LCW Liebert Cassidy Whitmore

Education Matters

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

October 2019

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LCW NEWS

Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in ***Education Matters*** should not be acted on without professional advice.

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EMPLOYMENT AGREEMENTS

Termination Agreement's Promise To Pay Health Benefits Beyond The Term Of The Employment Agreement For Terminated Superintendent Is Unlawful Under Government Code. Court Can Severe Unlawful Provision And Disallow Superintendent To Rescind Termination Agreement.

Warner Unified School District hired Ron Koenig as principal at three of the District's four schools. The District later promoted Koenig as superintendent and principal of the entire District, and they entered into a four-year employment agreement.

Three years into the agreement, the parties entered into a termination agreement that ended Koenig's employment one year early in exchange for a lump sum payment of $130,727.92, a sum that represented the value of Koenig's compensation during the final year of the employment agreement. The termination agreement also provided Koenig and his spouse with medical, dental, and vision insurance at the District's expense until Koenig reached age 65 or until Medicare or similar government-provided insurance coverage took effect, whichever occurred first.

Two years later, the District informed Koenig it was cancelling his health benefits. Koenig demanded the District reinstate his health benefits then filed a lawsuit to rescind the termination agreement. The District filed its own lawsuit against Koenig and argued the termination agreement's promise to continue paying health benefits was void and unenforceable under state law, and the payments it made in excess of the statutory maximum should be returned as an impermissible gift of public funds. The District asked the trial court to rewrite the termination agreement to remove the unlawful promise to provide continued health benefits, and the District requested attorneys' fees.

The trial court concluded the termination agreement was void because the District's promise to continue paying health benefits until Koenig turned 65 was unlawful. The trial court found Koenig was entitled to rescind the termination agreement under Civil Code section 1689, subdivision (b)(4) because there was a material failure of consideration (the unlawful payment of the health benefits). The trial court found the unlawful provision could not be severed from the agreement, so the entire agreement was unenforceable. Accordingly, the trial court ruled Koenig must return anything he received under the termination agreement unless he was

entitled to receive it under the employment agreement. However, the trial court found that Koenig was entitled to the lump-sum payment and the health benefit payments because the employment agreement contained those benefits. Both parties appealed.

Koenig argued because the termination agreement was void, the employment agreement was revived, and he was entitled to health benefits until he turned 65 or until Medicare or similar government-provided insurance took effect. The District argued the trial court erred when it refused to sever the void provision relating to continued health benefits from the remainder of the termination agreement. The District argued the trial court should have severed just the portion of the agreement inconsistent with Government Code sections 53260 and 53261 and preserved the remainder of the terms to provide Koenig health benefits only through the end of the four-year employment agreement. The District alternatively argued that if the entire termination agreement was void, Koenig still was only entitled to health benefits through the original end of the employment agreement, and he should repay the District for benefits beyond that point.

The Court of Appeal examined Government Code section 53260, which required that all employment contracts between the District and an employee state the maximum cash settlement for a terminated employee was an amount equal to the monthly salary of the employee multiplied by the number of months left on the unexpired term of the contract or a maximum of 12 months for a superintendent of a school district . Section 53261 provided that the cash settlement specified in section 53260 did not include noncash items except health benefits, which may be continued for the same duration of time or until the employee finds other employment, whichever occurred first.

The Court of Appeal found these state laws clearly limited the cash settlement and health benefits payable to Koenig under the termination agreement. Accordingly, the portion of Koenig's termination agreement providing continued benefits beyond the term of the original employment agreement was unlawful.

However, the Court of Appeal held that the unlawful provision could be severed from the rest of the termination agreement, and severance was appropriate because it allowed Koenig to retain the lawful benefits to which he was entitled under the termination agreement, while preventing him from obtaining an additional windfall in the form of health benefits he was not entitled to receive.

Although Koenig argued he would not have accepted the termination agreement without the promise of continued health benefits, the agreement reflected that the promise of continued health benefits was only a portion of the consideration the District provided. Furthermore, the $130,000 lump-sum payment and 12 months of paid health benefits (representing the maximum cash settlement permitted upon termination of Koenig's employment agreement) was sufficient consideration for the termination agreement.

Koenig argued that in light of the Court's decision that part of the termination agreement was unlawful, he should be able to rescind the entire agreement. The Court of Appeal found rescission was not appropriate because any failure of consideration was not the fault of either party, but was due state law invalidating the provision regarding continued health benefits.

Koenig argued that this consideration for the termination agreement failed because he would have received the same salary and benefits under the terms of the employment agreement. Yet, Koenig failed to complete his duties for the final year of the employment agreement, but received compensation. Accordingly, he was not

entitled to rescind the termination agreement because the agreement lacked consideration.

Ultimately, the Court of Appeal concluded Koenig was entitled to payment for health benefits only for the duration of the term of his original employment agreement—the maximum duration permitted under Government Code sections 53260 and 53261. Any payments made for health benefits by the District after that year were in excess of the statutory maximum, and the District was entitled to repayment of that amount for unjust enrichment and impermissible gift of public funds. The Court of Appeal sent the case back to the trial court to determine whether the District was entitled to attorney fees under the termination agreement.

Koenig v. Warner Unified School District (2019) __ Cal.App.5th __ [2019 WL 4507924].

TITLE IX

Student Received A Fair Hearing Where Both Sides Received Notice Of The Charges And Hearing And Had Access To The Evidence, The Hearing Included Live Testimony And Written Reports Of Witness Interviews, The Critical Witnesses Appeared In Person At The Hearing, And The Accused Had Opportunity To Propose Questions For The Adjudicator To Ask Complainant.

Occidental College's sexual misconduct policy prohibits sexual assault, which it defines as sexual intercourse without consent or when one person is incapacitated. The policy defines incapacitation as "a state where an individual cannot make an informed and rational decision to engage in sexual activity because s/he lacks conscious knowledge of the nature of the act and/or is physically helpless."

