Labor Code Section 1025, every private employer that regularly employs 25 or more employees must reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program, as long as the reasonable accommodation doesn't impose an undue hardship on the employer. However, you may refuse to hire or may discharge an employee when his current use of alcohol or drugs prevents him from performing his job duties or he is unable to perform his duties in a manner that doesn't endanger his health or safety or that of other individuals.

8. You must pay the costs for medical/psychological exams. California Labor Code Section 222.5 prohibits you from requiring an applicant to pay for a medical or mental exam taken as a condition of employment. It also prohibits you from requiring a current employee to pay for a medical/psychological exam that is mandated "by any law or regulation of federal, state or local governments or agencies thereof."

9. Establish procedures to ensure the confidentiality of medical/psychological information. Under the California Confidentiality of Medical Information Act (CMIA), you must establish appropriate procedures to ensure the confidentiality of employees' medical/psychological information. Prudent employers should instruct their employees and agents who handle medical records to maintain the hard copies of medical records separate and apart from general personnel files and to keep the files under lock and key. You also should protect computerized medical information with access codes.

10. Don't disclose medical information without the employee's written authorization. You generally may not disclose an employee's medical information without first obtaining her signed written authorization. The CMIA has specific requirements for written authorizations for release of medical information, including that the authorization be handwritten by the employee or typed in eight-point font or larger and describe who may disclose the medical information, the persons who may receive it, and the uses for which the medical information is being made available.

Bottom line

The decision to require an applicant or employee to submit to a medical or psychological exam exposes you to potential liability for invasion of privacy as well as disability discrimination. This article merely highlights the state's restrictions on medical exams and inquiries. Prudent employers should consult their employment attorneys for guidance in complying with both state and federal laws governing medical exams.

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PUBLIC EMPLOYERS

Return of the 'nondelegable duty,' buried treasure

by Jonathan Holtzman

In government, major policy decisions are made by the elected members of a local legislative body — a city council or county board of supervisors, for example. The primary public-sector bargaining law in California, the Meyers-Milias-Brown Act, expressly states that a labor agreement "shall not be binding" until it is approved by the governing body. While labor agreements are approved by governing bodies, those bodies "delegate" much of their work; if they didn't, their seemingly interminable meetings would be, well, actually interminable. That work includes most of the tasks associated with administering labor agreements, including arbitration of disputes.

Under established government law principles, major policy decisions must be made by the legislative body itself — they can't be "delegated" to others. Such decisions are considered "nondelegable duties." The concept of the nondelegable duty may not be sexy, but it's basic to democracies. There are certain policy decisions that we elect legislators to make and for which the public has a right to hold legislators accountable.

Background

In the wake of California's adoption of public-sector collective bargaining in the '60s, questions arose about whether arbitration of contract disputes — a fundamental aspect of private-sector bargaining — was a permissible delegation. The issue was put to rest in the seminal case of *Taylor v. Crane.*

In that case, the California Supreme Court held that having an arbitrator review whether a disciplinary action by a city manager complied with the terms in a collective bargaining agreement didn't amount to an unlawful delegation of legislative authority. But the court strongly suggested there were limits to how and when arbitration was permissible.

In short, the court suggested that when an arbitrator is actually determining the terms and conditions of employment, arbitration may in fact constitute an unlawful delegation of authority. "The power to set the terms and conditions of public employment," the court reasoned, "is broader and more intrusive upon the functions of city government than the arbitrator's authority in this case to resolve an individual grievance." The latter point was soon forgotten like the buried treasure of a dead man.

Recent case

A few weeks ago, more than 30 years after the *Taylor* ruling, that sentence surfaced with a vengeance in a

case before the California Court of Appeal. In the case, the court of appeal held that the question of whether involuntary furloughs were permissible under a declared state of fiscal emergency couldn't legally be submitted to arbitration because the delegation to the arbitrator was in essence a delegation of legislative power: "As the decision to impose mandatory furloughs due to a fiscal emergency is an exercise of the City Council's discretionary salary setting and budget making authority, the City Council cannot delegate this authority to an arbitrator."

This case will almost certainly be heard by the California Supreme Court or "depublished." (If the case is depublished, its conclusion would stand, but it couldn't be cited in the future.) Whatever the supreme court decides, this case is an important reminder that major labor relations decisions should be made by elected officials because they're inextricably tied to decisions about public services. *City of Los Angeles v. Superior Court* — Cal. App. 4th — 2011 WL 1088039 (March 25, 2011; certified for publication).

Bottom line

We speak of open government, yet there is often little public debate about the impact of labor decisions on other government services. Allowing such decisions to be made in arbitration behind closed doors may be acceptable in the private sector, but it's hard to justify in the public sector when the stakes include public services.

The term "nondelegable duties" may not be very exciting, but we're likely to hear a lot more about them in the next five years than we did in the previous 30. And that's good for the public and for local government services.

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WRONGFUL DISCHARGE

Jury swats away discrimination claim filed against NBA franchise

by Michael Futterman and Jaime Touchstone

On March 30, a Los Angeles County Superior Court jury unanimously rejected a claim for wrongful termination, retaliation, discrimination, and harassment filed by NBA great Elgin Baylor against the Los Angeles Clippers. Baylor had served as the Clippers' general manager. The Los Angeles Times reports that the jury believed the Clippers' argument that Baylor was fired because of the team's dismal long-term record, not for any reasons related to his age or race.

Former NBA great alleges discrimination and harassment

Baylor is a legendary hall-of-fame basketball player who played 13 seasons in the NBA for the Minneapolis and Los Angeles Lakers. After retiring as a player, he went to work as an executive with the Los Angeles Clippers, a somewhat less-storied franchise than the Lakers. He worked as a Clippers executive for 22 years, including as the team's executive vice president and general manager. Unfortunately for the Clippers and their fans, the team made the playoffs only four times during Baylor's 22 years as a team executive.

As reported in the *LA Times*, the Clippers replaced Baylor in 2008 amid rumors that the events leading up to his departure were less than amicable. In early 2009, 75-year-old Baylor, an African American, sued the NBA, the Clippers, team owner Donald Sterling, and team president Andy Roeser, alleging that he was discriminated against, harassed, retaliated against, and wrongfully terminated based on age and race. The *Times* reports that Baylor claimed that Sterling and Roeser oversaw a work environment hostile to older employees, as evidenced by an e-mail in which Roeser told Sterling that Baylor was "still not getting any younger."

Baylor sought nearly $2 million in damages for lost earnings and emotional distress. The Clippers vehemently denied any wrongdoing and, against the recommendation of the team's insurance carrier, refused to settle and instead opted for a jury trial.

Baylor's claim no slam dunk

California is an at-will state. An employer or employee may terminate the employment relationship at any time and for any reason, with or without cause or notice, so long as the termination isn't illegal. Baylor initially argued that he was terminated because of his age and race, although he dropped his race discrimination claim before trial.

The Age Discrimination in Employment Act makes it illegal to discriminate against individuals who are 40 years or older when making any employment-related decisions, including hiring, firing, reductions in force, promotions, demotions, assignments, and/or training. Title VII of the Civil Rights Act of 1964 and California's Fair Employment and Housing Act also broadly prohibit employment discrimination against individuals on the basis of race, color, religion, or national origin.

To succeed on claims of employer discrimination, the employee must establish that he is a member of a protected class (in this case, over 40 years old or African American), that in spite of being qualified for a job or performing a job well, he suffered an adverse employment action (in this case, a termination), and that the circumstances surrounding the termination suggest employer discrimination (in this case, alleged derogatory