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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GOVERNMENT LAW

Legislative Intent Of Assembly Bill 218 Was To Revive Causes Of Action Previously Barred By Government Claims Presentation Requirements.

In 2015, a high school teacher was convicted of felony unlawful sexual intercourse with E.D., a minor. The school principal previously disciplined the teacher for inappropriate contact with another student on at least one occasion, but the principal did not report the conduct to any authorities and did not take any steps to monitor the teacher's contact with other female students.

In 2016 when E.D. was 19, she filed a lawsuit against the school district, the principal, the teacher, and others, and alleged claims of sexual abuse, negligence, and failure to supervise teachers and protect students. E.D. and her foster mother also sued for intentional and negligent infliction of emotional distress.

E.D. and her foster mother argued the Government Claims Act did not require them to first present a claim to the District due to the exemption for claims of sexual abuse of a minor stated in Government Code section 905, subdivision (m). However, the District and the principal argued a District regulation required E.D. to present a claim to the District and, furthermore, the exemption from the Government Claims Act did not apply to the foster mother's claims because she was not the abused minor. The District board policy stated: "Any and all claims for money or damages against the district must be presented to and acted upon in accordance with Board policy and administrative regulation. Compliance with district procedures is a prerequisite to any court action ...." The District's administrative regulation provided: "Claims for money or damages specifically excepted from Government Code [section] 905 shall be filed no later than six months after the accrual of the cause of action." E.D. argued the Board policy and regulation circumvented the legislature's intent to exempt victims of childhood sexual abuse from government claims presentation requirements.

The trial court rejected E.D.'s arguments and dismissed her lawsuit against the District and principal, and dismissed the foster mother's lawsuit entirely. E.D. and her foster mother appealed.

Under the Government Claims Act, an individual must present personal injury claims against public entities to the entity within six months of accrual of the injury. Government Code section 905 exempted claims made pursuant to Code of Civil Procedure section 340.1 relating to childhood sexual abuse that occurred on or after January 1, 2009. However, Government Code section 935 stated local entities may prescribe claims presentation requirements, subject to specified restrictions, for claims "which are excepted by Section 905" and "are not governed by any other statutes or regulations expressly relating thereto."

While this case was pending before the Court of Appeal, the Legislature adopted Senate Bill 1053 in 2018, which E.D. argued demonstrated the argument that the Legislature never intended Government Code section 935 to allow the District to impose its own claims presentation requirements on claims of childhood sexual abuse as described in Section 905, subdivision (m).

Furthermore, in 2019, the Legislature adopted Assembly Bill 218, which extended the statute of limitations for childhood sexual assault and revived any claim based on childhood sexual assault that was not yet final that would otherwise be barred as of January 1, 2020, because of the expiration of any applicable statute of limitations, claim presentation deadline, or other time limit. The bill clarified that the revival provisions also applied to any pending action filed before the bill's enactment, including any action that would have been barred by the laws in effect before the bill's enactment.

E.D. argued that due to the enactment of Assembly Bill 218, if her action was previously barred by her failure to timely file a claim with the District, the bill now revived her lawsuit. The District argued Assembly Bill 218 was unconstitutional because it imposed liability and sanctions that were not previously actionable. However, the Court of Appeal noted that legislation reviving the statute of limitations on civil law claims does not violate constitutional principles.

The Court of Appeal held that the legislative intent behind Assembly Bill 218 was clear: the Legislature wanted to allow individuals to bring lawsuits previously barred by government claims presentation requirements. While the District argued against other provisions in the bill, it offered no reason for finding the claim revival provisions of the bill unconstitutional. Accordingly, the Court of Appeal held that the trial court should not have dismissed E.D.'s lawsuit because she was exempt from the claims presentation requirement established by the District's policy.

E.D. and her foster mother next argued the foster mother's lawsuit should not be dismissed because the purpose of Code of Civil Procedure section 340.1 was to allow a victim of childhood sexual abuse sufficient time to recognize and reveal her injury, and it would therefore make no sense to subject a parent's claims arising from the child's abuse to a six-month government claims presentation requirement. However, the Court of Appeal held that the plain language of Code of Civil Procedure section 340.1 demonstrated it was aimed at the direct victim of sexual assault, not the victim's parent or other third party. Additionally, nothing in the legislative history of Government Code section 905, subdivision (m) or Assembly Bill 218 suggested the Legislature intended the childhood sexual abuse exception to the government claims presentation requirement to apply to causes of action asserted by a party other than the victim of the childhood sexual abuse. Absent discernable legislative intent, the Court of Appeal could not conclude the Legislature intended to provide the foster mother the same rights as E.D. in this context. Accordingly, the Court of Appeal agreed with the trial court that the foster mother's causes of action were barred by her failure to file a timely claim with the District.