John Doe and Jane Roe lived in the same dormitory and had one class together. One evening, Jane drank a large quantity of alcohol and became extremely intoxicated. After many hours of heavy drinking, Jane had trouble walking. Separately, John also drank heavily. He had trouble walking and slurred his words. After returning from a party, Jane walked into John's room, danced with John, and continued drinking alcohol. Jane's friends repeatedly tried to get her to stop drinking. Her friends eventually took Jane to her room, helped her into her bed, and left. Subsequently, Jane and John exchanged text messages in which Jane expressed interest in sexual activity, and Jane returned to John's room. When she arrived, Jane told John she vomited in the hallway. Jane and John engaged in sexual intercourse, and Jane later left John's room again. Jane's friends found her stumbling in the hallway and slurring her words. The next day, Jane did not remember exchanging text messages with John, nor engaging in sexual activity with him, but John's roommates shared what happened.

Jane submitted a complaint against John for sexual misconduct. The College's Title IX team conducted an initial assessment and appointed independent investigators who interviewed Jane and nine other witnesses. The investigators issued a written report. Consistent with College policy, the investigators did not reach a determination as to responsibility for sexual misconduct.

The College designated a Hearing Coordinator who reviewed the report and made a threshold determination that there was sufficient evidence to support a finding that John violated the College's sexual misconduct policy. The threshold determination did not involve a credibility assessment of the witnesses. The Hearing Coordinator notified the parties regarding the hearing. The parties were permitted to consult attorneys, but the attorneys could not participate in the proceedings. The parties were permitted to have an advisor assist them, and they have the right to review

investigative documents and call witnesses.

The College held a disciplinary hearing before an external adjudicator. Jane, John, the lead investigator, and five other students testified during the hearing. John argued that he did not think Jane was incapacitated during their sexual activity. The parties were not permitted to question each other directly, but John submitted questions to the adjudicator in writing. The adjudicator has discretion to ask the submitted questions. By a preponderance of the evidence, the adjudicator determined John violated the College's sexual misconduct policy and issued written findings. The adjudicator found that Jane's text messages and conduct would usually indicate consent, but she was incapacitated when she engaged in the conduct. A sober person in John's position should have known Jane was incapacitated and could not consent. The College expelled John.

John appealed. The appeals officer did not find a basis for overturning the adjudicator's decision. John filed a petition in trial court asking the court to review the College's decision to expel him. John argued the hearing was unfair because the hearing lacked impartiality, the adjudicator failed to ask questions John proposed, and the hearing coordinator denied him "reasonable access to evidence." John also argued the evidence did not support the adjudicator's findings. The trial court denied the petition and entered a judgment in favor of the College. John appealed.

The Court of Appeal reviewed several recent cases in which California courts found fault with the procedures in private university sexual misconduct disciplinary proceedings. The court in one of those cases, *Doe v. Westmont College* (2019) 34 Cal.App.5th 622 explained: a college must comply with its own policies and procedures; there must be a hearing before a neutral, adjudicatory body; a college must permit the accused to respond to evidence; the alleged victim and other critical witnesses must appear before the adjudicatory body in some form; a college must provide the accused student the names of witnesses and the facts to which each testifies; and the accused must be able to pose questions to the witnesses in some manner. However, there is no requirement that the body ask every question the accused proposed nor is direct cross-examination appropriate. Here, the College's policy complied with all of the procedural requirements identified by California cases dealing with sexual misconduct disciplinary hearings, so the Court found the proceeding to be fair.

John additionally argued the hearing was unfair because the hearing coordinator excluded a document John's counsel gave the investigators. John never tried to use the document at the hearing or question witnesses about the content of the document, and he never previously argued the adjudicator prevented him from using the document. The Court found that John forfeited the argument by not raising it in the hearing or in the trial court.

John also argued the hearing coordinator was biased against him because she made the threshold determination to send the matter to the adjudicator for hearing. However, John failed to show actual bias. The hearing coordinator played no role in determining whether John violated the sexual misconduct policy, did not make any findings on credibility, and did not participate in the adjudicator's decision.

John next argued the hearing coordinator was biased against him because she waited until five days before the hearing to release information to him that the College would be using at the hearing. The Court of Appeal held John did not show the hearing coordinator had actual bias against him. In fact, the hearing coordinator complied with College policy regarding when the College provided hearing documents. Additionally, John did not identify any prejudice he suffered by not having the

information from the hearing coordinator sooner.

John also argued the adjudicator was biased because she refused to ask Jane 29 of the 38 written questions he submitted. Under the College's policy, the adjudicator had the discretion not to ask questions that were inappropriate, irrelevant, or cumulative. This discretion is fair, and it did not prejudice John.

Ultimately, the Court of Appeal found there was substantial evidence that Jane was incapacitated and that, despite her possible apparent assent, a sober person in John's position should have known she was incapacitated. The adjudicator reasonably concluded that Jane was unable to make "an informed and rational decision to engage in sexual activity" and that John, had he been sober, should have known it. Accordingly, the Court of Appeal denied John's appeal.

Doe v. Occidental Coll. (2019) 40 Cal.App.5th 208.

EMPLOYMENT LAW

Plaintiff Does Not Need To Establish Her Clearly Superior Credentials Before Being Allowed To Present Comparator Evidence At Trial.

San Francisco State University hired Dr. Rashmi Gupta in 2006 as a tenure-track assistant professor in the School of Social Work in the College of Health and Social Sciences. In Gupta's third-year review, she received positive reviews from all three faculty members who conducted teaching performance evaluations. Her student evaluation scores improved from the first two years, and the University retained her as an assistant professor.

In 2009, Gupta and several other women of color in the School of Social Work wrote a letter to the University provost and the dean of faculty affairs asking for a meeting to discuss concerns about the director of the School of Social Work and discrimination against people of color. Dean of the College of Health and Social Sciences, Dr. Don Taylor, and the Dean of Faculty attended the meeting with the complainants.

