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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TABLE OF CONTENTS

Business and Facilities 4
Benefits Corner 13
Conflicts of Interest. 2
Employment Law 3
Labor Relations 11
Litigation. 1
Public Safety. 8
Retirement 7
Wage and Hour 6

LCW NEWS

LCW Seminar 15
LCW Webinar 16
Blog 17
Firm Activities 18

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LITIGATION

The Phrase "Reasonable Attorney's Fees Incurred By The Employee" In Education Code Section 44944 Does Not Limit A Fee Award To Fees Actually Charged.

After Jerald Glaviano, a veteran teacher with nearly 30 years' experience teaching physical education, interceded in a confrontation between two of his students, the Sacramento City Unified School District placed him on unpaid leave and issued an accusation and a notice of intent to dismiss or suspend him without pay. Following a hearing, the Commission on Professional Competence dismissed the accusation and ordered the District to reinstate Glaviano to his former position with back pay and benefits. During the investigation and hearing, an attorney represented Glaviano and charged a reduced hourly rate.

Education Code section 44944 provides that if the Commission on Professional Competence determines an employee should not be dismissed or suspended, the governing board of the school district must pay "reasonable attorney's fees incurred by the employee." Accordingly, Glaviano requested fees based on the hourly rate for similar work in the community. The District opposed Glaviano's request and argued that section 44944 fees must be limited to reasonable fees actually incurred and may not be increased even if the fees charged are below market value. The trial court agreed with the District. However, Glaviano stood by his assertion that the actual rate charged is irrelevant and privileged, so the trial court denied his request for attorney's fees. Glaviano appealed.

On appeal, the Court of Appeal considered whether the phrase "reasonable attorney's fees incurred by the employee" in Education Code section 44944 limits a fee award to fees actually charged. The District argued Education Code section 44944 was a "pure reimbursement statute" providing for the payment of expenses of the hearing, including reasonable attorney's fees incurred. However, the Court found that section 44944 did not use the words "reimburse" or "reimbursement" to describe the fee award and did not say the expenses of the hearing included attorney's fees. Additionally, the legislative history of the statute did not show the Legislature only intended to reimburse employees for fees actually charged.

The Court acknowledged the District's argument that allowing employees to recover fees based on the reasonable hours spent multiplied by the prevailing hourly rate for similar work in the community, even if that rate

was more than what the employee incurred, would make teacher dismissals more expensive and undermine the ability of school districts to terminate incompetent teachers or teachers who engage in misconduct. Despite the acknowledgement, the Court stated the District should direct those concerns to the Legislature.

Ultimately, the Court of Appeal reversed the trial court's decision and instructed the trial court to calculate attorney's fees.

Glaviano v. Sacramento City Unified School District (2018) 22 Cal.App.5th 744.

CONFLICTS OF INTEREST

A Taxpayer Had Standing Under Government Code Section 1090 To Bring A Lawsuit Alleging Conflict Of Interest Of Agency In Contract For Real Property.

The San Lorenzo Valley Water District acquired real property in Boulder Creek, California, from a seller. Bruce Holloway, a taxpayer within the District, filed suit claiming the contract was void under Government Code section 1090. Holloway argued the contract was void because one of District's directors, Terry Vierra, had an interest in the contract as a part owner of Showcase Realty, the realty company that facilitated the property sale. Vierra's wife was also the listing agent for the property. After the sale, Vierra received a commission through the realty company and an interest in his wife's commission on the sale.

Holloway filed a lawsuit against the District, the realty company, and Vierra for conflict of interest under Government Code section 1090 and for liability pursuant to Government Code section 91005. Holloway sought to declare that the real estate contract was void and for Vierra to disgorge the money he received in commissions.

In the trial court, the District and reality company successfully argued that Holloway's arguments were invalid because Holloway lacked standing to sue and some of his arguments were time-barred. Holloway appealed.

On appeal, the Court of Appeal considered whether Holloway had standing to sue under Government Code section 1090 and whether Holloway was required to file a "validation action" in a trial court to determine the validity of the District's actions under Code of Civil Procedure section 863.

State law allows public agencies to file "validation actions" with a court to determine whether the agency's action in a matter is valid. If a public agency does not file a validation action, any "interested person" may bring a validation action. However, not all public agency actions are subject to validation actions, and the validation statutes themselves (Code of Civil Procedure sections 860 through 870.5) do not state with particularity what actions are subject to validation.
If the matter is subject to a validation action and neither the agency nor any interested person files a validation action within 60 days, the agency's action is deemed valid.

Here, District and Showcase argued that because Holloway's complaint challenged a county water district's action of entering into a contract, it was subject to provisions of the Water Code that made all contracts entered into by a county water district subject to the validation requirements. Specifically, Water Code section 30066 states: "An action to determine the validity of an assessment or of warrants, contracts, obligations, or evidences of indebtedness pursuant to this division may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure."

However, the Court pointed out that previous court decisions interpreted the term "contracts" under both Government Code section 53511, and its nearly identical counterpart, Water Code

section 30066, narrowly to include only those agreements that address an agency's bonds, warrants or other evidence of indebtedness. Accordingly, because Holloway was arguing that the District's real estate contract was tainted by a conflict of interest in violation of Government Code section 1090 and not challenging the District's bonds, warrants or other evidence of indebtedness, he was not required to file a validation action under Water Code section 30066.