Coats v. New Haven Unified Sch. Dist. (2020) 46 Cal.App.5th 415.

DISCRIMINATION

Openly Gay CHP Officer Overcomes CHP's Statute Of Limitations Defense to FEHA Lawsuit.

Jay Brome began his employment with the California Highway Patrol (CHP) in 1996. During his nearly 20-year career, other officers subjected Brome, who was openly gay, to derogatory, homophobic comments, singled him out for pranks, repeatedly defaced his mailbox and refused to provide him with backup assistance during enforcement stops in the field.

Brome eventually transferred CHP offices seeking a better work environment, but the offensive comments about his sexual orientation continued. Officers at Brome's new office also frequently refused to provide Brome with backup assistance during enforcement stops, including high-risk situations that should be handled by at least two officers. Brome was the only officer who did not receive backup. Further, when Brome won an officer of the year award, the CHP never displayed his photograph, which was a break from practice.

Through 2014, Brome continued to complain to his supervisors. They told him they would look into it, but the problems continued, and Brome believed management refused to do anything about it. As a result, Brome feared for his life during enforcement stops, experienced headaches, muscle pain, stomach issues, anxiety and stress, and became suicidal. In January 2015, Brome went on medical leave and filed a workers' compensation claim based on work-related stress.

After Brome took leave, his captain sent him a letter stating that he hoped they could work together to resolve Brome's work-related issues. Brome's workers' compensation claim was eventually resolved in his favor, and on February 29, 2016, Brome took industrial disability retirement.

On September 15, 2016, Brome filed a complaint with the Department of Fair Employment and House (DFEH) asserting discrimination and harassment based on his sexual orientation and other claims under the Fair Employment and Housing Act (FEHA). The next day, Brome filed a civil lawsuit. The CHP sought to dismiss the lawsuit as untimely. Under the FEHA at the time of the lawsuit, an employee's DFEH complaint must have been filed within one year of the alleged discriminatory or harassing conduct. While the crux of Brome's claims occurred before his medical leave in January 2015, Brome did not file his administrative complaint until September 15, 2016. Accordingly, the CHP argued that Brome could

only sue based on acts occurring on or after September 15, 2015. While Brome argued that various exceptions to the one-year deadline applied, the trial court ultimately dismissed Brome's lawsuit. Brome appealed.

The Court of Appeal considered three exceptions that could extend the one-year deadline: equitable tolling, continuing violation, and constructive discharge.

First, the court determined that Brome's workers' compensation claim could equitably toll the one-year deadline for filing his DFEH complaint. The equitable tolling doctrine suspends a statute of limitations to ensure fairness. To use equitable tolling, the employee has to prove: (1) timely notice; (2) lack of prejudice to the employer; and (3) his or her own good faith conduct. The court concluded that Brome could establish all of the elements. Brome's workers' compensation claim put the CHP on notice of his potential discrimination claims because it had to investigate the circumstances that caused his work-related stress. The court said that a reasonable jury could not find that applying the equitable tolling doctrine would prejudice the CHP. Finally, the court noted that Brome exhibited good faith and reasonable conduct in waiting to file his complaint until after the resolution of his workers' compensation claim.

Second, the court determined that the statute of limitations could be extended as a continuing violation. That doctrine allows liability for conduct occurring outside the statute of limitations if the conduct is sufficiently connected to conduct within the limitations period. To establish a continuing violation, an employee must show that the employer's actions are: (1) sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence. The homophobic conduct against Brome was ongoing and very common, and a jury could find that it was reasonable for Brome to seek a fresh start at a different office and request assistance from his supervisors there once similar problems arose. Further, Brome's supervisors consistently told him they would look into and address his concerns.

