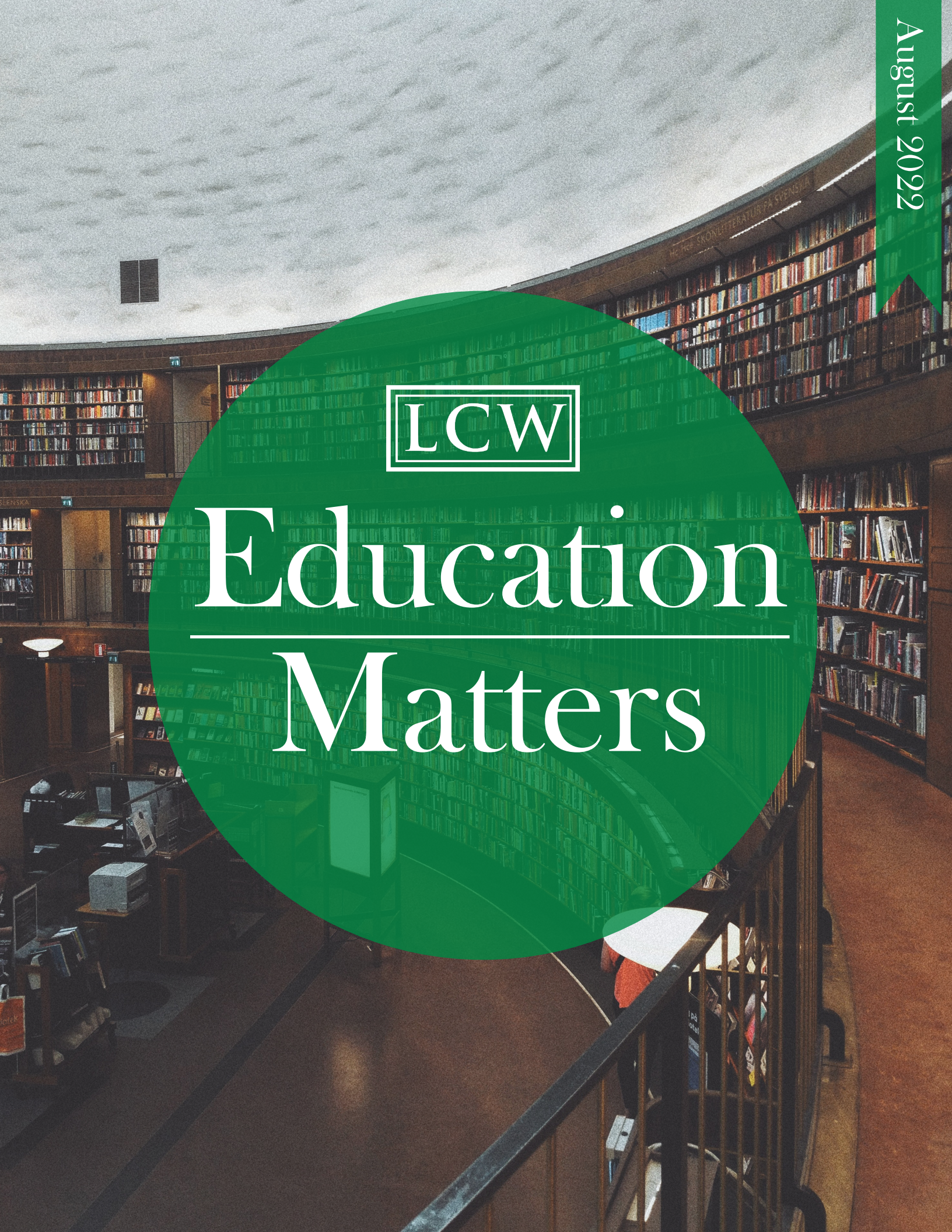

August 2022

LCW

Education Matters

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DUTY OF CARE

District Owed Duty Of Care To Protect Student Stabbed By Third Party While On Campus.

Plaintiff C. Achay was a tenth grade student and member of the track team at the Huntington Beach Union High School District. After her track practice ended early one day, Achay and her friend walked to a nearby Starbucks and returned to campus approximately 45 minutes later to grab books from her school locker. While the students were walking back to campus, they encountered a former student who they thought was "suspicious" and "kind of weird." While Achay was walking from the school's locker room to the school parking lot, the former student stabbed her and she suffered serious injuries.

Achay sued the Huntington Beach Union High School District, alleging that the District breached its duty to provide proper security on campus. The District filed a motion for summary judgment, arguing it owed Achay no duty of care at the time of the stabbing, and even if it did owe her a duty, there was no basis for a reasonable juror "to find a causal connection between the District's alleged negligence and the injury, which was unpredictable. The trial court granted the District's summary judgment motion, finding that the District did not owe Achay a duty of care because at the time of the stabbing, she was no longer on campus during school hours during a school-related activity. Achay appealed.

The Court of Appeal disagreed with the trial court. The court held that the District owed Achay a duty of care because at the time of the stabbing, Achay was on campus to retrieve her books from an open locker room after her track practice, and another sports team was still practicing nearby. The fact that the student left campus and later returned had no effect on whether the District owed her a duty because she was stabbed on school grounds during ongoing after-school sports activities. The court stated that Achay's brief departure from school is a "red herring," and there was a triable issue of fact as to whether the District used reasonable security measures to protect Achay from an arguably preventable injury. The court further held that a factfinder could conclude that had campus supervisors been present, the tenth grader would have sought their protection.

Achay v. Huntington Beach Union High School District (2022) 80 Cal.App.5th 528.

Welcome To LCW!

We are thrilled to announce that Kim Robinson has joined LCW's management team as the Director of Human Resources!

Kim Robinson comes to us after serving as the Vice-President of Human Resources and Administration for Child360 (formerly LAUP), a non-profit organization. Prior to her time at Child360, Kim acted as the Manager of HR and Administration at a national law firm for 5 years and the HR Administrator for an international law firm for over 15 years, respectively.

"With her background in law and human resources, Kim is a leader in her field. We welcome her to the firm and look forward to her contributions," LCW Managing Partner J. Scott Tiedemann stated. "I have no doubt she will be a key player in shaping our employee's experience and upholding our LCW values."

Please join us in welcoming Kim to the firm!

UNRUH CIVIL RIGHTS ACT

California Supreme Court Decides Public Schools Are Not Subject To Unruh Civil Rights Act.

Plaintiff Brennon B. was a 14-year-old special education student at De Anza High School in the West Contra Costa Unified School District (District) who had been diagnosed as severely autistic. Brennon alleged that during his time as a student at the District, he was sexually assaulted by other students and by a school-district staff member. After Brennon's initial complaints, the District agreed to assign a supervisor to accompany Brennon to the restroom and on the school bus but failed to do so, and he was assaulted again.