Less than two months later, Gupta received a fourth-year review that was critical of her performance in all three areas used to evaluate tenure — teaching effectiveness, professional achievement and growth, and contributions to campus and community. The review only briefly mentioned Gupta's student evaluation scores, all of which were significantly better than the department mean, and made no positive comments regarding her scholarship despite the fact that she had published enough articles to meet the requirements of tenure.

Shortly thereafter, Gupta sent emails to a colleague complaining that her workplace was hostile toward women of color, and Taylor was responsible for creating a hostile work environment. Taylor learned of the emails and became very angry with Gupta. At a meeting, Taylor shouted at Gupta, "I'm going to get even with you" and there were "consequences" to her conversations.

During the next academic year, Gupta requested early tenure and received support from the departmental and campus wide tenure committees and the School's interim director. However, Taylor recommended denial of Gupta's early tenure, stating she had not demonstrated "sustained progress" in the three areas used to evaluate tenure.

Gupta filed a complaint with the Equal Employment Opportunity Commission identifying Taylor by name and filed a federal lawsuit alleging the University denied her early tenure because of discrimination and retaliation. Gupta also grieved the denial of her tenure. The

matter went to arbitration, and an arbitrator ordered the University to review Gupta for tenure the following year. Gupta voluntarily dismissed her federal lawsuit.

During the next academic year, Gupta again received universal support from her colleagues and departmental and campus wide tenure committees. She exceeded the number of publications required by the department's tenure policy. The School's interim director supported Gupta's tenure, but Taylor again recommended against Gupta's tenure. Taylor told the interim director he was unhappy with her for recommending tenure, and he did not approve tenure because he "didn't like Gupta's attitude," and "he really didn't want people in the School of Social Work who were going to make the school look bad."

The year after the University denied Gupta tenure, it granted tenure to Dr. J.H., a professor in the School of Social Work who had not previously filed a complaint against the University. Gupta's student evaluation scores were better than J.H.'s scores, and Gupta had more than double the minimum requirements for publication, while J.H. had not met the minimum publication requirements.

Gupta grieved the denial of tenure. The University reevaluated her for tenure, but Taylor again recommended against tenure. The provost and the president of the University concurred with Taylor's recommendation. The University denied Gupta's tenure and terminated her employment in 2014.

Gupta filed a lawsuit alleging the University discriminated and retaliated against her when it denied her tenure and terminated her employment. The matter went to trial, and a jury found against Gupta on her discrimination claim but in her favor on her retaliation claim. Gupta filed a motion for reinstatement and promotion to full professorship. The University opposed the motion and argued it did not have an available position. The trial court denied reinstatement on the basis that there was no available position, but made its denial conditional on the University periodically reporting to the court concerning availability of positions within the School of Social Work. The University appealed.

Before the trial, the University filed a motion to exclude evidence of two comparator professors on the ground that Gupta's qualifications were not "clearly superior" to the qualifications of those professors. The trial court granted the University's motion as to one comparator on the ground that the comparator was in a different department and was not similarly situated to Gupta. However, the court denied the University's motion as to J.H., the professor in the School of Social Works, finding J.H. was similarly situated to Gupta in all material respects and that comparator evidence relating to J.H. was relevant. On appeal, the University argued the trial court erred when it allowed Gupta to introduce evidence of J.H.

The Court of Appeal held the evidence supported the trial court's finding that J.H. and Gupta were similarly situated in all relevant respects, and no authority required Gupta to show she was "clearly superior" to J.H. before allowing her to present evidence regarding J.H. Additionally, Gupta presented ample evidence other than comparator evidence from which the jury could infer retaliation. Accordingly, the trial court did not err.

The University also argued the trial court erred in refusing to give specific jury instructions that stated a plaintiff is required to prove her qualifications were clearly superior to those of the comparator. Similarly, the Court of Appeal ruled the trial court did not err on this issue.

Lastly, the University argued the trial court erred in improperly intervening in the trial by questioning witnesses or assisting Gupta during her testimony in a way that favored Gupta.

The Court of Appeal pointed to Evidence Code section 775, which allowed the trial court to call and question witnesses. The Court found the trial court intervened to assist counsel in obtaining clearer responses from Gupta and asking her counsel to write down various dates. The University failed to show that the trial court's questions or comments were improper or prejudicial.

Ultimately, the Court of Appeal affirmed the judgment in favor of Gupta.

Gupta v. Trustees of California State Univ. (2019) __ Cal. App.5th __ [2019 WL 4688544].

BUSINESS AND FACILITIES

Design Immunity Applies To Reasonable Design Decisions.

In broad daylight, outside the south hall of the Los Angeles Convention Center, Cynthia Dobbs walked into a round concrete bollard 17.5 inches wide and 17.5 inches tall. Three rows of these pillars ring the Convention Center, protecting the site from car bombs. Dobbs walked right into one of them and sued the City of Los Angeles because it allegedly created a dangerous condition that caused her to trip and fall.

About two million people visit the convention center yearly, and for the nine years preceding Dobbs's accident, no one filed any claim with the City alleging injuries attributable to the bollards.

At trial, the City moved for summary judgment, invoking a statutory defense called design immunity. Design immunity shields public entities from personal injury claims when a public employee reasonably exercised discretionary authority when approving the design at issue. The defense requires that a public entity establish: (1) There is causal relationship between the design and the accident; (2) The agency made a discretionary approval of the design; and (3) Substantial evidence supports the reasonableness of the plan.

At oral argument on the City's Motion, Dobbs stipulated to the first element that there was a connection between the design of the bollard and her injury. Dobbs then attacked the City's assertion that it approved of the pillar's design. Specifically, Dobbs objected to the sworn declaration of a project manager with 14 years of experience regarding the City's design approval process, because he did not approve the design in question. The trial court considered the project manager's qualifications to testify to the process and concluded that the project manager's experience was substantial and sufficient before overruling Dobbs's objection. The trial court noted that the third element is a question of law, not fact, and that in order to establish reasonableness of the plan, the parties need not necessarily agree that the design was reasonable. The trial court concluded that the evidence provided by the City regarding the reasonableness of the design was substantial. As a result, the trial court granted the City summary judgment against Dobbs, having concluded that the City established all three necessary elements. Following the grant of summary judgment to the City, Dobbs appealed the decision.

