



CLIENT UPDATE

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

SEPTEMBER 2018

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

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LABOR RELATIONS

California Supreme Court Deals Blow to Voter - Backed Pension Reform.

The City of San Diego’s Proposition B, a 2012 voter-approved ballot measure designed to save the City’s weakening pension system, was dealt a potentially fatal blow by a California Supreme Court decision. The decision finds that it was actually the City that caused the changes to employee pension benefits, and that the City did so without first negotiating with labor unions. The fate of those pension reforms is uncertain until the Court of Appeal to issues its remedy.

Proposition B Was a Citizen’s Initiative

In reaching its decision, the Supreme Court relied heavily on the following facts. Under the City of San Diego’s “Strong Mayor” form of government, the mayor acts as the City’s chief executive officer whose responsibilities include recommending measures and ordinances to the City Council, and conducting labor negotiations with the City’s labor unions. In 2010, San Diego’s former Mayor, Jerry Sanders, was outspoken on the need for pension reform due to mounting unfunded liabilities that strained the City’s budget. Reforming the City’s pension plan required an amendment to the City’s Charter, which could be achieved by placing a ballot initiative before voters either by the City Council’s own motion or a citizens’ initiative. Mayor Sanders decided to champion a citizens’ initiative to eliminate traditional defined benefit pensions for all newly-hired City employees, except for peace officers, and replace them with defined contribution plans.

Between November 2010 and March 2011, Mayor Sanders actively pursued the citizens’ initiative by issuing press releases with the City seal that publicized his intent to put forward a citizens’ ballot initiative, and by declaring his intent during his State of the City address. Mayor Sanders also promoted the initiative and solicited signatures in interviews, in media statements, at speaking appearances, and in a “message from the mayor” circulated to the San Diego Regional Chamber of Commerce. When 15% of voters approved the ballot measure, Mayor Sanders wrote an argument in favor of the initiative that appeared on the ballot.

Meanwhile, beginning in July 2011, the San Diego Municipal Employees Association and other employee organizations sought to negotiate the terms of any ballot measure on pension reform. The unions argued the Mayor

was acting in his official capacity to promote the initiative and, in doing so, made a policy determination related to mandatory subjects of bargaining. City officials believed that a voters' initiative that had a rightful place on the ballot and could not be subject to mandatory bargaining within the meaning of the Meyers-Milias Brown Act ("MMBA").

The Unfair Practice Charge

Prior to the election, employee labor organizations filed unfair practice charges with the Public Employment Relations Board ("PERB") over the City's failure to meet and confer on the pension changes sought by the initiative. The unions also filed a petition for injunction in superior court which was denied. In June 2012, Proposition B won approval by the City's voters.

In December 2015, after an administrative hearing, PERB held the City violated the MMBA by placing the initiative on the ballot before exhausting the meet and confer process. PERB found the Mayor was acting as the City's agent and was not privileged as a private citizen to pursue changes in the terms and conditions of employment for the City's represented employees.

The Court of Appeal Reversed PERB's Decision

The City challenged PERB's decision by filing a petition for a writ of extraordinary relief in the Court of Appeal. The Court of Appeal annulled PERB's decision and found that the City's decision to place the citizens' initiative measure on the ballot was purely ministerial because the City was required under its own Charter to do so upon the verified signatures of at least 15% of the City's voters. Thus, the City was not the actor and had no obligation to meet and confer. The California Supreme Court granted review.

The California Supreme Court Held that the Obligation to Meet and Confer is Broad

The California Supreme Court took guidance from its decision in *People ex rel. Seal Beach Police*

Officers Assn. v. City of Seal Beach (1984) 36 Cal.3d 591, which addressed whether the meet-and-confer provisions of Government Code Section 3505 applied when a city council exercised its own constitutional power to propose charter amendments to its voters. In *Seal Beach*, the Court found that a public agency must comply with Section 3505, even when it decides to take a proposal directly to the voters that could alter mandatory subjects of bargaining.

The Court observed that Mayor Sanders was the City's designated bargaining agent and had the authority to make policy decisions affecting City employees and negotiate with the City's unions. The Court held that the Mayor used that authority to draft, promote, advocate, and receive City resources and employees to assist him. The Court found that the intent of Section 3505 would be defeated if public officials could "purposefully evade the meet-and-confer requirements of the MMBA by officially sponsoring a citizens' initiative."

