



CLIENT UPDATE

Monthly news and developments in employment law and labor relations for California Public Agencies.

JUNE 2018

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LCW IN THE NEWS

LCW Ranked A Best Law Firm for Women Attorneys

In a national survey of law firms of comparable size, Liebert Cassidy Whitmore ranked as the third-best law firm for women. The survey, conducted by *Law360*, indicates that LCW is one of few law firms nationwide with an above average representation of women attorneys, including at its top management tiers. LCW is proud to be recognized as an industry “ceiling smasher” and sincerely thanks its women attorneys for the excellent contributions they make every day to both LCW and the legal profession. *More information is available at www.lcwlegal.com/news.*

WAGE AND HOUR

California Supreme Court Adopts “ABC Test” for Independent Contractor Status.

The California Supreme Court established a new, worker friendly test to determine whether a person should be classified as an independent contractor or employee. This test applies to California’s Industrial Welfare Commission (IWC) Wage Orders which regulate wages, hours, and working conditions.

Under the new “ABC Test,” a person qualifies as an independent contractor to whom the wage orders do not apply, only if the employer proves all three of the following:

- A) that the person is free from the control and direction of the hirer/contracting agency in connection with the performance of the work, both under the contract terms and in fact;
- B) that the person performs work that is outside the usual course of the hiring entity’s business; and
- C) that the person is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

An employer who cannot establish all three factors must treat that person as an employee and not an independent contractor for purposes of the IWC Wage Orders.

Although public sector employers are not governed by most parts of IWC Wage Order number 4 (Professional, Technical, Clerical or Mechanical Occupations), public sector employees are entitled to the following benefits under the Wage Orders: to be paid minimum wage; receive split shift pay; and receive the benefits of the meals and lodging limitations. For public sector employers who provide public transportation services under IWC Wage Order number 9 (Transportation Industry), public sector employees are entitled to be paid minimum wage, split shift pay, receive the benefits of the meals and lodging limitations, and receive rest and meal breaks (in most instances).

Dynamex Operations West, Inc. v. Superior Court (2018) 4 Cal.5th 903.

NOTE:

Although this decision applies only to the IWC Wage Orders, there will undoubtedly be efforts to extend the ABC Test to other areas of California law, such as California's anti-discrimination and leave laws. As a result, now is a good time to review whether the persons your agency contracts with qualify as independent contractors under the ABC Test. LCW is available to assist agencies in that effort. A more in-depth discussion of the Dynamex decision is available here: <https://www.calpublicagencylaboremploymentblog.com/wage-and-hour-2/california-supreme-court-adopts-new-abc-test-for-classification-of-independent-contractors-potential-risk-and-impact-on-public-agencies/>

AGENCY SHOP

Preparing for U.S. Supreme Court's Janus Decision on Fair Share Fees.

The U.S. Supreme Court is expected to issue a long-awaited decision in *Janus v. AFSCME* this month. The case will decide whether public sector bargaining unit employees can be required to pay "service" or "fair share" service fees under

an agency shop arrangement as a condition of their continued employment. While we wait for the Court to decide *Janus*, there are some proactive steps agencies can take to prepare for a potential decision that invalidates an agency's authority to deduct agency shop service fees from employee wages.

1. Identify Janus' Potential Scope of Impact Upon Your Agency

Your agency can begin by reviewing each collective bargaining agreement to determine whether any include an agency shop or other wage deduction arrangement. For those that include agency shop, review all relevant provisions, including those related to processing service fee deductions. Unions typically collect both union dues and service fees through wage deductions via the agency's Payroll Department. Agencies with agency shop will likely be required to make administrative changes to their payroll practices. So you should familiarize yourself with the amount, timing, and frequency of service fee deductions.

Your agency should be ready to both immediately implement any Court-mandated changes, if any, and notify and meet and confer with any impacted unions regarding negotiable impacts of the changes as soon as possible.

2. Identify Which Provisions May Be Subject to Effects Bargaining

After this initial review, you may find it helpful to create union-specific spreadsheets or tables identifying all relevant provisions in your collective bargaining agreements, particularly if your agency has different agency shop arrangements with different unions. If the Court rules that agency shop is unconstitutional, your agency should be prepared to bargain over any negotiable effects of the decision. In preparation for these negotiations, we recommend that you review the impacted collective bargaining agreements to familiarize yourself with any additional release time, union access, and employee orientation benefits.

Finally, you may also wish to review any management rights, zipper, reopener, and/or severability clauses to determine whether any of these provisions apply. In this way, you will be ready to take the actions necessary to amend or eliminate collective bargaining agreement provisions that are contrary to the anticipated *Janus* decision.

3. Identify Union Dues, Service Fee, and Religious or Conscientious Objector Payers

After identifying which unions have agency shop agreements, your agency should develop a spreadsheet identifying each union's service fee payers, and religious or conscientious objectors. This will be both the most labor intensive and absolutely critical element of your *Janus* preparation.

Janus will not directly impact union member employees because they are voluntarily paying union dues. However, if the Court rules that mandatory agency shops are unconstitutional, the decision will directly impact the agency's service fee payers and any bargaining unit members who have a religious objection and who must donate to a charitable organization in lieu of the service fee. Review the election forms in each employee's personnel file or payroll records to determine which category each bargaining unit member falls within.

On *Janus'* effective date, your agency may be required to immediately cease all wage deductions from service payers and religious objectors. Therefore, once you identify your employee categories, you must work with the Payroll Department to establish an action plan if the decision invalidates those wage deductions.

4. Conclusion

Public agencies should take all advance steps within their control to plan for the immediate cessation of deductions for service and religious objector fees. They should also be prepared to immediately give notice to unions of their

opportunity to engage in any necessary effects bargaining. LCW will publish more specific guidance after the Court issues its decision in *Janus*.

DISABILITY

Deducting Leave of Absence from Employee's Probationary Period, or Extending Probationary Period, May be Reasonable Accommodations.

A Court of Appeal decision found that if a classified probationary community college employee takes a leave of absence due to a disability, the employer may be obligated to extend the employee's probationary period, or deduct the leave period from the probationary period, if doing so constitutes a reasonable accommodation.