The District and realty company also argued that because the District had discretion to challenge the real estate contract and was not required to do so, Holloway did not have standing to challenge the contract under Code of Civil Procedure section 526a. Furthermore, the District and realty company argued that Holloway did not have standing to challenge the contract because he was not a party to the contract under Government Code section 1090.

The Court held that a contract in which a public officer is interested is void, and whether a contract is void is not a matter within the District's discretion. Vierra was a District director who had a personal financial interest in the real estate contract, making the contract void, not merely voidable. Therefore, the court found that Holloway had taxpayer standing under Code of Civil Procedure section 526a to challenge the contract and standing to assert a conflict of interest claim under Government Code section 1090.

Holloway v. Showcase Realty Agents, Inc. (2018) 22 Cal. App.5th 758.

EMPLOYMENT LAW

Education Code Section 88013 Does Not Require An Employer To Either Terminate An Employee Or Make The Employee A Permanent Employee On The Hiring Anniversary Date When The Employee Is On Leave For An Extended Period Of Time During The Probationary Period.

Marisa Hernandez worked for Rancho Santiago Community College District on and off for a number of years without any complaints about her performance. In 2013, she was hired as an administrative assistant. During her one-year probationary period, her performance was to be evaluated at three months, seven months, and eleven months. At the completion of 12 months of probation, she would be considered a permanent employee.

Eight months into her probationary period the District granted her temporary disability leave for four months to have surgery to replace a knuckle on a finger she injured while working for the district prior to her most recent hiring. She was scheduled to return to work on, or shortly after, the anniversary of her hiring date.

However, the district terminated Hernandez while she was on the approved leave, because her performance had not been reviewed. Hernandez sued the district under the California Fair Employment and Housing Act and argued that the district failed to make failed to engage in an interactive process to identify a reasonable accommodation that would enable her to perform the job effectively.

At the conclusion of the trial, the court found in Hernandez's favor and awarded her $723,746 in damages. On appeal, the district argued it had reasonably accommodated Hernandez's disability by giving her time off from work for her surgery and recovery. Additionally, the district argued it had to terminate her probation and employment when the anniversary of her hiring date approached because if it did not, she would have become a permanent employee on

the anniversary of her hiring under Education Code section 88013, subdivision (a), without the district having had an opportunity to evaluate her performance.

The Court of Appeal disagreed. The court found that although the district accommodated Hernandez by giving her time off for her surgery, the accommodation was not reasonable because it resulted in Hernandez losing her job to undergo surgery.

The court also held that Education Code section 88013, subdivision (a), did not require the district to either terminate Hernandez's employment or make her a permanent employee on the anniversary date of her hiring. The court concluded the district could have deducted from Hernandez's probationary period the extended period of time she was away from work due to her work-related injury. This would have allowed the district to receive the full 12-month period of time in which to evaluate the employee's performance.

The court also held that the district failed to engage in the interactive process with the employee as required by the FEHA because it failed to sit down with the employee to discuss an effective accommodation.

Hernandez v. Rancho Santiago Community College District (May 3, 2018, No. G054563) __ Cal.App.5th __ [2018 WL 2057468].

BUSINESS AND FACILITIES

Government Code Sec. 1090's Prohibition On Conflicts Of Interest In The Making Of Public Contracts Applies To Independent Contractors.

Karen Christiansen was employed as Director of Planning and Facilities for the Beverly Hills Unified School District. In 2006, Christiansen lobbied District officials to change her position from an employee to an independent consultant and entered into a new three-year contract with the District, which terminated her status as an employee. Subsequently, Christiansen formed Strategic Concepts, LLC, of which she was the sole owner.

Christensen's contract purported to limit her compensation at $170,000 per year, but the District approved and paid Strategic's invoices in the following amounts: $253,520 in 2006; $1,313,035 in 2007; and $1,390,804 in 2008 without alerting the Board about the over-payments. The invoices simply appeared on the Board's "consent calendar" and as such were items that the Board did not review on an individual basis.

Prior to the end of her first contract, Christensen negotiated a new contract in 2008 that provided for compensation per an hourly rate schedule and provided retroactive payment in an amount not to exceed $950,000 for services performed between January 1 and June 30, 2008. The new contract also contained a termination clause that allowed the District to terminate Christensen's employment without cause, but required 120 days' notice of termination and termination fee equal to three months' payment.

In Spring 2008, Christiansen strenuously advocated for a new school bond issue and spoke directly to the Board about the issue. Christiansen also recommended that her contract be amended to include management of the project funded by the bond. The Board approved placing the bond issues on the November 2008 ballot and Christiansen's requested a contract amendment, which directed an additional $16 million dollars to Strategic. Voters approved the bond measure, and between November 2008 and August 2009, Strategic collected more than $2 million in management fees even though no specific project had been approved.

A new Interim Superintendent became concerned about the amount of money being paid to Strategic without an approved project. The Board subsequently met to consider the matter with legal counsel who advised that Strategic's contracts with the District were void under

Government Code section 1090 for conflicts of interest. The same day, the District ordered Strategic to vacate the District's premises.

Christiansen and Strategic brought a lawsuit against the District seeking a declaration that the contracts were not void under California's conflict of interest laws, including section 1090, or due to the failure to comply with public contracting laws.