The Supreme Court remanded the case back to the Court of Appeal to devise a judicial remedy for the unlawfully imposed changes to the City's pension system. PERB has requested the courts invalidate the results of the voters' initiative election and/or issue a "make-whole" remedy of lost compensation for City employees affected by the changes to the City's pension system. LCW will report on the that judicial remedy when it is published.

Boling v. Public Employment Relations Board, et al, 5 Cal.5th 898 (2018).

NOTE:

An in depth discussion of the California Supreme Court's decision is available here <https://www.lcwlegal.com/news/voter-backed-pension-reform-is-dealt-a-blow-by-california-supreme-court>. The California Supreme Court's decision is available here: <http://sos.metnews.com/sos.cgi?0818//S242034>.

PERB Changes its Prior Rule About Employee Use of Email for Protected Communications During Nonwork Time.

The Public Employment Relations Board (“PERB”) broadened the rights of public employees to use employer email during nonwork time, and reversed its prior rule on this issue. Although the case was decided under the Educational Employment Relations Act (EERA), this new PERB rule applies to other public sector entities that are governed by the MMBA and other California public sector labor relations statutes.

Eric Moberg applied for and received a job at the Napa Valley Community College District (“District”) for a part time adjunct instructor position in 2014. Moberg’s application stated that he was formerly employed by the San Mateo County Office of Education (SMCOE) and that he left SMCOE to move out of the area. Moberg actually left SMCOE as the word part of a settlement agreement that resolved several unfair practice charges that Moberg brought against that agency. Moberg’s application did not disclose that he was terminated for cause from the Monterey Peninsula Unified School District (MPUSD).

In 2015, Moberg sent an email responding to an exchange between the faculty association president and a part time faculty member. The faculty association president reminded faculty about an upcoming association meeting. An adjunct faculty member suggested that adjuncts should be paid the same salary as full-time instructors. Moberg replied stating, “How about we take some money from the bloated Pentagon budget that funds death and destruction instead of education and enlightenment.” Another faculty member responded directly to Moberg, expressing that she was disturbed by his email. Moberg thanked the faculty member for “joining our discussion,” and noted “I stand by my suggested solution to low pay for educators, which is a working condition that I find both unsatisfactory and remediable.” Moberg’s department chair asked Moberg to

exclude politics from the discussion and referred Moberg to the District email policy. The faculty association president then sent an email message disavowing the email exchange and noting that the association’s practice was to use District email only for meeting reminders, and to conduct “any official online business of the Association” using non-District email.

Moberg filed a grievance claiming that the directive to refrain from using District email to discuss pay issues violated the collective bargaining agreement between the District and the Association.

The District withdrew Moberg’s offer of employment for the Spring 2016 semester because the District had discovered that Moberg’s employment application misrepresented his employment history and omitted material facts. The District’s letter to Moberg noted that had it been aware of facts underlying his termination from MPUSD, the District would never have hired him.

PERB’s General Counsel Dismissed the Charge

Moberg then filed an unfair practice charge with PERB alleging the District violated the EERA by withdrawing its offer of employment in retaliation for his prior protected activity. PERB initially dismissed the charge. PERB found that Moberg’s email exchange and grievance were not activity protected by the EERA. PERB also found that Moberg’s charge did not show that the District representative who withdrew the offer of employment knew that Moberg had earlier filed PERB charges against SMCOE; or the District withdrew its offer of Spring employment because Moberg engaged in any protected activity. PERB’s general counsel dismissed the charge and Moberg appealed.

PERB’s Decision on Appeal

PERB re-examined the general counsel’s dismissal of Moberg’s charge and found that he did engage in protected activity in 2015 by filing

a CBA grievance and participating in an email regarding adjunct instructor salary.

First, PERB noted that an employee engages in protected activity by asserting a violation of a labor agreement even if the employee does so outside of the contractual grievance process. Grievance processing is protected whether an individual or a union representative processes the grievance. PERB therefore found that Moberg's grievance regarding the direction not to discuss salary on employer email was a protected activity.

