LCW Liebert Cassidy Whitmore

Education Matters

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

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LCW NEWS

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STUDENT DISCIPLINE

If Student Discipline Involves Potentially Severe Consequences and the Disciplinary Committee's Decision Against the Student Depends on Believing the Complainant, the Committee's Procedures Should Include an Opportunity for the Committee to Assess the Complainant's Credibility.

While a freshman at Claremont McKenna College, John Doe met Jane Roe, a freshman at a neighboring school. On the night of a party, John and Jane engaged in sexual activity that Jane later alleged was a sexual assault in violation of the College's sexual misconduct policy.

The College initiated an investigation and hired a third-party investigator. The investigator interviewed Jane, John, and multiple other witnesses and reviewed other evidence. Pursuant to the College's policies, the investigator provided the parties with a preliminary investigative report. In response, John requested the investigator ask additional questions to witnesses already interviewed, including him and Jane, interview new witnesses, and seek additional documentary evidence. The investigator interviewed one new witness and clarified a point raised by one of the original witnesses, but did not grant any of the other requests. The investigator provided the parties with a final investigative report, and the College concluded the investigation was complete.

The College convened a Committee comprised of the investigator and two members of the College's faculty and staff to evaluate the evidence and decide by majority vote whether John had violated the College's sexual misconduct policy.

The procedures allowed, but did not require, the parties to appear at the meeting and make an oral statement to the Committee. The procedures did not provide for any questioning by the Committee or the parties. Jane did not appear at the meeting. The Committee issued a written decision finding that John violated the College's sexual misconduct policy.

John appealed the decision under the College's procedures, but the College denied his appeal. The College suspended John for one year and implemented additional sanctions against him.

John then requested a trial court set aside the College's sanctions against him, but the trial court denied his request, stating that John received a fair hearing at the College. Additionally, the trial court held that John had no right to

cross-examine Jane, he had an opportunity to review and respond to the evidence the Committee considered, and he failed to show prejudice from the investigator's decision not to grant his requests for additional investigative steps. John appealed.

On appeal, John argued he was denied a fair hearing because neither he nor the Committee was able to ask any questions of Jane who did not appear at the meeting, and therefore, the Committee had no basis for evaluating her credibility. The Court of Appeal agreed that Jane's failure to appear at the hearing either in person or via videoconference or other means deprived John of a fair hearing where John faced potentially serious consequences and the case against him turned on the Committee finding Jane credible.

In its analysis, the court examined recent court decisions to distill a set of core principles applicable to cases where the accused student faces a severe penalty and the school's determination turns on the complaining witness's credibility. First, the accused student is entitled to "a process by which the respondent may question, if even indirectly, the complainant." Second, the complaining witness must be before the finder of fact either physically or through videoconference or similar technology so the finder of fact can assess the complaining witness's credibility in responding to its own questions or those proposed by the accused student.

Here, Jane's allegations against John were still crucial to the Committee's determination of misconduct even if the Committee relied on other evidence to "corroborate" those allegations. Although the investigator, who was on the Committee, had the opportunity to access the credibility of both parties, the other Committee members did not.

Ultimately, the court held that a school's obligation in a case turning on the complaining witness's credibility is to "provide a means for the [fact finder] to evaluate an alleged victim's credibility, not for the accused to physically confront his accuser." Schools can use many methods to meet their obligation, including granting the fact finder discretion to exclude or rephrase questions from the responding witness as appropriate and ask its own questions, physically separating the witnesses, or having a witness appear remotely via appropriate technology. Accordingly, the Court of Appeal reversed the trial court's decision and instructed the court to review John's request to review the College's decision.

Doe v. Claremont McKenna College (2018) __ Cal.App.5th __ [2018 WL 3751345].

CONSTITUTIONAL LAW

Retired Peace Officers, But Not Concealed Weapons Permit Holders, May Carry Firearms On School Grounds.

In 1994, the California Legislature enacted the Gun-Free School Zone Act, which banned the possession of firearms on school grounds and within school zones. The Act exempted two groups: (1) individuals licensed to carry a concealed firearm under California law and (2) retired peace officers authorized to carry a loaded firearm.

In 2015, the Legislature considered an amendment to the Gun-Free School Zone Act that would have eliminated the Gun-Free School Zone Act's exception authorizing permit holders and retired peace officers to carry firearms "on school grounds," though it would have retained the exceptions authorizing both groups to carry firearms "within school zones." But after substantial opposition from law enforcement organizations, the Legislature passed a revised version of SB 707 that preserved the retired-officer exception for firearm possession on school grounds, as well as within school zones. Under the version of SB 707 that took effect, permit

holders could possess a firearm within school zones, but not on school grounds.

In 2016, a group of individuals with permits to carry concealed weapons filed a lawsuit against the State arguing that because the statute treats permit holders and retired peace officers differently, it was unconstitutional. The trial court rejected that argument because the Legislature had an articulable reason for treating retired peace officers differently on school grounds—unlike permit holders, they risked facing enemies made during their law-enforcement careers, and this need for self-protection did not end when officers stepped on campus. Therefore, allowing retired peace officers an exemption from the general ban of carrying concealed weapons on school property was rationally related to the legitimate state interest of ensuring their protection. The trial court also rejected the permit holders' argument that the Legislature impermissibly favored retired peace officers over "unpopular" civilian gun owners. The permit holders appealed.

The Equal Protection Clause of the Fourteenth Amendment directs States to treat all persons similarly situated alike. Here, the permit holders argued that they were similarly situated to retired police officers. They argued the State cannot deny one group the ability to carry firearms on school grounds while allowing the other group to do so. Because this lawsuit did not involve groups of individuals who have been historically subject to discrimination (like groups based on nationality or race) nor a fundamental right (laws that regulate the carrying of firearms in sensitive places are permissible), the permit holders would lose their lawsuit if the Legislature had a rationale for the law that was related to a legitimate state interest.

In looking at the basis for the law, the court may consider any "legitimate governmental interest" the State has in permitting retired peace officers to carry firearms on school grounds. The State claimed two interests: (1) the protection of retired peace officers and (2) public safety.

In its decision, the court pointed to the Legislature's determination that (1) retired peace officers are at a heightened risk of danger based on their previous exposure to crime, and (2) allowing them to carry firearms other than assault weapons on school grounds mitigates that risk and increases officer safety. Therefore, permitting retired peace officers to carry firearms on school grounds was sufficiently connected to the goal of ensuring such officers' safety, and the legislation survived review.

The court also addressed the permit holders' argument that the law violated the Equal Protection Clause because it was enacted to "favor a politically powerful group and to disfavor a politically-unpopular one." However, the court stated that although it was clear law enforcement organizations lobbied the Legislature, and the Legislature responded to those efforts, "[a]ccommodating one interest group is not equivalent to intentionally harming another." Therefore, the permit holders did not plausibly argue that the Legislature intended to harm permit holders. The court affirmed the trial court's decision.

Gallinger v. Becerra (2018) __ F.3d __ [2018 WL 3673154].

School Board's Prayers, Bible Readings, And Proselytizing in Board Meetings Violated First Amendment's Prohibition on Establishment of Religion.

Since at least 2010, the Chino Valley Unified School District Board of Education included prayer as part of its Board meetings. In October 2013, the Board even adopted an official policy regarding the practice of prayer at its board meetings. This policy permitted an opening prayer at the beginning of the public session of board meetings, usually led "by an eligible member of the clergy or a religious leader in the boundaries of" the District, or a volunteer from the Board or audience if no clergy member is available. Board members gave the opening prayer at least four times after the adoption of the

policy. Additionally, Board members frequently discussed Christian beliefs, read from the Bible, and prayed at Board meetings.

In November 2014, a group of students, parents, current and former district employees, and attendees of school board meetings challenged the Board's prayer policy, claiming that it violated the Establishment Clause of the First Amendment, because the policy was not neutral among religions and between religion and nonreligion. The trial court ruled against the Board, and issued an order preventing the Board from "conducting, permitting or otherwise endorsing school-sponsored prayer in Board meetings." The Board appealed.

On appeal, the Board argued that its prayer policy and practice fell within the legislative-prayer tradition, which allows certain types of prayer to open government sessions. The legislative-prayer tradition acts as an exception to the Establishment Clause of the First Amendment by allowing prayer to open legislative and government board sessions and to serve "a solemnizing, unifying purpose for mature adults before lawmakers embark on important government business." However, the court rejected this argument stating that though some individuals voluntarily attended the Board meetings, many were obligated to attend, such as students asked to give presentations, receive awards, or even face discipline, and the prayer practice risked pressuring these individuals to participate. Furthermore, the Board retained a high degree of control over the board meetings and its participants, which further distinguished the Board's prayer policy and practice from the legislative-prayer tradition.

Because the court initially ruled the legislative-prayer tradition did not apply, the Court of Appeal then determined whether the Board's policy or action was an impermissible establishment of religion. To be valid, the prayer policy and practice (1) must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster an excessive entanglement with religion.

The Court held that a secular purpose for a government practice must be genuine, and not merely secondary to a religious objective. Here, shortly after the adoption of the District's prayer policy, a Board member publicly stated that the Board's goal was "the furtherance of Christianity," the Court found that the policy lacked a secular legislative purpose.

Furthermore, the court determined that the Board's policy reinforced the dominance of particular religious traditions instead of highlighting a diverse range of beliefs. As a result, the opening prayers frequently advanced religion, particularly Christianity.

Finally, the Court found that there were other means besides prayer for the Board to achieve its cited goals of acknowledging the community's religious diversity and solemnizing the meetings. Limiting the opening solemnization to prayers performed principally by religious leaders promoted an excessive entanglement with religion. Accordingly, the Court ruled that the Board's prayer policy and practice failed the Establishment Clause test, because it was an impermissible establishment of religion.

Freedom from Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ. (2018) __ F.3d __ [2018 WL 3552446].

NOTE:

In this opinion, the Ninth Circuit placed particular weight on the large amount of student involvement at the board meetings and the fact that many of these students did not attend the meetings voluntarily. Therefore, public schools should be especially mindful of their own policies and practices regarding prayer, particularly in settings where students are required to be present. The result might be different in a case involving a community college district.

FIELD TRIPS

Field Trips And Excursions Immunity Provided By Code Of Regulations Sec. 55220 Does Not Apply To An Injury Suffered By A Member Of A Visiting Team During An Intercollegiate Athletic Event.

In 2016, Grossmont College, a college of the Grossmont-Cuyamaca Community College District, hosted an intercollegiate beach volleyball tournament on volleyball courts owned, controlled, and maintained by the District. Mary Anselmo traveled to the tournament as a member of the Los Angeles Community College District's Pierce College Women's Volleyball team. During the tournament, Anselmo was injured when she dove into the sand and her knee struck a rock in the sand.