The trial court held that Strategic's contracts did not violate Government Code section 1090 and that the claimed violation of that statute was not a legally valid ground for voiding the contracts. As a result, the trial court ordered the District to pay Strategic $20,321,169. The District appealed.

Christensen argued that she did not violate section 1090 because she was simply negotiating her own compensation, but the Court of Appeal was unconvinced. In its opinion, the Court of Appeal cited *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, which was pending when the trial court made its original ruling. In that case, the California Supreme Court concluded the term "employees" as used in Government Code section 1090 is "intended to include outside advisors with responsibilities for public contracting similar to those belonging to formal employees, notwithstanding the common law distinction between employees and independent contractors." The Supreme Court stated that if Government Code section 1090 exempted independent contractors, an official "could manipulate the employment relationship to retain 'official capacity' influence, yet avoid liability under section 1090. (*People v. Superior Court (Sahlolbei)*, supra, at 243.).

This scenario is illustrated by the facts of Christiansen. Specifically, the Court of Appeal pointed to Christensen's lobbying to move from employee to independent contractor status then using her influence to obtain a $16 million no-bid contract, which it held as a clear violation of section 1090.

The Court of Appeal reversed the trial court's decision and instructed the trial court to conduct further proceedings consistent with its opinion.

Strategic Concepts, LLC v. Beverly Hills Unified School District (May 10, 2018, No. B264478) __ Cal.App.5th __ [2018 WL 2147852].

California Supreme Court Resolves Split Of Authority And Holds That A "Good Faith Dispute" Exception In Prompt Payment Statutes Permit Extended Withholding Of Retention Only When There Is A Dispute Over Entitlement To The Retention Monies Themselves.

In 2010, Universal City Studios ("Universal") entered into agreements to build a new ride at its theme park. For the new attraction that would become Transformers: The Ride, Universal selected Coast Iron & Steel Co. ("Coast Iron") as the direct contractor to design, furnish, and install metal work. Universal agreed to pay Coast Iron on a monthly basis for amounts billed, minus a 10 percent withholding – referred to in the construction industry as a "retention" – as protection against nonperformance. Upon its receipt of payments from Universal, Coast Iron was contractually responsible for making corresponding payments to its subcontractors. One such subcontractor was United Riggers & Erectors, Inc. ("United Riggers") which was responsible for installing the metal work Coast Iron fabricated and supplied. The contract between Coast Iron and United Riggers called for United Riggers to receive approximately $700,000 for its work. Due to approved change orders that amount eventually rose to just under $1.5 million.

United Riggers completed its work to Coast Iron's satisfaction. In March 2012, once all work on the project was finished, Coast Iron asked United Riggers for a final bill. In its final bill, United Riggers demanded additional amounts that would have brought its pay to $1.85 million. United Riggers stated the additional amounts resulted from Coast Iron's mismanagement of the project. Coast Iron refused payment, responding instead that it would "see [United Riggers] in court!!"

In August 2012, Universal paid out the 10 percent withheld as a retention to Coast Iron, which in turn owed $149,602.52 of that amount to United Riggers. Although United Riggers requested payment, Coast Iron refused to pay forward any part of the retention to United Riggers.

In January 2013, United Riggers sued Coast Iron claiming that Coast Iron had violated the "prompt payment statute" by failing to make timely payment of the retention monies Coast Iron had received from Universal and in turn owed United Riggers. The prompt payment statute provides: "If a direct contractor has withheld a retention from one or more subcontractors, the direct contractor shall, within 10 days after receiving all or part of a retention payment, pay to each subcontractor from whom retention has been withheld that subcontractor's share of the payment." (Civ. Code, § 8814, subd. (a).)

Coast Iron argued that the prompt payment statute has an exception for good faith disputes. This exception provides: "If a good faith dispute exists between the direct contractor and a subcontractor, the direct contractor may withhold from the retention to the subcontractor an amount not in excess of 150 percent of the estimated value of the disputed amount." (Civ. Code, § 8814, subd. (c).) Coast Iron argued that the good faith exception is without limitation, and thus, a good faith dispute as to any matter can support withholding.

After a bench trial, the trial court agreed with Coast Iron and entered judgment in its favor. United Riggers appealed. The Court of Appeal reversed the trial court's decision. In doing so, the Court of Appeal held that limiting withholding to disputes specifically related to the withheld monies was more in harmony with what the Legislature had contemplated in enacting the prompt payment statute. Accordingly, Coast Iron could not use the parties' dispute over project mismanagement to justify withholding United Riggers' portion of the retention.

Coast Iron appealed and the California Supreme Court affirmed. "The dispute exception excuses payment only when a good faith dispute exists over a statutory or contractual precondition to that payment, such as the adequacy of the construction work for which the payment is consideration. Controversies concerning unrelated work or additional payments above the amount both sides agree is owed will not excuse delay; a direct contractor cannot withhold payment where the underlying obligation to pay those specific monies is undisputed."

United Riggers & Erectors, Inc. v. Coast Iron & Steel Co. (2018) __Cal.4th __ [2018 WL 2188916].

