LCW Liebert Cassidy Whitmore

Education Matters

News and developments in education law, employment law, and labor relations for School and Community College District Administration.

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LCW NEWS

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TITLE IX

University's Single Investigator Model that Requires Individual to Investigate and Adjudicate Complaint Without Providing a Hearing or the Right to Confront Adverse Witnesses Does Not Provide Fair Hearings to Students.

John Doe, a freshman attending the University of Southern California ("USC") on a football scholarship, and Jane Roe, a senior and student athletic trainer, engaged in sexual intercourse in Doe's campus apartment in October 2014. Doe believed the encounter was consensual. Roe claimed it was not. Roe reported the alleged misconduct to USC's Title IX Office, and met with the investigator assigned to the investigation.

Roe reported she arrived at Doe's apartment "tipsy," they went out to get food, and when they returned, smoked marijuana in Doe's room. Roe reported that Doe then committed forcible sexual acts against her in his bedroom. Roe provided the investigator with photos of bruises on her thighs, chest, and arm, and screenshots of text messages with her roommates with whom she discussed the incident after it happened.

USC notified Doe of the report of sexual misconduct against him, and Doe met the investigator the next week. During the meeting, Doe described another sexual encounter he had with Roe weeks before the reported misconduct. Doe denied he and Roe smoked marijuana at his apartment during the incident in question and denied he engaged in forcible sexual acts. In a second meeting with the investigator, Doe changed his testimony regarding when he smoked marijuana on the night in question but reiterated that Roe did not smoke. The investigator later opened a second case against Doe regarding the earlier incident Doe described in the interview.

The investigator contacted all individuals the parties had identified as potential witnesses but did not attempt to contact anyone who had been mentioned during the investigation but not fully identified.

On February 10, 2015, the investigator permitted the parties to view the information she gathered during the interviews and closed the investigation the next day.

Under USC's Sexual Misconduct Policy, the Title IX investigator alone makes findings of fact and, using a preponderance of the evidence standard, determines whether the student violated the Student Conduct Code. USC

does not conduct in-person hearings, and the accused student has no right to confront his or her accuser. The investigator imposes the sanction that he or she deems appropriate. Either party may appeal the result of the investigation, and an anonymous three-member panel reviews the appeal and makes a recommendation solely on the basis of documents. The panel forwards its recommendation to the Vice Provost who has unfettered discretion to accept, reject, or modify that recommendation based on his or her review of the record. The Vice Provost's decision is final.

Here, the investigator concluded Doe violated the Student Conduct Code and "more likely than not, engaged in unwanted sexual conduct…" The investigator determined the parties' conflicting accounts could not be reconciled, and found Roe's account more credible for several reasons that the investigator explained in the report. The investigator determined that expulsion and an order prohibiting Doe from contact with Roe were appropriate sanctions. USC notified the parties of the investigator's findings and conclusions and their right to appeal.

Doe submitted an appeal to the Student Behavior Appeals Panel. He stated the grounds for his appeal were: (1) new evidence had become available which was sufficient to alter the decision and about which Doe was not aware and could not reasonably have obtained at the time of the original investigation; (2) the investigator and USC committed procedural errors materially impacted the fairness of the investigation; and (3) the evidence did not support the investigator's conclusions and determination regarding sanctions.

The panel met to review the case file, rejected Doe's contentions, and upheld the sanction of expulsion. The Vice Provost accepted the panel's recommended expulsion and expelled Doe.

Doe filed a challenge in the trial court asking the court to review USC's decision. The trial court rejected Doe's contentions that he was denied due process, that the investigator or the Vice Provost were biased, and that there was insufficient evidence to support the investigator's findings. Doe appealed.

The Court of Appeal found Doe did not provide evidence to demonstrate that the investigator's findings and conclusions were premised on actual bias against him or generally against anyone accused of sexual assault, or that there was a high probability of such bias. However, the Court concluded USC's process was fundamentally flawed.

The Court held that in a case such as Doe's, in which a student faces serious discipline for alleged sexual misconduct, and the credibility of witnesses is central to the adjudication of the charge, fundamental fairness requires that the university must at least permit cross-examination of adverse witnesses at a hearing in which the witnesses appear in person or by some other means (such as videoconferencing) before one or more neutral adjudicator with the power independently to judge credibility and find facts. The factfinder may not be a single individual with the divided and inconsistent roles the Title IX investigator occupied here in the USC system.

Here, the disciplinary process outcome turned on witness credibility. Roe and Doe offered inconsistent accounts of whether their sexual encounter was consensual. Evaluation of the credibility of the only witnesses to the event was pivotal to a fair adjudication.