Second, PERB found that Moberg's email regarding faculty salary was protected activity. PERB noted that "the relationship between federal government spending on defense and education and the employment and/or wages of Moberg and other District faculty is not so attenuated that the emails lost their protection under EERA." This was so even though Moberg's proposed method of increasing adjunct salaries (decreasing federal government defense spending) was outside of the District's control. PERB also found it significant that Moberg's email was in response to a colleague's email regarding adjunct pay.

Public Employee Use of Employer Email for Protected Activity on Nonwork Time

PERB also addressed whether public employees have the right to use the employer's email to disseminate statements that are protected by the EERA.

PERB had previously held that an employer can restrict employee use of its email system so long as the restrictions do not discriminate against use of the email for union matters or other protected activity. PERB had followed the rule used by the National Labor Relations Board ("NLRB") – the agency that administers federal labor laws covering private sector employers. But the NLRB had itself changed course. The NLRB reversed its 2007 decision and announced a new rule in *Purple Communications, Inc.* (2014) 361 NLRB No.

126. In *Purple Communications*, the NLRB adopted a new rule that presumes that employees can use employer email to engage in protected activity on non-work time, unless the employer rebuts the presumption.

PERB adopted the NLRB rule and disapproved of its own earlier decision in *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 15. PERB found,

Recognizing that e-mail is a fundamental forum for employee communication in the present day, serving the same function as faculty lunch rooms and employee lounges did when EERA was written, we conclude the better rule which reflects this change in the contemporary workplace, presumes that employees who have rightful access to their employer's e-mail system in the course of their work have a right to use the e-mail system to engage in EERA protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights.

PERB noted that it would be a "rare case" that circumstances require a total ban on nonwork time email use, and that in the more typical case, employers may "apply uniform and consistently enforced controls over their email systems" that are no more restrictive than needed to protect the agency's interests.

Because the evidence showed that Moberg was authorized to access the District's email system, and it was not alleged that he sent emails during his work time, PERB presumed that Moberg had a right to use the email system for protected EERA communications. Thus, PERB found that Moberg's use of the District email system and the content of Moberg's emails were protected activity. Ultimately, however, PERB found that the general counsel properly dismissed Moberg's retaliation claims because his charge failed to assert sufficient facts to show the District

possessed a retaliatory motive when it decided not to employ him for the Spring semester.

Significance for Public Agencies

PERB decided this matter under the EERA which provides employees the right to “form, join, and participate” and discuss “matters of legitimate concern to the employees as employees.” These employee rights are also provided under the MMBA and other public sector labor statutes enforced by PERB, making the decision applicable to counties, cities and special districts subject to the MMBA and other public sector statutes administered by PERB.

Public agencies should review their email use policies to ensure they comply with the new standard announced in *Napa Valley CCD*. Under PERB’s new rule, employee use of an agency’s email system, during nonwork time, will be protected if it relates to subjects such as wages, hours of work and other employee terms and conditions of employment. As the decision noted, an agency’s restrictions on employee use of its email system during nonwork time should be no more restrictive than needed.

However, PERB did not find that agencies must allow employees to use employer email systems for all nonwork matters, and has not required public employers to allow email use for protected activity during working time. Agencies may be able to prohibit the use of email for nonwork purposes *during working hours*, and may be able to prohibit excessive use of its email system even during nonwork hours.

Moberg v. Napa Valley Community College District, PERB Dec. No. 2563 (2018).

NOTE:

LCW’s San Francisco office partner **Laura Schulkind** represented the District in this matter. Agencies can receive advice and guidance regarding their employee email use policies by contacting LCW.

Union Could Pursue Charge of Unilateral Change Due to County’s Implementation of New Policy.

SEIU’s unfair practice charge asserted that the County of Monterey violated its duty to bargain when it adopted a revised attendance policy without first notifying and negotiating with the union. SEIU contended that it never received the original version of the policy, and took issue with several sections of the revised policy. One section suggested that as “a courtesy” employees should “arrive and prepare for work 10 minutes early.” There was previously, according to SEIU, “no established past practice” and no policy requiring employees to begin working before the actual start time of their shift. Another section provided that “excessive absenteeism” or regular absences could result in consequences, such as suspension of shift trading privileges or voluntary overtime assignments, or a reduction in the employee’s departmental seniority. The policy also provided that if an employee failed to provide a return-to-work doctor note, the absence would be regarded as “unauthorized”. An unauthorized absence of three days (within a 60 day period) would be regarded as job abandonment and result in termination.