Finally, the court concluded that the constructive discharge theory could possibly apply. To establish constructive discharge, an employee must show that working conditions were so intolerable that a reasonable employee would be forced to resign. The court found that Brome raised a triable issue as to whether his working conditions were so bad a reasonable employee would have resigned. For example, Brome was routinely forced to respond to high-risk situations alone.
For these reasons, the court held that the trial court erred in dismissing Brome's lawsuit. The court remanded the case back to the trial court for further proceedings.

Brome v. California Highway Patrol (2020) 44 Cal. App. 5th 786.

NOTE:

Effective January 1, 2020, the statute of limitations to file a DFEH claim has been extended from 1 to 3 years. Employers have a legal duty to promptly investigate claims of discrimination and harassment to not only limit liability, but to provide a safe and productive workplace for all employees.

WAGE & HOUR

Time Spent In Mandatory Exit Searches Constituted "Hours Worked" For Purposes Of California Minimum Wage Law.

Apple uses an "Employee Package and Bag Searches" policy. This policy imposes mandatory, thorough searches of employees' bags, packages, purses, briefcases, and personal Apple technology devices before the employees can leave an Apple retail store for any reason.

Under the policy, Apple employees must clock out before the exit search. Employees estimate that exit searches range from five to twenty minutes, depending on manager or security guard availability.

A number of Apple employees filed a lawsuit in federal court alleging that Apple failed to pay them minimum and overtime wages for their time spent waiting for and undergoing exit searches in violation of California law. Industrial Welfare Commission Wage Order 7 (Wage Order 7) requires employers to pay their employees a minimum wage for all "hours worked," which is defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." The first clause of the definition – "the time during which an employee is subject to the control of an employer" – is known as the "control clause".

The district court concluded that the time spent by employees waiting for and undergoing exit searches was not compensable as "hours worked" under California law. The court determined that the control clause required the employees to prove that: (1) the employer restrains the employees' action during the activity in question; and (2) the employees had no plausible way to avoid the activity. The employees appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit asked the California Supreme Court to address the state law issue.

The California Supreme Court, however, determined that the employees' time related to exit searches was indeed "hours worked" under the control clause. The Court reasoned that the employees are clearly under Apple's control while waiting for and undergoing the exit searches. Apple employees are subject to discipline if they refuse the searches. Apple also confines its employees to the premises while they wait for and undergo the search, and requires employees to perform specific tasks such as locating a manager and unzipping compartments and removing items for inspection.

While Apple argued that the employees' activity had to be "required" or "unavoidable" in order to be compensable, the Court disagreed. The Court noted that those words did not appear in the control clause and that such a definition would be at odds with the wage order's fundamental purpose of protecting and benefitting employees. The Court also rejected Apple's argument that California precedent supports the notion that an activity has to be "unavoidable" in order to be compensable because the Court was not aware of any California case discussing the precise issue of whether time spent at the worksite relating to searches is compensable as "hours worked."

The Court noted that while exit searches may not be "required" in a formal sense because employees could choose not to bring personal belongings to work, as a practical matter they are. Employees have little genuine choice concerning whether to bring ordinary, everyday items such as a wallet, keys, and a cell phone to work. Indeed, Apple markets its iPhone as an "integrated and integral" part of the lives of its customers.

Ultimately, the Court concluded that the level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative of whether an activity is compensable under the "hours worked" control clause. The Court also concluded that courts should consider additional relevant factors, including the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures. Applying these factors to this case, the Court determined that it was clear the employees were subject to Apple's control during the exit searches and must be compensated for their time.

Frlekin v. Apple Inc. (2020) 8 Cal.5th 1038.

NOTE:

While Wage Order 7 does not apply to the public sector, the hours worked section of Wage Order 4 is applicable to public agencies and contains the same language the Court interpreted in this case. Accordingly, this decision offers guidance to public agencies as to how California courts would interpret the "hours worked" language in Wage Order 4.

CONFLICT OF INTEREST

Individual Could Not Simultaneously Serve As Mayor And Director Of Water Replenishment District.

Albert Robles served as a member of the board of directors of the Water Replenishment District of Southern California (WRD). The WRD ensures that a reliable supply of groundwater is available throughout the region, and is responsible for monitoring and testing the groundwater supply. As a WRD director, Robles represented a geographic division that included Carson, California.