On March 19, 2013, Rancho Santiago Community College District ("District") hired Marisa Hernandez as a classified probationary administrative assistant. She began a 12-month probationary period. Her performance was to be evaluated at the three, seven and eleven-month marks, but she was not evaluated after three or eleven months and was not informed of any concerns with her job performance.

Prior to starting work, Hernandez had injured one of her fingers; her knuckle was also broken but was not diagnosed at the time. After she had worked for the District for over six months, Hernandez' physician recommended that she undergo surgery to treat her injured knuckle. The surgery and recovery would require Hernandez to be out of work for three to four months, during which time she would be temporarily disabled. After about eight months of work, Hernandez underwent surgery. She was not working, nor evaluated at the time her 11-month evaluation would have occurred.

Interpreting California Education Code section 88013 as prohibiting the District from extending

Hernandez' probationary period for any reason beyond the one-year point, and because Hernandez' performance had not been evaluated, the District timely released Hernandez from probation.

Hernandez sued the District, claiming that by releasing her from probation while she was on disability leave, the District failed to accommodate her disability and failed to engage in the interactive process in violation of the FEHA. The trial court found for Hernandez and the Court of Appeal affirmed.

It was Hernandez' burden to prove that she had a disability, she was qualified for the position, and the District failed to reasonably accommodate her. The District asserted that it could not accommodate Hernandez by continuing her leave of absence because California Education Code section 88013 prohibited the District from extending Hernandez' probationary period for any reason, and this would have caused Hernandez to be converted to a permanent employee after one year without being evaluated.

The trial court and Court of Appeal disagreed with the District's interpretation of the Education Code. Instead, resolving an issue of first impression, the Court of Appeal held that when a probationary employee has "a temporary total disability requiring absence from work for an extended period of time, that period may be deducted from the employee's probationary period. In this way, the employer receives the full 12-month period of time in which to evaluate the employee's performance (Ed. Code, § 88013, subd. (a)), and the employee does not lose her job because she suffered a job injury resulting in her temporary total disability."

The Court of Appeal found that because the District could have deducted the period of disability leave from Hernandez's probationary period, or extended her probationary period by the amount of time she was on disability leave without experiencing undue hardship (due to having to convert her to permanent

status without reviewing her performance), the District's failure to do so violated the FEHA. Therefore, the Court of Appeal affirmed the trial court's finding for Hernandez.

Hernandez v. Rancho Santiago Community College District (2018) 232 Cal.Rptr.3d 349.

NOTE:

In light of the new standards announced in Hernandez, community college employers are obligated to consider whether deducting an employee's disability leave from the probationary period under Education Code section 88013, or extending a probationary employee's probationary period, could constitute a reasonable accommodation. Employers should also consider whether any applicable collective bargaining addresses the impact of such leaves on the probationary period. LCW attorneys are available to advise agencies on these issues

PUBLIC SAFETY

Agency's Interviews of Police Officers Were Protected Activities and Did Not Violate POBRA.

The California Court of Appeal found that a government entity's interviews of police officers and denial of their requests for representation, were legally protected activities and did not violate the Public Safety Officer's Procedural Bill of Rights Act (POBRA) because: (1) the interviews were held pursuant to a statutory directive; and (2) the officers themselves were not the targets of the investigation nor subject to discipline.

The case involved an investigation of California's High Desert State Prison. The Office of the Inspector General (OIG) is the agency responsible for overseeing the California Department of Corrections and Rehabilitation (CDCR). The OIG has statutory authority to review CDCR policies and practices, and must issue a written

report describing the findings of any review performed. Except in limited circumstances, the OIG does not have authority to investigate CDCR employee misconduct. The California Senate Rules Committee authorized the OIG to investigate several issues: the prison's policies and practices involving excessive force against inmates; the prison's internal review of these incidents; and the prison's protection of inmates from assault. The Rules Committee requested that the OIG publish a written report describing the results of the review, and recommendations for actions.

The OIG interviewed several correctional officers who were former employees of High Desert State Prison, and who were not the subject of allegations of misconduct, nor potential witnesses to the alleged misconduct. Although each of the five correctional officers requested representation for the interviews, the Deputy Inspector General (DIG) who conducted the interviews informed the officers that they were not the subject of the investigation and denied their requests. The DIG noted that the officers' statements would not be used to pursue an investigation or to recommend that an investigation be opened.

The officers and the California Correctional Peace Officers Association (CCPOA) sued the OIG, alleging the OIG violated the officers' POBRA right to have a representative present during the interviews. In its defense, the OIG filed an anti-SLAPP motion – a motion that asserts that a lawsuit is a “Strategic Lawsuit Against Public Participation,” and an impermissible attempt to stifle the OIG's protected right to investigate prison practices and policies.

The OIG's anti-SLAPP motion to dismiss the officers' claims required the courts to answer two questions: (1) whether the OIG interviewed the officers in furtherance of a legally authorized official proceeding; and (2) whether the officers showed a probability of winning their POBRA claims. The trial court had concluded that while the officers' lawsuit would prohibit OIG

from pursuing its legally protected actions (investigating prison practices), the officers had shown a likelihood of success on their claims. The Court of Appeal reversed the trial court and found in favor of the OIG.

First, the Court of Appeal affirmed that the OIG interviewed the officers in furtherance of the OIG's legally protected right to engage in free speech by investigating prison practices and policies. California courts have found that gathering information in preparation for publishing a news or investigation report or scholarly article is conduct in furtherance of the right to free speech. Here, pursuant to the California Penal Code, the Senate Rules Committee asked the OIG to review practices related to prison staff's use of excessive force and requested that the OIG to issue “a written report detailing the results of [the] review.” The Penal Code also required the OIG to prepare a public report of its findings to be distributed to the general public. The Court of Appeal found that the OIG interviewed the officers in preparation for issuing its report, and that findings related to allegations of mistreatment of prisoners at a state correctional facility qualified as an issue of public interest. Because the OIG's interview of the officers arose out of the OIG's legally protected speech, the officers' claim that the interviews violated their POBRA rights also arose from the OIG's protected speech.