On appeal, the Court considered whether the trial court properly granted summary judgment, specifically whether the City properly established the second and third elements of its defense.

With respect to the second element, the Court of Appeal examined the project manager's declaration and concluded that the trial court was correct in overruling Dobbs's objections. The Court stated that even though the City

Engineer ultimately approved the plans for the bollards, the project manager's declaration was adequate and that discretionary approval need not be established with testimony of the people who actually approved the project. Further, the Court found that testimony about the entity's discretionary approval custom and practice can be proper even though the witness was not personally involved in the approval process.

Regarding the third element, the Court reiterated the trial court's finding that the design immunity statute grants immunity as long as the design is reasonable, even if the parties disagree whether a design should have been approved. The Court stated that the design need not be perfect, but merely reasonable under the circumstances. Here, the Court of Appeal found the design of the bollards reasonable under the circumstances because they were large and conspicuous.

Before affirming the trial court's grant of summary judgment, the Court of Appeal rejected Dobbs's argument concerning a declaration that referenced two rows of bollards, instead of three. The Court concluded that the number of rows of bollards does not matter when the important thing from a tripping perspective is the size of the one bollard into which Dobbs walked.

Dobbs v. City of Los Angeles (2019) __ Cal.App.5th __ [2019 WL 5206043].

FIRM VICTORIES

LCW Obtains Victory For Agency In Police Officer Termination Appeal.

LCW Managing Partner **Scott Tiedemann** and Associate Attorney **Amit Katzir** defeated a former police officer's lawsuit seeking to overturn his termination.

In this case, an officer injured himself on duty and filed a workers' compensation claim. The officer signed a waiver allowing the workers' compensation division to obtain his medical records in order to determine his benefits.

The workers' compensation division then sent the officer's medical records to a physician to help them identify a diagnosis. In reviewing these records, the physician discovered that the officer appeared to be taking a large quantity of opiates while employed as an officer and that he had failed to disclose multiple medical injuries on his pre-employment medical history form. The physician was the same person who performed the officer's pre-employment medical examination. The physician opined, based on what the physician believed was a clear pattern of repeated, heavy opiate use, that the officer could not safely perform the functions of a police officer. The physician reported his opinion to the law enforcement agency.

The agency subsequently initiated an investigation into the officer, and interviewed the physician. Thereafter, the physician prepared two reports for the investigation. The reports outlined the physician's opinion and provided the underlying medical records. The agency terminated the officer for: omitting information in his pre-employment medical examination; failing to disclose that he was prescribed thousands of opiate painkillers during his employment; and dishonesty in the internal affairs investigation.

After the agency's legislative body upheld the termination, the officer filed a petition requesting that the Superior Court review the agency's decision. The officer argued that the physician's disclosure of his medical records violated his privacy rights, and that the agency should not have considered the medical evidence. The officer argued that the exclusionary rule, which generally applies to illegal searches and seizures in criminal cases,

made his medical evidence inadmissible.

The agency argued that its acquisition and use of the medical records was privileged under the Civil Code, and that the exclusionary rule did not apply. While the court declined to address the privilege issue, it determined the agency did not need to exclude the medical records under the exclusionary rule.

The court first noted that there was a real question as to whether the exclusionary rule applied to the officer's appeal hearing before the agency's legislative body. The purpose of that rule is to deter the police from violating the Fourth Amendment prohibition on illegal searches and seizures. Moreover, courts extend the rule to civil proceedings only when the proceedings are so closely related to the aims of criminal prosecution that they are deemed "quasi-criminal."

Here, the court reasoned that the agency did not obtain the records from an illegal search. Instead, the physician lawfully obtained the medical records through the waiver the officer signed. While the physician's decision to turn over the medical records to the agency may have gone beyond the original stated, workers' compensation purpose of the waiver, the court concluded the agency did not receive the medical records through an unlawful search or seizure.

Second, the court reasoned that even if the exclusionary rule applied, it did not prohibit the agency from considering the officer's records. The court noted that when the exclusionary rule applies, courts use a balancing test to determine whether to exclude the evidence. Although the agency used the officer's medical records in the course of its investigation, the court found that the agency was justified in doing so under the circumstances. The physician independently raised concerns about the officer's potential drug use. The agency did not ask the physician to create the reports until after it interviewed the physician, and after the agency had developed the reasonable suspicions that: the officer was using drugs he did not disclose; and that the officer had been untruthful on his pre-employment medical statement.

The officer argued that admitting his lifetime medical history into evidence at the hearing was egregious and shocking. The court disagreed. As a police officer, the officer owed a unique duty of loyalty, trust, and candor to his employer and the public at large. Therefore, when the agency received a credible concern from the physician about the officer's potential drug abuse, the agency had the authority to investigate and discipline a betrayal of that trust.

Thus, the court determined that the agency's legislative body did not abuse its discretion in considering the officer's medical records in terminating the officer.

NOTE:

One of the key points that the court relied upon was that the agency methodically reacted to information it received from the physician through its internal investigation process. The physician provided the department the medical information on his own, the department interviewed the physician, and then the agency developed a reasonable suspicion about the officer's misconduct. The agency's methodical approach gave the court reason to decide that even if the exclusionary rule did apply, the agency acted reasonably and lawfully as to the medical records. Agencies can count on LCW to be a trusted advisor that gives insightful advice throughout an investigation and disciplinary process.

LCW Wins Summary Judgment For City In Age Discrimination Action.

In a case handled by **Jennifer Rosner, Lee Heard**, and **Emanuela Tala**, LCW helped secure

summary judgment for a city in a firefighter's age discrimination lawsuit.

