), and parties "would do well to err on the side of caution" rather than assuming "that only a particular amount of time" is "all that the law requires" (*id*. at p. 30).

Finally, we held: "Although insufficient notice is an element of the prima facie case, and therefore part of the charging party's burden for proving a unilateral change allegation, where the facts demonstrate, or (as here) the employer admits, that no formal notice was provided to the representative, the burden is *the employer's* to prove its affirmative defense of waiver, and *not the union's* to prove *lack of notice* as part of its prima facie case." (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 38 [emphasis in original], citing *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 28 and *Victor Valley*, *supra*, PERB Decision No. 565, pp. 5-6.)

Notably, in *City of Sacramento*, *supra*, PERB Decision No. 2351-M and *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, the Board did not answer a procedural question arising if the employer establishes that the union obtained actual notice: Which party has the burden of proof as to the temporal sufficiency or insufficiency of such actual notice? In *Trustees I*, *supra*, PERB Decision No. 2915-H, we placed that burden on CSU, reading precedent to mean that *every* aspect of an actual notice argument falls to the respondent to prove as an affirmative defense. (*Id*. at p. 23 ["CSU would have to show, at a minimum, that it had not yet begun implementing the 2023 Policy in February and March"]; see also *id*. at p. 25 [placing burden on CSU to show that CFA obtained actual notice "sufficiently in advance of implementation to allow for good faith effects bargaining"].) In contrast, in *Trustees II*,

supra, 118 Cal.App.5th 90, the court placed the burden on CFA to prove when CSU began implementing the 2023 Policy. (*Id*. at p. 108, fn. 4.)

This change in burden is critical in the current case. There was limited evidence that implementation was underway by August, but neither party introduced competent, persuasive evidence as to when CSU began implementing the 2023 Policy. For instance, as the appellate court remarked, neither party's counsel asked O'Keefe when CSU took any steps to begin implementing the 2023 Policy. (*Trustees II*, *supra*, 118 Cal.App.5th at pp. 110-111.) Moreover, because the 2023 Policy applied to students rather than employees, this is not the typical case in which an employer begins implementation by notifying employees. (See *id*. at p. 109 [noting that in *Oakland*, *supra*, PERB Decision No. 2875, p. 8, the employer began to implement a school closure decision when it notified impacted staff that they would be transferred and began working with impacted families to choose new schools]; *City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 33-37 [collecting examples].)

Applying these principles, CFA has failed to show that when it learned of the 2023 Policy, there was insufficient time for good faith bargaining before the beginning of implementation.

III. CSU's Compliance with Its Bargaining Duty

Even if a union gains actual notice of an employer's non-bargainable decision, and the employer has not yet begun to implement its decision as of the date the union obtains such notice, the employer must still comply with its pre-implementation duty to bargain over any reasonably foreseeable effects on terms and conditions of employment. Normally, this means bargaining in good faith to impasse or agreement

before beginning implementation. (*County of Santa Clara* (2021) PERB Decision No. 2799-M, p. 25 ["An employer normally may not implement the decision while effects bargaining continues and instead must wait until the parties have reached agreement or impasse over the negotiable effects of the decision"].)

This case, however, hinges on a complementary principle that applies when an employer, having reached a decision that falls outside the scope of bargaining, believes in good faith that its decision has no reasonably foreseeable effects on terms and conditions of employment. In that narrow instance, "before refusing to negotiate, [the] employer must attempt to clarify through discussions with the union any uncertainty as to what is proposed for bargaining and whether it falls within the scope of representation." (*Trustees II*, *supra*, 118 Cal.App.5th at p. 112 [citations and internal quotation marks omitted].) Indeed, "[r]efusing an effects bargaining demand without first attempting to clarify ambiguities and[/]or whether matters proposed for bargaining fall within the scope of representation, violates the duty to bargain in good faith." (*Ibid*. [citations and internal quotation marks omitted].)[9]

In *Trustees II*, *supra*, 118 Cal.App.5th 90, the court recounted these settled principles before raising an open question: when an employer seeks clarification regarding a union's claim that there are bargainable effects, must the employer always do so at the bargaining table? (*Id.* at pp. 112-114.) Answering this question in the negative, the court held that "an employer may satisfy its duty to seek clarification *either* 'at the bargaining table'—that is, by formally meeting and conferring—*or* through

[9] There was no cause to analyze this issue in *Trustees I*, *supra*, PERB Decision No. 2915-H, since we found CSU did not prove CFA had actual notice of the 2023 Policy before implementation began.

an informal exchange between parties." (*Id*. at p. 114 [emphasis in original].) Accordingly, to conform PERB precedent to the court's holding, we clarify any contrary suggestions found in the following decisions: *Rio Hondo Community College District* (2013) PERB Decision No. 2313, p. 12; *City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 34; and *County of Orange* (2018) PERB Decision No. 2594-M, p. 27.[10]

Here, CSU had a good faith basis to doubt that the 2023 Policy had negotiable effects. This was true because: CFA had not asked to bargain over the effects of the 2002 Policy or the 2019 Policy; CFA had framed its bargaining demand as both a demand for decision bargaining and a demand for effects bargaining; and CFA had only offered a very general explanation that the 2023 Policy was likely to "impact faculty rights in the areas of health and safety and perhaps other rights as well."

CSU offered to meet on March 16 or on another date that was more convenient for CFA. The purpose of the proposed meeting was to discuss whether there were negotiable effects. If, after such a meeting, CSU had maintained there were no bargainable effects, that would have constituted a HEERA violation. (*Trustees II*, *supra*, 118 Cal.App.5th at p. 104, citing *County of San Luis Obispo*, *supra*, PERB Decision No. 2427-M, p. 26.) Alternatively, if the meeting had convinced CSU to bargain over the effects of the 2023 Policy, then CSU would have had to hold off on

[10] *City of Palo Alto*, *supra*, PERB Decision No. 2388a-M remains correct in holding that an employer cannot comply with its duty merely via comments at a public meeting of the employer's governing board. (*Id*. at p. 34.)

implementation until the parties reached impasse or agreement. But CFA instead refused to meet. In these circumstances, CSU did not violate HEERA.[11]

Finally, while *Trustees II*, *supra*, 118 Cal.App.5th 90 characterized its decision as remanding this matter for the parties to engage in effects bargaining, we interpret that statement as follows. Because CSU complied with HEERA, we issue no bargaining order or other remedial order. However, it is now established that CFA has the right to bargain over reasonably foreseeable health and safety effects of a student vaccination policy. CFA therefore has the option to demand such negotiations.

ORDER

The unfair practice charge and complaint in PERB Case No. SA-CE-422-H are hereby DISMISSED WITH PREJUDICE.

Chair Banks and Member Paulson joined in this Decision.

[11] CFA may have refused to meet because it believed implementation was underway, but as noted above, the record does not establish the timing of CSU's first implementation steps. Just as an employer acts at its peril if it mistakenly refuses to bargain over a bargainable decision (or bargainable effects), a union acts at its peril if, as here: (1) an employer's decision falls outside the scope of representation but has bargainable effects; (2) the employer, acting on a good faith doubt as to whether there are bargainable effects, seeks a clarification meeting; and (3) the union refuses to meet because it believes the employer has already commenced implementation, but the union ultimately fails to prove the employer had in fact done so.