The County asserted that the management rights clause in the relevant MOUs authorized the County to “issue and enforce rules and regulations,” and that the MOU effectively waived SEIU’s right to negotiate over the attendance policy. SEIU claimed the policies were not covered by the MOUs or exceeded the County’s authority to act unilaterally.

The MMBA requires agencies and unions to meet and confer in good faith regarding wages, hours and other terms and conditions of employment. An agency violates that duty when it does not provide the union with reasonable advance notice and a meaningful opportunity to bargain before the agency decides whether it will create or change a policy that affects a negotiable subject. In a unilateral change case, a union’s unfair practice charge must show: (1) the employer took actions to change a policy; (2) the policy concerns a matter within the scope of representation; (3) the

agency took action without giving the union notice or an opportunity to bargain the change; (4) the agency's actions had an impact on the terms and conditions of bargaining unit members. An agency may violate the duty to bargain if it adopts a new policy, without bargaining with the union, unless the union has clearly and unmistakably waived its right to bargain.

PERB found the revised attendance policy was negotiable. The early log-in portion impacted hours of work by affecting the time employees start their work day, and the amount of duty free time and work. The absenteeism portion of the policy was also negotiable because it affected wages and hours which are subjects within the scope of representation.

PERB also noted that at the pleading stage, if a charge alleges an unilateral change, PERB must issue a Complaint if the MOU does not clearly and unambiguously authorize the agency to unilaterally adopt or change the policies at issue. The MOU language presented to PERB did not meet this requirement.

PERB also found that the MOU management rights clause language did not *explicitly* address the County's attendance policies and could be interpreted *not* to waive SEIU's right to negotiate. The MOU language generally reserved the County's right to "direct its employees; take disciplinary action;...issue and enforce rules and regulations; maintain the efficiency of governmental operations...[and] exercise complete control and discretion over its work and fulfill all of its legal responsibilities."

PERB also noted that during initial investigation, a charge will be dismissed based upon the affirmative defense of the responding party only if the facts underlying that defense are undisputed. Because the County's waiver argument relied upon disputed interpretations of the MOU, PERB found that a Complaint should issue to provide the County and SEIU with the opportunity to

present bargaining history or other evidence in support of their competing theories.

SEIU v. County of Monterey, PERB Decision No. 2579 (July 20, 2018).

NOTE:

Whether a union has waived its right to negotiate a subject within the scope of representation is generally difficult to prove, and will depend on the unique language of each MOU and bargaining history between the parties. PERB did not decide this issue in this decision and simply allowed the union's claims to proceed. LCW's labor attorneys can provide agencies with advice in this area.

PUBLIC SAFETY

No Qualified Immunity for Police Officers Who Escorted Political Rally Attendees Through a Violent Crowd.

The U.S. Court of Appeals for the Ninth Circuit found that police officers were not immune from a lawsuit brought by political rally participants who claimed that the officers placed them in danger during the rally.

Juan Hernandez and others attended a political rally in June 2016. The rally was held at a convention center in downtown San Jose; between 12,000 and 15,000 participants were expected to attend beginning at 7:00 p.m. Before the rally started, the San Jose Police Department ("SJPD" or "Department") knew that rallies for this candidate that occurred elsewhere had "spurred violent anti-[candidate] protests." To prepare for the rally, SJPD requested approximately 60 additional officers from other departments, and provided some with riot gear. Approximately 250 officers total patrolled the rally and performed crowd control. About an hour prior to the rally, SJPD had "warned all officers deployed around the convention center that assaults had been reported." The rally proceeded as planned. Qualified immunity protects government officials

from civil lawsuits, as long as their conduct does not violate “clearly established” rights that a reasonable person would have known about. Courts decide: (1) whether the officer’s conduct violates a constitutional right; and (2) whether at the time of the incident, the right was “clearly established.” Generally, individuals do not have a right to sue police officers for failure to protect them from harm caused by others. However, an exception applies if the officers place a person in more danger than that person would have otherwise experienced (referred to as “state created danger”). For the exception to apply, the officer must take affirmative actions that create a specific and foreseeable danger, and the officer must have acted with “deliberate indifference.” To answer these questions, the court accepts the allegations in a lawsuit as true.