The WRD board of directors charges a "replenishment assessment" to fund its operating expenses and other activities. The replenishment assessment is levied on the production of groundwater within the district during the ensuing fiscal year. The City of Carson contracts with two private companies to provide its pumped groundwater. The companies pay the WRD's replenishment assessment and pass on the cost in the water rates they charge.

Robles was a WRD director in 2013 when he was elected to a city council seat in Carson. The District Attorney notified Robles that he was holding two incompatible offices under Government Code section 1099, but Robles continued to occupy both. Section 1099 makes it unlawful to simultaneously hold incompatible public offices, meaning, offices for which "there is a significant clash of duties or loyalties" based on the powers and jurisdiction of the positions. In April 2015, Robles was appointed to fill the vacant office of mayor of Carson. As mayor, Robles continued to sit on the city council.

Subsequently, the District Attorney requested approval from the Attorney General to sue Robles *in quo warranto*, a Latin term for a legal proceeding that demands a person show by what authority he or she holds a public office. The Attorney General granted the District Attorney's application, and the District Attorney filed a *quo warranto* complaint alleging that Robles' two offices were incompatible under section 1099 "because the WRD and City of Carson have overlapping territories, duties, and responsibilities, and a clash of duties is likely to arise in the exercise of both offices simultaneously." The WRD then passed resolutions expressly authorizing directors to hold positions in other governmental agencies. But the trial court agreed with the District Attorney and removed Robles from the office of WRD director. Robles appealed.

The California Court of Appeal affirmed the trial court's decision that Robles was holding incompatible offices. The court noted that Robles was setting the water replenishment assessment for his Carson constituents. As mayor and a councilmember, Robles had an electoral incentive to minimize the amount of the replenishment assessment. However, as a WRD director, Robles' duties required him to focus on ensuring the adequacy of the groundwater supply, not the financial impact of the assessment on Carson's residents. The court reasoned that section 1099 forbids this sort of conflicted arrangement by making it unlawful to hold multiple public offices when there is a "possibility of a significant clash of duties or loyalties" between them.

The court was not persuaded by any of Robles' arguments to the contrary. While Robles challenged the District Attorney's authority and process for bring a *quo warranto* proceeding, the court concluded that the District Attorney's actions were lawful. Further, the court noted that there was no "law" expressly authorizing Robles to hold both offices. Section 1099 allows an individual to hold two incompatible offices if "simultaneous holding of the particular offices is compelled or expressly authorized by law." While Robles argued that WRD passed resolutions expressly authorizing a director to hold positions in other agencies, the court determined that the Legislature's reference to "law" meant state, not local law.

People ex rel. Lacey v. Robles (2020) 44 Cal.App.5th 804.

NOTE:

This case highlights the potential conflict of interest that arises when an agency official holds multiple offices. WRD's resolutions expressly authorizing directors to hold positions in other governmental agencies did not override state law prohibiting incompatible offices.

COPYRIGHT & FAIR USE

High School Show Choir's Use Of Rearranged Musical Work Deemed Fair Use.

Burbank High School has five nationally recognized, competitive show choirs led by vocal music director Brett Carroll. The Burbank High School Vocal Music Association Boosters Club, a nonprofit organization operated by parent volunteers, holds fundraising events, such as show choir competitions, to help fund the show choir program.

Carroll commissioned an outside music arranger to create custom sheet music for two shows, "Rainmaker" and "80's Movie Montage" for one of the show choirs, In Sync, to perform. "Rainmaker" is an eighteen-minute performance composed of multiple musical works, including a small, rearranged segment of the chorus and a small segment of another verse of the song "Magic." "80's Movie Montage" is a twenty-minute performance that contains a sixteen-second segment of the chorus of the song "(I've Had) The Time of My Life." In Sync performed the two shows on several occasions, including at the Burbank Blast choir competition fundraiser hosted by the Boosters Club. Also at Burbank Blast, the John Burroughs High School show choir competed with a choir performance, which contained segments of the songs "Hotel California" and "Don't Phunk With My Heart."

Following the Burbank Blast choir competition, Tresóna Multimedia, LLC, (Tresóna) filed a copyright infringement claim under the Copyright Act of 1976 (Copyright Act) against Carroll, the Boosters Club, and several of its parent volunteers. Tresóna alleged that it held the exclusive right to issue copyright licenses for four musical works, "Magic," "(I've Had) The Time of My Life," "Hotel California," and "Don't Phunk With My Heart," and the show choir failed to obtain licenses for its use of the copyrighted sheet music in the Burbank Blast performances.