Second, the Court of Appeal found that the officers did not show a likelihood of winning their claim that the denial of a representative violated their rights under POBRA. The Court of Appeal found that the POBRA provides peace officers with a right of representation when the officer “is under investigation and subjected to interrogation...that could lead to punitive action.” But the POBRA states that the right to representation is not triggered by “any interrogation of a public safety officer in the normal course of duty, counseling, instruction...” Here, the Court of Appeal concluded, individual correctional officers were not under investigation, and were not subjected to an interrogation that

could lead to punitive action. The officers were only being interviewed because they were former employees of the prison. The OIG did not intend to and did not have authority to investigate specific officers. Thus, the officers' POBRA rights were not triggered.

The Court of Appeal granted the OIG's anti-SLAPP motion, and dismissed the officers' complaint.

Blue v. California Office of the Inspector General (2018) 232 Cal.Rptr.3d 590.

NOTE:

LCW has been very successful in crafting Anti-SLAPP motions to protect public entities. The Anti-SLAPP motion is also very cost-effective because it generally delays expensive discovery until after the motion is decided.

DISCRIMINATION

Employer Violated the FEHA by Falsely Informing a Pregnant Job Candidate That No Positions Were Available.

The Fair Employment and Housing Act ("FEHA") prohibits an employer from discouraging a pregnant candidate from applying for a job by falsely informing her that no employment opportunities are available. Doing so is unlawful pregnancy discrimination, even if the employee does not actually apply for the position or seek similar employment elsewhere.

Ada Abed was an extern at a Western Dental office in Napa, California. It was company practice to accept students from dental assistant programs and consider them for full-time employment upon successful completion of the externship and the job application process. In March 2015, Western Dental posted a pre-approved solicitation for dental assistant candidates. In May 2015, Abed applied for, and was accepted for an extern position. She was pregnant at the time but did not share that information with Western Dental staff or managers.

Abed was supervised by Sabrina Strickling, a registered dental assistant who was also involved in the hiring process in that Strickling answered questions and supervised and evaluated externs. Strickling consistently gave Abed positive reviews and marked Abed as above average in her final evaluation.

At the end of May, while Abed's externship was still in progress, Strickling found out about Abed's pregnancy when she saw prenatal pills in Abed's partially opened purse. Strickling attempted to confirm that Abed was pregnant by asking other Western Dental staff. The parties disputed the nature of Strickling's comments about Abed's pregnancy. Abed's coworker stated that she heard Strickling say that hiring a pregnant employee would be inconvenient for the office while Abed asserted that Strickling stated, "Well, if she's pregnant, I don't want to hire her." Abed presented as evidence -- a screen shot of a text message exchange between her and a coworker in which the coworker confirmed that Strickling did not want to hire Abed if Abed was pregnant.

Abed testified that about two weeks after hearing these comments from Strickling, she asked Strickling whether Western Dental's Napa office had an opening for a dental assistant. Strickling told Abed that there were no openings in the Napa office, so Abed did not apply. Abed also presented evidence that on the last day of her externship, Strickling stated that Abed should contact the Napa office after she gave birth to see if she could get a job there.

Less than a week after informing Abed that there were no available dental assistant positions, Western Dental management began working with a recruiter who presented two candidates for dental assistant positions. Less than a week after Abed completed her externship, the recruiter then presented Western Dental with an externship candidate. Western Dental on-boarded the extern and, in late July, extended her an offer for full time employment as a dental assistant. That extern was hired into the dental assistant position created by the requisition approved in March 2015, a date

prior to the start of Abed's externship.

Abed filed a pregnancy discrimination claim with the Department of Fair Employment and Housing, received a right to sue letter, and then sued Western Dental for pregnancy discrimination and other claims. The trial court granted summary judgment for Western Dental but the Court of Appeal reversed and found that Abed's claims should proceed to trial.

The Court of Appeal rejected Western Dental's argument that it could not be liable because Abed did not apply for a dental assistant position. The court said it was not necessary for Abed to apply because Western Dental's statement that no positions were available gave Abed no reason to apply. Additionally, the court noted that under Title VII, if a job applicant conveys interest in a position, it is not necessary for the applicant to formally apply in order to have a claim against the employer for discriminatory hiring practices. The court also found that a jury needed to resolve the following factual disputes: Strickling falsely told Abed there were no positions in the Napa office; Western Dental continued to consider other applicants after Abed expressed interest; Strickling's involvement in the hiring process and her specific actions to discourage Abed from applying for a position; and Strickling's discriminatory comments about not hiring pregnant employees.

Thus, the Court of Appeal reversed the trial court's grant of summary judgment in favor of Western Dental, allowed Abed's claims to proceed to a jury trial, and awarded Abed the costs of bringing the appeal.

Abed v. Western Dental Services, Inc. (2018) 2018 WL 2328418.

NOTE:

Discouraging a pregnant applicant from applying for a job because of her pregnancy is discrimination. The fact that an applicant for initial hire or promotion is pregnant cannot play any role in a hiring decision.

WHISTLE BLOWING

Employee's Lawsuit Survived Summary Judgment Because Non-Renewal of Employee's Contract Occurred Very Soon After Whistleblowing.

Carl Taswell was a licensed doctor certified in nuclear medicine. In December 2011, Dr. Scott Goodwin, chair of the UC Irvine radiology department, offered Taswell a position as nuclear medicine physician, and hired him as an Academic Appointee Specialist with a commitment that the UC would eventually grant him a clinical professorship. In this role, Taswell was responsible for controlling the safety, technical, and medical aspects of brain imaging procedures at the UC brain imaging center. He was responsible for ensuring that the brain imaging center operated safely, that appropriate documentation was gathered, and that the center complied with applicable government standards.

On February 17, 2012, a colleague informed Taswell of potential safety and compliance problems at the center. That same day, Taswell informed Goodwin of the information and also reported the issues to UC officials using the UC's designated whistleblower hotline. In mid-March, Taswell raised his concerns with the UC radiation safety committee, the state Department of Public Health, the federal Food and Drug Administration, and informed Goodwin that he had done so. Later in March, Taswell and other UC employees with radiation safety responsibilities visited a radiochemistry lab near the brain imaging center. Believing he was authorized to do so, Taswell took photos of what he believed were safety violations.