Furthermore, the Court found the investigator used her discretion to determine credibility in questionable ways—rejecting Doe's explanation for Roe's motive in claiming sexual misconduct despite investigative leads that, if pursued, would have lent support to Doe's theory and weakened Roe's credibility. The investigator did not follow up with presumably identifiable and available witnesses who might have filled in holes in the investigation, thus providing a fuller picture from which to make credibility determinations. The investigator also failed to follow up with the Athletic Department to

determine its policies and practices regarding sexual relations between student trainers and athletes that were relevant to assessing the witnesses' credibility.

Overall, the Court found USC's system, which places in a single individual the overlapping and inconsistent roles of investigator, prosecutor, factfinder, and determiner of sanctions, failed to provide Doe a fair hearing. Accordingly, USC's findings that Doe committed sexual misconduct in violation of the Student Conduct Code cannot stand. The Court of Appeal reversed the trial court's decision and directed the trial court to grant Doe's petition to the extent it sought to set aside the findings that he violated USC's student conduct code. USC was not required to reinstate Doe as a student as he was expelled for independent violations of the Student Conduct Code that occurred while this case was pending.

Doe v. Allee (2019) 30 Cal.App.5th 1036.

NOTE:

Many California colleges and universities use an "investigator model" for disciplinary proceedings, in which there is no formal hearing prior to imposition of student discipline. The Court of Appeal decisions in this case and Doe v. Claremont McKenna (2018) 25 Cal.App.5th 1055 may therefore require some revisions to district student conduct policies and procedures that use processes similar to "investigator model" to provide for hearings and allow for cross-examination of the complainant.

Schools, colleges, and universities should work with legal counsel to review and potentially update their policies and procedures in light of these decisions. In doing so, educational entities should consider including a "hearing" component, but also seeking to define what constitutes a "severe penalty" and provide guidance to fact finders for assessing the credibility of witnesses. When updating such policies and procedures, educational entities must consider their obligations under Title IX, as well as other federal and state laws and regulations governing due process.

EMPLOYEE DISCIPLINE

Brown Act Requirement to Provide 24-Hours' Notice to Employee Before Board's Hearing of Complaints or Charges Brought Against the Employee Does Not Apply if Board Considers the Appointment, Employment, Evaluation of Performance, Discipline, or Dismissal of Employee.

Arlie Ricasa was an academic administrator at Southwestern Community College District. This position required Ricasa to avoid any conflicts of interest, refrain from using District time and equipment for non-District activities, act within the law, and not use the position to benefit herself. Ricasa also served as an elected board member of a separate entity, a K-12 school district in San Diego County.

In January 2012, Ricasa faced criminal charges for bribery and corruption arising from her service on the K-12 District Board of Education. Ricasa ultimately pleaded guilty to one misdemeanor count of violating the Political Reform Act, which prohibits public officers of local agencies from receiving gifts from a single source in excess of $420. Ricasa resigned her position on the K-12 District Board of Education as part of her guilty plea.

In February 2014, Southwestern notified Ricasa it was considering terminating her employment as an academic administrator and demoting her to a faculty position. Southwestern conducted a predisciplinary *Skelly* meeting and later notified Ricasa that under Education Code section 87669, her demotion could take place immediately upon service of the amended notice of charges.

In April 2014, Southwestern's president/superintendent agreed with the demotion recommendation and placed the matter on the Board of Trustees' agenda for closed session on May 7, 2014, to address "Public Employee Discipline/Dismissal/Release."

As required by Education Code, Ricasa received the Board's decision advising her that she was disciplined under Education Code sections 87671 and 87732, demoted to the faculty position of academic counselor "effective immediately," she had a right under Education Code section 87673 to object and request a hearing, and that the written charges against her were attached. Ricasa timely appealed.

An administrative law judge from the Office of Administrative Hearings conducted an evidentiary hearing regarding Ricasa's discipline and upheld Southwestern's decision to demote Ricasa.

Before the administrative law judge rendered her decision, Ricasa filed a petition in trial court asking the court to rule that Southwestern violated the Brown Act. She alleged that it failed to report the action taken at the May meeting in violation of the Brown Act and was likely to continue to violate the Brown Act's open meeting requirement in the future. She sought to prohibit Southwestern from repeating these alleged violations.

After the administrative law judge's decision, Ricasa filed a second petition in trial court asking the court to set aside the administrative law judge's decision because the evidence did not support the findings.

The trial court agreed with the administrative law judge regarding Ricasa's demotion. However, the trial court found that Southwestern was obligated to provide 24-hour notice to Ricasa under the Brown Act prior to the May Board meeting. Nonetheless, the trial court concluded that this claim for a past violation of the Brown Act was barred because Ricasa did not timely submit the required cease and desist letter under Government Code section 54960.2. The court entered judgment in favor of Southwestern on Ricasa's claim for a past violation of the Brown Act. To the extent Ricasa sought to prevent future violations of the Brown Act, the trial court issued an order prohibiting Southwestern from violating the open meetings requirement and 24-hour notice requirement of the Brown Act. Both parties appealed.