The Copyright Act grants the right to the "legal or beneficial owner of an exclusive right under a copyright… to institute an action for any infringement of that particular right committed while he or she is the owner of it"; those who hold non-exclusive rights do not have standing to sue under the Copyright Act.

The trial court determined that Tresóna failed to produce evidence showing that it held an exclusive right to "(I've Had) The Time of My Life," "Hotel California," or "Don't Phunk With My Heart." Tresóna received its interests in "(I've Had) The Time of My Life" from PEN Music Group (PEN), which only controlled, and could only license, a 25 percent interest in the song. Similarly, Tresóna received its interests in "Hotel California" from PEN, which only controlled, and could only license, a 50 percent interest in the song. Moreover, Tresóna received its interests in "Don't Phunk With My Heart" from The Royalty Network, which only controlled, and could only license, a one-sixth interest in the song. Accordingly, the trial court found that Tresóna lacked standing to sue under the Copyright Act for infringement of those three songs because Tresóna did not hold exclusive rights in the musical works. However, the trial court found that Tresóna produced sufficient evidence to show that it had an exclusive right to "Magic" from PEN.

Carroll asserted the defenses of fair use and qualified immunity to the show choir's use of "Magic," while the Boosters Club and the parent volunteers asserted that they could not be held liable for direct or secondary copyright infringement. The trial court did not address

Carroll's fair use defense, but found that Carroll was entitled to qualified immunity for the show choir's use of "Magic" and the Boosters Club and parent volunteers were not liable for direct or secondary copyright infringement. Carroll and the Boosters Club moved to recover attorneys' fees, and the trial court denied the motion. Tresóna appealed the trial court's findings and Carroll and the Boosters Club appealed the denial of attorneys' fees.

On appeal, the U.S. Court of Appeals for the Ninth Circuit held that the trial court was correct in holding that Tresóna lacked standing under the Copyright Act to bring an infringement claim based on "(I've Had) The Time of My Life," "Hotel California," and "Don't Phunk With My Heart," because Tresóna only held non-exclusive licenses to those musical works.

The Court then turned to the show choir's use of the song "Magic" and the trial court's ruling in favor of Carroll on qualified immunity grounds. The Ninth Circuit affirmed the judgment in favor of Carroll on the show choir's use of the song "Magic," but based on Carroll's defense of fair use and not on the ground of qualified immunity. The Court found the fair use question "begs to be answered" because the defense of qualified immunity is only available to public school teachers, while the fair use defense would apply to both public and private school teachers.

Fair use is a defense that permits copyrighted works to be used "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." To determine whether the use of copyrighted material qualifies as fair use, Congress has directed the courts to consider at minimum, "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

Here, the Court said, "Carroll's use of the musical work was in his capacity as a teacher in the music education program at Burbank High School… and [s]uch an educational use weighs in favor of fair use." The Court then analyzed each of the four factors. First, the Court noted that "the purpose and character of the use" weighed strongly in favor of finding fair use. The segments of the song "Magic," used in the "Rainmaker" compilation was a transformative use of the song, which was performed by students as part of a music education program. The proceeds from the performance went to the nonprofit Boosters Club to further fund and support the school's music education program. Second, the Court found that the nature of the use of "Magic" in the "Rainmaker" compilation was "undoubtedly creative," which also supported a finding of fair use.

Third, the Court noted that the amount and substantiality of the portion of "Magic" used in the "Rainmaker" compilation was significant, because the "song's principle chorus, which is the central element of the musical work" was used and repeated in "Rainmaker" more than once. Nevertheless, the Court found that this factor did not weigh against a finding of fair use because those portions of the song were "embedded … into a larger, transformative showpiece that incorporated many other works." Fourth, the Court found that the use of "Magic" in "Rainmaker" did not affect the consumer market for sheet music of "Magic" because individuals truly interested in purchasing and performing "Magic" would not, instead, purchase sheet music for "Rainmaker."

The Court concluded that the choir's use of "Magic" for educational, nonprofit purposes in their high school choir performance was a fair use based on the weight of the factors. The Court also granted attorneys' fees to Carroll, the Boosters Club, and the parent volunteers to deter copyright holders with no reasonable infringement claim from bringing similar suits in the future in hopes that it would allow "for greater breathing room for classroom educators and those involved in similar educational extracurricular activities."