A firefighter sued the city, alleging that the city failed to promote him to Fire Captain in 2009, 2013, 2015, and 2017 due to his age in violation of the Fair Employment and Housing Act ("FEHA").

On summary judgment, LCW argued on behalf of the city that the statute of limitations barred all claims arising out of promotional decisions occurring before August 27, 2017 – one year prior to the filing of the firefighter's complaint with the Department of Fair Employment and Housing ("DFEH"). Under the FEHA, a person must file a DFEH complaint within one year of the act or omission alleged to constitute discrimination, harassment or retaliation. Except for certain limited circumstances, failure to timely file a DFEH complaint bars a civil action. The court agreed with LCW's argument that no exceptions applied, and held that any promotional decisions that occurred prior to August 27, 2017 could not form the basis for the firefighter's lawsuit.

With regard to promotional decisions that occurred between August 27, 2017 and August 27, 2018, the court agreed that the city had provided legitimate business reasons that were not pretextual for promoting other candidates. The court also emphasized that of the 13 individuals promoted between 2013 and 2019, seven were over the age of 40, and 11 outscored the firefighter during the promotional process.

NOTE:

This case illustrates the importance of an in-depth understanding of the FEHA, including its specific procedural requirements, in successfully defending public entities in discrimination actions. This case also illustrates how important it is for a public agency to be able to identify legitimate, non-discriminatory reasons for its employment actions and decisions. LCW is pleased to help the city obtain a complete victory without the need for a trial.

WAGE & HOUR

New Minimum Salaries Needed To Qualify For FLSA Minimum Wage And Overtime Exemptions.

The U.S. Department of Labor ("DOL") announced the final version of its new exemption rule. This DOL regulation increases the salary thresholds that qualify for the "white collar" and "highly compensated employee" exemptions to the Fair Labor Standards Act ("FLSA").

The FLSA provides "white collar" exemptions for executive, administrative, and professional employees. To qualify under one of these exemptions from the FLSA's minimum wage and overtime requirements, an employee must first meet the DOL salary basis test. Part of that test is a minimum salary the employee must receive. Since 2004, the salary basis test required the employee to receive a minimum salary of $455 per week or $23,660 per year. However, under this new rule, employees must now make $684 per week or $35,568 per year to qualify.

The FLSA also provides a "highly compensated employee" exemption, which covers well-paid personnel who perform some managerial duties. This new rule also increases the highly compensated employee threshold from $100,000 to $107,432.

Under the FLSA, full-time faculty, part-time faculty, and teaching assistants are exempt from overtime requirements as teachers because the definition of teaching is quite broad and there is no salary basis test for the teacher exemption.

The FLSA also contains a separate salary test for academic employees (other than teachers) whose primary duties are administrative functions relating to academic instruction or training (as opposed to general business

operations of the school). Common examples of those positions at schools are a Dean, a Director of Student Success and Equity, and a Director of Admissions and Records. The FLSA salary requirement is the standard weekly threshold or the minimum entrance salary for full-time teachers at the school, whichever is lower.

The new salary thresholds will take effect on January 1, 2020. The new DOL regulation does not change the "duties" test, which an employer must also meet to exempt an employee from overtime.

NOTE:

Given that the new salary basis test threshold of $684 per week and highly compensated employee threshold of $107,432 annually will go into effect on January 1, 2020, public education employers should audit exempt job positions to determine which job positions are affected by these new salary basis test regulations. As noted above, full-time faculty, part-time faculty, and teaching assistants engaged in a teaching capacity should not be affected by these changes to the FLSA salary basis test, as they are exempt from the FLSA salary basis test under the FLSA's teacher exemption. However, we suspect that some educational institutions will have employees who will qualify for the "highly compensated employee" exemption that would not have qualified under the $134,004 threshold proposed by the 2016 regulations.

INDEPENDENT CONTRACTORS

Governor Signs AB 5: The "ABC" Test For Independent Contractor Status Is Codified.

On September 18, 2019, Governor Gavin Newsom signed Assembly Bill No. 5 ("AB 5") into law. AB 5 codifies the "ABC" test for determining independent contractor status that the California Supreme Court adopted in its 2018 decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. AB 5 also expands the ABC test so that it applies not only to the IWC wage orders, but also to the California Labor and Unemployment Insurance Codes.

AB 5 creates Labor Code section 2750.3, which provides that under the Labor Code, the Unemployment Insurance Code, and Industrial Welfare Commission ("IWC") wage orders, an individual providing labor or services for compensation is an employee rather than an independent contractor unless the hiring entity demonstrates that all three of the following conditions are satisfied: (1) the individual is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract terms and in fact; (2) the individual performs work that is outside the usual course of the hiring entity's business; and (3) the individual is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

There is no express exemption in AB 5 for public agencies.

Labor Code section 2750.3 does exempt from the ABC test, however, a number of occupations that remain subject to the previous independent contractor test stated in a California Supreme Court case that was decided before *Dynamex*. These exempted occupations include, insurance agents; medical professionals such as physicians, dentists, podiatrists, psychologists, and veterinarians; licensed professionals such as attorneys, architects, engineers, private investigators, and accountants; financial advisers; direct sales salespersons; commercial fisherman; some contracts for professional services for marketing, human resources administrators, travel agents, graphic designers, grant writers, fine artists, freelance writers, photographers and photojournalists, and

cosmetologists; licensed real estate agents; "business service providers"; construction contractors; construction trucking services; referral service providers; and motor club third party agents.

Additionally, AB 5 applies this new Labor Code section 2750.3 to Labor Code section 3351, which relates to employment status for workers' compensation coverage. This portion of the law is not effective until July 1, 2020.

Finally, AB 5 amends Unemployment Insurance (UI) Code section 621 to incorporate *Dynamex's* ABC test. But, the UI Code amendment does not reference the occupations that Labor Code section 2750.3 exempts. Thus, those who fall into one of the exemptions in Labor Code section 2750.3 may not be exempt from the provisions of the UI Code unless the conditions of the ABC test are satisfied.