NOTE:

This case involves the "good faith dispute" exception in the prompt payment statutes governing retention payments from direct contractors to subcontractors. The "good faith dispute" exception also exists in the prompt payment statutes governing retention payments from owners to direct contracts in both public and private projects. (See, Pub. Contract Code, §§ 7107, subd. (c), 10262.5, subd. (a); Bus. & Prof. Code, § 7108.5, subd. (a).) The Court's analysis and holding will likely apply with equal force in those contexts.

WAGE AND HOUR

Reversing Ninth Circuit, U.S. Supreme Court Rules that FLSA Overtime Exemptions Should be Interpreted Fairly, Not Narrowly.

The U.S. Supreme Court recently rejected the Ninth Circuit's interpretation that the overtime exemptions from the Fair Labor Standards Act ("FLSA") should be "construed narrowly." The case was *Encino Motorcars, LLC v. Navarro*.

Navarro and other employees worked as "service advisors" at Encino Motorcars, a car dealership which sold and serviced Mercedes-Benz cars. The company's service advisors were expected

to greet car owners at the dealership service area, note customer concerns about the condition of their cars, evaluate repair and maintenance needs, suggest services to car owners, write up estimates, and communicate with customers while repair work was in progress.

Navarro and other employees sued, claiming that Encino Motorcars improperly denied them overtime wages in violation of the FLSA. Under the FLSA, employers must pay overtime wages for hours worked above 40 hours in a seven-day work period, unless an FLSA overtime exemption applies. Encino Motors asserted that service advisors are exempt under FLSA provisions for "salesm[e]n…primarily engaged in …servicing automobiles.

The trial court found in favor of Encino Motors but the Ninth Circuit reversed on appeal and found in favor of Navarro and other employees. The U.S. Supreme Court then reversed the Ninth Circuit and remanded the case for further findings. When the Ninth Circuit again found in favor of Navarro, Encino Motors sought further review in the Supreme Court. The Court again reversed the Ninth Circuit.

First, the U.S. Supreme Court found that the service advisors are "salesmen" within the meaning of the FLSA because they sell goods or services. Specifically, they sell vehicle maintenance and repair services to dealership customers. They are also "primarily engaged in …servicing automobiles" because they provide a service to dealership customers. It was not necessary for service advisors to spend the majority of their time physically repairing vehicles to qualify for this exemption given that they are "integrally involved in the servicing process." Thus, the Court found that the service advisors were exempt from the FLSA overtime requirements.

Next, the U.S. Supreme Court went further and rejected the principle, long applied by the Ninth Circuit, that FLSA overtime exemptions should be construed narrowly. This approach, according to the Supreme Court, relies on the flawed premise that the remedial purposes of the FLSA -- awarding back pay to misclassified employees -- should be pursued at all costs. Rather, the FLSA's overtime exemptions are a key portion of the statute and should be given a "fair reading" rather than a narrow interpretation.

Encino Motorcars, LLC v. Navarro, 138 S.Ct. 1134 (2018).

NOTE:

Although the reasoning in this case is encouraging for employers, it is still the employer's burden to prove that one of the exemptions to FLSA overtime that is listed in 29 USC section 213 applies. This U.S. Supreme Court opinion may make it easier for an employer to meet that burden. This opinion does not discuss the FLSA regular rate of pay that is used to calculate FLSA overtime, nor does it offer any guidance on how to interpret the types of pay that are included in the FLSA regular rate of pay under 29 USC section 207(e).

RETIREMENT

California Supreme Court to Review Appellate Court Decision Impacting CERL and CalPERS Employers.

In January 2018, LCW reported on a California Court of Appeal decision, *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* That decision addressed whether the County Employees Retirement Law of 1937 (CERL) could change the definition of "compensation earnable" under the Public Employee Pension Reform Act of 2013 (PEPRA) for employees hired before PEPRA's January 1, 2013, effective date.

The Alameda opinion was contrary to prior, well settled precedents and principles governing public employee "vested rights" in pension benefits.

The California Supreme Court has granted

review of the decision. The Supreme Court will address the issue: Did statutory amendments to the County Employees' Retirement Law (Gov. Code, section 31450 et seq.) made by the Public Employees' Pension Reform Act of 2013 (Gov. Code, section 7522 et seq.) reduce the scope of the pre-existing definition of pensionable compensation and thereby impair employees' vested rights protected by the contracts clauses of the state and federal Constitutions?

The Supreme Court's decision could bring much needed clarity to the current inconsistency in California law.

NOTE:

LCW's earlier discussion of the Alameda opinion is available here. **https://bit.ly/2IZTnNw**. *We will continue to provide updates on these issues as new developments arise.*

Circular Letter Notifies Employers that CalPERS Will Begin Assessing Fees for Failure to Enroll and Report on Employment of Retired Members Starting in July 2018.

CalPERS Circular Letter 200-010-18, dated March 30, 2018, reminds employers that effective January 1 this year, the California Legislature added two new penalties designed to enforce the limitations on employment of retired CalPERS annuitants. This Circular Letter notifies employers that CalPERS will begin to assess these penalties starting in July 2018.

Government Code section 21220 states that a person who has retired for service or disability under CalPERS, cannot be employed in any capacity unless: 1) the person has been reinstated from retirement; or 2) the employment without reinstatement is authorized by complex CalPERS rules.