Tresóna Multimedia, LLC v. Burbank High School Vocal Music Association (9th Cir. 2020) 953 F.3d 638.

NOTE:

The decision in Tresóna *appears to broaden how schools may use copyrighted materials for educational purposes. Nevertheless, schools and community college districts should thoughtfully analyze whether their use of copyrighted materials is legally compliant and become familiar with the boundaries of "fair use" in the educational setting. When in doubt, it is advisable to obtain written permission from the copyright holder.*

BUSINESS & FACILITIES

Community Colleges May Be Entitled To Reimbursement For Costs Associated With State-Mandated "Minimum Conditions."

The Los Rios Community College District, Santa Monica Community College District, and West Kern Community College District each sought state reimbursement for costs associated with meeting various "minimum conditions" set out in the Education Code and Title 5 of

the California Code of Regulations. These "minimum conditions" pertain to standards and procedures that a community college district must adopt and maintain in a multitude of areas in order to receive state funding.

The state must reimburse a local agency, including a community college district, for costs mandated by the state, including increased costs as a result of a statute or regulation mandating a new program or a higher level of service for an existing program. A local agency seeking reimbursement must file a test claim with the Commission on State Mandates, and the Commission decides whether to approve or deny a request for reimbursement.

The Commission denied Los Rios Community College District's, Santa Monica Community College District's, and West Kern Community College District's claims for reimbursement on the grounds that the minimum conditions are not state mandates because they can choose to decline state funding. Coast Community College District, North Orange County Community College District, San Mateo County Community College District, Santa Monica Community College District, and State Center Community College District (the "Community College Districts") filed an action in the trial court asking the court to reverse the Commission's decision.

The trial court agreed with the Commission based on a previous case, *Department of Finance v. Commission on State Mandate (Kern High School Dist.)* (2003) 30 Cal.4th 727. That case involved state statutes requiring certain school district councils and advisory committees to provide notice of meetings and post meeting agendas in connection with particular underlying programs. There the court held that the notice and postings requirements were voluntary because the district could decline program funding. The trial court here ruled that the Community College Districts could decline state apportionment funding and so the regulations were not legally compelled to comply with the minimum conditions. The Community College Districts appealed.

On appeal, the court reversed the trial court's decision in part. The court distinguished this case from *Kern High School District* because there, the requirements applied to discrete, voluntary programs and the associated costs were "modest." Here, the court found that the minimum conditions applied to state-mandated programs. Therefore, the Community College Districts were entitled to reimbursement if they could meet other requirements. The court then went on to analyze which of the specific claims for reimbursement required further consideration.

The court held that the Community College Districts were entitled to the following claims for reimbursement, although some were moot because the Commission had already agreed to reimbursement:

- Costs related to maintaining standards of scholarship under former 5 CCR § 51002;
- Costs related to complying with regulations related to degrees and certificates under former 5 CCR § 51004;
- Costs related to maintaining a policy of open courses under former 5 CCR § 51006;
- Costs related to collecting student fees under 5 CCR § 51012;
- Costs related to obtaining approval for new colleges and educational centers under former 5 CCR § 51014;
- Costs related to meeting accreditation standards under former 5 CCR § 51016;
- Costs related to counseling programs under 5 CCR § 51018;
- Costs related to establishing long-term goals and objectives under 5 CCR § 51020;
- Costs related to maintaining educational programs under 5 CCR § 51020;
- Costs related to maintaining instructional programs under former 5 CCR § 51022;
- Costs related to participatory governance under 5 CCR §§ 51023, 51023.5, 51023.7;
- Costs related to requirements for the ratio of full-time to part-time faculty under 5 CCR § 51025;
- Costs related to maintaining policies for changing grades made in error, fraud, bath faith, or incompetency under former 5 CCR, § 55760;
- Costs related to maintaining a policy identifying directory information under former 5 CCR, § 54626.