Anselmo sued the District for multiple reasons related to her injury but later amended her lawsuit to only sue for a dangerous condition of public property. In response, the District argued that it was immune from the lawsuit under Section 55220 of Title 5 of the California Code of Regulations, which provides immunity to community college districts that conduct field trips or excursions. The trial court entered a judgment in the District's favor, and Anselmo appealed.

On appeal, the court considered whether the immunity provided by Section 55220 extended to an injury sustained during an interscholastic athletic competition by a member of the visiting team caused by the negligence of the home team's district.

The court noted that the District had a duty under Government Code section 835 to maintain its property and athletic facilities in a safe condition. Furthermore, a district that hosts an interscholastic athletic event owes a general duty to all participating teams—both home and visitor—to avoid acts or omissions that materially increase the risks to participants beyond those inherent in the sport. Ultimately, the court held that field trip immunity under Section 55220 did not extend to the District as the host of an interscholastic athletic competition for injuries suffered by a player on a visiting team merely because her team traveled to the site of the competition.

The court reversed the trial court's decision and instructed the trial court to conduct further proceedings.

Anselmo v. Grossmont-Cuyamaca Community College District (2018) __ Cal.App.5th __ [2018 WL 3688572].

IMMUNIZATIONS

Legislature's Elimination Of A Previously Existing "Personal Beliefs" Exemption From Mandatory Immunization Requirements For School Children Passes Constitutional Muster.

In 2015, the California legislature passed and the Governor signed Senate Bill 277, which amended California's public health laws governing immunization requirements against childhood diseases. Specifically, the bill eliminated the personal beliefs exemption from the requirement that children receive vaccines for specified infectious diseases before being admitted to any public or private elementary or secondary school, day care center, or the like. The bill contained exemptions for pupils in a home-based private school or independent study program who do not receive classroom-based instruction and for pupils previously allowed a personal beliefs exemption until they enroll in the next grade span (i.e., birth to preschool, kindergarten and grades 1 to 6, and grades 7 to 12). Otherwise, as of July 1, 2016, no pupil may be unconditionally admitted for the first time, or admitted or advanced to seventh grade level, unless immunized.

On April 22, 2016, a group of parents with "sincerely held philosophic, conscientious, and religious objections to state-mandated

immunization, filed a lawsuit against the director of the California Department of Public Health. The parents sought to invalidate the amendments based on allegations that the law violated four provisions of the California Constitution: the free exercise of religion, the right to attend school, equal protection (alleging "discrimination based on vaccination status"), and due process (alleging the bill was vague). The parents also alleged a violation of Health and Safety Code that required informed consent for medical experiments. The trial court dismissed the parents' challenge, and the parents appealed.

Despite the parents' arguments that the amendments violated their constitutional rights, they did not cite any pertinent authorities for any of their assertions, and on appeal, the Court could not identify any. On the contrary, the Court noted "the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." Nor is a pupil's right of education "any more sacred than any of the other fundamental rights that have readily given way to a State's interest in protecting the health and safety of its citizens, and particularly, school children."

The parents also alleged a violation of the Health and Safety Code because "all vaccines are 'medical experiments,'" so participants must provide informed consent prior to the immunization. However, the Court held that applicable authorities—legal and scientific—clearly showed that immunization is reasonably related to maintaining the health of the subject of the immunization as well as the public health.

Ultimately, the Court agreed with the trial court's dismissal of the parents' claims, therefore the state's elimination of a previously existing "personal beliefs" exemption from mandatory immunization requirements for pupils passed these constitutional challenges.

Brown v. Smith (2018) 24 Cal.App.5th 1135.

LABOR AND EMPLOYMENT

Community College Employee's Claims of Employment Discrimination Were Barred by Adverse Ruling of Administrative Law Judge.

Carol Wassmann was a tenured librarian employed by the South Orange County Community College District ("District") when she was dismissed for multiple incidents of unsatisfactory performance, and discourteous and unprofessional behavior. Wassmann challenged her dismissal during a five-day administrative proceeding which was conducted in accordance with the California Education Code. Pursuant to the Code, an Administrative Law Judge ("ALJ") conducted a hearing in which Wassmann had the opportunity to present witnesses. At the end of the hearing, the District provided Wassmann with a written statement describing the District Board's dismissal decision. The ALJ that presided over the hearing determined that the District terminated Wassmann for cause, and a trial court upheld the judge's decision. Although the Education Code allowed Wassmann to object to the ALJ decision "on any ground," Wassmann did not assert that she was terminated because of her race, age, or for any other discriminatory reason.

Years later, Wassmann filed a civil lawsuit against the District and other parties, claiming that she was terminated because of her race and age, in violation of the Fair Employment and Housing Act ("FEHA") and other claims. The trial court granted defendants' motions for summary judgment and the Court of Appeal affirmed on the ground that the FEHA claims were barred by *res judicata*, and collateral estoppel. These legal principles prevent a party from re-litigating issues or legal claims that have already been heard or decided in another forum. The Court of Appeal found that the ALJ's decision at the hearing on Wassmann's dismissal barred her civil lawsuit because it had a "sufficiently judicial character." The hearing was conducted by an impartial decision maker, witnesses gave testimony under oath, Wassmann

had the opportunity to subpoena and examine witnesses, introduce evidence, make written and oral argument, the proceeding was transcribed, and the ALJ issued a written decision. After Wassmann's subsequent challenge to the ALJ's decision was unsuccessful, the decision became final and binding.

Thus, the Court of Appeal found that Wassmann had a sufficient opportunity to present any evidence that she was terminated due to the unlawful discrimination but failed to do so during her administrative proceedings. The Court upheld the ALJ's determination that she was terminated for cause.

Wassmann v. South Orange County Community College District (2018) 24 Cal.App.5th 825, reh'g denied (June 27, 2018).

Alleged Act of Sharing Medical Information about a Public Employee Was Not Conduct in Furtherance of a Protected Activity for Purposes of the Anti-SLAPP Statute.

Dawn Turnbull was a member of the Lucerne Valley Unified School District Board of Trustees. After Turnbull publicly opposed the District Superintendent's alleged misappropriation of District funds, the Superintendent, Board Members, and a District volunteer (1) obtained and published on social media confidential medical information about Turnbull from Turnbull's employer, (2) generated false reports concerning school lunch program eligibility from a statewide student data system, (3) falsely told Board Members that evidence strongly suggested Turnbull illegally accessed the statewide student data system, and (4) attempted to have her terminated from her employment and recalled from her elected position on the Board.

Ultimately, Turnbull was fired from her employment with another school district and lost her elected position after a successful recall election. Turnbull sued the District, Superintendent, two Board Members, and the volunteer for (1) disclosing her private medical information, (2) invading her privacy, (3) interfering with her constitutional rights, (4) violating her civil rights, and (5) conspiring to deprive her of her right of privacy or right of free speech.

In response to the lawsuit, the District, one Board Member, and the Superintendent brought a motion to enforce California's anti-SLAPP statute, a law designed to "encourage continued participation in matters of public significance" by stopping lawsuits that would otherwise chill a person's public participation due to abuse of the judicial process.

There are two steps to determine if a lawsuit violates the anti-SLAPP statute. The first step is to examine the causes of action to determine if they arise from any act in furtherance of the defendant's "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." The second step is to determine whether the plaintiff has a probability of prevailing on her claims. If a lawsuit arises from an act in furtherance of the defendant's right of petition or free speech and the plaintiff does not have a probability of prevailing, then the lawsuit will be dismissed.

Here, the trial court found that the District, Superintendent, Board Members, and the volunteer did not prove that Turnbull's medical information was disclosed during a Board meeting or during Board discussions, or that it was a matter of public interest. As a result, the trial court found that the District, Superintendent, Board Members, and the volunteer failed to prove the alleged acts were protected activities and denied their anti-SLAPP motion. They appealed.

Turnbull's causes of action for disclosing her private medical information and invading her privacy stemmed from the Superintendent and one Board Member obtaining Turnbull's medical information in the form of a doctor's note and giving it to the volunteer. Although the Superintendent and Board Member argued

this was a protected activity, they did not explain how giving the note to the volunteer was protected as a statement or writing made in a place open to the public or a public forum. Furthermore, the Superintendent and Board Member did not explain how giving the note to the volunteer constituted conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or issue of public interest.

Turnbull's causes of action for violating her civil rights and conspiring to deprive her of her right of privacy or right of free speech stem from the Superintendent obtaining the doctor's note from Turnbull's employer and using it to intimidate her into not pursuing her claims that the Superintendent misappropriated District funds. As with Turnbull's first two causes of action, the Superintendent failed to show how this behavior constituted a protected activity that would support an anti-SLAPP motion.

Finally, the Court considered Turnbull's third cause of action for interfering with her constitutional rights based on Turnbull's allegation that a Board Member pressured her to resign from the board, (2) the Board member threatened to have Turnbull recalled from the Board; and (3) the Board member used District resources to support the efforts to recall Turnbull. Although Turnbull's allegations were vague, the District, Superintendent, and Board Members argued that the allegations arose from a protected activity. However, the Court ultimately found that the District, Superintendent, and Board Members did not establish that the alleged pressure and threats occurred in a place open to the public or public forum, which would constitute a protected activity.

Overall, the District, Superintendent, Board Members, and District volunteer failed to establish that the allegations in Turnbull's complaint arose from protected activities. Accordingly, the Court did not examine the second prong of the anti-SLAPP analysis, which was Turbull's probability of prevailing on the merits, and affirmed the trial court's decision against the anti-SLAPP motion.

Turnbull v. Lucerne Valley Unified School District (2018) 24 Cal. App.5th 522.

Court Upholds Dismissal of Administrative Law Judge ("ALJ") from State Personnel Board Where ALJ's Misconduct was Repeated, Egregious and Likely to Recur.

Richard Paul Fisher served as an Administrative Law Judge ("ALJ") for the California State Personnel Board (SPB). While still serving as an ALJ, Fisher joined the law firm of Simas & Associates as "of counsel." The firm represented clients in administrative actions before the SPB, including one high-profile case that was heard by the SPB while Fisher was serving in his ALJ and "of counsel" roles. Fisher never disclosed his "of counsel" role to the SPB during any of these events.

Fisher's dual role violated the SPB's policies, including its policy prohibiting ALJ's from participating in activities that are incompatible with their duties as an SPB ALJ. The policy stated that an Officer of SPB who engages in any employment or activity "which might conceivably be incompatible, or interfere in any way with his or her duties as a State officer or employee, whether or not specifically covered by the Statement must consult with his or her supervisor…" When Fisher's involvement with the Simas & Associates law firm was discovered, the SPB dismissed him from his ALJ position.