Brennon sued the District alleging disability discrimination under the Unruh Civil Rights Act. The Unruh Civil Act states that the disabled and other protected groups are entitled to equal treatment and services "in all business establishments of every kind whatsoever." The Act also provides enhanced remedies available for plaintiffs, including statutory penalties and attorney fees. The trial court sustained the District's motion to dismiss the case on the grounds that the District was not a "business establishment" subject to the Act. Brennon petitioned for a writ of mandate to the California Court of Appeal. The appellate court examined the legislative history of the Unruh Act and California Supreme Court decisions, and found that public school districts were not business establishments under the Unruh Act by reasoning that public school districts act as the state's agent in delivering constitutionally mandated, free education to children, and denied the petition seeking to overturn the trial court's order.

On appeal, the California Supreme Court addressed the issue of whether a plaintiff can hold a public school district liable under the Act and thus avail themselves of the enhanced remedies –such as the statutory penalties and attorney fees. After examining the statutory text of the Act, its purpose and history, and prior case law, the California Supreme Court unanimously held that public schools are not subject to the Act. In reaching its decision, the Court noted that "Educating students is a task that is fundamentally different from what could fairly be described as 'regular business transactions." The Court concluded that public schools, as governmental entities engaged in the provision of a free and public education, are not "business establishments" within the meaning of the Act. When acting in their core educational capacity, public school districts do not perform "customary business functions," nor is their overall function to protect and enhance economic value. Therefore, the Supreme Court concluded that under the circumstances, the District was not a "business establishment" for the purposes of the Act.

Brennon B. v. Superior Court (2022) __ Cal.5th __.

RETIREMENT

Court Denies Pension Benefits Sought By Retired University Of California Employees.

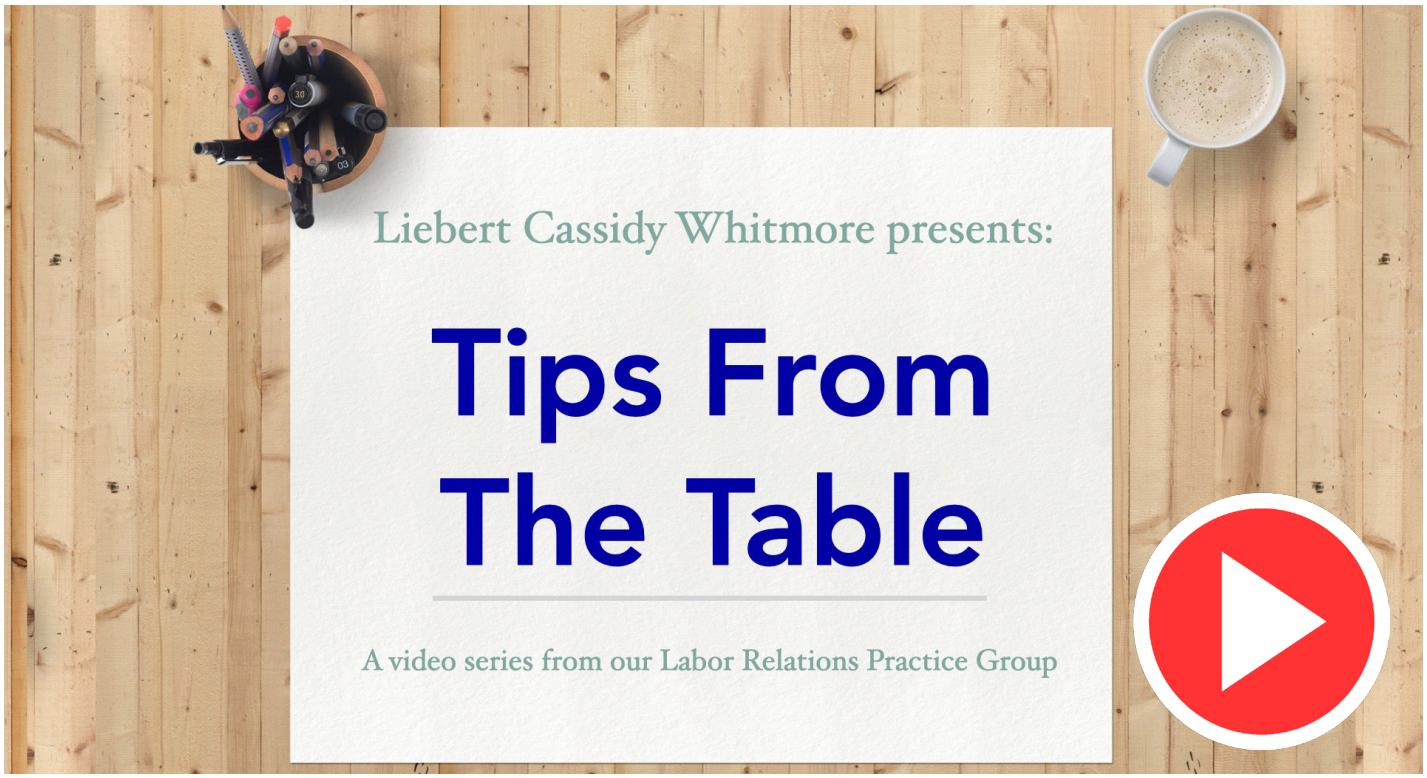
The Board of Regents of the University of California (Regents) adopted a resolution granting approval for establishing a plan for the restoration of retirement plan benefits denied due to limitations under the Internal Revenue Code. The university president's office drafted an appendix document, which had provisions aiming to restore benefits reduced by the maximum compensation limit. The appendix stated that the Regents, via the president and the board chairs, retained an unlimited right to amend or terminate the document. The president and the chairs subsequently chose not to implement the appendix or any other plans for restoring benefits by the maximum compensation limit.

Plaintiffs Anne Broome and William Gurtner, retired employees of the University of California, brought a class action suit against the Regents for breach of contract, promissory estoppel and other claims, alleging the Regents violated an obligation to provide them with certain pension benefits. The trial court ruled in the Regents' favor and Plaintiffs appealed.

The California Court of Appeal for the First District agreed with the trial court. First, the Court of Appeal held that there was no breach of contract. The 1999 Resolution did not ratify a contract or result from negotiations with public employees, and did not show a clear intent to create contractual rights. Rather, the 1999 Resolution delegated its future implementation to the president, with concurrence of the chairs. The Court noted that the resolution expressly contemplated further review and action before the granting of an employee benefit. Second, the Court of Appeal determined that the Plaintiffs did not have any implied contractual rights to the pension benefits that they sought. The evidence did not clearly show that the Regents intended to create contractual rights to the benefits, and the 1999 Resolution did not implement any benefits or specify their terms. While the appendix had these specifics in its provisions, the appendix never took effect.

The Court of Appeal also agreed with the trial court in that the Regents' vote on the 1999 Resolution did not amount to a clear and unambiguous promise. Under the 1999 Resolution, the chairs' concurrence in an implementation plan that the president proposed was an express condition for implementing the benefits. This condition was not fulfilled because the chairs never concurred on the appendix or on any other implementation plan. Therefore, the Court of Appeal concluded that the 1999 Resolution was not a clear and unambiguous promise for benefits.

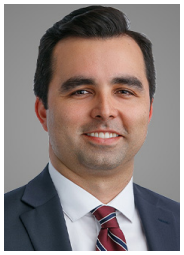
Broome et al. v. Regents of the University of California (2022) 80 Cal.App.5th 375.