However, the appeals court affirmed the trial court's decision with respect to certain claims or portions of claims for reimbursement. The appeals court found that the following claims for reimbursement were not state mandates or otherwise exempt from reimbursement:

- Costs related to comprehensive plans under 5 CCR § 51008;
- Costs related to matriculation services under Education Code sections 78210 through 78218 (known as the Seymour-Campbell Matriculation Act), (community college districts are only entitled to reimbursement when funds are specifically appropriated under Seymour-Campbell Matriculation Act of 1986);
- Costs related to maintaining comprehensive transfer programs under Education Code section 66738;
- Costs related to vocational educational contracts with third-parties under former 5 CCR §§ 55602, 55602.5, 55603, 55605, 55607, 55620 and 55630;
- Costs related to policies permitting articulated high school courses to be applied towards college credit

under former 5 CCR § 55753.5;
- Costs related to distance learning and independent study under former 5 CCR §§ 55205-55219, 55300, 55316, 55316.5, 55320-55322, 55340 and 55350;
- Costs related to offering courses on a credit/no-credit basis under former 5 CCR § 55752;
- Costs related to offering credit by examination under former 5 CCR § 55753;
- Costs related to maintaining policies for course repetitions and grade changes for reasons other than error, bad faith, or incompetency under former 5 CCR § 55761, 55764;
- Costs of establishing and maintain community service classes Education Code 78300;
- Costs related to reinstating courses eliminated a result of budget cuts pursuant to the Budget Act of 1982 under former 5 CCR § 55182;
- Costs related to converting noncredit courses to credit courses under former 5 CCR § 55807;
- Costs related to providing clear and understandable course descriptions under former 5 CCR § 58102;
- Costs related to releasing directory information under former 5 CCR § 54626;
- Costs of adopting policies governing when students can be required to provide instructional materials under Education Code § 76365.

The court also rejected the following claims for reimbursement because they were not adequately developed or properly brought to the court:

- Costs related to equal employment opportunity under 5 CCR § 51010;
- Costs related to the student equity plan under 5 CCR § 51026;
- Costs related to issuing certificates of achievement under former 5 CCR § 55809;
- Costs related to maintaining open programs and courses under 5 CCR §§ 58107 and former 5 CCR § 58108;
- Costs related to calculating grade point averages under former 5 CCR § 88758.5 (repealed).

Lastly, the court rejected the Community College Districts' argument that the Commission utilized improper parameters and guidelines to determine which costs to reimburse and acted improperly in reaching its decision.

Coast Community College District v. Commission on State Mandates (2020) --- Cal.App.5th --- [2020 WL 1649919]

DID YOU KNOW….?

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

CA Attorney General Becerra issued an opinion on February 7, 2020 giving a firefighters' union approval to sue under the *quo warranto* procedure regarding the City of Palo Alto's action to rescind the binding interest arbitration provision in its city charter. (Attorney General Opinion No. 19-701.)

If litigation has been threatened outside a local agency's public meeting, it may be discussed in closed session under Government Code §54956.9(e)(5) only if a record of the threat is made before the meeting. (*Fowler v. City of Lafayette*, 2020 WL 612870 (Cal. Ct. App. February 10, 2020.)

A qualifying disability for Industrial Disability Retirement must be permanent or "extended and uncertain," meaning that the disability will last at least 12 months. (CalPERS Circular Letter 200-018-17 (Mar. 30, 2017).)

CONSORTIUM CALL OF THE MONTH

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

Question: A human resources manager called LCW to ask whether the district could request a doctor's note from an employee who called in sick for the third consecutive day.

Answer: The attorney explained that California's Paid Sick Leave law is silent as to whether employers can request medical verification. There is a risk of liability for violating this law if the employer insists on getting a doctor's note before it permits the use of this type of paid sick leave. This law requires employers to provide

employees with paid sick leave upon oral or written request, and allows the employee to determine how much sick leave to use. It further provides that employers cannot deny the right to use sick leave.

An employer's insistence on medical verification for this type of paid sick leave is risky because employees could claim a denial of their paid sick leave entitlement. The employer's risk in requiring verification, however, would most likely only apply to the first 24 hours or 3 days of paid sick leave used in a 12-month period. After this type of sick leave is used, any other type of sick leave provided by an employer through a CBA or internal policy, however, could be subject to medical verification requirements.