On April 2, Goodwin informed Taswell that Taswell was being placed on administrative leave pending further investigation of his alleged unauthorized entry into the lab. On the same day, the UC informed Taswell that his contract would not be renewed. (Ultimately, in May, an investigation concluded that Taswell's entry into the lab was not unauthorized.) Goodwin testified that while he was initially in favor of renewing

Taswell's contract, he changed his mind in mid-March because of Taswell's alleged refusal to perform his job duties, interpersonal issues, and Taswell's poor behavior at the radiation safety committee meeting.

Thereafter, Taswell filed an internal complaint against the UC alleging whistleblower retaliation. He also brought a grievance that culminated in a hearing during which Taswell had the opportunity to be represented by counsel and present evidence. The grievance hearing officer ultimately concluded that the UC did not retaliate against Taswell and that his contract was not renewed due to reasons unrelated to Taswell's whistleblowing activities. Taswell did not appeal his grievance but instead sued UC for violating Labor Code section 1102.5, which prohibits retaliation against employees because of whistleblowing.

The trial court granted the UC's motion for summary judgment because Taswell failed to exhaust his remedies by appealing the UC's denial of his grievance, and there were no disputed factual questions for the jury to decide. The Court of Appeal reversed.

On the issue of exhaustion of remedies, the Court of Appeal cited its earlier decision in *Campbell v. Regents of University of California*. The Campbell decision held that Labor Code section 1102.5 clearly permits an employee to bring a "civil action" and that the employee is not required to exhaust judicial remedies by filing a writ for review of a public agency's internal remedies. Thus, it was not necessary for Taswell to appeal the UC's denial of his grievance to a court before he could initiate a lawsuit for whistleblower retaliation.

The Court of Appeal also reversed the trial court's finding on the question whether there were factual disputes that should be presented to a jury. First, the UC did not dispute evidence that on the same day it placed Taswell on paid leave pending investigation of his entrance into the lab, it informed him that his contract would not be renewed. This showed an adverse employment

action; a key element of a retaliation claim which Taswell would be able to prove at trial. Second, a jury could decide that the proximity in time between Taswell's whistleblower activity and the UC's decision to place him on leave and not renew his contract was evidence of a causal connection. Finally, there were factual disputes for the jury to decide on the issue whether the UC had a legitimate business reason for not renewing Taswell's contract.

The UC asserted that it did not renew Taswell's contract because he disregarded instructions not to investigate his suspected safety violations; he was difficult to work with; and he entered the lab without authority. Taswell disputed these reasons and presented evidence showing they were pretext. He produced evidence that the UC prevented him from performing his job; that he continued investigating the brain imaging safety concerns because Goodwin directed him to do so; that other employees of the UC were known to be difficult to work with but remained employed; and that Goodwin decided not to renew Taswell's contract within a day of finding out that that Taswell reported safety violations.

Thus, the Court of Appeal reversed summary judgment for the UC and permitted Taswell's claims to proceed to a jury.

Taswell v. Regents of UC (2018) 232 Cal.Rptr.3d 628.

NOTE:

The closer in time between an employee's whistleblowing and the employer's adverse employment action against that employee, the more likely it will be for a court to find unlawful retaliation. An employer can avoid retaliation claims and provide better personnel management by promptly addressing any employee performance and conduct issues.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's employment relations consortiums may call or email a 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 our answer. We will protect the confidentiality of client communications with LCW attorneys by changing or omitting identifying details.

ISSUE: An Agency Administrator contacted LCW about the potential legal risks of using the agency's email system to distribute an employee's GoFundMe fundraising link to employees throughout the agency. The employee had sustained a personal loss and started the GoFundMe account to enable any interested individual to make donations directly to the employee. The agency had not used its email system in this way in the past. There was no agency policy or MOU provision allowing such a use of the agency's email system.

ANSWER: The LCW attorney recommended against distribution of the GoFundMe link. The attorney noted that if the agency allowed the employee to use its email system in this way, this could begin a practice of allowing employees to use its email for fundraising purposes. The union and/or individual employees could assert that the agency is obligated to continue to allow its email system to be used for fundraising, whatever the cause or purpose. If the agency refused, the union may be able to claim that the agency was unlawfully discriminating against

email use for union activity. An individual employee denied use of agency email for another fundraising effort could claim that the agency is discriminating against that employee's viewpoint in violation of the First Amendment.

DUE PROCESS

Probationary Employee Did Not Hold Property Interest in Employment.

The U.S. Court of Appeals for the Ninth Circuit found that when the applicable civil service rules and charter plainly state that a public employee does not have a property interest in a probationary position, termination of the employee does not violate his due process rights.

Richard Palm worked for the Los Angeles Department of Water and Power ("LADWP") as a Steam Plant Assistant for 25 years. He was promoted to a Steam Plant Maintenance Supervisor position and began a six-month probation. Palm claimed that he was forced to resign prior to completing his probation, because he had objected to his supervisor's allegedly unlawful changes to Palm's time records. Palm brought several legal claims against LADWP (most of which were dismissed), including that LADWP violated his federal 14th Amendment Due Process rights. On the Due Process claim, it was Palm's burden to prove that applicable state law – the City of Los Angeles Charter and personnel rules – created a property interest in his probationary position.

Both the federal trial court and the Ninth Circuit agreed that Palm failed to prove that he had a property interest in his Supervisor position. The Ninth Circuit noted that: (1) property interests are created when state law "restricts the grounds on which an employee may be discharged," and (2) the procedures established for terminating an employee inform the question of whether a

property interest is created. The issue does not turn solely on whether the position is designated as permanent or probationary. The Ninth Circuit applied California rules of statutory construction and ultimately concluded that the Charter and personnel rules did not create such a property interest.

First, the plain language of the Charter indicated that no property interest existed. Section 1011(b) of the Charter, titled "Termination During Probation," provided, "[a]t or before the expiration of the probationary period, the appointing authority may terminate the probationary employee by delivering written notice of termination to the employee..."