Fisher challenged his dismissal. He claimed, among other things, that dismissal was unwarranted because the SPB never served him with notice that working for a law firm that represented clients in administrative matters was impermissible.

California's Office of Administrative Hearings ("OAH") heard Fisher's appeal and upheld his dismissal. The Court of Appeal affirmed that the SPB's dismissal of Fisher was appropriate, and that the OAH's denial of Fisher's appeal was supported by substantial evidence. The Court of Appeal rejected Fisher's argument that

he should have been expressly informed that it was inappropriate for him to work for a law firm that was litigating cases before the very agency for which Fisher worked as an ALJ. The Court of Appeal also found that substantial evidence supported the OAH findings that Fisher "displayed an appalling lack of judgment when he became of counsel with Simas & Associates" and "continued to demonstrate poor judgment when he failed to disclose his of counsel relationship to SPB." The Court of Appeal therefore found that SPB did not abuse its discretion when it dismissed Fisher, and affirmed the decision of the OAH denying Fisher's appeal.

Fisher v. State Personnel Board (June 11, 2018, No. C081957) 25 Cal.App.5th 1 [2018 WL 3327710], as modified on denial of reh'g (July 6, 2018).

Tenured Private University Professor's Blogpost Criticizing Encounter Between Graduate Instructor And A Student Qualified As An Extramural Comment Protected By Academic Freedom.

Dr. John McAdams was a professor who taught political science at Marquette University in Wisconsin. In November 2014, McAdams published a post on his personal blog in which he criticized a graduate instructor who refused to permit debate about gay marriage. The graduate instructor claimed that any opinion against gay marriage was homophobic and would not be permitted in her class.

The instructor filed a formal complaint with the University against McAdams. In December 2014, the University suspended McAdams with pay, but did not identify a reason for the suspension until January 2015 when it identified the blogpost as justification for his suspension. The University also informed McAdams that it intended to revoke his tenure and terminate his employment because his "conduct clearly and substantially fails to meet the standards of personal and professional excellence that generally characterizes University faculties."

Pursuant to the University's discipline procedures, the University convened the Faculty Hearing Committee, an advisory body whose membership consists solely of University faculty members, to consider McAdam's case. After hearing testimony and reviewing documents, the Committee drafted a report for the University's President and recommended suspension without pay for no more than two semesters. The University President then told McAdams that he was suspended without pay for two semesters, as the Committee recommended. However, the President went beyond the Committee's recommendation, and demanded that as a condition of his reinstatement to the faculty, McAdams provide a written statement expressing "deep regret" and admitting that his blogpost was "reckless and incompatible with the mission and values of Marquette University."

McAdams refused to write the requested letter. As a result, the University did not reinstate McAdams at the end of his two-semester suspension and effectively fired him.

McAdams then sued the University alleging the University breached his employment contract by suspending then dismissing him. McAdams demanded money damages and reinstatement as a tenured faculty member.

The trial court issued a decision in favor of the University and dismissed McAdams's lawsuit. In its opinion, the trial court concluded it must defer to the University's resolution of McAdams's claims, because "public policy compels a constraint on the judiciary with respect to Marquette's academic decision-making and governance," out of a recognition that "professionalism and fitness in the context of a university professor are difficult if not impossible issues for a jury to assess." The trial court also concluded that the University's internal dispute resolution process afforded McAdams sufficient due process.

McAdams then appealed directly to the Supreme Court of Wisconsin, which reversed the trial court's decision.

The Court explained it would not defer to the University's internal discipline procedures because (1) the parties never agreed that the University's internal discipline procedures would either replace or limit the adjudication of their contract dispute in our courts, (2) the University's internal discipline procedures were not comparable to a judicial proceeding that is entitled to deference because it was not an impartial tribunal that had authority to impose discipline, it only made recommendations, and (3) the Court no longer automatically defers to an administrative agency's conclusions of law as it did in the past because that practice is unsound in principle.

In its analysis of the merits of McAdams's academic freedom argument, the Court relied upon standards and principals of academic freedom as defined by the American Association of University Professors. Accordingly, the court determined that McAdams's blog post was an "extramural comment," a type of expression made in McAdams's personal, rather than professional, capacity. The Court then analyzed the impact of the blog post. The court, borrowing language from the AAUP, noted a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. If the comment meets this standard, the second part of this analysis considers the broader context of the faculty member's complete record before deciding whether the extramural comment is protected by the doctrine of academic freedom: "A final decision should take into account the faculty member's entire record as a teacher and scholar." The Court held the University failed to follow these long-standing AAUP standards and principles.

Ultimately, the Court concluded that McAdams's blog post was an extramural comment protected by the doctrine of academic freedom. The blog post alone did not clearly demonstrate McAdams was unfit to serve as a professor because, although the University identified many aspects of the blog post about which it was concerned, it did not identify any particular way in which the blog post violated McAdams's responsibilities to the University's students.

Consequently, the University breached McAdams's employment contract by suspending him without cause (with pay), affirming the suspension, and then increasing the discipline to suspension without pay. Accordingly, the Court required the University to immediately reinstate McAdams to the faculty with unimpaired rank, tenure, compensation, and benefits, and the Court ordered the trial court to conduct further proceedings to determine the amount of McAdams's damages including back pay.

McAdams v. Marquette University (2018) __ Wis.2d __ [2018 WL 3341739].

NOTE:

This case is from outside California, and so is not binding in California. The case does provide some insight as to how one state supreme court interpreted challenges to employee discipline and academic freedom.

ADMINISTRATIVE LAW

The Filing Of A Request To Reconsider An Agency Decision Does Not Extend The Deadline To File A Writ Petition. The Failure To Correct Another Party's Legal Misunderstanding Due To One's Own Confusion Is Not Grounds For The Application Of Equitable Estoppel.

This lawsuit arose after surgical staff at Saint Francis Memorial Hospital left a sponge in a patient during the patient's back surgery in 2010. As a result of the incident, the Department

of Public Health imposed a $50,000 fine on the Hospital. The Hospital challenged the fine and appeared before an administrative law judge to argue their case. The Administrative Law Judge issued a proposed decision finding no basis for the fine.

However, the Department issued a final decision on December 15, 2015, rejected the Administrative Law Judge's proposed decision, and affirmed the fine. The Department's decision was "effective immediately," and the Department served the decision on the Hospital by certified mail on December 16, 2015.

On December 30, 2015, the Hospital submitted a request for reconsideration to the Department, but the Department denied it on January 14, 2016. On the same day, without knowledge of the Department's denial, counsel for the Hospital emailed a Department attorney notifying the Department that the Hospital intended to challenge the Department's decision.

The Hospital filed its challenge, known as a writ petition, in the trial court on January 26, 2016. The Department subsequently asked the court to dismiss the case because the Hospital filed the petition after the filing deadline. Instead, the trial court allowed the Hospital to amend its petition to show why it did not miss the filing deadline. However, the trial court found that because the Department's decision was effective immediately, it was not subject to a request for reconsideration. Additionally, the Hospital's mistaken understanding of the law did not excuse it from filing a petition within the 30 days required by Government Code section 11521, a deadline the Hospital missed. The Hospital appealed.

On appeal, the Hospital argued that the request for reconsideration it filed with the Department extended the deadline to file a writ petition. However, the Court examined Government Code section 11521 that establishes the timeline for a party's request to reconsider an agency's decision. That section provides that the ability to request reconsideration expires 30 days after the delivery or mailing of a decision or the effective date of the agency's decision if that date occurs prior to the end of the 30-day period. Here, the Department's decision was effective immediately, which eliminated the 30-day period for reconsideration, so the Department did not need to consider the Hospital's request.

Additionally, Government Code section 11523 sets the timeline for a party to file a writ petition. The statute states a party must file its petition within 30 days after the last day on which reconsideration can be ordered or the effective date of the agency's decision. Here, the Department's decision was effective immediately, there was no period in which to file a request for reconsideration, and the 30-day period for filing a writ started to run on the day the decision was mailed—December 16, 2015. Therefore, the Hospital's last day to file a petition was January 15, 2016, but the Hospital did not file until January 26, 2016, 11 days later.

The Hospital argued that because it requested reconsideration, it was allowed 15 extra days to file its petition based on Government Code 11518.5, subdivision (a). However, that section addresses the correction of a mistake or clerical error in the decision. The Hospital did not request corrections, rather, it sought substantive changes to the decision, and so it was not entitled to the extension.

Next, the Hospital also argued the 30-day filing deadline should have been paused because there was a mistake that led to the running of the period. The Court held that the Hospital's mistake about the availability of reconsideration and the fact it notified the Department of its intent to file a writ petition did not pause the 30-day period.

Finally, the Hospital argued the Department should not be able to argue that the Hospital filed its petition untimely because the Department allegedly contributed to the Hospital's misunderstanding of the governing law.

Although the Department was confused about its authority to reconsider its decision against the Hospital, it did not make any affirmative representations to the Hospital that would incite the Hospital's mistaken understanding of the applicable law. It was not the Department's responsibility to ensure that the Hospital's counsel understood the procedural rules or correct his misunderstanding.

The Court's dismissal of the Hospital's petition did not cause a grave injustice, and the court must strictly enforce the filing deadlines as proscribed by statute. Accordingly, the Court found no reason to overturn the trial court's ruling in favor of the Department.

Saint Francis Memorial Hospital v. California Department of Public Health (2018) 24 Cal.App.5th 617.

ARBITRATION AGREEMENTS

Integration Clause Contained Within An Agreement Does Not Preclude Proof Of Later-Signed Arbitration Clause; Parties Are Not Bound By Terms Of Arbitration Agreement That They Did Not Sign.

After suffering a traumatic brain injury and other major injuries, John Williams signed a residency agreement to live in Atria Los Posas, a residential care facility to elder or dependent adults. The agreement contained an integration clause which read: "This Residency Agreement and all of the Attachments and documents referenced in this Residency Agreement constitute the entire agreement between you and us regarding your stay in our Community and supersedes all prior agreements regarding your residency." The agreement did not contain an arbitration clause.

Immediately after signing the agreement, Williams signed a separate arbitration agreement. The arbitration agreement stated: "It is understood that any and all legal claims or civil actions arising out of or relating to care or services provided to you at Atria… or relating to the validity or enforceability of the Residency Agreement for Atria, will be determined by submission to arbitration as provided by: (1) the Federal Arbitration Act (FAA), 9 U.S.C., Sections 1-16, or (2) CA law, in the event a court determines that the FAA does not apply."

Williams's wife, Vicktoriya Marina-Williams, did not sign any of the documents.