NOTE:

Under AB 5, if an individual is an employee of the public education employers under the ABC test, then: he or she is eligible for unemployment benefits; and any Labor Code laws applicable to public education employees, including workers' compensation coverage and paid sick leave benefits. LCW can assist public education employers to evaluate all independent contractor arrangements under the ABC test and Labor Code section 2750.3.

LABOR RELATIONS

PERB Directs City To Reinstate Proposal It Withdrew Three Years Earlier.

The City of Palo Alto and the Utilities Management & Professional Association of Palo Alto ("UMPAPA") negotiated their initial collective bargaining agreement. Throughout the bargaining, the parties deferred negotiations on non-economic issues. Following the City's last, best, and final economic proposals, the City proposed that the parties bifurcate economic issues from non-economic issues. This would allow the pay increases to go into effect while the parties continued to negotiate non-economic terms.

UMPAPA took the City's economic proposals to its members, who ratified them. After UMPAPA ratified the City's economic proposals, the City made a non-economic proposal seeking to include an "at-will" provision for eight management positions. After UMPAPA rejected that proposal, the City withdrew the bifurcation plan.

The Administrative Law Judge (ALJ) concluded this constituted bad faith bargaining in violation of the Meyer-Milias-Brown Act (MMBA). Neither party excepted to the ALJ's findings on liability.

However, UMPAPA requested that the Public Employment Relations Board (PERB) alter the ALJ's proposed remedial order, and require the City to reinstate the bifurcation proposal and the related last, best, and final economic proposals that the ALJ had determined were withdrawn in bad faith. Further, UMPAPA requested that PERB amend the proposed order to include an attorney's fee award.

PERB noted that a properly designed remedial order seeks to restore the situation to what the situation would have been without the unfair labor practice. Thus, PERB directed the City to put the bifurcation proposal and the related last, best, and final economic proposals back on the table if UMPAPA requested. PERB reasoned that reinstating these proposals would restore the situation as nearly as possible to what would have existed but for the City's withdrawal of the proposals.

However, PERB declined to amend the proposed order to include an attorney's fee award. To obtain reimbursement of attorney's

fees or other litigation expenses while litigating a matter in front of PERB, the moving party must demonstrate that the claim, defense, motion, or other action was "without arguable merit" and pursued in "bad faith." PERB reasoned that while the positions taken by the City's representatives were unsuccessful, they were nonetheless positions that a prudent representative might legitimately take in good faith.

City of Palo Alto, PERB Decision No. 2664-M (2019).

NOTE:

This case illustrates PERB's power to determine a remedy. PERB remedies can include reinstating a withdrawn proposal, even if the agency withdrew the proposal years earlier. Although this case involved an interpretation of the Meyers-Milias-Brown Act, the bargaining statute that applies to cities, counties, and special districts, PERB frequently looks to decisions under the MMBA in interpreting the Educational Employment Relations Act. This PERB decision disparages a nine-year old PERB precedent and overturns the ALJ's decision that was in the employer's favor. LCW will continue to monitor PERB decisions and report on whether this decision is part of any trend.

DISCRIMINATION

Title III Of The ADA Applies To Websites Connected To Places Of Public Accommodation.

Cheryl Thurston is blind and uses screen-reading software to access the Internet and read website content. When Thurston attempted to access the website for a restaurant named "The Whisper Lounge," her software could not read the menu or make reservations. While a non-visually impaired person could make a reservation on the website 24/7, Thurston would have to call the restaurant during business hours to make one.

Thurston filed a complaint against the owner of the restaurant alleging that the inaccessible website violated the Unruh Act. The Unruh Act requires businesses to provide full and equal accommodations, advantages, facilities, privileges, and services. Additionally, the Unruh Act makes any violation of the federal Americans With Disabilities Act ("ADA") a violation of the Unruh Act.

Title III of the ADA provides, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges… of any place of public accommodation . . . ." Discrimination includes treating an individual with a disability differently by failing to provide auxiliary aids and services. Further, federal regulations require that a public accommodation "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."

In this case, the California Court of Appeal considered whether Title III of the ADA applied to a website connected to a physical place of public accommodation. While the parties agreed the physical restaurant was a place of public accommodation, the restaurant argued that the ADA did not apply to its website.

The court evaluated the plain language of the ADA and noted that the statute applies to services of a place of public accommodation, not services in a place of public accommodation. Thus, the court noted that Title III of the ADA encompasses more than a physical place. Additionally, the court noted that Congress intended that the ADA "keep pace with the rapidly changing technology of the times." For these reasons, the court concluded the ADA applied to websites connected to a physical place of accommodation. However, the court declined to consider whether Title III of the

ADA governs a website unconnected to a physical place of public accommodation offering only purely Internet-based services or products.

While the restaurant argued that its website was not sufficiently connected to its physical restaurant, the court disagreed. The court concluded that because the website connects customers to the services of the restaurant, there is a sufficient nexus between the site and the restaurant. Thus, the Court of Appeal concluded that the ADA applied to the restaurant's website.

Thurston v. Midvale Corp. (2019) __ Cal.App.5th __ [2019 WL 4166620].

NOTE:

This case reaffirms the Ninth Circuit's decision in Robles v. Domino's Pizza LLC *that LCW published in the February 2019 Client Update. In Robles, a man who used screen-reading software to access the internet asserted that the Domino's website and smart phone app were inaccessible for visually impaired people. The Ninth Circuit concluded that since the website and app were designed to facilitate access to Domino's products and services, Robles' lawsuit under the ADA could proceed.*

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.

Governor Newsom signed Senate Bill No. 778 into law, which provides that the requirement to provide harassment prevention training to both supervisory and nonsupervisory employees is not required until calendar year 2020. Previously, Senate Bill No. 1343 required that all applicable harassment training be conducted this year.

Need to get your employees trained? Visit **https://www.lcwlegal.com/harassment-prevention-training-services**

Vaping is not permitted in non-smoking sections of the workplace. (Labor Code, § 6404.5.)