The Brown Act requires that school district board meetings be open to the public. Closed sessions may only be conducted if authorized by statute. One such statutory authorization is Government Code section 54957, which allows a local agency to hold a closed session hearing "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session." As a condition to holding a closed session on specific complaints or charges brought against an employee by another person, the agency must provide the employee written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session is void.

The Court considered whether the Board considered the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or whether the Board heard complaints or charges brought against the employee by another person or employee. In the former instance, the personnel exception applied and Ricasa did not have the right to 24-hour notice, while in the latter instance she had this right.

The evidence showed that the president/superintendent only presented her recommendation to the Board along with all the documentation required by the Education Code at the May meeting. The Board only debated whether the undisputed facts warranted discipline. Accordingly, because the Board did not consider a complaint or charge, the 24-hour

rule did not apply, and the District did not violate the Brown Act.

The Court also held that Southwestern did not violate the Brown Act in handling Ricasa's demotion. Moreover, Ricasa did not present evidence showing that Southwestern ever violated the Brown Act, so the trial court erred in issuing an order to prevent future Brown Act violations.

Finally, the Court of Appeal held that substantial evidence supported Southwestern's decision to demote Ricasa based on immoral or unprofessional conduct connected to her ability to carry out her job duties as an academic administrator, and Southwestern did not abuse its discretion when choosing this penalty.

Ricasa v. Office of Administrative Hearings (2018) __Cal. App.5th __ [2018 WL 7021473].

NOTE:

LCW attorneys are experienced in administrator termination issues and regularly assist K-12 school districts, community college districts, and universities on these issues. LCW attorneys can analyze the applicable employment agreements, policies, and procedures to ensure the termination process runs smoothly.

CHARTER SCHOOLS

Charter Schools Subject to State Laws Regarding Open Meeting, Public Access to Information, Conflict of Interest, and Inspection by a Grand Jury.

In a recently published opinion, the California Attorney General considered whether charter schools and their governing bodies are subject to the open-meeting rules of the Brown Act and the information-access rules of the Public Records Act. The Attorney General concluded a charter school is a "school district … or other local public agency" within the meaning of the Brown Act and the Public Records Act and therefore is subject to those laws. A charter school's governing body is, therefore, a "legislative body" within the meaning of Government Code section 54952, subdivision (a).

The Attorney General did not find that the doctrine of "mega-waiver" under Education Code section 47610 precluded applying the public access laws to charter schools, and a charter school's corporate governance structure did not exempt it from the laws' coverage.

The Attorney General also stated a California charter school's governing body is subject to Government Code section 1090, which broadly prohibits conflicts of interest in public contracts, and the Political Reform Act of 1974, which also provides conflict-of-interest provisions.

Lastly, the opinion determined that for schools chartered by either a local school district or a county board of education, a grand jury may review and inspect the school's books and records pursuant to Penal Code section 933.6. However, Penal Code section 933.6 does not apply to charter schools chartered directly by the State Board of Education because the statute does not provide authority for a grand jury to examine the books and records of a state agency.

To read the Published Attorney General Opinion No. 11-201, visit here.

__ Ops.Cal.Atty.Gen. __ (2018) [2018 WL 6844116].

BUSINESS & FACILITIES

California Court of Appeal Invalidates School District Board's Imposition of $500,000 Fee on New Residential Development and Requires Refund.

Education Code section 17620 authorizes a school district to levy a fee against any new residential construction within school district boundaries

to fund the construction of school facilities. Such fees are known as "Level 1" fees. Under California Government Code section 66001, to impose Level 1 fees on a developer, the district must: (i) identify the purpose of the fee; (ii) identify the use to which the fee is to be put and if the use is to finance public facilities, identify the facilities; and (iii) establish a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

In February 2012, the Campbell Union School District ("CUSD") hired a consultant to prepare a Level 1 fee study. The fee study calculated that CUSD's enrollment exceeded capacity by 311 students, and projected growth of 359 additional students over the next five years. It devoted one paragraph to addressing how much new residential construction was expected within CUSD's boundaries in the next five years, stating only that there were in excess of 133 residential units that could be constructed in that time period. The study projected a cost of $22,000 to house students in new facilities based on projected costs of constructing two hypothetical new schools which CUSD conceded were not needed. In reliance on the study, the CUSD Board enacted a resolution imposing a fee of $2.24 per square foot on new residential construction.

SummerHill Winchester, LLC owned a residential development project within CUSD's boundaries at the time the Board enacted the resolution. It tendered approximately $500,000 fees to CUSD under protest, and subsequently filed a challenge to the resolution and assessment seeking refund of fees and a declaration that the fees were invalid. Summerhill argued, among other things, the fees lacked an essential nexus between the amount of the development fees imposed and CUSD's alleged need to construct facilities for reasons attributable to the development project.