Government Code section 21200 includes two penalties for failure to report the employment of retirees who are not reinstated. The first penalty is $200 per month to any employer who fails to enroll, solely for CalPERS' administrative recordkeeping purposes, a retired member who is employed without reinstatement, in any capacity within 30 days of employment. The second penalty is $200 per month to any employer who fails to report the pay rate and number of hours worked of any retired member who is employed without reinstatement within 30 days following the last day of the pay period in which the retired member worked.

Government Code section 21220 prohibits employers from passing on these costs to an employee.

PUBLIC SAFETY

Modification of Timely Written Reprimand Did Not Violate POBRA's One-Year Limitations Period.

The California Court of Appeal reiterated that if a public agency employer provides timely notice of proposed discipline under the Police Officer Bill of Rights Act ("POBRA"), and then imposes a modified form of that discipline more than one year after becoming aware of the conduct at issue, the discipline is still timely under the POBRA.

In *Squire v. County of Los Angeles*, the Los Angeles County Sheriff's Department ("Department") issued Officer Matthew Squire a written reprimand dated May 22, 2014. It was undisputed that the reprimand was the result of conduct that occurred between September 2008 and continued through May 31, 2013. It was also undisputed that May 31, 2013 was the start of the Department's one year time limit, under the POBRA at Government Code section 3304(d), to investigate Squire's misconduct and provide notice of the Department's proposed discipline.

The May 2014 written reprimand stated that Squire violated the Department's policy prohibiting inappropriate conduct based on

gender. Specifically, Squire knew of, but failed to report an inappropriate relationship between a supervisor and a subordinate officer.

Squire filed a grievance on June 4, 2014 under the MOU, seeking to revoke the written reprimand. The Department denied the grievance but modified the written reprimand to cite violation of the Department's policy governing the duties of supervisors and managers. The Department then presented Squire with a written reprimand dated September 29, 2014 and signed October 3, 2014. The September 2014 reprimand referred to the same events as the May 2014 reprimand.

The Court of Appeal rejected Squire's claims that the September 2014 written reprimand was invalid because it was a new reprimand issued outside of the one-year POBRA deadline. The Court of Appeal noted that, by its terms, POBRA requires that an employer provide notice of proposed discipline within one year, which the Department did. POBRA did not require that the Department issue final discipline within the one year time frame. Moreover, the September 2014 written reprimand was a modification of a timely May 2014 reprimand, not a new reprimand based upon different conduct. The court rejected Squire's arguments to the contrary.

As the court aptly noted, "if a peace officer is not required to initiate a grievance procedure within the one-year limitations period, the public employer cannot be required to issue its response to the grievance within the same year." Thus, the Court of Appeal upheld the written reprimand and found that it complied with the POBRA.

Squire v. County of Los Angeles, 2018 WL 1726152 18 Cal. Daily Op. Serv. 3297 (March 21, 2018).

NOTE:

This case is a good reminder to timely investigate and pursue potential misconduct. Timely follow up is not only good personnel practice, but it complies with the POBRA.

Sergeant's Factual Inquiry into Complaint of Officer Misconduct Triggered POBRA One-Year Limitations Period Because Sergeant Had Discretion to Issue Discipline.

The California Court of Appeal confirmed that a County of Kern Sherriff's Department ("Department") Sergeant was "a person authorized to initiate an investigation" under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code section 3300), or POBRA. But in an unpublished section of the opinion, the Court rejected the Deputy Sheriff's claim that the Department failed to timely investigate allegations that led to his discipline. The case was *Ochoa v. County of Kern*.

Ochoa worked as a Deputy Sheriff with the Department. On March 22, 2013, a young woman, referred to as P.S., accused Ochoa of harassing her. She reported the harassment to another Deputy, named Chiadez, who documented the woman's complaint. On March 25, 2013, a Sergeant named Bittle inquired further into P.S.'s allegations. The investigation revealed evidence that, among other things, Ochoa made unwanted sexual advances toward the woman over a period of four years, including when she was a minor. The Department subsequently began a criminal investigation of Ochoa's conduct for assault and molesting a minor. On August 11, 2014 the Department provided Ochoa with Notice of proposed termination. The Department then conducted a *Skelly* conference and determined that termination was appropriate.

POBRA establishes a one-year statute of limitations. Before disciplinary action may be taken against an officer, POBRA requires that an investigation and notice of intended disciplinary action must occur within one year after " a person authorized to initiate an investigation" discovers the allegation of misconduct. This requirement is intended to balance the public's interest in maintaining the integrity and efficiency of the police force, and the officer's interest in being treated fairly.

Ochoa asserted that Bittle was authorized to initiate an investigation, and did initiate the investigation on March 25, 2013. Ochoa further claimed that because the Department did not provide him with a Notice of proposed discipline until August 11, 2014, more than a year after the initiation of the investigation, his termination was procedurally invalid. He filed a writ requesting that the Department be ordered to rescind his termination. The Department asserted that its internal affairs investigation was not initiated on March 25 by Deputy Bittle, because Department policies did not authorize Bittle to initiate internal affairs investigations. Rather, the Department asserted, the internal affairs investigation was initiated on May 6, 2013 by an officer who was formally authorized to conduct the investigation.