Shortly after his admission to Atria, Williams walked away from the facility. Several hours later, paramedics found him lying in a ditch five miles away. He suffered kidney failure, respiratory arrest, heat stroke, and a second traumatic brain injury.

Williams and Marina-Williams sued Atria and Williams's primary care physician. In one cause of action, they alleged that both Atria and the physician were negligent. In another, Marina-Williams sued both Atria and the physician for loss of consortium, or deprivation of the benefits of a family relationship due to William's injuries caused by Atria.

Atria asked the court to force the parties to arbitration based upon the arbitration agreement. Williams and Marina-Williams opposed the request. They argued (1) the court could not consider the arbitration agreement because it was not included in the residency agreement, (2) the Federal Arbitration Act applied instead of California state law, (3) the arbitration agreement was unconscionable, and (4) Marina-Williams was not a party to nor bound by the arbitration agreement. The trial court denied Atria's request and reasoned that the integration clause in the prior residency agreement barred the subsequent arbitration agreement.

The Court of Appeal reviewed the timing of residency agreement and arbitration agreement and determined the parties did not intend the residency agreement to be the final and complete expression of their agreement. The residency agreement superseded any "prior" agreements,

but it did not invalidate agreements signed later, such as the arbitration agreement. Additionally, the arbitration agreement expressly provided that it applied to claims regarding "the validity or enforceability of the residency agreement." Therefore, the trial court erred in concluding that the integration clause in the residency agreement precluded the later signed arbitration agreement.

Atria also argued the parties should be forced to arbitrate Marina-Williams's claim for loss of consortium because the claim arose out of Atria's care of Williams. The Court held that because Marina-Williams did not sign the arbitration agreement and was not acting as a representative of her husband, but is pursuing her own claim based on the alleged misconduct of others, she was not bound by the arbitration agreement.

Atria also claimed that because the arbitration agreement provided for the application of the Federal Arbitration Act, the procedural rules of the Federal Arbitration Act applied to the exclusion of California Code of Civil Procedure. Although the Court found that the language of the arbitration agreement did not rule out the application of the Code of Civil Procedure, the trial court must decide whether the Code of Civil Procedure applied to deny arbitration of the claims.

Finally, rather than ruling on the Williamses' claims that the arbitration agreement was unconscionable, the Court ordered the trial court to consider the argument.

Ultimately, the Court affirmed the trial court's order denying the request to force arbitration of Marina-Williams's cause of action for loss of consortium, but for all other causes of action, the Court reversed and instructed the trial court to consider and rule on the objections to enforcement of the arbitration agreement.

Williams v. Atria Las Posas (2018) 24 Cal.App.5th 1048.

NOTE:

Public education employers frequently enter into arbitration agreements with employees, parents, and students. Employers must ensure the language of these agreements complies with state and federal laws and is signed by the appropriate party in order for the agreement to be enforceable. LCW attorneys are available to discuss arbitration agreements and how to respond to threatened litigation.

LEGAL ADVISORIES

Department of Education and Department of Justice Issued Joint Dear Colleague Letter on the Withdrawal of Guidance Regarding How to Consider Race in Admissions Decisions.

The U.S. Department of Education issued updates to its guidance regarding discrimination based on race, color, and national origin in programs and activities receiving federal financial assistance on July 3, 2018. The Joint Dear Colleague Letter with the U.S. Department of Justice withdrew guidance documents for educational institutions on the use of race by elementary, secondary, and post-secondary schools under the Constitution, Title IV, and Title VI.

Among the withdrawn documents are the 2011 Dear Colleague Letter regarding the Use of Race by Educational Institutions, the 2013 Dear Colleague Letter on the Voluntary Use of Race to Achieve Diversity in Higher Education after *Fisher v. University of Texas at Austin* [Fisher I], and the 2016 Q & A about *Fisher v. University of Texas at Austin* [Fisher II].

The letter stated that following review, the Departments concluded that the documents "advocate policy preferences and positions beyond the requirements" of the Equal Protection Clause of the Fourteenth Amendment and federal law, and thus "are inconsistent with governing principles for agency guidance documents."

The Interim Guidance recites that protections from discrimination on the basis of race guaranteed by the Constitution, Title IV, and Title VI remain in place.

To read the Joint Dear Colleague Letter, visit https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf

Department of Education Delays Regulations on Program Integrity and Improvement.

In 2017, the U.S. Department of Education announced dates by which institutions subject to the Department's gainful employment regulations must comply with certain disclosure requirements in the gainful employment regulations.

These regulations, 34 CFR 668.412, subd. (d) and (e) specifically, require institutions to disclose information about the educational program such as the program's completion rate, length, number of individuals enrolled, and the cost of tuition and fees on all promotional materials distributed to prospective students and before a prospective student signs an enrollment agreement.

However, the Department has again postponed the deadline for institutions to comply with those disclosure requirements to July 1, 2019. In the meantime, the Department continues to evaluate the efficacy of the regulations and may develop proposed regulations that would replace the current regulations.

To read the announcement, visit https://www.gpo.gov/fdsys/pkg/FR-2018-06-18/pdf/2018-13054.pdf

LABOR RELATIONS

Employer May be Able to Exclude Supervisor from Bargaining Unit.

A public employer may be able to exclude an employee who is a supervisor within the meaning of 3580.3 of the Higher Education Employer-Employee Relations Act (HEERA) from a bargaining unit.

The union sought to add an additional classification – Lead Teacher – to a bargaining unit composed of teachers and non-teachers, through a unit modification petition. The Regents objected, asserting that the lead teacher classification was in fact a supervisory classification that HEERA prohibited from being included in the bargaining unit.

PERB reviewed the factors relevant to a determination whether an employee is a supervisor. Under HEERA section 3580.3 a supervisor is:

> "Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. . . . *Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.*" (Emphasis in original.)

A supervisory employee can be included in a unit when their supervisory duties are sporadic, routine, or the employee performs duties sufficiently similar to rank and file employees.

PERB found that the "substantially similar" rule applied in light of the non-supervisory role of Lead Teachers in personnel matters, and the majority of Lead Teacher job duties were similarity to those of Core Teachers. PERB affirmed the ALJ decision finding it was appropriate to add Lead Teachers to the unit.

In particular, PERB found it significant that: Lead Teachers do not make hiring recommendations for Core Teachers, even though Lead Teachers give input on their assignments; Lead Teachers provide Core Teachers with feedback but do not discipline them; Lead Teachers do not decide whether a Core Teacher will be placed on a performance improvement plan and evaluate Core Teachers only in consultation with management. This showed that Lead Teachers do not exercise independent judgment necessary to be regarded as supervisors.

Regents of the University of California and Teamsters Local 2010 (July 18, 2018) PERB Decision No. 2578-H.

U.S. Supreme Court Says Mandatory Agency Shop Fees Are Unconstitutional; California Legislature Responds with AB 866.

In a long-awaited decision, the U.S. Supreme Court held that requiring public employees to pay agency shop service fees as a condition of continued employment violates the First Amendment of the U.S. Constitution. The *Janus v. AFSCME* decision reverses the Court's 1977 decision in *Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209, and became effective immediately on June 27, 2018.

Under an agency shop arrangement, employees within a designated bargaining unit of a labor organization (i.e., a union or local labor association) who decline to join as full members must pay a proportionate "fair share" agency shop fee to the labor organization, as a condition of employment. These agency shop fees are different from union dues, which union members voluntarily pay to unions as a payroll deduction.

Mark Janus, represented by AFSCME, challenged the constitutionality of agency fees. Janus had refused to become an AFSCME member because he opposed the union's position in bargaining and the policy positions that the union advocated. Janus claimed that all "nonmember fee deductions are coerced political speech" which violates the First Amendment of the U.S. Constitution.

The U.S. Supreme Court applied "exacting scrutiny" to the Illinois Public Labor Relations Act (IPLRA) that authorized agency fees and ruled against AFSCME 5-4, holding that public agencies and "public-sector unions may no longer extract agency fees from non-consenting employees." In its prior opinion in *Abood*, the U.S. Supreme Court upheld a Michigan law that allowed a public employer to require employees represented by a union to pay fees to the Union because nonunion member employees also benefitted from the union's collective bargaining. According to *Abood*, the fees could only be great enough to cover union activities that were "germane to [the union's] duties as collective bargaining representative," but nonmembers could not be required to fund the union's political and ideological projects.

In *Janus*, the Court reasoned that the First Amendment right to free speech includes the right to refrain from speaking. Requiring public employees to pay agency fees was equivalent to compelling the agency fee payer to subsidize union speech, i.e. positions which the union takes in collective bargaining that have "political and civic consequences." The Court went on to reject *Abood's* justifications for upholding agency fees. First, the Court found that "labor peace" did not justify agency fees because labor peace could be achieved through less restrictive means, and the *Abood* Court's fears that labor conflicts would result if agency fees were not paid, had not materialized.

Additionally, the Court rejected *Abood's* finding that states have a compelling interest in avoiding "free riders" – nonmember employees who

enjoy the benefits of union representation without contributing to the costs that unions incur while representing them. A compelling interest is not present, reasoned the Court, on the grounds that unions would otherwise be unwilling to represent non-members, or that it would be unfair to require unions to represent non-members who do not pay a fee for the representation. The Court also noted that the burden of representing non-members is offset by the benefits the union enjoys as the exclusive representative, and that unions can eliminate the burden of representing nonmembers through less restrictive means. For example, as to representation in grievance proceedings, unions may simply decline to represent non-members or require nonmembers to pay for union representation in grievance proceedings.

The Court further found that stare decisis – the principle that courts should follow the precedent set by prior decisions -- did not require it to uphold *Abood*. The Court found several reasons to ignore stare decisis and overrule *Abood* including: "quality of []reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." Among other things, the Court noted, *Abood*: did not provide a workable distinction between chargeable and non-chargeable fees; was out of step with First Amendment jurisprudence because it did not apply the "exacting scrutiny" standard to state legislation allowing agency fees to be charged as a condition of employment; and unions' reliance on agency fees was not a decisive factor.

Thus, the Court held that compelling public employees to pay agency fees "violates the First Amendment and cannot continue."

Janus v. American Federation of State, County, and Municipal Employees (2018) __ U.S. __ [138 S.Ct. 2448].

Senate Bill 866 Provides Public Employee Unions Greater Control Over Dues, Communications and New Employee Orientations.

Immediately after the U.S. Supreme Court decided *Janus*, Governor Brown signed Senate Bill 866. This law is urgency legislation that applies to all California public employers effective June 27, 2018. Among other things, S.B. 866 amends the Government Code and creates new state laws regulating: organization membership dues and membership-related fees; employer communications with employees about their rights to join or support, or refrain from joining or supporting unions; and the disclosure of the date, time, and place of the union's access to new employee orientations.