The trial court agreed, concluding that the fee study did not contain sufficient support for the Board's resolution enacting the fees. The fee study failed to: (i) project the total amount of housing that was to be constructed in the district; (ii) adequately estimate the number of new students in the district resulting from the new development; and (iii) did not establish the necessary relationship between the number of new students and the proposed capital facilities. The trial court noted as significant that the fee study cost calculation was heavily dependent on two hypothetical new schools, which may never be constructed. The trial court ultimately ordered CUSD to refund SummerHill's fees. CUSD appealed.

The Court of Appeal affirmed. Facilities fees are justified only to the extent that they are limited to the cost of increased services made necessary by virtue of the development. The fee study failed to establish this essential nexus and thus, the Board abused its discretion in relying on the fee study to impose the fees. The study failed to adequately project: (i) the total amount of new housing expected within the District; (ii) the number of new students that would result from such housing; (iii) whether new facilities would be required to accommodate increased enrollment; and (iv) the type of such facilities, if any. The Board's decision to enact fees was invalid because the Board did not decide that its enrollment increases would necessitate the construction of new schools, but it nevertheless based the amount of the development fee on the cost of building new schools. The key missing element was what new facilities would be necessary for the new students generated by the residential development.

SummerHill Winchester LLC v. Campbell Union School District et al. (2018) 30 Cal.App.5th 545.

Labor Code Section 1072 Requires Public Agencies to Provide a Ten Percent Bidding Preference to Service Contractors Only if Contractors Expressly State They Will Retain Employees of the Prior Contractor for at Least 90 Days in their Respective Written Bids.

Labor Code section 1072 creates a bid preference for service contractors that promise to retain employees in connection with their bid. Specifically, Section 1072 subdivision (a) states: "A bidder shall declare as part of the bid for a service contract whether or not the bidder will retain the employees of the prior contractor or subcontractor for a period of 90 days…if awarded the service contract." Section 1072, subdivision (b) states an awarding authority "shall give a 10-percent preference to any bidder who agrees to retain the employees of the prior contractor or subcontractor" under subdivision (a).

The City of Monterey Park contracts with private companies to operate its municipal bus system. MV Transportation, the incumbent contractor, stated in its bid for a renewed contract that it would retain existing employees for at least 90 days, and the City awarded MV Transportation a 10 percent preference under Section 1072. However, the City also gave First Transit a 10 percent preference under Section 1072, even though First Transit did not state in its bid it would retain the employees of MV Transportation for 90 days. The City awarded the contract to First Transit. Three bus operators of MV Transportation and their union subsequently filed a petition for writ of mandate and a complaint for declaratory relief, alleging the City violated Section 1072 in awarding First Transit the 10 percent preference.

The City demurred to the union's complaint, and the trial court sustained the demurrer without leave to amend. It concluded that Section 1072 does not require an express statement in a bid regarding the 90-day guarantee of employee retention. Instead, bidders may communicate to an awarding agency a "willingness to retain some or all of the employees of the prior contractor or subcontractor." In such circumstances, the agency retains discretion to confer a 10 percent preference. The union appealed.

The Court of Appeal reversed. It held that Section 1072 is unambiguous and requires a bidder to state in its bid whether it will retain employees for at least 90 days in order to receive the preference. The Court expressly rejected the City's argument that it had discretion to give the same 10 percent preference to award bidders the same preference even if they do not make any statement regarding 90-day employee retention. The City's interpretation would undermine the purpose of the statute: to afford public transit employees a measure of job security by giving retained employees 90 days to prove their worth to the new contractor or to seek other employment. A bidder would have no incentive to offer to retain employees for at least 90 days as part of its bid if the awarding agency could give the same preference to any bidder who did not make the same agreement.

International Brotherhood of Teamsters, Local 848 v. City of Monterey Park (2019) 30 Cal.App.5th 1105.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney as part of the consortium service to answer direct questions not requiring in-depth research, document review, written opinions, or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

ISSUE: An HR Director at a community college called and wondered if there were any special requirements for the District to non-renew the employment contracts of a first or second year probationary faculty member (also known as contract employee) for the following academic year.

RESPONSE: The attorney responded that if the district decides to end the employment relationship with the employee, the district's governing board must give written notice of its decision and the reasons for the decision to the employee on or before March 15 of the academic year covered by the existing contract. The District must send the notice by registered or certified mail to the most recent address on file with the district's personnel office. If the district does not provide the required notice, the employee's contract is extended without change for two academic years.

PREVAILING WAGE

Court Adopts Broad Definition of "Public Works" That Are Subject to California's Prevailing Wage Law.