Department policies provided that only Department Undersheriffs or Chief Deputies are authorized to initiate an administrative investigation. However, as a Sergeant, Bittle was obligated to inquire into allegations, such as those asserted by P.S., to determine whether the allegations are criminal or civil in nature. Sergeants are also authorized to issue discipline, such as documented oral counseling and written reprimands if the alleged misconduct does not warrant an internal affairs investigation and is not serious or criminal misconduct. Bittle acknowledged that he "started an investigation… to determine what the nature of the complaint was," and ultimately took statements from P.S. regarding Ochoa's harassing conduct.

The Court of Appeal found that considering Bittle's authority to inquire into a subordinate officer's wrongdoing, he was authorized to initiate an investigation for purposes of the POBRA. The Court of Appeal found that Bittle's inquiries into P.S.'s complaints were an "investigation" within the meaning of POBRA because they "could lead to punitive action" within the meaning of POBRA. Indeed, Bittle's inquiry ultimately did lead to punitive action.

Thus, the Court of Appeal found that Bittle's inquiry into allegations of Ochoa's misconduct did constitute an investigation within the meaning of the POBRA, and triggered the POBRA one-year limitations period.

Ochoa v. County of Kern, 2018 WL 1755494 (Cal.App. 5 Dist. 2018).

NOTE:

This case is an important reminder that even if a law enforcement agency's internal polices do not delegate authority to initiate a full internal affairs investigation to a particular rank of officer, any authority delegated to that officer to make factual inquiries into misconduct may trigger the one-year POBRA limitations period.

Internal Reports Containing Summaries of Police Officer Personnel Matters, Including Information from Citizen Complaints Older than Five Years Old, May Be Discoverable.

This case arose when Robert Riske, a police officer for the City of Los Angeles Police Department ("Department"), sued the agency. He claimed the Department repeatedly hired less qualified officers for positions instead of him, and that the Department unlawfully did so in retaliation for Riske's reports of misconduct by other officers. After Riske made his report, some colleagues viewed him as a "snitch", refused to work with him, and ignored him in the field. Riske applied for promotion from police officer to 14 different detective positions. Each time, the Department awarded the position to an applicant who Riske viewed as less experienced or less qualified.

Riske sought, and was granted discovery of documents submitted by successful candidates subject to a court protective order. This information included training and evaluation ("TEAMS") reports summarizing candidates' history of discipline, commendations, personnel complaints, performance evaluations and other personnel matters that had occurred during the officers' employment. The Department used the

reports to evaluate and select candidates. Some of this information was also contained in the officers' confidential personnel files.

However, relying on California Evidence Code section 1045, the trial court ordered the City to disclose the TEAMS reports, with redaction of all information that occurred more than five years before Riske filed his lawsuit. Section 1045 (a) provides that in litigation involving peace officers the following information shall be disclosed: "records of complaints, or investigations of complaints, … concerning an event or transaction in which the peace officer or custodial officer … participated, … provided that information is relevant to the subject matter involved in the pending litigation." Section 1045 (b)(1) excludes from disclosure: "information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation." Riske appealed and asserted that the trial court improperly allowed redaction of the TEAMS reports.

The Court of Appeal found that section 1045(b)(1) only limited disclosure of actual citizen complaints that occurred more than five years prior to the events at issue in Riske's lawsuit (the Department's alleged failure to promote him over other candidates). The Court of Appeal reasoned that the plain language of the Evidence Code, and court precedents supported this interpretation. While section 1045(a) broadly permits disclosure of records of complaints, the section 1045(b)(1) prohibition on disclosure of information "consisting of complaints" has been interpreted by the courts to prohibit only the disclosure of "citizen complaints" against an officer. Because the TEAMS reports are not citizen complaints, and they do not quote directly from citizen complaints, they were not subject to the disclosure bar set forth in Evidence Code section 1045(b)(1) and should not have been redacted.

Thus, the Court of Appeal found that the trial court erred by ordering disclosure of the TEAMS reports subject to redaction and directed the City to produce unredacted reports.

Riske v. Superior Court (City of Los Angeles), 2018 WL 1789937 (Cal.App. 2 Dist. 2018).

NOTE:
Whether information contained in police officer personnel files is subject to disclosure or discovery depends on the facts of each case. Here, the Court's decision to disclose the TEAMS reports without redaction turned on the fact that they were not citizen complaints and they did not directly quote information from citizen complaints.

LABOR RELATIONS

The PERB Decides that County's Surveillance of, and Denial of Access to Unrecognized Employee Organizations Were Unfair Labor Practices.

The Public Employment Relations Board (PERB) approved an Administrative Law Judge's decision that the County of San Bernardino violated the Meyers-Milias-Brown Act (MMBA) and the County's Employee Relations Ordinance (ERO) by: 1) prohibiting non-employee representatives of SEIU from accessing non-work areas of County facilities; and 2) photographing County employees meeting with SEIU organizers. The County claimed that SEIU had no right of access because it was not a recognized employee organization, and that the photographing did not interfere with employee rights.

The County's ERO stated that recognized employee organizations had access to County work locations, but was silent about access for unrecognized employee organizations. By May 2014, the County had reached a tentative agreement for a successor MOU with the San Bernardino Public Employees Association (SBPEA), the incumbent recognized employee organization. That same month, the County's Human Resources Director issued a memo regarding Campaign/ Solicitation Activities. That

memo stated that SEIU and other organizations were visiting County facilities to urge a no vote on the tentative agreement. The memo also stated the County's position about access to County facilities, and said that organizers were not permitted to access offices, worksites, break and lunch rooms, and employee parking lots.