The Government Code now requires public agencies to honor union requests to deduct voluntary union membership dues and initiation fees (distinct from agency fees) from employee wages, and requires agencies to rely on union certifications that the union has and will maintain member dues deduction authorizations. (Gov. Code, Sections 1152, 1157.3.) Additionally, if an employee requests to "cancel or change deductions," the agency must direct the employee to the union. (Gov. Code, Section 1157.12.) Unions are responsible for processing these requests, not the public employer.

Additionally, SB 866 adds section 3553 to the Government Code which defines a "mass communication" as a "written document, or script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees." A public agency that chooses to send mass communications to its employees or applicants concerning the right to "join or support an employee organization, or to refrain from joining or supporting an employee organization" must first meet and confer with the union about the content of the mass communication. If the employer and exclusive representative do not come to an agreement about the content of the communication, the employer may still choose to send its

communication but must simultaneously send a communication of reasonable length provided by the exclusive representative.

Senate Bill 866 now requires that new employee orientations be confidential. In addition to existing law that provides exclusive representatives with mandatory access to new employee orientations following the passage of AB 119 in 2017, the newly enacted Government Code section 3556 requires that the "date, time, and place of the orientation shall not be disclosed to anyone other than the employees, the exclusive representative, or a vendor that is contracted to provide services for the purposes of the orientation."

Although SB 866 makes changes to the Government Code affecting all public sector employers, it does not apply to all employers in the same manner. Thus, public school employers, community college districts, and other public agencies should familiarize themselves with SB 866 and its impact in light of the *Janus* decision.

BUSINESS & FACILITIES

Ninth Circuit Upholds California Statute Requiring Public Works Employers to Obtain Employee Collective Consent before Contributing to Anti-Union IAFs to Meet Prevailing Wage Requirement.

California Labor Code section 1770 requires contractors on public works projects to pay their employees a "prevailing wage." To satisfy the prevailing wage requirement, employers can either pay all cash wages or pay a combination of cash wages and benefits, such as contributions to healthcare, pension funds, and other fringe benefits, such as employer payments to third-party industry advancement funds. ("IAFs"). In 2017, the Legislature, in Senate Bill 954, amended the Labor Code to clarify that employers may take a wage credit to support their prevailing wage contributions to IAFs *only* if their employees consented to doing so through a collective bargaining agreement ("CBA"). The U.S. Court of Appeals for the Ninth Circuit upheld SB 954 against Constitutional challenge.

Interpipe Contracting, Inc. ("Interpipe") and Associated Builders and Contractors of California Cooperation Committee, Inc. ("ABC-CCC") challenged SB 954 claiming it was unconstitutional. Before SB 954 took effect, Interpipe took a wage credit for its contributions to ABC-CCC. After SB 954 went into effect, Interpipe ceased making payments to ABC-CCC.

Both plaintiffs argued SB 954 was unconstitutional because it discriminated against some forms of advocacy, and asserted that SB 954 violated the Supremacy Clause because it frustrated the purposes of the National Labor Relations Act ("NLRA"). ABC-CCC also claimed that SB 954 violated its First Amendment right to free speech.

The trial court denied plaintiffs' motion for a preliminary injunction and dismissed their action, holding that the NLRA did not preempt SB 954, and that SB 954 did not infringe ABC-CCC's First Amendment rights. Plaintiffs separately appealed, and the Court consolidated their appeals. The Ninth Circuit affirmed the trial court's decision.

NLRA Preemption

Interpipe argued on appeal that SB 954 impermissibly interfered with the federal National Labor Relations Act ("NLRA") provisions protecting labor speech and favoring open debate on matters between unions and employers. It argued that SB 954 had discriminatory effects on Interpipe's pro-open shop speech, because unionized employees would be more likely to consent to wage-crediting that benefits pro-union IAFs, but would not approve wage-crediting benefitting pro-open shop IAFs.

The Ninth Circuit found Interpipe's arguments unpersuasive, because SB 954 is a legitimate labor standard unrelated to the collective bargaining process that regulated no one's labor speech. It did not limit employers' use of their own funds to engage in whatever labor speech they like. It imposed no burdens or litigation risks that pressured appellants to forgo their speech rights in exchange for state funds. It simply barred employers from diverting their *employees'* wages to the employers' preferred IAFs without their employees' collective consent. The Court found insufficient evidence that SB 954 actually impaired Interpipe's ability to engage in labor speech. Thus, SB 954 was a legitimate exercise of California's legislative power to regulate labor conditions.

First Amendment

ABC-CCC also asserted that SB 954 violated the First Amendment. The Ninth Circuit rejected this argument. The Court stated there is no standalone right to receive the funds necessary to finance one's own speech. Because IAFs are free to spend their own funds on expressive activities as they wished, it did not burden ABC-CCC's First Amendment speech rights.

Moreover, SB 954 targeted employer conduct that is not inherently expressive – the payment of wages. SB 954 merely ensures employee approval before employers may re-route employee wages to third party advocacy groups. In addition, SB 954 did not favor a pro-union viewpoint over a pro-open shop viewpoint. SB 954 left IAFs- regardless of viewpoint, free to engage in whatever speech they like, and did not regulate IAFs at all. At most, it only indirectly affected ABC-CCC, and also protected employees' First Amendment speech right to contribute to causes of their choosing.

Interpipe Contracting, Inc. v. Becerra (9th Cir., July 30, 2018, No. 17-55248, No. 17-55263) __ F.3d__ [2018 WL 3613378).

RETIREMENT

Retirement Board Must Provide Pensioner with Due Process to Determine Whether Felony Conviction Arose Out of Performance of Official Duties.

Government Code section 7522.72 of the Public Employees' Pension Reform Act ("PEPRA") states that a public pensioner forfeits a portion of retirement benefits if the pensioner is convicted of a criminal felony that occurred in the performance of the pensioner's official duties. The California Court of Appeal upheld the constitutionality of this law and decided that the applicable retirement board must provide appropriate due process.

Tod Hipsher was a firefighter for the Los Angeles County Fire Department ("County"). Hipsher conducted an illegal gambling operation while employed at the County. After federal authorities charged Hipsher with managing the illegal operation, Hipsher retired. Hipsher was ultimately convicted of a felony related to the gambling operation.

The Los Angeles County Employees Retirement Association ("LACERA") sent Hipsher a letter stating that it was required to reduce his retirement benefits under section 7522.72. The letter stated that the County Human Resources Department had determined that Hipsher's felony conviction arose out of Hipsher's performance of his official duties. Human Resources relied on investigation reports from federal authorities which stated that Hipsher met with undercover agents at a fire station where Hipsher allegedly showed them a room where he conducted his gambling operations. LACERA reduced Hipsher's retirement benefits and sent Hipsher's attorney a second letter stating there were no administrative remedies available to challenge the benefits reduction. Hipsher sued LACERA, naming the County a real party in interest, claiming that section 7522.72 was unconstitutional, and challenging the determination that his felony conviction related to his performance of his official duties.

The Court of Appeal ruled that section 7522.72 is not unconstitutional. The Court of Appeal noted that although Hipsher's right to pension benefits was vested at the time of LACERA's determination, a felony criminal conviction arising from the pensioner's public service constitutes a valid justification for "limited forfeiture of vested retirement benefits under section 7522.72," and the County was not required to provide Hipsher a comparable benefit to replace what was forfeited. Thus, the Court of Appeal denied Hipsher's request to invalidate this section of PEPRA.

Next, the Court of Appeal found that LACERA, in its capacity as the retirement board, was required to provide Hipsher with additional due process protections in determining whether the misconduct underlying his felony conviction arose out of the performance of his official duties. The Court of Appeal noted that a pensioner has a protected interest in his/her retirement benefits, but that section 7522.72 does not establish a mechanism by which a pensioner can challenge a determination that a felony conviction arises from the pensioner's job duties. At a minimum, Hipsher had the due process rights to "written notice reasonably calculated to apprise him of the pendency of the section 7522.72 action," and to "contest his eligibility for forfeiture before an impartial decision maker." The Court found that LACERA, rather than the County, should provide such due process because the California Constitution provides that a public pension retirement board "holds the 'sole and exclusive responsibility' to administer the system". The Court of Appeal therefore reversed the trial court finding that the County, as Hipsher's employer, was responsible for providing this additional process.

Hipsher v. Los Angeles County Retirement Association (2018) 24 Cal.App.5th 740.

NOTE:

LCW attorneys and public retirement experts ***Steven M. Berliner***, ***Joung H. Yim***, ***Christopher Frederick*** *and* ***Jennifer Rosner*** *successfully represented the County of Los Angeles in this matter during both the superior court and appellate proceedings. Agencies are encouraged to contact LCW's retirement experts with questions regarding this or other public retirement issues.*

DISCRIMINATION

California Expands Protections Against National Origin Discrimination.

Effective July 1, 2018, California's Fair Employment and Housing Commission regulations expand protections against "national origin" discrimination under the Fair Employment and Housing Act ("FEHA"). The FEHA applies to public employers in California.

Newly Expanded Definition of "National Origin"

Prior to July 1, 2018, the FEHA did not define "national origin." The regulations (2 C.C.R. Section 11027.1) now define the term broadly to include "the individual's or an ancestor's actual or perceived characteristics" including:

1. Physical, cultural, or linguistic characteristics associated with a national origin group;
2. Marriage to or association with persons of a national origin group;
3. Tribal affiliation;
4. Membership in or association with an organization identified with or seeking to promote the interests of a national origin group;
5. Attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and
6. A name that is associated with a national origin group.

The regulations also extend protections to "national origin groups" which are defined broadly to include ethnic groups, geographic places of origin, and countries that are not presently in existence. Under this definition, an employee's protected national origin status includes a geographic location or country, a formerly existing country, or a region that is not a country but that is associated with an ethnic group. The regulations also state that "undocumented applicant or employee" is the appropriate reference to someone who lacks authorization under federal law to be or work in the United States.

Further Restrictions on Employer "English-Only" Policies

The new regulations establish additional restrictions on employer policies that limit or prohibit employees from speaking a particular language in the workplace. Workplace language restrictions are prohibited unless: the restriction is justified by a "business necessity"; the restriction is narrowly tailored; and the employer effectively notifies employees of the circumstances and time when the restriction must be observed and the consequences for violating the restrictions. A "business necessity" does not exist where the restriction is based on mere "business convenience."

The new regulations also specify that employment discrimination based on an individual's accent is unlawful, unless the employer proves the accent "interferes materially" with job performance. An employer is also prohibited from discriminating based upon English proficiency, unless the action is justified by "business necessity." It is not unlawful for employers to ask applicants or employees for information related to proficiency in any language, if the inquiry is justified by a business necessity.