Another section of the Charter provided that those in the classified service could only be discharged for cause, but this requirement did not apply to section 1011(b), which allowed LADWP to terminate probation based upon a subjective determination that the employee's performance was unsatisfactory. Ninth Circuit precedents hold that an appointing authority's purely subjective determination of satisfactory performance "undercuts any expectation of continued employment."

Second, the Civil Service rules defined the probationary period as the "working test period during which an employee ... may be terminated without right of appeal." Citing its earlier decision in *Fleisher v. City of Signal Hill*, the Ninth Circuit confirmed that the absence of appeal rights in termination procedures indicates that no property right exists.

Third, the Civil Service rules treated Palm as a probationary employee. They specified, employees on probation "are considered automatically on leave of absence from his/her former position while serving the probationary period," and that employees who fail probation "shall...be returned to the [permanent] position from which he/she is on leave."

Thus, the Ninth Circuit confirmed that Palm lacked a protected property interest in his probationary employment as a Supervisor and

upheld the trial court's dismissal of his due process claim.

Palm v. Los Angeles Department of Water and Power (9th Cir. 2018) 889 F.3d 1081.

NOTE:

A public employer's own rules, ordinances, and/or charter provisions create or withhold property rights to continued public employment. In order to ensure that your probationary employees can be released without cause, audit your agency's rules and laws annually. LCW attorneys are experienced in conducting employment rules audits.

CONFLICTS OF INTEREST

Section 1090's Prohibition On Conflicts Of Interest Applies To Independent Contractors.

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

Christensen's contract purported to limit her compensation at \$170,000 per year, but the District paid Strategic's invoices for three years for amounts far exceeding that limit without alerting the Board about the over-payments. The invoices simply appeared on the Board's "consent calendar" and the Board did not review each individual invoice.

Prior to the end of her first contract, Christensen negotiated a new contract in 2008 that provided for both compensation per an hourly rate schedule and retroactive payment in an amount not to exceed \$950,000 for services performed

between January 1 and June 30, 2008. The new contract also contained a termination clause that allowed the District to terminate Christensen's employment without cause, but required 120 days' notice of termination and a termination fee equal to three months' payment.

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

A new Interim Superintendent became concerned about the amount of money being paid to Strategic without an approved project. The Board subsequently met to consider the matter with legal counsel who advised that Strategic's contracts with the District were void under Government Code section 1090 for conflicts of interest. The same day, the District ordered Strategic to vacate the District's premises.

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

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

Christiansen argued that she did not violate

section 1090 because she was simply negotiating her own compensation, but the Court of Appeal was unconvinced. In its opinion, the Court of Appeal cited *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, which was pending when the trial court made its original ruling. In that case, the California Supreme Court concluded the term "employees" as used in section 1090 is "intended to include outside advisors with responsibilities for public contracting similar to those belonging to formal employees, notwithstanding the common law distinction between employees and independent contractors." The Supreme Court stated that if section 1090 exempted independent contractors, an official could manipulate the employment relationship to retain "official capacity" influence, yet avoid liability under section 1090. (*People v. Superior Court (Sahlolbei)*, *supra*, at 243.).

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

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

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

BENEFITS CORNER

ACA Back to Basics: The Employer Mandate

This article is the first installment in LCW's ACA Back to Basics series. The series will allow employers to brush up on the Patient Protection and Affordable Care Act's (also known as "the ACA") Employer Shared Responsibility Provisions.

The Employer Mandate – What is it?

The ACA's Employer Shared Responsibility Provisions, commonly known as the "Employer Mandate," require certain employers to offer qualifying medical coverage to substantially all of their ACA full-time employees and their dependents or, alternatively, to make an employer shared responsibility payment to the IRS. The Employer Mandate applies only to **Applicable Large Employers** ("ALEs"), i.e. employers that had an average of at least 50 full-time employees – including full-time-equivalents – during the preceding calendar year.

Applicable Large Employer ("ALE")

An employer is an ALE for the current calendar year if it has at least 50 full-time employees, including full-time equivalent employees, on average, during the prior year.

ALE Calculation: Add the total number of **full-time employees** for each month of the prior calendar year to the total number of **full-time equivalent employees** for each calendar month of the prior calendar year and divide that total number by 12.

For purposes of this calculation: 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 employer determines the number of **full-time equivalent employees** for a month in two steps:

- (1) Combine the number of hours of service of all non-full-time employees for the month but do not include more than 120 hours of service per employee, and
- (2) Divide the total by 120.

The Employer Mandate Penalties

An employer that meets the requirements of an ALE must offer minimum essential coverage to substantially all of its ACA full-time employees

and their dependents, and such coverage must provide minimum value and be affordable, otherwise, the IRS may assess one of two employer shared responsibility payments (aka "Penalty A" and "Penalty B"). These penalties are triggered if an ACA full-time employee purchases coverage through Covered California and obtains a premium tax credit.

Penalty A: The IRS may assess Penalty A where an ALE fails to offer **minimum essential coverage** to at least 95 percent of its full-time employees (and their dependents). The IRS will calculate Penalty A as follows: \$2,320 annually (\$193.33 per month) multiplied by the total number of full-time employees less 30. For example, Penalty A for an ALE with 40 employees could result in up to \$23,200 of liability in 2018 (40 less 30 is 10, multiplied by \$2,320).

Penalty B: The IRS may assess Penalty B where an ALE offers minimum essential coverage to at least 95 percent of its full-time employees and their dependents, but the coverage offered to a full-time employee is either **not "affordable" or does not provide "minimum value."** Penalty B is \$3,480 annually (\$290 per month) multiplied by the number of full-time employees who actually purchase coverage through Covered California and receive a premium tax credit. Both Penalties are indexed. The numbers above are for 2018.

Key Compliance Points

- The IRS will look at the lowest cost plan offered each month.
- Employers must report this data through ACA Reporting. (e.g. Forms 1094C/1095C).
- To avoid Penalty A, an employer must offer minimum essential coverage to at least 95 percent of its ACA full-time employees and their dependents.
- To avoid Penalty B, an employer must offer coverage that is affordable and provides minimum value.