Starting in 2020, public employers will be able to offer new health reimbursement arrangements to their current employees.

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: An HR manager called LCW to ask if a newly hired employee who is not a United States citizen is required to take a loyalty oath as a disaster service worker.

Answer: The attorney advised the HR manager that the statute requiring public employees to take an oath to be disaster service workers excludes legally employed aliens (Government Code section 3101). Therefore, the attorney advised the HR manager that legally employed aliens are not required to take a loyalty oath to be disaster service workers.

BENEFITS CORNER

IRS Letter Highlights Ongoing Applicability Of ACA's Employer Shared Responsibility Provisions.

Under the Affordable Care Act ("ACA"), an applicable large employer (i.e., an employer with at least 50 full-time employees, including full-time equivalent employees in the preceding calendar year) may be liable for an employer shared responsibility payment if it fails to comply with the ACA's employer shared responsibility provisions (aka, the employer mandate). The payment requirement is generally triggered in one of two situations:
The employer fails to offer minimum essential coverage to substantially all of its full-time employees (and their dependents), and at least one full-time employee receives a premium tax credit through Covered California.

The employer offers minimum essential coverage to substantially all of its full-time employees (and their dependents) but at least one of the full-time employees receives a premium tax credit through Covered California because the offered coverage does not provide minimum value or is not affordable, or the full-time employee was not offered coverage.

In a recent letter responding to an inquiry by Senator Susan Collins, the IRS addressed an Executive Order issued January 20, 2017, directing federal agencies to exercise authority and discretion to waive, defer, grant exemptions from, or delay the regulatory burden that the ACA imposed. The question that Senator Collins had posed was whether an employer shared responsibility payment may be waived or reduced based on hardship or other factors.

In its response, the IRS pointed out that the ACA itself does not provide for a waiver of an employer shared responsibility payment. The IRS then confirmed that "[t]he legislative provisions of the ACA are still in force until Congress changes them. Therefore, taxpayers must follow the law and pay what they may owe."

The letter underscores the importance of compliance with the ACA's employer shared responsibility provisions and other requirements including reporting, and suggests that the IRS will interpret the law strictly. Employers should carefully evaluate their health benefits arrangements and reporting practices to ensure conformity with the ACA.

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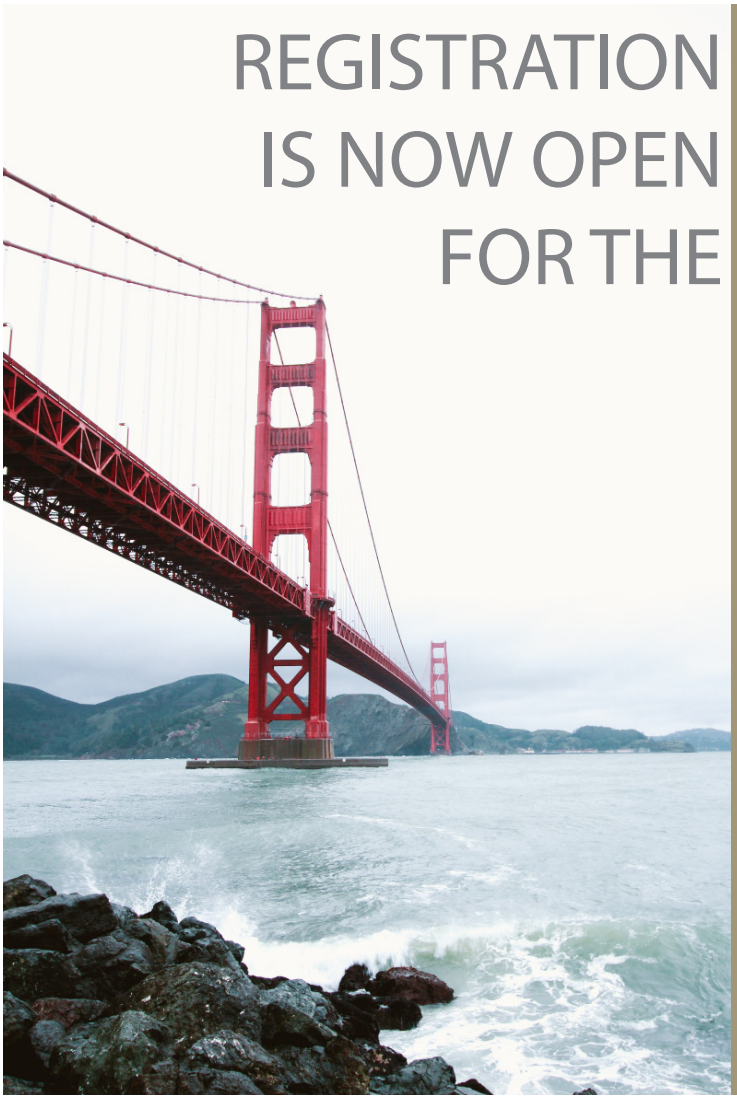
NOTICE: We will be publishing Legislative Round Ups next month and will return with our Education Matters newsletter in December.

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 Selena Dolmuz at 310.981.2000 or info@lcwlegal.com.



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LCW 2020

Public Sector Employment Law Annual Conference

Hyatt Regency
San Francisco
January 22-24, 2020

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lcwlegal.com/lcw-conference

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FIRM PUBLICATIONS

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

J. Scott Tiedemann and Alison Kalinski authored an article for the League of California Cities' magizine *Western City* October 2019 issue. The article is about the #MeToo movement and some of the major legislative changes affecting employees in the workplace as well as best practices to protect your agency and create a harassment-free workplace.

Litigation Partner Jesse Maddox wrote an article for the *Santa Monica Observer* titled, "Use It or Lose It: SCOTUS Decision Clarifies that Employers Must Assert an Administrative Exhaustion Defense Early During Litigation." on September 23, 2019.