David Kaanaana and others were former employees ("employees") of Barrett Business Services, Inc. ("Company"). The Company supplied employees to publicly-owned and operated recycling facilities through contracts with the Los Angeles County Sanitation District. The employees worked at the recycling facilities as belt sorters. Their work consisted of standing at sorting stations placed along a conveyor belt; removing recyclable materials from a conveyor belt; and placing the material into receptacles at their sorting stations.

Kaanaana and other employees sued, claiming that the Company failed to pay them the "prevailing wage" they were owed under California law. They asserted that their recycling sorting duties constituted "public work" under the California Labor Code which states:

> "[e]xcept for public works projects of … ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works." (§ 1771.)

This section of the Labor Code applies to work performed under contract with public agencies, but not to work that a public agency performs using its own labor force.

The Court of Appeal agreed with the employees and found that this recycling was "public work" that is subject to prevailing wage law. This was the case even though recycling sorting work is not specifically listed among the categories of public work in the Labor Code.

The Court reviewed the plain language and legislative history of the Labor Code and determined that the definition of "public work" had broadened over time to cover work beyond that associated with construction projects. The purpose of the prevailing wage law had also expanded to protect employees from substandard wages, and to compensate nonpublic employees with higher wages. The Court of Appeal reversed the judgement that narrowly defined "public works" and remanded the case back to the trial court.

Kaanaana v. Barrett Business Services et al. (2018) 29 Cal. App.5th 778.

NOTE:

LCW attorneys are experienced in prevailing wage issues and regularly assist special districts and other public agencies on these issues.

Personnel Rules that Restricted On-Duty Protected Activity Were Lawful, but Rule that Restricted Off-Duty Activity Was Not.

The Court of Appeal found that a trial court employer, the Superior Court of Fresno County ("employer" or "Court"), was justified in adopting personnel rules that prohibited employees from wearing any insignia at work, or soliciting during work hours, among other things. The represented Court employees included over 300 office assistants, judicial assistants, account clerks, court reporters and marriage and family counselors. The Personnel Rules in question prohibited them from: (1) wearing clothing or adornments with any writings or images, including pins, lanyards and other accessories; (2) soliciting during work hours for any purpose without prior Court approval; and (3) distributing literature during non-work time in working areas, among other things.

Restriction on wearing any writings or images

The Court employer argued that its prohibition on insignia was necessary to preserve the appearance of impartiality of court staff and personnel to people who interact with the judicial branch. The employer also presented evidence showing that the affected employees work in various areas of the court that are visible to the public to some degree, and that the employees regularly move throughout the courthouse to perform their duties.

State and federal laws generally provide public employees the right to wear union buttons and other union paraphernalia at work, except in "special circumstances" that justify a prohibition. To decide whether special circumstances exist, PERB and the courts weight the right of employees to wear union insignia against any legitimate employer interest in prohibiting this activity. The specific details of the employer's operations, and employee interactions with the public are relevant to the analysis.

The Court of Appeal noted that that the "legitimacy of the Judicial Branch depends on its reputation for impartiality and nonpartisanship," and this necessarily requires the courts to maintain a neutral appearance. Evidence also showed that court employees regularly interacted with the public and that employees are subject to a code of ethics that requires them to maintain the appearance of impartiality. Therefore, the Superior Court of Fresno had a substantial interest in regulating its workforce to ensure that the judicial process appears impartial. The Court of Appeal found that this justified the broad restrictions on wearing union insignia.

Prohibition on solicitation during working hours for any purpose

Contrary to PERB's findings, the Court of Appeal found that the Court employer's ban on soliciting during working hours for any purpose was lawful. The rule prohibited solicitation during "working hours," and defined "working hours" as "the working time of both the employee doing the soliciting and distributing and the employee to whom the soliciting is being directed." It was reasonably susceptible to only one interpretation; that employees are prohibited from engaging in solicitation during working time but may engage in solicitation during nonworking time. Thus, that Personnel Rule was lawful.

Prohibition on distribution of literature during nonworking time

The Court of Appeal found the Court employer's Personnel Rule restricting distribution of literature "at any time for any purpose in working areas" was impermissibly ambiguous. The rule did not define the term "working areas." Moreover, mixed-use work and non-work areas existed at the Court, and other Personnel Rules only generally referred to "court property." In this context, a Fresno Superior Court employee could reasonably interpret the rule to mean that distribution was prohibited in mixed-use areas even during an employee's off-duty time, and in non-work areas during the employee's

off-duty time. Therefore, this Personnel Rule impermissibly interfered with employee protected rights to distribute literature during non-work time under California's Trial Court Act.

Superior Court of Fresno v. Public Employment Relations Board (2018) 30 Cal.App.5th 158.