NEW TO THE FIRM!

Troy M. Heisman, an associate in our San Francisco office, provides advice and counsel regarding a variety of employment law matters as an experienced investigator and litigator. Troy litigates in both state and federal court and has experience from pre-litigation through trial.

Aleena Hashmi, an associate in our Los Angeles office, is a skilled trial attorney who provides representation and counsel to clients in all litigation matters. Before joining LCW, Aleena gained legal expertise through her work at the Office of the Attorney General and the Los Angeles County District Attorney's Office, where she conducted preliminary hearings, jury trials, and authored appellate briefs.



John LaCrosse is an associate in LCW's San Diego office. As an experienced litigator, John assists clients with matter including labor and employment, governance, student discipline issues, and special education. He is also has experience in all aspects of the discovery process, including interviewing witnesses, and regularly conducts extensive and in-depth research.

Kiyoshi Din is an associate in our San Francisco office who provides representation and counsel to public agencies, educational institutions and non-profit organizations across the state. He is a litigator with experience in all aspects of the discovery process, including conducting pre-trial interviews and extensive in-depth research.

LCW

LABOR RELATIONS CERTIFICATION PROGRAM

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DISTRICT FUNDING

Supreme Court Holds Funding Entitlement Regulations Did Not Impose State Mandate.

In *Coast Community College District v. Commission on State Mandates*, several California community college districts sought reimbursement for costs incurred in complying with regulations that specified various conditions the districts must satisfy to avoid the possibility of having their state aid withheld. The conditions describe standards governing core areas of community college administration, including matriculation requirements, hiring procedures, and curriculum selection. The districts filed a claim with the Commission on State Mandates (Commission), a quasi-judicial body that adjudicates whether a state mandate exists. The Commission rejected the districts' claims, concluding that the districts failed to show they were legally compelled to comply with the regulations because there was no provision creating a mandatory duty that they do so. Instead, noncompliance raised the possibility that some portion of the district's funding would be withheld.

The trial court affirmed the Commission's findings and found that there was no practical compulsion either because the districts cited no evidence establishing they were unable to function without state funding, or that they otherwise lacked any choice but to comply with the conditions. The Court of Appeal reversed, concluding that the districts were legally compelled to comply with the regulations because those regulations "apply to the underlying core functions of the community colleges, functions compelled by state law." The Court of Appeal also found that the evidence in the record demonstrated that districts rely on state aid to function, leaving them no choice but to comply with the regulations.

The Supreme Court of California agreed with the Commission and reversed. Contrary to the Court of Appeal's interpretation, the California Supreme Court concluded that the districts were not legally compelled to comply with the regulations. The fact that the standards set forth in the regulations relate to the districts' core functions does not in itself establish that the districts have a mandatory legal obligation to adopt those standards. The regulations also gave the chancellor the discretion on what remedial measures to impose on non-compliant districts, ranging from no action to reducing or withholding some or all of a district's funding. In light of this, the Court concluded the districts are not legally obligated to follow the regulations. Rather, the districts faced the risk of potentially severe financial consequences if they chose not to do so. The Court clarified that inducing compliance is not the same as obligating compliance. The Court of Appeal did not address whether there was "practical" compulsion, meaning the districts had no "true choice" but to comply. Therefore, the Court left the issue for the Court of Appeal to address whether the districts may be entitled to reimbursement under that theory.

Coast Community College Dist. v. Commission on State Mandates (2022) No. S262663, WL 3349232.

UPDATES FROM DEPARTMENT

New DOE Guidance Helps Schools Support Students With Disabilities And Avoid Discriminatory Use Of Discipline.

On July 19, 2022, the U.S. Department of Education's Office for Civil Rights and Office of Special Education and Rehabilitative Services released new guidance which aims to help public elementary and secondary schools fulfill their responsibilities to meet the needs of students with disabilities and avoid the discriminatory use of student discipline. In releasing this new guidance, U.S. Secretary of Education Miguel Cardona, noted: "Too often, students with disabilities face harsh and exclusionary disciplinary action at school. The guidance we're releasing today will help ensure that students with disabilities are treated fairly and have access to supports and services to meet their needs – including their disability-based behavior.

We also expect that districts utilize the federal American Rescue Plan dollars to build capacity, provide professional learning opportunities for educators and school leaders, and hire additional staff. These resources will also help schools live up to their legal obligations, support an equitable recovery for all our students, and make sure that students with disabilities get the behavioral supports and special education services they need to thrive." The guidance describes schools' responsibilities under Section 504 of the Rehabilitation Act of 1973 (Section 504) to ensure nondiscrimination against students based on disability when imposing discipline. Specifically, the guidance explains how compliance with Section 504's requirement to provide a free appropriate public education (FAPE) to students with disabilities can assist schools in effectively supporting and responding to behavior that is based on a student's disability, and that could lead to student discipline. By using Section 504's procedures to identify and meet the behavioral, social, emotional, and academic needs of students with disabilities as required for FAPE, schools can help prevent or reduce behaviors that might otherwise result in discipline.

The new resources include:

- Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973 and an accompanying Fact Sheet
- Questions and Answers Addressing the Needs of Children with Disabilities IDEA's Discipline Provisions
- Positive, Proactive Approaches to Supporting the Needs of Children with Disabilities: A Guide for Stakeholders and
- A letter from the U.S. Dept. of Education Secretary Miguel Cardona to educators, school leaders, parents, and students about the importance of supporting the needs of students with disabilities.

THE U.S. OF EDUCATION

U.S. Dept. Of Education Office For Civil Rights Revises Case Processing Manual.

The U.S. Department of Education Office for Civil Rights (OCR) issued a revised Case Processing Manual (CPM), which was last updated in August 2020. The revised CPM "provides OCR with the procedures to promptly and effectively investigate and resolve complaints, compliance reviews, and directed investigations to ensure compliance with the civil rights laws OCR enforces." The latest changes, which went into effect on July 18, 2022, include how OCR will evaluate, investigate, and resolve complaints. Although not an exhaustive list, some of the key changes include the following:

- The revised CPM clarifies that the following are not complaints: oral allegations that are not reduced to writing; anonymous correspondence; courtesy copies of correspondence or a complaint filed with or otherwise submitted to another person or other entity; inquiries that seek advice or information but do not seek action or intervention from the Department.

- The revised CPM clarifies that OCR may investigate Title IX complaints filed by employees, students, parents, and applicants.

- Specifies that the release of information by OCR to the public is subject to restrictions imposed by the Freedom of Information Act.

- Under the previous CPM, a case could be dismissed if OCR obtained credible evidence that a matter had been resolved. Under the revised CPM, OCR will only dismiss cases under certain circumstances if there are no systemic issues.

- Rather than make dismissals automatic or mandatory, OCR "generally" or "may" close or dismiss an allegation when certain circumstances exist. This suggests that OCR will exercise more discretion in determining whether to close or dismiss an allegation, which could possibly result in more investigations.