Restrictions on Employment Actions Related to Immigration Status

The new regulations apply to undocumented job applicants to the same extent that they apply to any other applicant or employee. The regulations also establish specific prohibited "immigration-related" practices related to an individual's immigration status. For example, employers are prohibited from inquiring into an applicant or employee's immigration status, or discriminating based on immigration status, unless the employer clearly and convincingly shows that doing so is necessary to comply with federal immigration law. Under the Federal Immigration Reform and Control Act of 1986 ("IRCA"), employers must verify new employee authorization to work in the U.S. using federal Form I 9. IRCA also prohibits employers from knowingly hiring or continuing to employ individuals who are not authorized to work in the U.S.

Additionally, under the new regulations, employers may not take adverse action against an employee who updates or attempts to update the employee's personal information because of a change in the employee's name, social security number, or government issued employment documents.

NOTE:

Agencies are encouraged to review existing handbooks, applications, and other policies to ensure they comply with the new FEHA regulations. LCW can provide legal guidance when navigating questions relating to job applicant or employee immigration status. A full copy of the revised regulations is available here: https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/05/FinalTextRegNationalOriginDiscrimination.pdf

Supervisor Who Mocked Employee's Stutter Over a Period of Two Years Violated FEHA's Prohibition on Disability Harassment.

The California Court of Appeal upheld a $500,000 award to a prison guard whose supervisor frequently mocked the guard's stutter in front of other supervisors and colleagues. The evidence supported the guard's claims that: he was harassed because of his disability; and that the prison failed to prevent the harassment in violation of the Fair Employment and Housing Act (FEHA).

Augustine Caldera worked as a correctional officer in a state prison. Caldera is an individual with a speech impediment that causes him to stutter or stammer. Over a period of about two years, Caldera's supervisor, Sergeant Grove, mocked Caldera's stutter about a dozen times. On one occasion, after Caldera made an announcement over the loudspeaker, Sergeant Grove repeated Caldera's announcement and mimicked the stutter; the announcement was heard by about 50 employees. On multiple other occasions, Sergeant Grove would repeat the words that Caldera stuttered on in front of other employees. Caldera filed a formal complaint about Grove's actions with the Department of Corrections and raised concerns with his superiors when he learned that Grove was to be assigned to the same work area as Caldera (though under a different chain of command). Grove was reassigned to Caldera's work area and continued to mock Caldera's stutter.

At trial, Caldera presented testimony from two witnesses to Grove's conduct; one witness testified that he observed Grove mocking Caldera about a dozen times, and that there was a "culture of joking" about Caldera's stutter at the prison. The jury found the harassment to be both severe and pervasive. To prevail on a FEHA claim, an employee need only prove either that the harassment was severe or that it is pervasive. The jury awarded Caldera $500,000 in noneconomic damages. The trial court judge found the damage award to be excessive, but the Court of Appeals reversed the trial court.

The Court of Appeal found that the jury's award was appropriate because: Caldera was subjected to unwanted harassing conduct based on his disability; the harassment was severe and pervasive; a reasonable person in Caldera's position would have considered the work environment to be hostile or abusive; a supervisor participated in, assisted, or encouraged the harassing conduct; the Corrections Department had failed to take reasonable steps to prevent the harassment; and the Department's failure to prevent the harassment was a substantial factor in causing Caldera harm.

Caldera v. Department of Corrections and Rehabilitation, et al., (2018) 235 Cal.Rptr.3d 262.

NOTE:

Supervisors and other public agency employees can be held personally liable for harassment that violates the FEHA. In order to fulfill its duty to prevent harassment, a public agency employer must promptly investigate and remedy complaints regarding any protected status. LCW attorneys are available to discuss appropriate responses to such complaints.

WAGE & HOUR

Starbucks Case Provides Guidance to Public Employers on the FLSA De Minimis Rule.

Starbucks was on the losing end of a California Supreme Court decision regarding whether the Fair Labor Standards Act's (FLSA's) *de minimis* rule applies to private employers who are governed by the California Wage Orders. FLSA fans and regular readers of LCW's *Education Matters* know that the California Wage Orders generally do not apply to public sector employers (i.e., a notable exception is that California's minimum wage applies). Instead, the FLSA is the go-to wage and hour law for public employers.

The California Supreme Court found that the FLSA's *de mimimis* rule does not apply to claims for unpaid wages under California's wage and

hour laws. The facts of the *Troester v. Starbucks* case, however, still provide a good case study for public employers.

Douglas Troester was a shift supervisor for Starbucks who was responsible for closing the store. Starbucks's computer software required him to clock out before he initiated the software's "close store procedure" on a separate computer terminal that was located in the back office. After Troester completed the "close store procedure" he activated the store alarm, exited the store, and locked the front door. Also per Starbucks policy, he walked his coworkers to their cars. Occasionally, Troester: had to reopen the store to allow employees to retrieve items they left in the store; waited with employees for their rides to arrive; or brought in store patio furniture that was mistakenly left outside. Over 17 months, Troester's unpaid time doing these tasks added up to 12 hours and 50 minutes. The evidence showed that Troester's off-the-clock work generally took 4-10 minutes each day, not including the additional time required on the occasional periods when he had to reopen the store.

Under the FLSA, in order to determine whether work time is *de minimis*, or too small to account and pay for, the courts consider the facts of each case in light of three factors: 1) the practical administrative difficulty of recording the additional time; 2) the aggregate amount of compensable time; and 3) the regularity of the additional work. (*Lindlow v. US*, 738 F.2d 1057(9th Cir. 1984).

This decision found only that the FLSA *de minimis* rule does not apply to the California wage and hour law. Public employers should not interpret this case to mean that they need not pay employees for off-the-clock work. Instead, public employers should pay for all off-the-clock work as required by the FLSA de minimis rule.

Troester v. Starbucks, Inc., (July 26, 2018) __ Cal.4th __ [2018 WL 3582702].

INDEPENDENT CONTRACTORS

California's New Independent Contractor Test Does Not Apply in Joint Employer Context.

LCW previously reported on the California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, in which the Court created a new test to determine whether a worker is properly classified as an independent contractor or as an employee. The decision overturned well-established legal standards in this area and held that the burden is on the hiring entity to prove independent contractor status under the newly created "ABC Test."

In *Curry v. Equilon Enterprises, LLC*, the California Court of Appeal held that the ABC Test does not apply to the question whether a worker has been hired by more than one employer, or "joint employers." In that case, Sadie Curry worked for A.R.S., a company that had entered into an agreement with Shell to operate Shell service stations throughout California. Curry was hired directly by A.R.S. and employed to manage two Shell gas stations. Curry completed an A.R.S. employment application, A.R.S. assigned Curry her job duties and controlled her hours of work, and Curry reported to A.R.S. employees. In spite of this, Curry sued A.R.S., and Equilon Enterprises, LLC (doing business as Shell Oil Products), claiming that both entities were her employers, misclassified her as exempt from overtime, and failed to pay her wages for overtime work and missed meal and rest breaks.

The Court of Appeal found that the policies reasons underlying the Supreme Court's decision in *Dynamex* did not apply to questions relating to joint employer status. While the Supreme Court in *Dynamex* cited concerns that cost savings could incentivize employers to misclassify a worker as an independent contractor, these concerns are unique to misclassification. "In the joint employer context, the alleged employee is already considered an employee of the primary employer; the issue is whether the employee

is also an employee of the alleged secondary employer. Therefore, the primary employer is presumably paying taxes and the employee is afforded legal protections due to being an employee of the primary employer."

Thus, the Court of Appeal rejected Curry's argument and concluded that "placing the burden on the alleged employer to prove that the worker is not an employee is meant to serve policy goals that are not relevant in the joint employment context."

Curry v. Equilon Enterprises (2018) 24 Cal.App.5th 289.

NOTE:

Because Curry v. Equilon Enterprises *is a Court of Appeals decision, it does not reverse* Dynamex. *However, this narrow interpretation of* Dynamex *tests whether the California Supreme Court intended to apply the "ABC" test only to the question of whether independent contractors are appropriately classified. LCW will continue to monitor developments in this area. LCW's discussion of the* Dynamex *decision is available here: https://www.lcwlegal.com/news/california-supreme-court-adopts-abc-test-for-independent-contractor-status.*

EMPLOYER LIABILITY

Employer Was Not Liable for Harm Caused by Employee Who Injured a Pedestrian During Employee's Normal Commute.

The California Court of Appeal clarified an exception to the circumstances under which an employer may be liable for harm caused by an employee, i.e. a car accident, when the employee is commuting to and from work in the employee's personal vehicle.

In *Newland v. County of Los Angeles*, the Court of Appeal noted that an employee can attribute the employee's injury-causing conduct to an employer only if the employee shows that at the time of the accident: 1) the employer required the employee to drive the employee's personal car to and from the work place; or 2) the employee was using his or her personal car to the benefit to the employer. Whether these two exceptions apply depends on the circumstances of each case.

Donald Prigo worked as a public defender for the County of Los Angeles. Prigo drove his personal vehicle about eight to ten days per month to accomplish job duties outside of the office such as: appearing in court, visiting clients at jails, interviewing witnesses, and viewing crime scenes. County policy did not require Prigo to use his personal car for work purposes, or to have his personal car available for work purposes on a daily basis or for emergencies. The County only required Prigo to possess a valid Class C driver's license or use public transportation as needed to perform his job duties. Although it was impractical for Prigo to use public transportation to perform these duties, Prigo did not perform these duties on a daily basis. Prigo also had "authority and discretion to determine when he needed to drive to a location for work" and, when it was not necessary for him to use his personal car for work, Prigo could, and did use public transportation or carpools to commute.

Prigo left work at the end of one work day and drove his personal car to a post office to mail his rent check. While in route to the post office, Prigo's car collided with another car; the collision forced the other car off the road and it hit and injured pedestrian, Jake Newland. Newland sued the County and Prigo, claiming the County was at fault for his injuries because Prigo was acting within the scope of his employment duties at the time of the collision that caused Newland's injuries.

The County asserted, and the Court of Appeal agreed, that Prigo was not acting with the scope of his job duties at the time of the collision. There was no evidence that the County required Prigo to use his personal car for work purposes at the time of Prigo's accident and there was no evidence that Prigo's use of his personal

car at that time was a benefit to the County. Indeed, Prigo had left work for the day and was performing a personal errand during his commute home.

The Court of Appeal also noted that this case differed from others cases that have found that the employee's commute was within the scope of employment. In those cases, the employer *required* the employee to bring a personal vehicle to work, to have it available to provide transportation to various remote work sites during the work day, or to have the vehicle available for client meetings and emergencies.