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TUESDAY, MAY 5, 2020 | 10:00 AM - 11:00 AM
As unemployment claims continue to rise in California, employers who may be reducing hours of work or issuing layoff notices should understand the three unemployment compensation programs under the CARES Act: Federal Pandemic Unemployment Compensation (FPUC), Pandemic Emergency Unemployment Compensation (PEUC), and Pandemic Unemployment Assistance (PUA) and how these programs interact with state unemployment insurance and compensation. This webinar will provide an overview of eligibility for unemployment benefits, benefit calculation, the impact of partial wage payments on weekly benefits, and the applicability of the provisions of the three new programs under the CARES Act. If it has been a while since your agency has responded to unemployment claims or if you need to understand how employment decisions will impact unemployment eligibility and/or benefits, don't miss this webinar!

Who Should Attend: All California Employers, including: Public Agencies, Public Schools and Colleges, Private Schools and Colleges (including religious schools) and Nonprofit entities.

PRESENTED BY:
ALEXANDER VOLBERDING & ANNI SAFARLOO

Firm Publications

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

Fresno Partner **Shelline Bennett** and Sacramento Associate **Lars Reed** authored an article for *Bloomberg Law* titled "Employer Tips for Accommodating Non-Binary Workers."

San Diego Partner **Frances Rogers** and Los Angeles Associate **Kate Im** authored an article for the *Daily Journal* titled "Medical Marijuana Makes Its Way Into California K-12 Schools."

Los Angeles Partners **Heather DeBlanc**, **Oliver Yee** and San Francisco Associate **Kelly Tuffo** authored an article for the *California Lawyers Association Public Law Journal* titled "Employee Housing Assistance—Legal Considerations for California Public Agencies."

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Los Angeles Partners **J. Scott Tiedemann**, **Peter Brown**, and **Steve Berliner** were interviewed in the *Daily Journal* to discuss advising clients in the time of COVID-19.

Los Angeles Partner **Steve Berliner** authored an article for the *Daily Journal* titled "How to Hire CalPERS Retirees the Right Way."

Sacramento Partner **Gage Dungy** and Sacramento Associate **Savana Manglona** authored an article for *Western City* magazine titled "New Law Expands Workplace Lactation Accommodation Requirements for Employers."

Los Angeles Senior Counsel **David Urban** authored an article for the *Daily Journal* titled "Government-Hosted Social Media and the First Amendment"

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

May 7 **"Maximizing Supervisory Skills for the First Line Supervisory - Part 1"**
Imperial Valley ERC | Webinar | Kristi Recchia

May 7 **"Employees and Driving"**
East Inland Empire ERC | Webinar | James E. Oldendorph

May 7 **"Building Workforce Diversity"**
SCCCD ERC | Webinar | Jenny Denny

May 14 **"Ethics for All"**
Gateway Public ERC | Webinar | Kristi Recchia

May 14 **"Finding the Facts: Employee Misconduct & Disciplinary Investigations"**
North State ERC | Webinar | Gage C. Dungy

May 14 **"Addressing Workplace Violence"**
San Diego ERC | Webinar | Kevin J. Chicas

May 15 **"The Disability Interactive Process"**
East Inland Empire ERC | Webinar | James E. Oldendorph

May 21 **"Advanced FLSA"**
North State ERC | Webinar | Gage C. Dungy

May 28 **"Maximizing Supervisory Skills for the First Line Supervisor - Part 2"**
Imperial Valley ERC | Webinar | Kristi Recchia

May 28 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
Monterey Bay ERC | Webinar | Lisa S. Charbonneau

Customized Training

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

May 8 **"Name that Section: Frequently Used Education Code and Title 5 Sections for Community College Districts"**
West Valley Mission Community College District | Webinar | Laura Schulkind

May 27 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
Rancho Santiago Community College District | Webinar | Laura Schulkind

Seminars/Webinars

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

May 1 **"COVID-19 Office Hours for Community College District Consortium Members"**
Liebert Cassidy Whitmore | Webinar | Pilar G. Morin & Frances Rogers & Meredith Karasch

May 5 **"Understanding State Unemployment and Unemployment Programs Under the CARES Act"**
Liebert Cassidy Whitmore | Webinar | Anni Safarloo & Alexander Volberding

May 13 **"Getting Ready for Fall: Top Labor and Employment Issues You Should Be Addressing Now"**
Liebert Cassidy Whitmore | Webinar | Frances Rogers & Laura Schulkind & Kristin Lindgren

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