- Unlike the previous CPM, appeals for certain determinations and dismissals, which the previous CPM permitted for complainants only, are no longer provided for in the revised CPM.

Note:

OCR's revised CPM may impact current and future investigations conducted by OCR. Districts with existing civil rights complaints that are under investigation by OCR should contact legal counsel for information regarding these new revisions.

Community College Student Housing Projects - Public Construction.

Hundreds of thousands of community college students suffer from homelessness every year and a recent report estimates that one in five California community college students experienced homelessness in 2020. California's recent budget has allocated $1.4 billion to 26 public universities and community colleges in order to help address this crisis. The budget also included a pledge of an additional $900,000 for the 2023 and 2024 budgets to establish a revolving loan program to issue interest free loans to campuses to build student and employee housing. (Budget Act 2022. Sec. 19.54)

With an influx of funds, many community college districts (District(s)) have an opportunity to begin student housing projects. Yet, public work construction can take many forms and often presents Districts with complex and challenging legal questions. A District should undertake a construction project, whatever its size and cost, only after careful consideration and planning. Districts must develop a design that is compliant with California law, select an appropriate project delivery method, and ensure the construction contract addresses the risks that occur during construction. The following sections outline some of the main legal considerations for Districts undertaking construction projects.

Develop a Compliant Design

1. **Division of the State Architect**
   The Division of the State Architect (DSA) must review and approve the project to ensure the plans, specifications, and construction comply with DSA requirements and the California Building Code. The DSA plan review is comprised of four disciplines: (1) accessibility, (2) fire and life safety, (3) structural safety, and (4) sustainability. Without DSA certifications, board members could incur personal liability for accidents at the project site. (Ed. Code, §81177.)

2. **California Building Code**
   Public work construction projects must comply with Title 24 of the California Code of Regulations known as the California Building Standards Code. The District's architect should be familiar with and design the project in accordance with these regulations. The regulations cover structural safety, sustainability, and accessibility.

Select the Appropriate Delivery Method for the Project

Each District should analyze the facts and circumstances to determine the appropriate project delivery method for each specific project. The following are some of the project delivery methods available to Districts for housing projects.

1. **Design-Bid-Build**
   Design-bid-build is the most popular delivery method Districts use for public construction. Districts must use this method for public projects involving an expenditure of $15,000 or more unless another statutory vehicle applies to the project. This method requires the District to (1) retain an architect to design the project, (2) solicit and receive bids for the construction, (3) award the contract to the lowest responsible and responsive bidder, and then (4) construct the project. (PC Code, § 20651, subd. (b).) Utilization of this method places the responsibility for completeness and accuracy of the plans and specifications on the District. (PC Code, § 1104.)

2. **Design-Build**
   With the design-build delivery method, the design and construction scope are under one contract with the District. The District may select a design-build contractor either by a competitive bidding process awarding the contract to the lowest responsible bidder or by selection of a design-build contractor based on qualifications and other criteria. Districts may utilize the design-build delivery method for projects with an expenditure that will exceed $2,500,000. (Ed. Code, § 81702, subd. (a).) The process involves the District first preparing a request for proposal that sets forth: (1) the desired design character of the buildings and site; (2) performance specifications covering the quality of materials, equipment and workmanship; (3) preliminary plans or building layouts; and (4) or any other information deemed necessary to describe the District's needs. (Ed. Code, §81703, subd. (a)

(1).) The success of this method largely relies on a clearly defined project and the selection of a qualified design-build contractor.

Benefits of this delivery method include that the District may establish a procedure to prequalify design-build entities and develop a short-list of contractors. (Ed. Code, §§81703, subd. (b), & 17250.25, subd. (b).) The District may also reserve the right to hold discussions or negotiations with responsive bidders. (Ed. Code, §81703, subd. (a)(2)(C)(v).) If the District elects to use the best value selection, the District must make a determination based on price, technical expertise, life-cycle costs over 15 years or more, and an acceptable safety record. (Ed. Code, §81703, subd. (d)(2).)

This method may reduce claims and change orders that would otherwise result from deficient design of the project because it integrates the design and construction work from the beginning of the process.

3. **Public-Private Partnerships**
Generally, a public-private partnership is a collaboration between a public entity and the private sector for the purposes of studying, planning, designing, constructing, developing, or financing a project. Public-private partnerships have become more popular in recent years, likely due to rising housing needs and the budget constraints felt by the COVID-19 crisis. Education Code Section 81004 expressly permits the use of public-private partnerships for the purpose of constructing education buildings or education centers. This statute further provides that Districts and private parties may construct these facilities on a site donated through the public-private partnership or on the Districts' existing land. (Ed. Code, §81004, subd. (a).)

This delivery method may transfer some of the risk associated with construction projects away from the District and to the private sector partner. It may also serve to provide access to private sector financing and expertise. This delivery method is also subject to the requirements outlined in Education Code Sections 17200-17204.

4. **Lease-Leaseback**
A lease-leaseback involves the District entering into two leases with a developer/contractor as well as a preliminary services agreement. (Ed. Code, §81335.) The District leases land to a developer/contractor who then constructs the building on the leased land. The District then leases the building from the developer, and ownership of the building vests with the District at the expiration of the lease. This method permits Districts to select contractors by qualifications rather than by the lowest bid. It also limits the amount of change orders or other typical delays associated with construction projects. However, this delivery method is often more expensive than other options and has been challenged in the courts.

Negotiate a Construction Contract that Protects Districts from Risk

While Districts often spend a considerable amount of time planning the project, they must also pay close attention to the construction contract itself. Aside from the statutorily required provisions, a contract should lay out the deadlines, expectations, obligations, and duties of the parties. It is critical to the success of a project for the District to anticipate issues that can arise during construction and negotiate provisions to address such risks.

Conclusion

Since funding is now available to community colleges to address the housing crisis, Districts must consider their processes for construction projects to develop housing. Design, project delivery method, and construction contract negotiations are just some of the key issues Districts will face.

LCW's Business and Facilities practice group has invaluable expertise in public education construction law and best practices for community college districts planning to undertake these projects.

GOVERNMENT IMMUNITY

CHP Was Not Immune From Wrongful Death Lawsuit Caused By On-Duty CHP Officer.

In the early morning of October 14, 2019, Danuka Silva was riding with another passenger in the back of a rideshare vehicle driven for Uber. While on the freeway, the driver abruptly stopped the vehicle and demanded the two passengers exit, refusing to pull to the shoulder first. As the passengers attempted to cross the freeway to safety, Sergeant Richard Langford's patrol car struck and killed Danuka while Langford was responding to an emergency call concerning an altercation on the freeway.

On February 5, 2020, Marakkalage and Shirin Silva filed a complaint alleging causes of action for negligence and wrongful death, as well as a survival cause of action claims for negligence and wrongful death. They alleged Langford violated Vehicle Code Section 22350 for which California Highway Patrol (CHP) was liable as Langford's employer. At the time of the collision, Langford was driving at an excessive speed without activating his patrol car's lights and sirens.