The lawsuit alleged that the officers violated their rally attendees’ due process rights when officers directed the attendees to leave the rally from a single exit, actively prevented them from leaving through alternative exits, and required attendees to instead travel “into the crowd of violent anti-[candidate] protesters.” The rally attendees alleged that: they could have safely exited if the officers had not directed them toward anti-candidate protestors; officers saw anti-candidate protesters being violent but continued to direct rally attendees toward them; officers saw rally attendees being assaulted by anti-candidate protesters; and officers did nothing to stop the assaults.

The Ninth Circuit allowed the lawsuit to proceed. Specifically, the court noted that: it was only a “possibility” that rally attendees would be attacked at the time attendees arrived at the rally; officers increased that risk by directing the attendees toward the crowd waiting outside the convention center; and the danger that the anti-candidate protesters would harm rally attendees was actual, particularized, and foreseeable.

The court found that the officers showed deliberate indifference. Deliberate indifference occurs when public officials know that some danger is going to happen, but ignore that risk

and expose an individual to danger anyway. The law required the court to accept the rally attendees’ allegations as true. The court thus found that the officers were aware that the rallies had previously drawn violent crowds; had received reports of assaults; and had observed violence on the day of the rally in San Jose. These allegations indicated that SJPD knew about, and was deliberately indifferent to, the danger that anti-candidate protesters would be violent toward rally attendees.

The court also found that the officers were on notice that their actions would violate rally attendees’ clearly established right to be free from state created danger. The court found that its earlier decision in *Johnson v. City of Seattle* “clearly establishes that the state-created danger doctrine applies to the crowd control context.” (9th Cir. 2007) 474 F.3d 634.) *Johnson* involved police department efforts to perform crowd control at a Mardi Gras event and claims that police officer crowd control techniques placed participants in danger. The Ninth Circuit made the uncommon finding that *Johnson* put SJPD officers on notice that their crowd control actions unlawfully violated attendees rights to not be placed in danger, even though *Johnson* did not ultimately find that the officers in that case violated a clearly established right.

The Ninth Circuit therefore permitted the rally attendees to proceed with their lawsuit but noted that the officers would still have the opportunity to re-assert their defense of qualified immunity later in the litigation and move to dismiss the lawsuit on a motion for summary judgment.

Hernandez v. City of San Jose, 897 F.3d 1125 (9th Cir. 2018).

Department Was Immune from Lawsuit Because Pursuit Policy Required Officers to Certify Receipt of the Policy.

California’s Supreme Court has confirmed when a public safety agency can receive immunity from liability for damages caused during a police pursuit. Under the California Vehicle

Code, an agency that employs peace officers is immune from claims for money damages that are caused by a police chase, but only if the agency “adopts and promulgates a written policy on, and provides regular and periodic training on an annual basis for, vehicular pursuits.” (Veh. Code § 17004.7 (b)(1).) The policy must include “a requirement that all peace officers of the public agency certify in writing that they have received, read and understand the policy. The failure of an individual officer to sign a certification shall not be used to impose liability on an individual officer or a public entity.” (Veh. Code § 17004.7 (b)(2).)

This case arose when Mark Gamar was involved in a police pursuit in the City of Gardena. Gamar was a passenger in a pick-up truck that was being pursued by a City Police Officer. The Officer used a “Pursuit Intervention Technique” in an attempt to stop the truck by bumping the back, left corner of the truck with the right front portion of his police vehicle. The truck spun out, hit a streetlight pole, and Gamar died from injuries from the collision.

Gamar’s mother, Ramirez, sued the City for his wrongful death. She claimed that the City was liable for the collision because the City did not prove that all of its officers actually signed written certifications. The City had a written policy on police pursuits, provided training to its officers and required officers to electronically certify that they received, read and understood the pursuit policy. Of the City’s 92 officers, the City possessed completed written certifications for 64.

The Supreme Court sided with the City. The language of the Vehicle Code supported the City’s position because it did not explicitly require actual 100% compliance with the written certification requirement. Requiring 100% compliance would also create an inappropriate heavy burden on agencies and could create an absurd situation in which, if a single officer out of thousands of employees did not provide the certification, the agency would lose immunity.

Ramirez v. City of Gardena, 2018 WL 3827236 (Cal., August 13, 2018, No. S244549).