Thus, the Court of Appeal reversed the jury's finding that the County was liable for the injuries caused by Prigo's accident.

Newland v. County of Los Angeles (2018) 24 Cal.App.5th 676.

NOTE:

Agencies wishing to evaluate whether employee use of private vehicles for job duties constitutes use of a private vehicle within the scope of employment are encouraged to reach out to LCW attorneys.

BENEFITS CORNER

ACA Back to Basics: Measuring Full-Time Employees.

This article is the second installment in LCW's ACA Back to Basics series. The series will help employers brush up on the Patient Protection and Affordable Care Act's (also known as "the ACA") Employer Shared Responsibility Provisions ("ESRP"). In our June 2018 Education Matters, we published an article discussing the applicability of ACA's ESRP to Applicable Large Employers ("ALE") and how to calculate whether an employer is an ALE. This month we will discuss how an ALE may identify full-time employees under the ACA.

Measuring Full-Time Employees

An ALE must offer minimum essential coverage to substantially all full-time employees and their dependents to avoid Penalty A. Also, the coverage an ALE offers must provide minimum value and be affordable in order to avoid Penalty B. For further explanation of Penalty A and Penalty B, see [include link to June 2018 article on ACA]

The ACA rules for measuring full-time employees are relevant to determine: (1) benefit eligibility, (2) ACA reporting obligations, or (3) both benefit eligibility and ACA reporting obligations.

Benefit Eligibility: Employers may have existing contracts or policies in place that dictate benefit eligibility. These contracts or policies may provide different eligibility requirements for benefits than the ACA's ESRP. Employers should consult with legal counsel before making an offer of coverage if the provisions of a contract or policy differ from the ACA's ESRP requirements. The ACA does not necessarily trump existing contracts or policies.

ACA Reporting Obligations: An ALE must file informational returns with the Internal Revenue Service ("IRS") for each full-time employee to whom it offered coverage (i.e. Form 1095-C). In connection with this reporting, an ALE also must provide a copy of the Form 1095-C (or compliant written statement) to each full-time employee conveying the information the ALE reported to the IRS.

For the above two potential purposes, an ALE must be able to identify its **full-time employees** as that term is defined under the ACA. The ESRP provide two methods to measure full-time employees, the Monthly Measurement Method and the Look Back Measurement Method Safe Harbor.

1) **Monthly Measurement Method**

Under the Monthly Measurement Method, an employee is a full-time employee if he/she has on average at least 30 hours of service per week during the calendar month, or at least 130 hours of service during the calendar month.

An "hour of service" is generally defined as "each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence." If an employee has 130 hours of service in any given month, then the IRS will consider that employee to be an ACA full-time employee for that month.

An ALE will have trouble using the Monthly Measurement Method to determine benefit eligibility unless it can predict the hours of service for an employee. However, many employers use this method to identify ACA full-time employees for reporting purposes.

The Monthly Measurement Method is the default that the IRS will apply unless the employer has adopted the Look Back Measurement Method Safe Harbor.

2) **Look Back Measurement Method Safe Harbor ("Look Back Safe Harbor")**

The Look Back Safe Harbor has different rules for ongoing employees than it does for new variable hour and new seasonal employees. We will explore these rules in depth in our next article in our "ACA Back to Basics" series. Generally, this method allows an employer to measure hours of service over a longer period of time (e.g. up to 12 months) by looking back over past months and calculating hours of service. For example, an employee who hits at least 1560 hours of service over a 12 month period will have a status that is "locked in" as full-time for the next 12 month period.

An ALE who is using the Look Back Safe Harbor will need to establish a "Standard Measurement Period," "Administrative Period," and "Stability Period" for ongoing employees and an "Initial Measurement Period," "Administrative Period" and "Stability Period" for new variable hour and seasonal employees, that comply with the restrictions in the ESRP regulations. Once the ALE establishes these periods, it must comply with a set of rules to measure the hours of employees (either for ACA reporting, benefit eligibility, or both).

The benefit of the Look Back Safe Harbor is that it allows an employer to plan and predict who may be full-time. It also allows seasonal or variable hour employees to work more than 130 hours of service in any given month without them qualifying as ACA full-time.

Later installments in our ACA Back to Basics series will provide additional details on the Look Back Measurement method Safe Harbor Rules.

IRS Releases 2019 HSA Contribution Limits, High Deductible Health Plan Minimum Deductibles, and High Deductible Health Plan Out-of-Pocket Maximums

See IRS Publication located at: https://www.irs.gov/pub/irs-drop/rp-18-30.pdf

The IRS released the 2019 cost-of-living adjusted limits for health savings accounts (HSAs) and high-deductible health plans (HDHPs) as follows:

HSA Contribution Limits. The annual HSA contribution limit will increase from $3,450 in 2018 to $3,500 in 2019 for individuals with self-only HDHP coverage, and from $6,900 in 2018 to $7,000 in 2019 for individuals with family HDHP coverage.

HDHP Minimum Deductibles. The 2019 minimum annual deductible remains at $1,350 for self-only HDHP coverage and $2,700 for family HDHP coverage.

HDHP Out-of-Pocket Maximums. The 2019 limit on out-of-pocket expenses (including items such as deductibles, copayments, and coinsurance, but not premiums) will increase from $6,650 in 2018 to $6,750 in 2019 for self-only HDHP coverage, and from $13,300 in 2018 to $13,500 in 2019 for family HDHP coverage.

IRS Creates Webpage Regarding Letter 227 and Releases Sample Versions of Letter 227

The IRS created a webpage on its site (located here: https://www.irs.gov/individuals/understanding-your-letter-227) to understand Letter 227, which was sent to certain applicable large employers (ALEs) acknowledging the employer's responses to Letter 226J. Letter 226J is a tax notice ALEs may receive in connection with the assessment of proposed employer shared responsibility penalties for non-compliance with the ACA.

The IRS sends Letter 227 to explain its review and determination, and the next steps for resolving the tax penalty. There are five different versions of Letter 227, with samples provided on the IRS' webpage.

Letter 227-J states that the IRS will assess the proposed penalty amount because the ALE agreed with the proposed penalty. No response is required to Letter 227-J, and the case is deemed closed.

Letter 227-K confirms that the penalty amount has been reduced to zero. No response is required to Letter 227-K, and the case is deemed closed.

Letter 227-L confirms that the proposed penalty amount has been revised. Letter 227-L includes an updated Form 14765 (Employee Premium Tax Credit ("PTC") Listing) and revised calculation table. The ALE can agree with the revised penalty amount, request a meeting with the IRS, or appeal the determination. Note: The PTC is a refundable credit that helps eligible individuals and families cover premiums for coverage purchased through Covered California.

Letter 227-M confirms that the penalty amount did not change. This version of the letter also includes an updated Form 14765 and revised calculation table. The ALE can agree with the revised penalty amount, request a meeting with the IRS, or appeal the determination.

Letter 227-N acknowledges the decision reached by the IRS appeals division and shows the resulting penalty amount. No response is required to Letter 227-N, and the case is deemed closed.

Only Letters 227-L and **227-M** require a response, which must be provided by the date note in the corresponding letter.

Employers should constantly be on the lookout for all correspondence from the IRS relating to employer shared responsibility payments and penalties to avoid any potential delays and untimely filings. Employers who have been assessed penalties and are corresponding with the IRS should carefully review all information reported on Forms 1094-C and 1095-C for the appropriate year to ensure they provided accurate information to the IRS. Employers should keep copies of submitted Forms and all correspondence with the IRS and carefully review all information for accurate calculations. Lastly, employers should consult with an appropriate tax and legal professional if they are in the process of reviewing/disputing/modifying IRS assessed penalties.

ACA Affordability Percentages Increase in 2019 & CalPERS Adopts Health Care Rate and Plan Changes

On May 21, 2018, the IRS issued revenue procedures listing the contribution percentages in 2019 to determine affordability of an employer's plan under the ACA. For plan years beginning after December 31, 2018, employer-sponsored coverage will be considered "affordable" for employer shared responsibility purposes if the employee's required contribution for self-only coverage does not exceed 9.86 percent of the employee's household income for the year (increased from 9.56% for 2018).

On a related note, on June 20, 2018, CalPERS approved health care rate and plan changes for 2019, which include an average of 1.16 percent overall premium increases. These CalPERS premium increases should be considered by employers and accounted for when determining whether offered-health care coverage is affordable for ACA-reporting purposes.

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

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

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

LCW Liebert Cassidy Whitmore

2-DAY FLSA ACADEMY

Registration is Now Open!

Monday October 1st - Tuesday October 2nd, 2018
Piedmont Community Hall
711 Highland Ave
Piedmont, CA 94611

This seminar offers an in-depth training for public agencies on one of the most fundamental employment areas – items dealing with wages and hours. The FLSA became applicable to the public sector in 1986, and governs many significant matters that supervisors, human resources, finance, and labor relations professionals need to understand and ensure agency compliance. But the FLSA often confuses and complicates the lives of public agencies. We understand the struggle is real and this program is designed to help you strategize through those struggles and walk away feeling comfortable that you understand this complicated law and can be an effective leader in your organization to ensuring compliance. Public agency liability can be significant and costly so the best strategic plan is one of prevention.

This two-day workshop will cover all you need to know to understand the key areas covered by the FLSA including:

- FLSA Basics
- Work Periods & Hours Worked
- Exemption Analysis
- The Regular Rate of Pay & Compensatory Time Off
- Conducting a Compliance Review

Attendees will recieve a copy of our FLSA Guide. The seminar includes a continental breakfast and lunch.

Intended Audience: Professionals in Human Resources, Finance, Legal Counsel and Managers/Executives

Time: This is a 2-Day Event, 9:00 a.m. to 4:00 p.m both days.

Pricing: $500 pp for Consortium Members | $550 pp for Non-Consortium Member

For more information and to register, visit
http://www.lcwlegal.com/events-and-training /webinars-seminars/2-day-flsa-academy-1

LCW
Labor Relations Certification Program

Developing Positive Partnerships and Leadership Excellence for Labor Relations Professionals

The Liebert Cassidy Whitmore Labor Relations Certification Program© is designed for labor relations and human resources professionals who work in public sector agencies. These workshops combine educational training with experiential learning methods ensuring that knowledge and skill development are enhanced. Participants may take one or all of the Certification programs, in any order. Take all of the classes to earn your certificate!

Upcoming Classes:

The Public Employment Relations Board (PERB) Academy

September 13, 2018 | Citrus Heights, CA

This workshop will help you understand unfair labor practices, PERB hearing procedures, representation matters, agency shop provisions, employer-employee relations resolutions, mediation services, fact-finding, and requests for injunctive relief - all subjects covered under PERB's jurisdiction. Join us as we share the insight on PERB!