According to CalPERS, all health plans it offers meet the minimum essential coverage requirement and provide minimum value.

All employers that qualify as an ALE should determine whether they offer “affordable” coverage to their ACA “full-time employees,” as those terms are defined by the ACA.

Later installments in our ACA Back to Basics series will provide additional details on how to identify ACA full-time employees and determining whether an employer is offering affordable coverage.

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The **Client Update** is available via e-mail. If you would like to be added to the e-mail distribution list, please visit <https://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 the **Client Update**.

If you have any questions, contact **Sherron Pearson** at 310.981.2000 or at info@lcwlegal.com.

LCW WEBINAR: THE NEGOTIABLE ASPECTS OF ORGANIZATIONAL RE-STRUCTURING AND DAY-TO-DAY LABOR RELATIONS



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

California law requires public entities to negotiate with labor representatives concerning more than just successor MOUs. This webinar will discuss the negotiation process concerning periodic labor relations events such as updating job descriptions, departmental reorganizations, contracting-out, lay-offs and other management actions.

Presented by:



[Jack Hughes](#)

Who Should Attend?

Human Resources, Labor Relations Professionals, Legal Counsel, Managers and Directors

Workshop Fee: Consortium Members: \$70 Non-Members: \$100

Register Today: www.lcwlegal.com/events-and-training

LCW WEBINAR: LIFE AFTER RETIREMENT – HIRING RETIRED ANNUITANTS AND AVOIDING VIOLATIONS



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

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

be familiar with the legal framework, ever-changing administrative interpretations, and heavy risks associated with employing retired annuitants.

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

Who Should Attend?

Human Resources Professionals, Risk Managers, Supervisors, and Managers

Workshop Fee: Consortium Members: \$70, Non-Members: \$100

Presented by:



T. Oliver Yee



Michael Youril

LCW WEBINAR: CLOSING THE WAGE GAP: CALIFORNIA AND FEDERAL EQUAL AND FAIR PAY LAWS



Tuesday, July 24, 2018 | 10 AM - 11 AM

Although both California and Federal law now mandate “equal” and “fair pay” for all, many employers may not know exactly what those terms mean and what laws govern them. Intended as a broad introduction to this emerging area of the law, this presentation will address the nuts and bolts of both the Federal Equal Pay Act and the California Fair Pay Act – two overlapping but

distinct laws that try to close the historic “wage gap” between men and women. The workshop will cover recent case developments, defenses to Equal Pay Act claims, and the extent to which equal pay laws apply to public sector employers.

Who Should Attend?

Managers, Supervisors, Department Heads, and Human Resources Staff.

Workshop Fee: Consortium Members: \$70, Non-Members: \$100

Presented by:



T. Oliver Yee

Register Today: www.lcwlegal.com/events-and-training



LCW LIEBERT CASSIDY WHITMORE

WEBINARS ON DEMAND

Throughout the year, we host a number of webinars on a variety of important legal topics. If you missed any of our live presentations, you can catch-up by viewing recordings of those trainings.

Topics

Visit our website to view our extensive collection of pre-recorded webinars on a variety of important legal topics. Apply various filters to chose from **over 50 legal presentations** that specifically designed for California's public employers. All webinar pages display a short preview of each training that will help you decide whether this topic is relevant.

Access

Once you purchase a webinar recording, we will email you a link to that presentation. You will have access to this presentation for 10 business days. During this timeframe you can view the webinar as many times, and from as many computers, as you wish. This will allow you to train all of your employees for one low registration fee.

To learn more and browse through our entire collection of webinars on demand, visit:

WWW.LCWLEGAL.COM/EVENTS-AND-TRAINING/



LCW BLOG

EVERY WEEK, LCW ATTORNEYS AUTHOR BLOG POSTS ON A VARIETY OF IMPORTANT LABOR AND EMPLOYMENT LAW TOPICS AND HOW THEY AFFECT CALIFORNIA'S PUBLIC EMPLOYERS.

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LCW LIEBERT CASSIDY WHITMORE



HOW TO AVOID CLAIMS OF DISABILITY DISCRIMINATION: THE ROAD TO REASONABLE ACCOMMODATION REGISTRATION IS NOW OPEN!

LCW is pleased to announce a comprehensive seminar for Public Sector personnel:

Wednesday, June 20, 2018 in South San Francisco
South San Francisco Conference Center
255 S Airport Blvd
South San Francisco, CA 94080

Agencies are faced with many challenges when presented with disabled employees in the workplace. This seminar will help employers navigate through the reasonable accommodation process and answer the difficult questions such as:

- What are an employer's responsibilities when it suspects a disability but the employee hasn't requested an accommodation?
- How far is an employer required to go to accommodate a disability, and what happens when that clashes with other statutory schemes or rights of other employees?
- What are the employer's responsibilities when discipline and disability intersect?

This workshop will also provide key information on what you should do when the interactive process breaks down and whether you can separate an employee or file for disability retirement.

Attendees will learn:

- Real case studies from litigation handled by LCW, including a discussion about what went right and what went wrong in those cases;
- Practical ways to avoid claims of disability discrimination, failure to accommodate, and failure to engage in the disability process;
- Tips to identify known and unknown disabilities;
- Triggers to know your duty to accommodate;
- Medical certifications you can require;
- Tactics to handle seemingly endless leaves; and
- Preventive strategies

Intended Audience: This seminar is fitting for Human Resources Professionals, Risk Managers, Supervisors

Time: 9:00 a.m. to 12:00 p.m

Pricing:

\$250 per person for Consortium Members
\$300 per person for Non-Consortium Members

*For more information regarding this seminar,
contact Alea Holmes at aholmes@lcwlegal.com or 415.512.3009 or visit*

<http://www.lcwlegal.com/events-and-training>


LIEBERT CASSIDY WHITMORE


PAYROLL PRACTICES & FLSA COMPLIANCE SEMINAR

REGISTRATION IS NOW OPEN!