On at least two occasions, SEIU representatives entered an outdoor and an indoor break area of different County facilities to talk with County employees about joining SEIU. On one of those occasions, a District Manager photographed the SEIU representatives talking to County employees; the District Manager did so because she had understood the County's directive to mean that organizing activity could not occur in County break areas. On the second occasion, the SEIU organizers were escorted from the County facility.

The PERB concluded, without determining all of the contours of unrecognized employee organization access, that the County violated the MMBA by denying SEIU from accessing the break room areas during non-work time in order to solicit membership. PERB noted that while California's various labor relations statutes do not treat the issue of employee organization access uniformly, there was no basis in case law or the purpose of the MMBA to support the County's contention that unrecognized employee organizations had no right of access.

Specifically, the PERB noted that the MMBA at Government Code section 3507(a)(6) does not distinguish between the access of recognized or unrecognized employee organizations. The PERB agreed with the County that the MMBA does give recognized and unrecognized employee organizations very different statuses because only the recognized representative can negotiate for and represent the organizations members before the employer. But, the PERB decided that employees do not have a meaningful right to select their representative unless the non-incumbent employee organizations have reasonable access to work sites. The PERB adopted the ALJ's conclusion that the County's blanket prohibition on organizational activities in non-work areas of County facilities was unreasonable, and improperly denied SEIU its right of access.

The PERB also agreed with SEIU that the County had interfered with County employees' exercise of MMBA rights by photographing SEIU organizers meeting with County employees in one County break area. The PERB noted that the MMBA prohibits employers from interfering with employees' MMBA rights. Once the employer is shown to have interfered with its employees' MMBA rights, the burden shifts to the employer to provide a legitimate justification for its conduct. If the harm to the employees' MMBA rights is slight, an unfair practice will be found unless the employer's justification outweighs the severity of the harm. If the employer's conduct is inherently destructive of employees' MMBA rights, however, the conduct will be excused only if the interference was caused by factors outside the employer's control and no alternative course of action was available.

The PERB found that harm to the employees' MMBA rights occurred if employees saw the County manager taking the photograph. The fact that the manager deleted the photograph after the SEIU organizers objected was evidence that the employees were intimidated enough to ask for the photograph to be deleted. Moreover, the PERB found that the manger did not repudiate her conduct by simply deleting the photograph, because she did not say anything to indicate that she would not photograph again.

Because the PERB found that the photograph did cause slight harm to employees' MMBA rights, the burden shifted to the County to provide a legitimate justification for the interference. The County argued that the manager was justified in taking the photograph because she reasonably believed that the organizers were violating the County's policy. But PERB disagreed, finding that the act of documenting a violation of an unlawful access policy cannot constitute a legitimate justification.

PERB decided in favor of SEIU and ordered the County to rescind its access policy.

SEIU v. County of San Bernardino, (2018) PERB Decision No. 2556-M

NOTE:

Employers should review their local employee relations rules and/or MOU's to ensure they are providing unrecognized employee organizations access to employees during non-work times in non-work areas.

BENEFITS CORNER

IRS Takes First Step To Assess Employer Mandate Penalties.

We have started to see our public agency clients receive IRS Letter 226J, providing employers a preliminary calculation of the Employer Shared Responsibility Payment ("ESRP") they owe for the 2015 tax year. The letter explains whether the IRS is assessing the penalty for failure to offer minimum essential coverage to "substantially all" full-time employees or the "unaffordable" coverage penalty. Employers who receive this letter have an opportunity to agree or disagree with the proposed ESRP. If you receive Letter 226J, you should carefully compare the data noted on Letter 226J with the Forms 1094-C and 1095-C you filed for tax year 2015. It is possible that the IRS may have assessed the ESRP in error. If you disagree with the preliminary ESRP, you will need to file a statement with supporting documentation and follow the detailed instructions on Letter 226J.

Benefit Decisions Should Not Discriminate Against Employees With Disabilities Or Employees Who Associate With Persons With Disabilities.

A New York federal district court upheld a jury's determination that an employer illegally discriminated against a former employee (Barry Reiter) when it terminated him shortly after he requested time off to care for his disabled daughter. This case is not binding authority for California public agencies, nor does it raise novel principles of law. We highlight this case here, however, because it serves as an important warning for implementing best practices.

Mr. Reiter worked for his employer for approximately two years. Mr. Reiter had health issues and requested that he and his family be added to his employer's health plan. The employer initially refused, and even allegedly made disparaging remarks about the employee's health conditions and their impact on the health plan. Mr. Reiter demanded the employer not to discriminate against him based on his health conditions, and three months later, he and his family were enrolled. Mr. Reiter subsequently requested FMLA leave to care for a suicidal daughter with chronic depression and acute anxiety disorder, but he was terminated a day later, allegedly for performance reasons. Mr. Reiter sued his employer under the association provision of the Americans with Disabilities Act ("ADA"), which protects employees from termination and other adverse employment actions based on their association/relationship with another disabled individual. The jury ruled in Mr. Reiter's favor, and the employer requested the district court to review that verdict.