RETIREMENT

Teachers Have Property Right to Daily Accrued Interest on Retirement Contributions.

The U.S. Court of Appeals for the Ninth Circuit found that teachers have a property right in the daily interest accrued on their retirement fund contributions. In this case, several teachers, including Mickey Fowler, participated in the State of Washington’s Teachers’ Retirement System, a public retirement fund that was managed by the State Department of Retirement Systems (“DRS”).

As fund manager, DRS was responsible for tracking teachers’ contributions and for crediting their accounts for accumulated interest. The interest was credited at a rate determined by the DRS director, and according to the account balance at the end of the prior quarter. Therefore, DRS did not credit accounts with the interest accrued during the quarter in which it accrued. Additionally, if an account had a zero balance in a given quarter, DRS did not credit that account with any interest, nor in the quarter preceding the zero balance.

Fowler and other teachers had transferred their account holdings from one plan to another in the middle of a quarter which created a zero balance. DRS did not credit their accounts for interest earned in the zero balance quarter or the prior quarter. DRS instead used the interest earned to pay benefits to other members. The teachers sued, seeking the return of interest that the DRS allegedly “skimmed” from their retirement accounts; they alleged that failure to credit their accounts violated the U.S. Constitution.

The Ninth Circuit agreed with the teachers that they possessed a private property interest in the daily interest that accrued on their retirement accounts. The court pointed to its earlier decision in *Schneider v. California Department of Corrections* which found that interest income earned on an interest-bearing account is a fundamental

property right. The Ninth Circuit then clarified that the property right identified in *Schneider* “covers interest earned daily, even if payable less frequently.” In turn the teachers’ property right in daily accrued interest was protected by the U.S. Constitution. The Ninth Circuit let the teachers pursue their lawsuit because they had stated a claim that DRS committed an unlawful taking by depriving them of daily interest accrued on their retirement accounts.

Fowler v. Guerin, 2018 WL 3893114, (9th Cir. Aug. 16, 2018, No. 16-35052).

LITIGATION

Government Claims Act Barred Lawsuit Because Employee Was Aware of the Facts Underlying Her Claims but Failed to Timely Present Her Claim or Disclose Actual Date of Her Claim.

Renee Estill was terminated from her employment with the Shasta County Sheriff’s Office. She intended to sue the County, and presented a government claim on February 23, 2012. Under the California Government Claims Act, a litigant must first present a claim to the government agency within six months of when she knew or should have known of the incidents underlying the claims. Estill stated on the claim that she first became aware of the incidents that supported her claim on September 9, 2011. Estill claimed that on that date, an employee of the Sheriff’s Office told her that a Sheriff’s Captain had informed employees about the details of the internal affairs investigation leading to her termination.

Estill then sued the County claiming that the Captain’s actions were an invasion of her privacy, and harassment, among other things. However, during Estill’s deposition, the County learned that she became aware of the incidents underlying her lawsuit in 2009. The County moved to dismiss her lawsuit on the basis that she did not timely present her claims.

The trial court allowed Estill’s claims to proceed but the Court of Appeal dismissed her case, finding that she did not timely comply with the requirements of the Government Claims Act. The Court of Appeal rejected Estill’s argument that she could not have presented her claim any sooner because she did not know the identity of the specific person who inappropriately shared information about the internal affairs investigation into her conduct. Ignorance of a defendant’s identity does not delay accrual of the cause of action because Estill could have simply listed a “Doe” defendant, conducted discovery to learn the defendant’s identity, and then amended her Complaint.

The Court of Appeal also rejected Estill’s argument that the County was barred from asserting that her claim was untimely. The Court of Appeal found that “equitable estoppel” applied and that Estill could not prevent the County from bringing this defense. The court found it would be unfair to prevent the County from making this argument because: Estill knew of the events underlying her lawsuit as early as 2009, but chose not to disclose this information; Estill intended for the County to treat her claim presentation as timely in 2012 by concealing her earlier knowledge; the County relied on Estill’s representation and treated her claim as timely; and the County did not know that Estill had actually become aware of the events underlying her claim in 2009. Thus, “equitable estoppel” required that the County should be able to defend itself from Estill’s claims. The Court of Appeal dismissed the lawsuit.