NOTE:

Whether "special circumstances" will justify restrictions on the wearing of union insignia must be analyzed on a case-by-case basis because of the wide variety of work settings, and services provided by public agencies. LCW attorneys can analyze your agency's personnel rules and policies, including those that impact protected concerted activities.

RETIREMENT

PEPRA's Forfeiture Provisions Applied to Convicted Employee-Embezzler.

Jon Wilmot was a long-term employee of the Contra Costa County Fire Protection District ("District"), and a member of the retirement program administered by the Contra Costa County Employees' Retirement Association ("CCERA"). Wilmot retired from his position as Fire Captain. His last day of work was December 12, 2012. He applied for a service retirement to CCERA the following day.

Soon after, on January 1, 2013, the Public Employees' Pension Reform Act ("PEPRA") took effect. One provision of PEPRA, mandated that a public employee must forfeit part or all of the employee's pension if the employee is convicted of "any felony under state or federal law for conduct arising out of or in the performance of his or her official duties." (Gov. Code section 7522.72(b)(1).)

In February 2013, Wilmot was indicted on charges of embezzling County funds (he later pled guilty). In April 2013, the CCERA approved Wilmot's retirement application; his retirement was effective as of December 13, 2012, and Wilmot began receiving pension checks. In December 2015, Wilmot pled guilty to embezzling County funds over a period of about 12 years, from approximately 2000 until December 2012. Wilmot had stolen District property and equipment for several years.

CCERA reduced Wilmot's pension payments in accordance with PEPRA's forfeiture provisions and Wilmot sued CCERA, claiming that PEPRA's forfeiture provision did not apply to him because he "retired" before its effective date, among other things.

The Court of Appeal rejected Wilmot's claim and found that CCERA properly applied PEPRA's forfeiture provisions. PEPRA states:

> "A public employee shall forfeit all the retirement benefits earned or accrued from the earliest date of the commission of any felony … to the forfeiture date, inclusive. The retirement benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the public employee's conviction. Retirement benefits attributable to service performed prior to the date of the first commission of the felony for which the public employee was convicted shall not be forfeited as a result of this section."

Moreover, for purposes of applying PEPRA's forfeiture provisions, Wilmot was retired as of the date the CCERA approved his retirement in April 2013, not on his last date of employment or the date he submitted his retirement application. Thus, PEPRA became effective before Wilmot actually retired, so he was subject to its retirement benefit forfeiture provisions.

Wilmot v. Contra Costa County Employees Retirement Association (2018) 29 Cal.App.5th 846.

BENEFITS CORNER

Texas Federal District Court Judge Strikes Down Entire ACA.

LCW previously reported via a Special Bulletin that a federal district judge in Texas ruled on Friday, December 14, 2018, that the Patient Protection and Affordable Care Act's ("ACA") individual mandate was unconstitutional, and that the ACA's other provisions were therefore also invalid.

Last year, Congress reduced the shared responsibility payment amount to zero, effective January 1, 2019, as part of the Tax Cuts and Jobs Act of 2017. According to the district court ruling, when this change in the law takes effect, it will eliminate the individual mandate's constitutional hook. The district court further ruled that the remainder of the ACA was invalid absent the individual mandate. LCW will continue to monitor and report on this district court ruling as it proceeds through the court system.

Federal Government's Proposed Regulations on HRAs.

On October 29, 2018, the U.S. Departments of the Treasury, Health & Human Services, and Labor jointly issued proposed regulations expanding permitted uses for health reimbursement arrangements ("HRAs"). An HRA is a type of group health plan that allows employers to fund medical care expenses for their employees on a pre-tax basis. Employer contributions fund HRAs, and can only be used to reimburse an employee for the medical care expenses (as defined by the IRS) of the employee, the employee's spouse, children, or tax dependents. HRAs qualify for pre-tax treatment because they are considered group health plans, and therefore have historically not been able to be used to pay premiums for coverage in the individual market.

If the proposed regulations are finalized, employers will be allowed (starting January 1, 2020) to establish two new types of HRAs that were not previously allowed under the ACA: Premium Reimbursement HRAs and Excepted Benefit HRAs.

Premium Reimbursement HRAs would provide for reimbursements for premiums for individual health insurance. Employers would need reasonable procedures to verify that an individual is enrolled, such as attestation by the employee or documentation from a third-party. An employer could not offer employees a choice of either this HRA or a traditional group health plan. Employers could divide employees into separate classes and offer some classes an HRA and others a traditional group health plan as long as the HRA is offered according to the same terms and conditions to all employees within such class. The proposed regulations define these allowable classes (e.g. full-time, part-time, seasonal, union, primary employment site), but classes based on hourly and salaried employees are not permitted.