The Rules of Engagement: Issues, Impacts & Impasse

October 11, 2018 | Fullerton, CA

Understanding the scope of meet and confer matters, impacts/effects bargaining, the rights of union/association representatives, dealing with pickets, protests and concerted activity, issuing last, best & final offers, impasse procedures and managing the chaos that can come when engaged with labor relations challenges will be covered in this workshop.

Nuts & Bolts of Negotiations

November 7, 2018 | Citrus Heights, CA

Navigate the nuts & bolts of public sector labor negotiations by exploring the legal framework of collective bargaining, preparation tips for the process, and setting up your strategy. The fundamentals are the building blocks to success and this workshop will provide the key elements in this process.

Register Now!

https://www.lcwlegal.com/events-and-training/labor-relations-certification-program

NEW TO THE FIRM

Tony Carvalho is a new associate in our Fresno and provides assistance to clients in matters pertaining to employment law, wage and hour, and litigation. His main areas of focus include: harassment and discrimination of all types, wage and hour claims, and wrongful termination claims. He is also fluent in Spanish and Portuguese. Tony can be reached 559-256-7803 or tcarvalho@lcwlegal.com.

Michael Le joins our San Francisco office where he primarily works as a litigator, representing public safety agencies, cities, and counties at all levels of the litigation process, including administrative hearings and grievance arbitrations, trial, and appeal. Michael can be reached 415-512-3052 or mle@lcwlegal.com.

Ronnie Arenas joins our Los Angeles office after most recently working with public and private agencies in southern California. Ronnie has experience in all phases of litigation, from the pleading stage through trial. He also speaks fluent Spanish. Ronnie can be reached 310-981-2038 or rarenas@lcwlegal.com.

Bryan Rome is a new associate in our Fresno office office where he provides assistance to clients in matters pertaining to litigation services and real property laws. He also has experience representing public safety officers in all types of civil litigation in state and federal courts. Bryan can be reached 559-256-7802 or brome@lcwlegal.com.

Six LCW Attorneys Honored by the Northern California Super Lawyers

2018 NORTHERN CALIFORNIA SUPER LAWYERS

Shelline Bennett, Managing Partner of LCW's Fresno and Sacramento offices, is receiving this honor for the 12th time. Having represented public sector management in labor and employment law matters for over 20 years, Shelline has an extensive background in litigation and labor relations, including collective bargaining.

This is the ninth time that **Richard (Rick) Bolanos** has been selected as a Northern California Super Lawyer. A Partner in the San Francisco office, Rick represents public entities in a full range of labor and employment law matters. He has served as lead negotiator for numerous agencies as well as provided advice and counsel in matters ranging from FLSA, POBR, FBOR, to leaves and disciplinary matters.

2018 NORTHERN CALIFORNIA RISING STARS

For the third consecutive year, **Joy Chen** has been named a "Rising Star." Joy, an Associate in LCW's San Francisco office, represents and advises public sector agencies in all aspects of labor, employment, and education law. She is experienced in defending employers in various litigation matters before federal and California state courts.

Sacramento Partner **Gage C. Dungy** is receiving this honor for the tenth consecutive year. Gage provides management-side representation and legal counsel to clients in all matters pertaining to labor and employment law. He regularly serves as chief negotiator for public sector agencies in labor negotiations with their employee organizations.

San Francisco office Associate **Juliana Kresse** is receiving this honor for the sixth consecutive year. Juliana assists the Firm's clients with a wide-range of employment and education law matters. She has represented employers in California State and federal courts and is well-versed in all aspects of the litigation process.

This is the second time that **Erin Kunze**, Associate in the San Francisco office of LCW, has received this honor. Erin provides representation and legal counsel to clients on a variety of employment and education law matters, including retirement, labor relations in the public and private nonprofit sectors, public safety, and safety planning in schools.

Liebert Cassidy Whitmore congratulates them for being honored in their work!

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Sept. 5 **"Preventing Workplace Harassment, Discrimination and Retaliation"** and **"The Future is Now – Embracing Generational Diversity and Succession Planning"**
NorCal ERC | San Ramon | Joy J. Chen

Sept. 5 **"Public Service: Understanding the Roles and Responsibilities of Public Employees"**
Ventura/Santa Barbara ERC | Webinar | Kristi Recchia

Sept. 6 **"Maximizing Performance Through Evaluation, Documentation and Discipline"**
Gateway Public ERC | Pico Rivera | Christopher S. Frederick

Sept. 6 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Napa/Solano/Yolo ERC | Fairfield | Kristin D. Lindgren

Sept. 12 **"Navigating the Crossroads of Discipline and Disability Accommodation"** and **"Leaves, Leaves and More Leaves"**
San Gabriel Valley ERC | Alhambra | T. Oliver Yee

Sept. 13 **"Managing the Marginal Employee"** and **"Nuts & Bolts Navigating Common Legal Risks for the Front Line Supervisor"**
East Inland Empire ERC | Fontana | Danny Y. Yoo

Sept. 13 **"Disciplinary and Harassment Investigations: Who, What, When and How"** and **"Principles for Public Safety Employment"**
San Diego ERC | Chula Vista | Stefanie K. Vaudreuil

Sept. 13 **"Contracting"**
Ventura County Schools Self-Funding Authority ERC | Camarillo | Heather DeBlanc

Sept. 18 **"Maximizing Performance Through Evaluation, Documentation and Discipline"** and **"12 Steps to Avoiding Liability"**
North San Diego County | San Marcos | Stephanie J. Lowe

Sept. 20 **"Difficult Conversations"**
Los Angeles County Human Resources | Los Angeles | T. Oliver Yee

Sept. 20 **"A Supervisor's Guide to Labor Relations"**
Monterey Bay ERC | Webinar | Che I. Johnson

Sept. 20 **"Public Sector Employment Law Update"**
Orange County Consortium | San Juan Capistrano | Geoffrey S. Sheldon

Sept. 20 **"Maximizing Supervisory Skills for the First Line Supervisor"**
San Joaquin Valley ERC | Ceres | Kristin D. Lindgren

Sept. 20 **"Conducting Disciplinary Investigations: Who, What, When and How"**
San Mateo County ERC | Brisbane | Suzanne Solomon

Sept. 21 **"Human Resources Academy 1 for Community College Districts"**
SCCCD ERC | Anaheim | Lee T. Patajo

Sept. 26 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Humboldt County ERC | Arcata | Erin Kunze

Sept. 26 **"A Guide to Implementing Public Employee Discipline"** and **"Moving Into the Future"**
Sonoma/Marin ERC | Rohnert Park | Lisa S. Charbonneau

Sept. 27 **"Public Sector Employment Law Update"**
Bay Area ERC | Webinar | Richard S. Whitmore

Sept. 27 **"Difficult Conversations"** and **"Nuts and Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
Gold Country ERC | Roseville | Kristin D. Lindgren

Sept. 27 **"Iron Fists or Kid Gloves: Retaliation in the Workplace"**
Humboldt County ERC | Arcata | Erin Kunze

Sept. 27 **"Exercising Your Management Rights"** and **"Terminating the Employment Relationship"**
North State ERC | Red Bluff | Jack Hughes

Sept. 27 **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
South Bay | Manhattan Beach | Danny Y. Yoo

Customized Training

Sept. 5 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Campbell | Erin Kunze

Sept. 7 **"The FLSA and Equal Pay Laws: What Community Colleges Need to Know"**
San Joaquin Delta College | Stockton | Eileen O'Hare-Anderson

Sept. 12 **"Laws and Standards for Supervisors"**
Orange County Probation | Santa Ana | Christopher S. Frederick

Sept. 13 **"Performance Management: Evaluation, Documentation and Discipline"**
ERMA | Tulare | Kristin D. Lindgren

Sept. 14 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
County of San Luis Obispo | Christopher S. Frederick

Sept. 17 **"Ethics in Public Service"**
City of Sunnyvale | Erin Kunze

Sept. 18 **"File That! Best Practices for Documents and Record Management"**
City of Concord | Heather R. Coffman

Sept. 18 **"Leaves, Leaves and More Leaves"**
Ventura County Schools Self-Funding Authority | Camarillo | Lee T. Patajo

Sept. 19 **"Courageous Authenticity & Conflict Resolution, Do You Care Enough To Have Critical Conversations?"**
City of Pico Rivera | Kristi Recchia

Sept. 24,25 **"Ethics in Public Service"**
Merced County | TBD

Sept. 25 **"POBR"**
City of Alameda Police Department | Morin I. Jacob

Sept. 25 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Gage C. Dungy

Sept. 27 **"MOU's, Leaves and Accommodations"**
City of Santa Monica | Laura Kalty

Speaking Engagements

Sept. 7 **"Meet the Trailblazers"**
California Counsel of School Attorneys (CCSA) Conference | Santa Ana | Laura Schulkind

Sept. 11 **"Role of the Chief Class"**
California Police Chiefs Association (CPCA) | Buena Park | J. Scott Tiedemann

Sept. 13 **"It Can Happen to #YouToo: Harassment Claims against City Officials"**
League of California Cities 2018 Annual Conference | Long Beach | J. Scott Tiedemann & Kirsten Keith & Tammy Letourneau

Sept. 20 **"Labor Relations Training"**
California State Association of Counties (CSAC) Labor Relations Class | Martinez | Richard S. Whitmore & Richard Bolanos & Gage C. Dungy

Sept. 20 **"Legal Update"**
Riverside County Law Enforcement Executives Association (RCLEAA) | Temecula | Geoffrey S. Sheldon

Sept. 20 **"10 Things You Can Do Now to Comply CalPERS Rules"**
Southern California Public Labor Relations Council (SCPLRC) Meeting | Cerritos | Steven M. Berliner

Sept. 26 **"Tackling Challenges in Accommodating Mental Disabilities in the Workplace"**
Public Agency Risk Managers Association (PARMA) Chapter Meeting | La Palma | Danny Y. Yoo

Sept. 27 **"Drugs & Alcohol in the Workplace"**
California Fire Chiefs Association (CFCA) | Sacramento | Morin I. Jacob

Seminars/Webinars

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

Sept. 12 **"Releasing Probationary Employees --More Complex Than you Might Think"**
Liebert Cassidy Whitmore | Webinar | Suzanne Solomon

Sept. 26 **"How to Successfully Implement and Defend A Light or Modified Duy Assignment for Temporarily Injured or Ill Employees"**
Liebert Cassidy Whitmore | Webinar | Jennifer Rosner & Rachel Shaw

LCW Liebert Cassidy Whitmore

View more information and register for LCW seminars and webinars at:

WWW.LCWLEGAL.COM/EVENTS-AND-TRAINING

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