LCW is pleased to announce a comprehensive seminar for Public Sector personnel:

Thursday, July 19, 2018 in Buena Park

Buena Park Community Center

6688 Beach Blvd

Buena Park, CA 90621

Overtime: the bane of nearly every payroll department's existence. Yet, correct tracking, calculation and payment of overtime is necessary to avoid violating the requirements of the Fair Labor Standards Act (FLSA). Under the FLSA, the onus of keeping track of time falls on the employer, regardless of whether the employee is required to clock in or out, so it is imperative agencies have solid timekeeping and payroll practices in place.

This 3-hour workshop will take an in depth look at the difficult challenges agencies face in administering payroll while keeping in compliance with the FLSA. Specifically, it will review some of the most common errors made by agencies in time/record keeping, pay code processing, special pay administration, overtime calculations, comp time processing and payroll system utilization. The workshop will also offer solutions for implementing the best or most practical timekeeping and payroll practices.

Intended Audience:

This seminar is designed for public agencies: finance, payroll, human resources, and legal counsel.

Time:

9:00 a.m. to 12:00 p.m

Pricing:

\$250 per person for Consortium Members

\$300 per person for Non-Consortium Members

For more information regarding this seminar, visit
<http://www.lcwlegal.com/events-and-training>



*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. It is designed for both those new to the field as well as experienced practitioners seeking to hone their skills. 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!

Next Class:

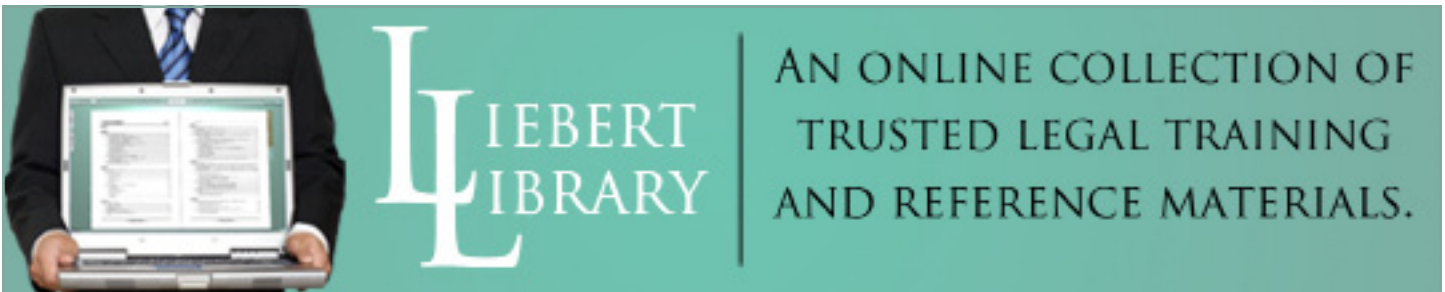
Trends & Topics at the Table!

July 12, 2018 | Fullerton, CA

What is happening in that room? This workshop puts you into the negotiation session environment and focuses on tips from our time at the table. Trending topics, union tactics, creative problem solving, and techniques to tackle various contract provisions will be shared and demonstrated.

Register Now! <https://www.lcwlegal.com/events-and-training/labor-relations-certification-program/trends-and-topics-at-the-table>

LEARN MORE AT WWW.LCWLEGAL.COM/LRCP



Through our experience we know that one of the most effective ways to reduce liability for an employer is to give managers the tools needed to understand and implement best practices. This occurs through training and practical reference material.

We now offer clients our entire library of reference material that covers a variety of labor, employment, and education law topics.

Membership Levels:

Basic (\$450 per year): this membership gives users access to view, search and download all of our sample forms, policies, checklists that are used in our workbooks. These are available in both PDF and Word formats.

Premium (\$995 per year): this membership gives users access to all of our workbooks, as well as the sample forms, policies, checklists listed above. Additionally, Premium Members also receive a \$15 discount on any workbook they choose to purchase.

All members of our Employment Relation Consortiums (ERC) are eligible to receive 10% off their registration.

For more information, please visit:

WWW.LIEBERTLIBRARY.COM



Please Note: To celebrate the upcoming summer break, we will combine the July and August 2018 issues of this newsletter.

Check your inbox in August for information on the latest legal developments.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

- June 5 **“Maximizing Performance Through Evaluation, Documentation and Discipline”**
San Mateo County ERC | Brisbane | Joy J. Chen
- June 7 **“Inclusive Leadership”**
Los Angeles County Human Resources | Los Angeles | Kristi Recchia
- June 21 **“Leaves, Leaves and More Leaves” and “Issues and Challenges Regarding Drugs and Alcohol in the Workplace”**
Monterey Bay ERC | Santa Cruz | Kimberly A. Horiuchi
- June 21 **“Employees and Driving” and “Labor Code 101 for Public Agencies”**
Orange County Consortium | Buena Park | Mark Meyerhoff & Paul D. Knothe

Customized Training

- June 1 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Millbrae | Joy J. Chen
- June 1,4 **“Writing Investigations”**
Probation Training Center | Pico Rivera | Los Angeles County Probation
- June 4 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
ERMA | Cathedral City | Christopher S. Frederick
- June 5 **“Preventing Workplace Harassment, Discrimination and Retaliation and Ethics in Public Service”**
City of Atherton | Erin Kunze
- June 5 **“A Guide to Implementing Public Employee Discipline and Investigations”**
Metropolitan Water District of Southern California | Los Angeles | Christopher S. Frederick
- June 5,27,29 **“Handling Grievances”**
Probation Training Center | Pico Rivera | Los Angeles County Probation
- June 5 **“Costing Labor Contracts”**
City of Long Beach | Kristi Recchia
- June 6 **“Performance Management”**
City of Gardena | Kristi Recchia
- June 6 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Santa Maria | Che I. Johnson
- June 6 **“The Brown Act and Ethics and Grievance Procedures”**
County of Imperial | El Centro | Stefanie K. Vaudreuil
- June 7 **“Preventing Workplace Harassment, Discrimination and Retaliation and Maximizing Performance Through Evaluation, Documentation, and Discipline”**
City of Fairfield | Gage C. Dungy
- June 7 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Los Angeles | Laura Kalty