Excepted Benefit HRAs could only be *offered* to participants who are also offered coverage under a traditional group health plan. Employees may still choose to enroll in this type of HRA even if they do not enroll in the group health plan. Employers would be able to fund this HRA up to $1,800 per year, with carryover amounts into the future. This HRA would not be available to reimburse premiums paid for individual or group health insurance, or Medicare. The HRA, however, can be used to reimburse premiums for excepted benefits (such as dental or vision coverage). Also note, this HRA would also be considered an excepted benefit, which is not subject to the ACA's prohibition on annual or lifetime limits.

Employers wishing to establish the HRAs set forth by the proposed regulations will not be able to do so until at least January 1, 2020. Existing rules under the ACA still apply, and they impose substantial penalties on most employers using HRAs to reimburse employees for individual health insurance premiums. There

are also multiple requirements, exceptions and considerations to account for in establishing these contemplated HRAs, and employers should confer with legal counsel and other professionals throughout that process.

ACA Reporting Deadlines.

The upcoming 2019 filing and reporting deadlines under the ACA for 2018 coverage are as follows:

- February 28, 2019 – Deadline to file paper reporting forms to the IRS, if employers choose this option in lieu of e-filing.
- March 4, 2019 – Deadline to furnish Form 1095-C to employees (extended from January 31, 2019 per IRS Notice 2018-94).
- April 1, 2019 – Deadline to e-file reporting forms to the IRS (must e-file with over 250 forms).

Applicable Large Employers ("ALEs") (employers with 50 or more full-time employees, including full-time equivalents) are required to report proof of compliance with the ACA's Employer Shared Responsibility Mandate. Though IRS Form 1094-C, ALEs report required information about whether they offered minimum essential health coverage (MEC) to substantially all of their full-time employees and their dependents. Employers also must furnish IRS Form 1095-C to report whether the lowest cost plan offered to its full-time employees was affordable for the previous calendar year. IRS Form 1094-C is also the form used to transmit Form 1095-C to the IRS.

ALEs must fill out Part III of Form 1095-C if they offer employer-sponsored, self-insured health coverage in which an employee or other individual enrolled. Therefore, note that Part III on IRS Form 1095-C must be completed for employers with Self-Insured Retiree-Only HRAs (i.e. those that reimburse medical expenses and not just premiums). Retiree-Only HRAs are generally used to assist retirees purchase coverage from a public health insurance marketplace.

Small employers with less than 50 full-time employees or full-time equivalents may not be required to file Forms 1094-C and 1095-C, unless for example they are self-insured, in which case they would need to file Forms 1094-B and 1095-B. Further instructions for filling out applicable IRS forms are accessible on the IRS' website. ACA reporting can be a time-consuming and complex process. Employers are advised to gather the necessary information and prepare proper documentation for ACA reporting purposes. LCW is available for all ACA compliance needs. For further information, please visit our ACA practice area website.

Fixed Indemnity Benefits.

As tax season looms around the corner, employers should be aware of certain taxable implications of fixed indemnity benefits. Fixed indemnity health plans provide supplemental coverage of a fixed cash benefit payout directly to the employee for certain health-related events. Employers should note that if they are providing these benefits on a pre-tax basis through a Section 125 plan, then benefits should be taxed when paid out to employees. If benefits are not taxed when paid out, then they should not be offered as a pre-tax benefit under a Section 125 Cafeteria Plan. These benefits could, however, be offered outside of the Cafeteria Plan on an after-tax basis.

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Education Matters is available via e-mail. If you would like to be added to the e-mail distribution list, please visit **www.lcwlegal.com/news**.

Please note: by adding your name to the e-mail distribution list, you will no longer receive a hard copy of our ***Education Matters*** newsletter.

If you have any questions, contact Nick Rescigno at 310.981.2000 or info@lcwlegal.com.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Feb. 1 **"Summit: "Building Workforce Diversity: It Takes a Village""**
Central CA CCD ERC | Clovis | Eileen O'Hare-Anderson

Feb. 1 **"Speaking Freely or Shouting Fire"**
SCCCD ERC | Anaheim | Alysha Stein-Manes

Feb. 6 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Central Coast ERC | Paso Robles | Kelly Tuffo

Feb. 7 **"Issues and Challenges Regarding Drugs and Alcohol in the Workplace"**
Bay Area ERC | Webinar | Heather R. Coffman

Feb. 7 **"Advanced FLSA"**
Gateway Public ERC | La Mirada | Jennifer Palagi

Feb. 7 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
San Mateo County ERC | Menlo Park | Morin I. Jacob

Feb. 8 **"Summit 2: 'Safety'"**
Bay Area CCD ERC | Santa Clara | Laura Schulkind

Feb. 13 **"Managing Performance Through Evaluation"**
Northern CA CCD ERC | Sacramento | Kristin D. Lindgren