Langford and CHP each demurred to the first amended complaint, arguing the complaint was barred by investigative immunity conferred under Government Code Section 821.6. This law provides, "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." The trial court granted both demurrers and this appeal followed.

Because Langford was immune from suit under Vehicle Code Section 17004, the California Court of Appeal declined to consider whether he was immune under 821.6. However, the Court did reason that even if Langford was immune from suit under Section 821.6 (in addition to his immunity under Vehicle Code Section 17004), it does not follow that CHP was immune.

The Court first noted that Government Code Section 821.6 immunity, like Vehicle Code Section 17004 immunity, expressly applies only to a "public employee." The court agreed with the Silvas's argument that CHP's immunity does not necessarily flow from any investigative immunity Langford may have under Section 821.6 because the language in Government Code Section 815.2(b). That law limits the public entity's immunity if "otherwise provided by statute." In this case, Vehicle Code Section 17001 provides a separate statutory basis for CHP liability: "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment." Therefore, because the first amended complaint specifically alleged CHP was liable under Vehicle Code Section 17001, it was therefore CHP's burden to establish its affirmative defense of governmental immunity, which it failed to do.

Silva v. Langford, 79 Cal.App.5th 710 (2022).

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RETALIATION

County Defeats Whistleblower Claim That Employee Was Working Below Her Classification.

In 2016, after being released on probation from her position with Sacramento County, Cynthia Vatalaro sued the County for unlawful retaliation under Labor Code Section 1102.5. Vatalaro alleged that her discharge was retaliation against her for reporting that she was working below her service classification. The superior court granted summary judgment for the County. Vatalaro appealed. The California Court of Appeal affirmed the County's win and simultaneously clarified the precise standard for evaluating Labor Code Section 1102.5 claims.

Until recently, courts evaluated 1102.5 claims using a three-part framework. However, the California Supreme Court held that instead, courts are required to use the framework outlined in Labor Code Section 1102.6. Labor Code Section 1102.6 places the burden on the employee to establish that retaliation for the employee's protected activities was a contributing factor in a contested employment action. In other words, an employee must show a *prima facie* claim of retaliation under Labor Code Section 1102.5. Once the employee has made this showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the employment action for legitimate, independent reasons even if the employee had not engaged in protected activity.

Labor Code Section 1102.5 states that "An employer . . . shall not retaliate against an employee for disclosing information . . . to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance . . . if the employee *has reasonable cause to believe* that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation…." (emphasis added).

The Court of Appeal held that Vatalaro could not satisfy the "reasonable cause to believe" component of the prima facie case of retaliation because she admitted in a deposition that she did not have the belief that the content of her job description violated civil service rules.

In the initial phase of this litigation, both Vatalaro and the County interpreted that phrase to mean "reasonably believes." However, the Court of Appeal stated that this interpretation was incorrect and that the two phrases are not equivalent. Indeed, the Court of Appeal noted, a person may have reasonable cause to believe that something is true even if she does not in fact reasonably believe it to be true.

Having established this academic point, the Court of Appeal ended its analysis of this crucial phrase because it found that the trial court's decision could be upheld on another ground. The Court then moved on to the next component of the Labor Code Section 1102.6 framework; whether the employer can demonstrate that it would have taken the contested action for a legitimate, independent reason even had the employee not engaged in protected activity.

Here, the Court of Appeal held that the County had clearly established that it would have taken the action in question for legitimate reasons, even if Vatalaro had not complained she was doing low-level duties. In doing so, the Court relied heavily on the evidence that Vatalaro had been insubordinate, disrespectful, and dishonest. The Court of Appeal found that Vatalaro was unable to rebut any of the three charges and the County was entitled to summary judgment.

Vatalaro v. County of Sacramento, 79 Cal. App. 5th 367 (2022).

Note:

This case serves as an important reminder of the updated standard for whistleblowing claims. Not only must the correct standard be used, but whistleblowing cases may hinge on the difference between whether an employee "reasonably believes" she has blown the whistle or whether she has "reasonable cause to believe" so. Employers now must satisfy the more demanding burden of showing that they would have taken the challenged employment action for a legitimate reason, instead of simply showing a legitimate reason for the action existed.

Legislative Support Staff Can Attend A Closed Session Only In Limited Circumstances.

California's Attorney General's Office recently authored a legal opinion pertaining to the Brown Act. The Brown Act is an open meeting law that generally requires the legislative bodies of local agencies to deliberate and take action in meetings that are open to the public. There are, however, exceptions to this public access requirement.

An agency can meet in "closed session", without the public attending or observing, in certain limited circumstances. One of those circumstances is if the agency wishes to meet with its attorney about pending litigation. Another exception is if the agency will be handling certain sensitive personnel matters.

Generally, only persons who have an "official or essential" role may attend a closed session. A person has an "official" role if they are authorized by a statute to attend the closed session. This means that members of the legislative body conducting the closed session can attend, as well as other individuals who are specifically identified in an exception that allows for a closed session meeting. Those without an "official" designation may only attend a closed session meeting if their presence is "essential" to the agency's ability to conduct closed session business.

This "essential" designation has been used sparingly in the past. For example, when evaluating an employee's disability retirement request, the disabled employee or their representative was deemed "essential" to the determination of the merits of the disability retirement application. However, an alternate board member who would soon be taking the place of an existing board member was not allowed to participate in closed session even though it would have fostered a seamless transition. Finally, a mayor was not allowed to attend closed session to instruct the city's negotiator on real estate matters even though his involvement would have been beneficial.

The public agency that requested this opinion indicated that its legislative staff would attend a closed session meeting to: (1) administer the meeting, (2) take notes, and (3) provide councilmembers with relevant information because staff "may have unique knowledge or information about a particular matter that could assist Councilmembers to better serve their constituency."

The Attorney General stated that because no statute provides for these staff members to fill these roles at closed sessions, they are not designated as "official". The Attorney General also opined that the staff members' presence was not "essential."

The Attorney General stated that most city councils in California do not allow legislative staffers to attend closed sessions, which indicates that councilmembers do not require the presence of individual staff members. The Attorney General also stated that because the legislative bodies themselves administer closed sessions, they do not need legislative staff to do so. The Brown Act authorizes the designation of a clerk to take notes of closed sessions, which means that legislative staff are not needed to perform that function. Moreover, the Attorney General said this last reason was not adequate, and more closely approximates the examples of the mayor and alternate councilmember who were denied attendance at closed session, as discussed above.

Because individual support staff are not allowed to attend closed sessions, they are also not allowed to receive information from the closed session. To allow otherwise, the Attorney General opined, would violate the general intent for closed session information to be kept confidential.

The Attorney General's opinion reminded agencies that two legislative bodies can meet in the same closed session if a statutory exception allowing a closed session applies to both bodies. This would be a fact- based inquiry but generally, so long as an aspiring closed session participant is either "official" or "essential", those participants may attend the closed session meeting.

Opinion No. 21-1102 of Rob Bonta, Attorney General.

Note:

This Opinion from the Attorney General is a good reminder for public agencies that participation in a closed session meeting under the Brown Act is very limited and restricted. Only individuals who are "official" or "essential" may attend closed sessions, and it is very difficult to satisfy the "essential" criteria.