Estill v. County of Shasta, 25 Cal.App.5th 702 [236 Cal.Rptr.3d 191, 195] (2018), reh’g denied (Aug. 24, 2018).

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.

Issue: A public agency's HR Director asked whether the agency is required to provide its represented employees with a lunch break before the employees' fifth hour of work. The HR Director had heard about this requirement from a colleague but was not familiar with it. The Director noted that nothing in the relevant MOU required that employees take a lunch break prior to working five hours, and no agency policy required this. There was no agency practice of scheduling lunches before an employee's fifth hour of work.

Answer: The agency's obligations regarding the scheduling of employee lunches depends on the requirements of the relevant wage and hour law and any terms set forth in the MOU, agency policy or practice. The California Wage Orders generally exempt public agency employees from our State regulations that require lunch breaks. The Fair Labor Standards Act (FLSA) does not require meal or break periods. Even if the applicable MOU, agency policy or practice does not specify that lunch breaks must be provided before the fifth hour of work, the agency must comply with any other negotiated agreement or policy relating to lunch scheduling (i.e. a requirement that lunch will be provided midway through the work shift).

WAGE AND HOUR

Ninth Circuit Finally Affirms U.S. Supreme Court's Broader Interpretation of FLSA Overtime Exemptions.

LCW previously reported on an opinion from the U.S. Supreme Court that held that the Fair Labor Standards Act (FLSA) overtime exemptions should be given "a fair reading". That U.S. Supreme Court's decision reversed the decision of the Ninth Circuit Court of Appeals that found that the overtime exemptions should be "construed narrowly." The case was *Encino Motorcars, LLC v. Navarro*.

The history of the case shows that after the original trial court hearing, the U.S. District Court ruled in favor of the employer and found that Navarro and other employees worked as "service advisors" at Encino Motorcars, were "salesmen" within the meaning of the FLSA and exempt from the FLSA overtime requirements.

On appeal, the Ninth Circuit twice found in favor of Navarro and other employees, and was twice reversed by the U. S. Supreme Court. After the second remand from the U.S. Supreme Court, the Ninth Circuit has now affirmed the federal trial court's decision finding that Navarro and other employees are exempt from FLSA overtime.

NOTE:

LCW's summary of the *Encino Motorcars, Inc.* decision is available here: <https://www.lcwlegal.com/news/reversing-ninth-circuit-us-supreme-court-rules-that-flsa-overtime-exemptions-should-be-interpreted-fairly-not-narrowly-3>.

Navarro v. Encino Motorcars, LLC, 897 F.3d 1008 (9th Cir. 2018).

LCW WEBINAR: BONA FIDE PLAN ASSESSMENT & THE CASH-IN-LIEU CONUNDRUM: STRATEGIES FOR IMPROVEMENT



Tuesday, October 30, 2018 | 10 AM - 11 AM

Presented by:



Peter J. Brown

Following the decision in *Flores vs. the City of San Gabriel*, one critical outcome is the need for agencies to analyze their benefit plans to ensure that those plans are bona fide plans. This analysis requires that you identify the plan and all elements of the plan and evaluate the ratio of cash paid relative to total plan benefits paid. The higher the ratio the greater likely hood that you have a non-bona fide plan which will impact the way in which you calculate the regular rate of pay for FLSA overtime. This session will review the definitions and steps you need to take to conduct the analysis and will explain the strategies for reducing the ratio and/or calculating overtime in compliance with the law.

Who Should Attend?

Human Resources/Personnel Department Heads, Finance Managers, Payroll Administrators, and Agency Labor Negotiators.

Workshop Fee:

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

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

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2-DAY FLSA ACADEMY

REGISTRATION IS NOW OPEN!

Monday October 1st - Tuesday October 2nd, 2018

Piedmont Community Hall
711 Highland Ave
Piedmont, CA 94611

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

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

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

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

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

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

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

For more information and to register, visit

<http://www.lcwlegal.com/events-and-training/webinars-seminars/2-day-flsa-academy-1>



*Developing Positive Partnerships
and Leadership Excellence
for Labor Relations Professionals*

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

Upcoming Classes:

The Public Employment Relations Board (PERB) Academy

September 13, 2018 | Citrus Heights, CA

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

The Rules of Engagement: Issues, Impacts & Impasse

October 11, 2018 | Fullerton, CA

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

Nuts & Bolts of Negotiations

November 7, 2018 | Citrus Heights, CA

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

REGISTER NOW!