Feb. 13 **"Human Resources Academy I"** and **"Introduction to the FLSA"**
San Gabriel Valley ERC | Alhambra | Jennifer Palagi

Feb. 14 **"Human Resources Academy II"** and **"Negotiating Modifications to Retirement and Retiree Medical"**
San Diego ERC | San Marcos | Frances Rogers

Feb. 20 **"Legal Issues Regarding Hiring & Promotions"** and **"Human Resources Academy I"**
Central Valley ERC | Clovis | Tony G. Carvalho & Jesse Maddox

Feb. 20 **"Employees and Driving"** and **"Navigating the Crossroads of Discipline and Disability Accommodation"**
North State ERC | Orland | Kristin D. Lindgren

Feb. 20 **"Workplace Bullying: A Growing Concern"** and **"Prevention and Control of Absenteeism and Abuse of Leave"**
Ventura/Santa Barbara ERC | Camarillo | Christopher S. Frederick

Feb. 21 **"Technology and Employee Privacy"**
LA County HR Consortium | Los Angeles | Christopher S. Frederick

Feb. 21 **"Public Service: Understanding the Roles and Responsibilities of Public Employees"** and **"Managing the Marginal Employee"**
South Bay ERC | Redondo Beach | Laura Drottz Kalty & Ronnie Arenas

Feb. 28 **"Management Guide to Public Sector Labor Relations"** and **"Exercising Your Management Rights"**
Napa/Solano/Yolo ERC | Suisun City | Jack Hughes

Feb. 28 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"** and **"The Art of Writing the Performance Evaluation"**
West Inland Empire ERC | Chino Hills | Christopher S. Frederick

Customized Training

Feb. 1 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
Hartnell College | Salinas | Laura Schulkind

Feb. 5,7,12,14 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Midpeninsula Regional Open Space District | Los Altos | Erin Kunze

Feb. 5 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
Rancho Santiago Community College District | AM- Orange & PM - Santa Ana | Laura Schulkind

Feb. 6 **"Faculty Engagement in the Disabled Student Accommodations Process"**
El Camino College | Torrance | Jenny Denny

Feb. 6 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Midpeninsula Regional Open Space District | Los Altos | Lisa S. Charbonneau

Feb. 7 **"Bias in the Workplace"**
ERMA | Hughson | Kristin D. Lindgren

Feb. 7 **"Supervisor's Guide to Public Sector Employment Law"**
Mariposa County | Mariposa | Gage C. Dungy

Feb. 11 **"Ethics in Public Service"**
City of Bellflower | James E. Oldendorph

Feb. 13 **"Technology and Employee Privacy in the Workplace"**
City of Fountain Valley | Laura Drottz Kalty

Feb. 13 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Midpeninsula Regional Open Space District | Los Altos | Lisa S. Charbonneau

Feb. 14 **"Unconscious Bias and Microaggressions"**
Santa Rosa Junior College | Petaluma | Laura Schulkind

Feb. 20, 21 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Mendocino County | Ukiah | Jack Hughes

Feb. 28 **"DOT and Reasonable Suspicion"**
City of Mountain View | Heather R. Coffman

Speaking Engagements

Feb. 15 **"Legal Update"**
College and University Personnel Administrators - Human Resources (CUPA-HR) Spring Conference | Riverside | Judith S. Islas

Seminars/Webinars

Register Here: https://www.lcwlegal.com/events-and-training

Feb. 6 **"Hot Topics in Negotiations"**
Liebert Cassidy Whitmore | Webinar | Richard C. Bolanos

Feb. 15 **"Train the Trainer: Harassment Prevention"**
Liebert Cassidy Whitmore | Fresno | Shelline Bennett

Feb. 13 **"Trends & Topics at the Table"**
Liebert Cassidy Whitmore | TBD | Kristi Recchia

Feb. 19 **"Train the Trainer: Harassment Prevention"**
Liebert Cassidy Whitmore | San Diego | Judith S. Islas

Feb. 26 **"Nuts & Bolts of Negotiations"**
Liebert Cassidy Whitmore | Fresno | Shelline Bennett & Kristi Rechia

New to the Firm

Kaylee Feick is an Associate in our Los Angeles Office where she provides representation and counsel to clients in all matters pertaining to labor, employment, and education law. She provides support in litigation claims for discrimination, harassment, retaliation, wage and hour disputes, and other employment matters. Kaylee has experience in litigation procedures such as drafting pleadings and discovery. She also has experience in trial preparation, including researching and drafting pretrial motions and preparing witnesses for trial.

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The information in ***Education Matters*** should not be acted on without professional advice. To contact us, please call 310.981.2000, 415.512.3000, 559.256.7800, 619.481.5900 or 916.584.7000 or e-mail info@lcwlegal.com.