DID YOU KNOW?

Whether you are looking to impress your colleagues or just want to learn more about the law, LCW has your back! Use and share these fun legal facts about various topics in labor and employment law.

- Cal/OSHA may adopt permanent COVID-19 regulations, which would replace the current Emergency Temporary Standards. The regulatory board next meets on August 18, 2022 to decide.

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FIRM VICTORIES

Arbitrator Denies Employee's Out-Of-Class Pay Grievance.

Los Angeles Partner **Adrianna Guzman** and Associate Attorney **Danny Ivanov** convinced an arbitrator to deny an employee's grievance. In 1991, the employee-grievant began working at a public agency as an intermediate typist clerk. In 2005, she was promoted to senior clerk. She alleged that upon her promotion she began performing duties associated with a higher-level classification, which entitled her to a monetary bonus for those additional and higher-level responsibilities.

In the grievance arbitration, the employee-grievant had the burden of proving that she was not only entitled to the bonus, but that she was entitled to the bonus from 2005 to present. At the hearing, LCW and our client established that the true difference between employee-grievant's position and the higher-level classification was computer coding of medical information. The employee-grievant admitted that she had never performed coding work for the employer. The employee-grievant also admitted that she was neither licensed nor certificated in software or computer coding.

The arbitrator denied the grievance, and our client prevailed.

Arbitrator Dismisses Union's Grievance As Untimely.

Senior Counsel **Stefanie Vaudreuil** in our San Diego office was able to show that a union filed its grievance after the applicable deadline had passed. The Memorandum of Understanding (MOU) between the union and the employer stated that the union must file a grievance within 30 calendar days that the union becomes aware, or should have been aware, of the circumstances giving rise to the grievance.
Here, the grievance was filed in May 2021. The grievance alleged that the employer had violated the terms of the MOU by not giving union-represented employees 2.5% salary increases pursuant to a "fairness agreement." Attorney Vaudreuil and our client were able to show that the union should have known of the salary increase for another bargaining unit when the employer approved that unit's MOU in January 2020. This MOU also was posted on the employer's website in March 2020. Further notices were posted in August 2020.

The arbitrator dismissed the entire grievance on grounds of timeliness and our client prevailed.

Arbitrator Denies An Employee's Grievance That He Performed Director Duties.

Los Angeles Partner **Adrianna Guzman** convinced an arbitrator to deny an employee's grievance. In 2017, an employee began working as a Senior Dentist. He reported to the Dental Director, a higher-level position. In 2019, the Dental Director retired, and the employee-grievant claimed that from that time on, he performed the duties of both a Dental Director and a Senior Dentist.

LCW and our client established that the employee-grievant was not entitled to relief under either theory. As an initial matter, the employee-grievant was not entitled to an out-of-class bonus because the agency had eliminated the Dental Director position after the Dental Director retired in 2019. As a result, the employee-grievant could not prove that he was performing the duties of a funded, but vacant position since the position no longer existed. In regards to the second theory, LCW and our client proved that the additional duties that the employee-grievant claimed were simply duties that were already required of a Senior Dentist, or reasonably related to or encompassed by the Senior Dentist duties.

The arbitrator denied the grievance in its entirety, and our client prevailed.

The CPRA Applies To Nongovernmental Entities Only In Very Limited Circumstances.

In April 2019, Lynne Bussey requested a variety of records from the Community Action Agency of Butte County (CAA). CAA is an organization dedicated to alleviating the effects of poverty. CAA declined to provide the records, stating that California law did not require the requested records to be maintained and that CAA was not subject to the California Public Records Act (CPRA). Bussey thereafter sued in superior court to compel CAA to give her the records. The superior court sided with Bussey and directed CAA to produce the records. CAA appealed.

The California Court of Appeal considered whether a nonprofit, nongovernmental entity like CAA was subject to the CPRA. The Court of Appeal developed a four-factor test to evaluate such entities and eventually held that CAA was not subject to the CPRA.

In making this determination, the Court of Appeal examined the reach of the CPRA. The CPRA expressly applies to cities, counties, school districts, municipal corporations, districts, political subdivisions, and, among other entities, "other local public agenc[ies]". Earlier versions of the CPRA also extended its reach to nonprofits. The Court of Appeal noted that the definition of local agency was changed in 1998 to only apply to nonprofits that are legislative bodies of a local agency. The definition was changed again in 2002 so as remove the reference to "nonprofit" and replace it with "entity" to ensure that for-profit entities that were still legislative bodies of local agencies would not be able to circumvent the CPRA.

The Court of Appeal concluded that these changes reflected a desire to include a very limited universe of local nongovernmental entities within the CPRA's coverage. The Court of Appeal held that "other local public agenc[ies]" would be limited to governmental entities. At the same time, the Court of Appeal acknowledged that a nonprofit entity may be a governmental entity and thus an "other local public agency" if the nonprofit operates as a local public entity.

The Court of Appeal developed a four-factor test to determine if a nonprofit entity is operating as a local public entity.

The first factor inquires as to whether the nonprofit entity performs a core government function. Here, the Court of Appeal decided that poverty alleviation is "not a core government function that cannot be delegated to the private sector." The first factor weighed against CAA's inclusion in CPRA coverage.

The second factor reviews the extent to which the government funds the nonprofit's activities. The Court of Appeal found that because public funding amounted to $3.5 million of the CAA's $5.6 million annual total expenses, most of CAA's funding was attributable to public sources. Therefore, the second factor weighed in favor of CAA's inclusion in CPRA coverage.

The third factor evaluates the extent to which the government is involved in the nonprofit's day-to-day activities. Here, the Court of Appeal found that nothing in the record indicated the government was involved in the day-to-day activities of CAA. The Court could not make a determination of this factor's weight.

Finally, the fourth factor asks whether the nonprofit entity was created by the government. Here, private individuals incorporated CAA. But, Bussey showed that the CAA website acknowledged it was created by the Board of Supervisors of Butte County. The Court of Appeal could not make a determination of this factor.

The Court of Appeal stated that because only one of the four factors in this matter weighed in favor of including the CAA in the CPRA statutory scheme, the CAA is not a governmental entity and is therefore excluded from coverage by the CPRA.

Community Action Agency of Butte County v. Superior Ct. of Butte County, 79 Cal. App. 5th 221 (2022).

Note:

This case conveys a new, important, four-factor test that nonprofits can use to evaluate whether they are subject

PUBLIC RECORDS ACT

to the CPRA. This case also serves as a reminder for public entities to carefully evaluate these four factors before creating a nonprofit entity. An evaluation of these four factors will allow a public agency to either avoid or ensure CPRA coverage.

The Government Must Use A Variety Of Terms To Search For Records For A FOIA Request.

Inter-Cooperative Exchange (ICE) is a cooperative of fishers who harvest and deliver crab off the coast of Alaska. In 2005, as part of a program designed to allocate crab resources among the harvesters and coastal communities, an arbitrator developed a price formula to guide the price of crab. In 2014, Alaska increased the minimum wage, which raised the question of whether this increase should be included in the price formula. A member of a U.S. Government Regional Council tasked with making this decision, Glen Merrill, advocated for including this extra cost. He was unsuccessful.