Firm Activities

Consortium Training

Oct. 30 **"Difficult Conversations"** & **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
Gold Country ERC | Roseville | Gage C. Dungy & Brian J. Hoffman

Nov. 1 **"Ethics in Public Service"** & **"Creating a Culture of Respect"**
Central CA CCD ERC | Stockton & Webinar | Kristin D. Lindgren

Nov. 5 **"Supervisor's Guide to Public Sector Employment Law"** & **"Managing the Marginal Employee"**
North San Diego County ERC | San Marcos | Stefanie K. Vaudreuil

Nov. 6 **"Public Service: Understanding the Roles and Responsibilities of Public Employees"** & **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
Central Coast ERC | Atascadero | Tony G. Carvalho & Shelline Bennett

Nov. 7 **"Advanced Investigations of Workplace Complaints"** & **"Conducting Disciplinary Investigations: Who, What, When and How"**
Bay Area ERC | Union City | Morin I. Jacob

Nov. 7 **"Prevention and Control of Absenteeism and Abuse of Leave"** & **"Workplace Bullying: A Growing Concern"**
East Inland Empire ERC | Fontana | Danny Y. Yoo

Nov. 7 **"Workplace Bullying: A Growing Concern"** & **"Conducting Disciplinary Investigations: Who, What, When and How"**
Napa/Solano/Yolo ERC | Fairfield | Kristin D. Lindgren

Nov. 7 **"Public Sector Law Employment Update"**
Orange County Consortium | Brea | Geoffrey S. Sheldon

Nov. 7 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"** & **"Prevention and Control of Absenteeism and Abuse of Leave"**
San Diego ERC | San Marcos | Stacey H. Sullivan

Nov. 7 **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
San Mateo County ERC | Webinar | Suzanne Solomon

Nov. 13 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Humboldt County ERC | Arcata | Casey Williams check with fran

Nov. 13 **"Difficult Conversations"**
Monterey Bay ERC | Hollister | Drew Liebert

Nov. 13 **"Exercising Your Management Rights"**
Northern CA CCD ERC | Webinar | Eileen O'Hare-Anderson

Nov. 14 **"Difficult Conversations"**
Humboldt County ERC | Arcata | Casey Williams

Nov. 14 **"Key Legal Issues for Supervisors: Absenteeism, Disability and Labor"**
South Bay ERC | Beverly Hills | Laura Drottz Kalty & Antwoin D. Wall

Nov. 14 **"Navigating the Crossroads of Discipline and Disability Accommodation"** & **"Family and Medical Care Leave Acts"**
West Inland Empire ERC | San Dimas | Mark Meyerhoff

Nov. 15 **"Personnel Management"**
Bay Area CCD | Kentfield | Kristin D. Lindgren

Nov. 21 **"Difficult Conversations"**
Gateway Public ERC | Long Beach | Christopher S. Frederick

Nov. 21 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
LA County Human Resources Consortium | Webinar | Mark Meyerhoff

Nov. 27 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"** & **"Difficult Conversations"**
North State ERC | Redding | Jack Hughes

Customized Training

Our customized training programs can help improve workplace performance and reduce exposure to liability and costly litigation. For more information, please visit www.lcwlegal.com/events-and-training/training.

Oct. 30 **"Title V Diversity"**
Contra Costa Community College District | Pleasant Hill | Laura Schulkind

Oct. 30 **"Unconscious Bias"**
County of San Luis Obispo | San Luis Obispo | James E. Oldendorph

Oct. 30 **"Principles for Public Safety Employment and 12 Steps to Avoiding Liability"**
Los Angeles County | Los Angeles | J. Scott Tiedemann

Nov. 1,6,22 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Gilroy | Gage C. Dungy

Nov. 4,5 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Ventura | Shelline Bennett

Nov. 4,5 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Irvine Ranch Water District | Irvine | Christopher S. Frederick

Nov. 6 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Fremont | Jack Hughes

Nov. 6 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Menlo Park | Kelsey Cropper

Nov. 6 **"Preventing Workplace Harassment, Discrimination and Retaliation and Mandated Reporting"**
East Bay Regional Park District | Oakland | Erin Kunze

Nov. 6 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Mariposa County | Mariposa | Michael Youril

Nov. 6 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
West Basin Municipal Water District | Carson | Jenny-Anne S. Flores

Nov. 8 **"Title V Diversity"**
Contra Costa Community College District | San Pablo | Laura Schulkind

Nov. 12 **"Legal Aspects of Violence in the Workplace"**
City of Glendale | Mark Meyerhoff

Nov. 13 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Port of Stockton | Stockton | Jack Hughes

Nov. 14 **"Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment"**
Mt. San Jacinto College | San Jacinto | Alysha Stein-Manes

Nov. 14 **"Implicit Bias"**
Town of Truckee | Truckee | Kristin D. Lindgren

Speaking Engagements

Nov. 20 **"Courageous Authenticity"**
College & University Professional Association for Human Resources (CUPA-HR) Northern California Chapter Half Day Conference | Sacramento | Linda K. Adler

Nov. 21 **"Town Hall Legal Eagles"**
Community College League of California (CCLC) | Riverside | Laura Schulkind & Pilar Morin & Eileen O'Hare-Anderson & Kristin D. Lindgren

Nov. 21 **"Board Ethics and Governance Issues - A View from the Trenches"**
CCLC | Riverside | Eileen O'Hare-Anderson & James Temple & Diane Fiero

Nov. 22 **"Title IX: The US Department of Education's Proposed Regulations"**
CCLC | Riverside | Pilar Morin & Laura Schulkind & Jenny Denny

Nov. 22 **"Industrial Hemp Research: Opportunities and Challenges for Community Colleges"**
CCLC | Riverside | Frances Rogers & Martha Garcia

Seminars/Webinar
For more information and to register, please visit www.lcwlegal.com/events-and-training/webinars-seminars.

Nov. 14 **"Communication Counts!"**
Liebert Cassidy Whitmore | Alhambra | Peter J. Brown & Kristi Recchia

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