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| June 11 | “Performance Management and Performance Evaluation” Housing Authority Santa Clara County San Jose Kristi Recchia |
| June 12 | “Preventing Workplace Harassment, Discrimination and Retaliation” Merced County Association of Governments Merced Che I. Johnson |
| June 13,14 | “Preventing Workplace Harassment, Discrimination and Retaliation” Town of Truckee Jack Hughes |
| June 14 | “Mandated Reporting” East Bay Regional Park District Oakland Erin Kunze |
| June 14,27 | “Preventing Workplace Harassment, Discrimination and Retaliation” Fallbrook Public Utility District Fallbrook Stephanie J. Lowe |
| June 15 | “Keenan SWAAC Training: Performance Management” Keenan Torrance Pilar Morin |
| June 15 | “Freedom of Speech and Right to Privacy” Labor Relation Information System - LRIS Las Vegas Mark Meyerhoff |
| June 18 | “Preventing Workplace Harassment, Discrimination and Retaliation” City of Torrance Christopher S. Frederick |
| June 18 | “Preventing Workplace Harassment, Discrimination and Retaliation and Mandated Reporting” East Bay Regional Park District Oakland Erin Kunze |
| June 19 | “Performance Evaluation” City of Gardena Kristi Recchia |
| June 19 | “12 Steps To Avoiding Liability” City of Rialto James E. Oldendorph |
| June 19,26 | “Key Legal Principles for Public Safety Managers - POST Management Course” Peace Officer Standards and Training - POST San Diego Frances Rogers |
| June 20 | “Risk Management Skills for Front Line Supervisor” ERMA Rancho Cucamonga Christopher S. Frederick |
| June 20,21, 25,27 | “Embracing Diversity” Los Angeles County Employees Retirement Association - LACERA Pasadena Lee T. Patajo |
| June 26,28 | “Embracing Diversity” Los Angeles County Employees Retirement Association - LACERA Pasadena Christopher S. Frederick |
| June 27 | “Unconscious Bias and Micro Aggressions” City of Rancho Cucamonga Rancho Cucamonga Kristi Recchia |
| June 28 | “Case Study for Managing Illnesses or Injuries” City of Los Angeles Jennifer Rosner |
| June 28 | “Preventing Workplace Harassment, Discrimination and Retaliation” City of Torrance James E. Oldendorph |
| July 10 | “Progressive Discipline” City of Gardena Kristi Recchia |
| July 12,25 | “Preventing Workplace Harassment, Discrimination and Retaliation” City of Walnut Creek Jack Hughes |

- July 18 **“Performance Management”**
East Bay Regional Park District | Oakland | Erin Kunze
- July 19 **“File That! Best Practices for Documents and Record Management”**
City of Concord | Heather R. Coffman
- July 24 **“Labor Relations 101”**
City of Gardena | Kristi Recchia
- Aug. 15 **“Ethics in Public Service”**
City of Vallejo | Lisa S. Charbonneau
- Aug. 28 **“Legal Issues Regarding Hiring”**
City of Glendale | Mark Meyerhoff
- Aug. 28 **“Key Legal Principles for Public Safety Managers - POST Management Course”**
Peace Officer Standards and Training - POST | San Diego | Frances Rogers

Speaking Engagements

- June 25 **“Strategies to Manage Increasing Pension Costs”**
California Special Districts Association (CSDA) General Manager Leadership Summit | Olympic Valley | Steven M. Berliner
- June 26 **“Powerful Leadership: Effective Tips for Stellar General Managers”**
CSDA General Manager Leadership Summit | Olympic Valley | Gage C. Dungy
- July 10 **“Defining Staff Board & Staff Roles and Relationships”**
CSDA Special District Leadership Academy | Napa | Jack Hughes
- July 11 **“Bullying, A Hostile Workplace, and Sexual Harassment”**
International Public Management Association Central California Chapter (IMPA-CCC) Meeting | Merced | Che I. Johnson
- July 25 **“Harassment Prevention”**
CSDA District Network Workshop | Avila Beach | Shelline Bennett
- Aug. 2 **“Webinar on Next Steps for Cities after Janus v. AFSCME”**
League of Cities City Attorneys’ Webinar | Webinar | Laura Kalty
- Aug. 14 **“Avoiding Retaliation Claims”**
Gallagher Seminar What Nonprofits Can Expect in 2018 | Oakland | Erin Kunze

Seminars/Webinars

- June 13,14 **“Best Practices for Conducting Fair and Legally Compliant Internal Affairs Investigations”**
Liebert Cassidy Whitmore | Fullerton | Geoffrey S. Sheldon & J. Scott Tiedemann
- June 20 **“How to Avoid Claims of Disability Discrimination: The Road to Reasonable Accommodation”**
Liebert Cassidy Whitmore | South San Francisco | Jennifer Rosner
- June 26 **“Firefighter Discipline and Appeal Rights: How to Comply with the Bill of Rights”**
Liebert Cassidy Whitmore | Webinar | Richard Bolanos
- June 27 **“Life After Retirement - Hiring Retired Annuitants and Avoiding Violations”**
Liebert Cassidy Whitmore | Webinar | Frances Rogers & Michael Youril
- June 28 **“The Negotiable Aspects of Organizational Restructuring and Day-to-Day Labor Relations”**
Liebert Cassidy Whitmore | Webinar | Jack Hughes

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| July 12 | “Trends & Topics at the Table!” Liebert Cassidy Whitmore Fullerton Kristi Recchia & Frances Rogers |
| July 19 | “Payroll Processing & Regular Rate of Pay Seminar” Liebert Cassidy Whitmore Seminar Brian P. Walter & Jennifer Palagi |
| July 24 | “Closing the Wage Gap: California and Federal Equal and Fair Pay Laws” Liebert Cassidy Whitmore Webinar T. Oliver Yee |
| Aug. 15 | “Seminal PERB Cases and What They Mean for Your Agency’s Labor Relations” Liebert Cassidy Whitmore Webinar Adrianna E. Guzman |

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