ICE thereafter filed a Freedom of Information Act (FOIA) request, a federal governmental document public access law upon which California's Public Records Act is modeled. The request sought information behind Merrill's and the government's actions, including records related to "crab arbitration system standards" and "the Alaska state minimum wage increase". The government produced 146 records along with a search log that showed that the government had searched Merrill's emails, network and desktop using three search terms: "binding arbitration", "arbitration", and "crab". Merrill also submitted a declaration stating that he did not own a government cellphone but had searched his personal cellphone with the three terms and had found no responsive records.

ICE was unsatisfied with this response and filed suit to compel the government to conduct a more thorough search and produce further records. The Ninth Circuit Court of Appeals reviewed this suit and held that the search terms used were not reasonably calculated to uncover all documents relevant to ICE's request.

The critical inquiry was whether the government's selection of the three search terms was reasonably calculated to uncover all responsive documents. The Ninth Circuit explained that the test for making this determination was one of reasonableness, while keeping in mind that "FOIA requests are not a game of Battleship", and also that requestors are not entitled to a "perfect" search.

The Ninth Circuit compared the government's search here to two previous cases, in which the government had used a variety of keywords which included common misspellings and alternate spellings. The Ninth Circuit concluded that the government's search was inadequate for three reasons.

First, the terms did not cover the part of the FOIA request that was related to the Alaska minimum wage. Second, the search terms did not encompass the broad request for records relating to crab arbitration. Third, the terms did not account for related variants and shorthand terms. Thus, the government was unable to meet its burden of showing the adequacy of their search beyond a material doubt.

The Ninth Circuit also determined that aside from the inadequate search terms, allowing Merrill to personally search his personal cellphone by looking for or listening to keywords was indeed reasonable. Aside from the inadequacy of the chosen search terms, the fact that the government showed that Merrill did not use his personal cell phone for government business and that he searched his text messages, Facebook account, WhatsApp account, and voicemails for records was enough to convince the Ninth Circuit that the search of Merrill's cell phone was "reasonably calculated to uncover all relevant documents."

Inter-Coop. Exch. v. United States Dep't of Com., 36 F.4th 905, 913 (9th Cir. 2022).

Note:

This case illustrates just how important it is for public entities to provide a detailed accounting of the search they undertake in response to CPRA or FOIA requests. Adequate search terms should always be chosen, and a diligent search should always be conducted.

Timing Of CPRA Request Prevented Disclosure Of Peace Officer Records.

Jerald Wyatt was a police officer for Kern High School District (KHSD). During Kern's employment, an internal affairs investigation was opened into allegations against him. By the time the investigation was completed, the KHSD no longer considered Wyatt an active employee. In November 2017, Wyatt requested to review his KHSD personnel records. He made the request because he had "been offered a position with the Kern County [District Attorney's] Office as an Investigator," and the DA was about to conduct his background investigation. When Wyatt requested access to his personnel file, he discovered a document listing two sustained findings for "Misuse of [the California Law Enforcement Telecommunications System]" and "Dishonesty." Wyatt claimed that he was not notified of these findings.

On January 1, 2019, Senate Bill 1421 (SB 1421) went into effect. This law permits certain types of peace officer personnel records to be disclosed under the California Public Records Act (CPRA). The disclosable records include records relating to sustained findings of certain dishonesty-related peace officer misconduct. Prior to this law, such records were only accessible via a *Pitchess* motion.

Following the enactment of SB 1421, KHSD received various records requests seeking information concerning KHSD officer-involved events. On April 25, 2019, upon receipt of the CPRA requests, KHSD notified Wyatt that it had identified "documents from [Wyatt's] personnel file responsive to these requests".

Upon receipt of the notification, Wyatt filed a petition for a writ of mandate, temporary restraining order, and preliminary injunction, to enjoin KHSD from producing his personnel documents in response to the CPRA requests. He argued that the records at issue did not relate to "sustained" findings (as the term is defined in Penal Code Section 832.8(b)) because he was never notified of such findings, and did not receive an opportunity to administratively appeal. KHSD argued that Wyatt's voluntary separation of employment precluded KHSD from imposing discipline, and, there was therefore no need for KHSD to provide Wyatt with notice and an opportunity for administrative appeal. KHSD contended Wyatt's voluntary separation of employment from KHSD effectively waived his right to any administrative appeal.

The trial court determined KHSD was had an obligation to give proper notice of a 'final determination' [to Wyatt] if one had been made, and not simply place a "memo to file" among other records. The trial court ruled "[t]he subject records relate to an incident for which there was no 'sustained finding' within the meaning of Penal Code [Section] 832.7 (b), and are therefore confidential and exempt from disclosure under state law," citing Government Code Section 6254(k) and Penal Code Section 832.7(a). KHSD appealed to the Fifth District of the California Court of Appeal.

The appellate court examined the statutes at issue. The term "sustained" as used in Penal Code Section 832.7 is (and, at the time of the CPRA requests, was) defined in Penal Code Section 832.8 as: " 'Sustained' means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or departmental policy.

The Court found the statutes continue to protect peace officer privacy interests except for certain records including those that relate to "sustained" findings involving certain types of officer misconduct. The Court also found that the alleged "sustained" findings contained in the IA findings document do not fit precisely within the plain language of Senate Bill 1421 since Wyatt was never provided notice and an opportunity to challenge the findings by way of an administrative appeal. The appellate court concluded that the records at issue were not disclosable.

The appellate court also noted that the CPRA request at issue in this case was was made before January 1, 2022. Senate Bill 16, which went into effect on January 1, 2022, after the CPRA request in this case. Under Senate Bill 16, "Records that shall be released pursuant to this subdivision also include records relating to an incident … in which the peace officer or custodial officer resigned before the law enforcement agency … concluded its investigation into the alleged incident." (Penal Code Section 832.7(b)(3).) As a result, the Court directed the trial court to limit the injunction to prohibit disclosure of the subject records only in response to those CPRA requests received by KHSD prior to January 1, 2022. To the extent KHSD may receive future CPRA requests on or after January 1, 2022, seeking disclosure of the subject records, the Court said that neither its opinion in this case nor the judgment or writ issued in the trial court will determine whether the subject records should be disclosed.

Wyatt v. Kern High School, 2022 WL 2662880.

NOTE:

The Court found that Senate Bill 16, effective January 1, 2022, made the issue of a sustained finding irrelevant if a subject peace officer resigns before the law enforcement agency concludes its investigation into alleged misconduct.

BENEFITS CORNER

Important Reminder: Agencies Must Amend Section 125 Plans To Reflect Adopted COVID-19 Changes by the December 31, 2022 Deadline.

Public agencies who established flexible changes or extensions for employer-sponsored health coverage, health flexible spending accounts (health FSAs), or dependent care assistance programs (DCAPs) in response to COVID-19 in 2021, must ensure they affirmatively amend their Section 125 plan documents to reflect the changes by December 31, 2022. Agencies should start preparing these amendments now in order to adopt them by the strict deadline.