The district court considered a variety of factors and held there was sufficient evidence to show that the employer knew about Mr. Reiter's daughter's disability, and that it factored into the termination decision. The district court relied on the closeness of time between the employer's learning of the daughter's condition and the termination decision. The district court

also determined that the alleged performance reasons for Mr. Reiter's termination was "pretextual" (or otherwise untrue or suspect), especially considering the employer's past remarks about Mr. Reiter's medical issues. The court upheld the jury award to Mr. Reiter for $6,000 for lost wages and COBRA premiums paid, as well as $50,000 in punitive damages.

Employers should take steps to ensure employment and benefit decisions are not being made in a manner that discriminates (or reasonably can be construed to discriminate) against an employee with a disability or an employee who cares for a family member with a disability. Similar to the referenced case, an employer's past interactions with the employee should be considered when assessing the scope of potential liability.

This article is based on *Reiter v. Maxi-Aids, Inc.,* 2018 WL 557864 (E.D.N.Y. 2018).

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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.

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Wednesday, June 27, 2018 | 10 AM - 11 AM

CalPERS agencies need to be familiar with the rules governing the employment of retired annuitants and the risk associated with reinstatement when post-retirement employment violates the law. In an area where the costs of reinstatement can be catastrophic, and where the rules governing retired annuitant employment are not always clear, it is important for agencies to be familiar with the legal framework, ever-changing administrative interpretations, and heavy risks associated with employing retired annuitants.

Topics covered in the webinar will include: The laws governing post-retirement work, the common retired annuitant exceptions, common mistakes agencies make when hiring or retaining retired annuitants, hiring retired annuitants as independent contractors, hiring retired annuitants through a third party, and the consequences and liability for reinstatement from retirement.

Who Should Attend?

Human Resources Professionals, Risk Managers, Supervisors, and Managers

Workshop Fee:

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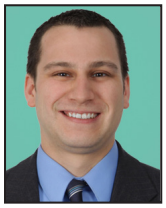
Presented by:

T. Oliver Yee



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San Mateo County ERC | Brisbane | Joy J. Chen

June 7 — **"Inclusive Leadership"**
Los Angeles County Human Resources | Los Angeles | Kristi Recchia

June 21 — **"Leaves, Leaves and More Leaves"** and **"Issues and Challenges Regarding Drugs and Alcohol in the Workplace"**
Monterey Bay ERC | Santa Cruz | Kimberly A. Horiuchi

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Orange County Consortium | Buena Park | Mark Meyerhoff & Paul D. Knothe

Customized Training

June 1,4 — **"Writing Investigations"**
Probation Training Center | Pico Rivera | Los Angeles County Probation

June 4 — **"Preventing Workplace Harassment, Discrimination and Retaliation"**
ERMA | Cathedral City | Christopher S. Frederick

June 5 — **"Costing Labor Contracts"**
City of Long Beach | Kristi Recchia

June 5 — **"Preventing Workplace Harassment, Discrimination and Retaliation and Ethics in Public Service"**
City of Atherton | Erin Kunze

June 5,27,29 — **"Handling Grievances"**
Probation Training Center | Pico Rivera | Los Angeles County Probation

June 6 — **"Performance Management"**
City of Gardena | Kristi Recchia

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June 6 — **"The Brown Act and Ethics and Grievance Procedures"**
County of Imperial | El Centro | Stefanie K. Vaudreuil

June 6 — **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
San Bernardino Community College District | Laura Schulkind

June 6 — **"Exercising Your Management Rights"**
San Joaquin Delta College | Stockton | Eileen O'Hare-Anderson

June 7 — **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Fairfield | Gage C. Dungy

June 13,14 — **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Town of Truckee | Jack Hughes

June 14 **"Mandated Reporting"**
East Bay Regional Park District | Oakland | Erin Kunze

June 15 **"Keenan SWAAC Training: Performance Management"**
Keenan | Torrance | Pilar Morin

June 15 **"Freedom of Speech and Right to Privacy"**
Labor Relation Information System - LRIS | Las Vegas | Mark Meyerhoff

June 19 **"Managing the Marginal Employee"**
San Joaquin Delta College | Stockton | Eileen O'Hare-Anderson

June 20 **"Risk Management Skills for Front Line Supervisor"**
ERMA | Rancho Cucamonga | Christopher S. Frederick

June 21 **"The Art of Writing the Performance Evaluation"** and **"Management Professional Development"**
Barstow Community College District | Eileen O'Hare-Anderson

June 21 **"Creating a Culture of Respect"**
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June 22 **"Legislative Update"**
California State University (CSU) Human Resources Conference | Long Beach | Judith S. Islas

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CSDA General Manager Leadership Summit | Olympic Valley | Steven M. Berliner

June 26 **"Powerful Leadership: Effective Tips for Stellar General Managers"**
CSDA General Manager Leadership Summit | Olympic Valley | Gage C. Dungy

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June 26 **"Firefighter Discipline and Appeal Rights: How to Comply with the Bill of Rights"**
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June 27 **"Life After Retirement - Hiring Retired Annuitants and Avoiding Violations"**
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June 28 **"The Negotiable Aspects of Organizational Restructuring and Day-to-Day Labor Relations"**
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