In 2021, employers were allowed to adopt flexible options to permit employees to make mid-year election changes to their health coverage, health FSAs, and DCAPs; adopt carryovers and increase carryover amounts; extend grace periods; spend down health FSA funds; increase a dependent's maximum age for DCAP fund coverage; and increase the maximum DCAP contribution. While the flexible changes were optional, any employer who took advantage of the flexible changes in 2021 is required to adopt a written plan amendment to reflect these changes. The amendments must be adopted by December 31, 2022 in order for them to apply retroactively to 2021.

IRS Issues Guidance On What Qualifies As "Medical Care" For Reimbursement Under A Health FSA.

The IRS issued Information Letter 2022-0005 providing guidance about what qualifies as "medical care" that can be reimbursed under a health flexible spending account (health FSA) or health savings account (HSA). Since the expenses permitted to be reimbursed by health FSAs and HSAs have changed over time, the IRS guidance provides welcome clarification on how to determine what expenses may be reimbursed.

Section 213(a) of the Internal Revenue Code allows tax deductions for expenses paid for medical care that have not been paid for by insurance. Section 213(d)(1)(a) defines "medical care" as amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. The Treasury Regulations limit deductions to expenses paid primarily for the prevention or alleviation of a physical or mental defect or illness. Taxpayers are prohibited from deducting personal, family or living expenses as "medical care" if they do not fall within Section 213's definition.

In IRS Information Letter 2022-0005, the IRS was asked whether health and wellness coaching for alleviation or prevention of a disease or chronic health risk qualified as "medical care." While the IRS did not answer that specific question, the IRS provided guidance that taxpayers should use objective factors to determine whether an expense that is typically personal in nature was incurred for medical care. The factors may include:

- The taxpayer's motive or purpose for making the expenditure;
- A physician's diagnosis of a medical condition and recommendation of the item as treatment or mitigation;
- The relationship between the treatment and the illness;
- The treatment's effectiveness;
- The proximity in time to the onset or recurrence of a disease;
- Whether the costs are incurred for diagnosing, treating, mitigating, preventing, or alleviation of the taxpayer's disease;
- Whether the costs are merely beneficial to the taxpayer's general health such that they might be considered the taxpayer's personal expense; and
- Whether the taxpayer would not have incurred the expense but for the taxpayer's medical condition.

The IRS' guidance will help employers and third party administrators determine what expenses are reimbursable as "medical care" for employer-offered health FSAs and HSAs. For more information, the IRS Information Letter 2022-0005 can be found here: https://www.irs.gov/pub/irs-wd/22-0005.pdf.

LCW In The News

To view these articles and the most recent attorney-authored articles, please visit: **www.lcwlegal.com/news**.

- Partner **Geoff Sheldon** and Attorney **Paul Knothe** authored an insightful article titled "For The Record" in the May/June issue of *Sheriff & Deputy* that addresses SB16 and the laws surrounding The Freedom of Information Act. Agencies in California are strongly advised to work closely with their legal advisors to ensure they are complying with the public's right to information and officers' confidentiality rights as to not leave themselves open to liability for violations of those rights. Click here for access to the full article (Page 62-63).
- Attorney **Lisa S. Charbonneau**, who regularly advises public employers in California on wage and hour compliance, shared her thoughts on seasonal employment in "Summer Shines Spotlight On Seasonal Wage Exemption," which was published in the June 24th Employment Authority section of *Law360*. In the piece, Lisa addresses employment overtime exemption laws and how they affect seasonal employers. To read the full article, please click here (Law360 subscription required).
- Senior Counsel **Dave Urban** authored an article in *IPMA-HR* titled "High Court Ruling: Football Coach's Prayers Amount to Private Speech." Dave states, "This case not only involves free speech rights of a public school football coach to engage in prayer at games, but involves issues of establishment of religion and free speech as it applies in the entire public employment and education sector. The court's opinion squarely addresses the current framework for speech law as it applies to talking about religion in or around the workplace."
- Published in the Labor and Employment section of the *Daily Journal*, LCW Partner **James Oldendorph** and Attorney **Ashley Sykora** authored an insightful article titled "Game-changing Legislation Concerning Peace Officer Employment and Decertification." This article evaluates the new regulations surrounding SB 2 and its effects on Peace Officer employment by promoting transparency and accountability in misconduct by opening the doors to Peace Officer decertification.
- Featured on the home page of *The Recorder*, a Law.com publication, LCW attorney **Nathan Jackson** authored a well-grounded article entitled "California's Draft Regulations Addressing AI in Employment Thrusts Employers into Regulatory Wild West." This article sheds light on the use of artificial intelligence in hiring practices and the regulations being imposed to protect job seekers from algorithmic bias.
- Senior Counsel **Dave Urban** shared his thoughts on *Kennedy v. Bremerton*, along with other hot-button issues that have arisen in 2022 in *Law360*'s "4 Key Employment Rulings In First Half of 2022." He notes that "the ruling is directly applicable for public employers like counties, cities and schools where situations often arise in which employees engage in potentially problematic speech."
- Senior Counsel **Dave Urban** authored an Expert Analysis published by *Law360* which speaks on the *Kennedy v. Bremerton School District* ruling. Dave states that employee speech "on a matter of public concern that is outside official duties has First Amendment protection if the speech survives the applicable balancing test of interests, which courts test on a case-by-case basis."

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's employment relations consortiums may speak directly to an LCW attorney free of charge regarding questions that are not related to ongoing legal matters that LCW is handling for the agency, or that do not require in-depth research, document review, or written opinions. Consortium call questions run the gamut of topics, from leaves of absence to employment applications, disciplinary concerns to disability accommodations, labor relations issues and more. This feature describes an interesting consortium call and how the question was answered. We will protect the confidentiality of client communications with LCW attorneys by changing or omitting details.

Question

I understand that the Equal Employment Opportunity Commission (EEOC) updated its guidance on July 2022 regarding how certain COVID-19 policies and practices interact with the Americans with Disabilities Act. Do I need to remove my agency's mandatory vaccination policy?

Answer

No. So long as employers engage in the interactive process with any employee who requests an accommodation as to a universally applicable workplace standard -- in this case, a mandatory COVID-19 vaccination policy -- such policies are still permissible.

The EEOC simply clarified that employers may implement these policies if the policy satisfies the "job related and consistent with a business necessity" standard as applied to that employee. This clarifies ambiguity in the prior guidance, which suggested that the policy must satisfy the standard when applied to all employees. Employers may require compliance with a COVID-19 vaccination requirement so long as the requirement is consistent with business necessity. This will require a case-by-case analysis as to whether the requirements are appropriate for each position covered by the requirement. If a particular employee cannot meet such a COVID-19 vaccination requirement because of a disability, the employer must be able to demonstrate that the employee's continued performance of their job duties would pose a "direct threat" to the health or safety of the employee or others.

For a complete overview of the updated EEOC guidance, please consult this Special Bulletin.


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