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



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 choose 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/



FIRM PUBLICATIONS

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

“Strategies to Manage Increasing Pension Costs” authored by [Steven M. Berliner](#) of our Los Angeles office, appeared in the August 2018 issue of the League of California Cities - *Western Cities Magazine*.

The articles can be viewed by visiting the link listed above.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities**Consortium Training**

- Sept. 6 **“Maximizing Performance Through Evaluation, Documentation and Discipline”**
Gateway Public ERC | Pico Rivera | Christopher S. Frederick
- Sept. 6 **“Maximizing Supervisory Skills for the First Line Supervisor”**
Napa/Solano/Yolo ERC | Fairfield | Kristin D. Lindgren
- Sept. 12 **“Navigating the Crossroads of Discipline and Disability Accommodation” and “Leaves, Leaves and More Leaves”**
San Gabriel Valley ERC | Alhambra | T. Oliver Yee
- Sept. 13 **“Nuts & Bolts Navigating Common Legal Risks for the Front Line Supervisor” and “Managing the Marginal Employee”**
East Inland Empire ERC | Fontana | Danny Y. Yoo
- Sept. 13 **“Disciplinary and Harassment Investigations: Who, What, When and How” and “Principles for Public Safety Employment”**
San Diego ERC | Chula Vista | Stefanie K. Vaudreuil
- Sept. 18 **“12 Steps to Avoiding Liability” and “Maximizing Performance Through Evaluation, Documentation and Discipline”**
North San Diego County ERC | San Marcos | Stephanie J. Lowe
- Sept. 20 **“Difficult Conversations”**
LA County HR Consortium | Los Angeles | T. Oliver Yee
- Sept. 20 **“Management Guide to Public Sector Labor Relations (formerly titled A Supervisor’s Guide to Labor Relations)”**
Monterey Bay ERC | Webinar | Che I. Johnson
- Sept. 20 **“Public Sector Employment Law Update”**
Orange County Consortium | San Juan Capistrano | Laura Kalty
- Sept. 20 **“Maximizing Supervisory Skills for the First Line Supervisor”**
San Joaquin Valley ERC | Ceres | Kristin D. Lindgren
- Sept. 20 **“Conducting Disciplinary Investigations: Who, What, When and How”**
San Mateo County ERC | Brisbane | Suzanne Solomon
- Sept. 26 **“Maximizing Supervisory Skills for the First Line Supervisor”**
Central Valley ERC | Fresno | Sue Cercone & Shelline Bennett
- Sept. 26 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
Humboldt County ERC | Arcata | Erin Kunze
- Sept. 26 **“A Guide to Implementing Public Employee Discipline” and “Moving Into the Future”**
Sonoma/Marin ERC | Rohnert Park | Lisa S. Charbonneau
- Sept. 27 **“Public Sector Employment Law Update”**
Bay Area ERC | Webinar | Richard S. Whitmore
- Sept. 27 **“Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety”**
Coachella ERC | Indio | Jeremy Heisler

Sept. 27	“Nuts and Bolts: Navigating Common Legal Risks for the Front Line Supervisor” and “Difficult Conversations” Gold Country ERC Roseville Kristin D. Lindgren
Sept. 27	Iron Fists or Kid Gloves: Retaliation in the Workplace” Humboldt County ERC Arcata Erin Kunze
Sept. 27	“Exercising Your Management Rights” and “Terminating the Employment Relationship” North State ERC Red Bluff Jack Hughes
Sept. 27	“Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor” South Bay ERC Manhattan Beach Danny Y. Yoo
Oct. 3	“Leaves, Leaves and More Leaves” and “Labor Negotiations from Beginning to End” Central Coast ERC Santa Maria Che I. Johnson
Oct. 3	“Public Service: Understanding the Roles and Responsibilities of Public Employees” Monterey Bay ERC Webinar Heather R. Coffman
Oct. 4	“Risk Management Skills for the Front Line Supervisor” Gateway Public ERC Commerce Danny Y. Yoo
Oct. 4	“The Future is Now – Embracing Generational Diversity and Succession Planning” Gold Country ERC Rancho Cordova Jack Hughes
Oct. 4	“Maximizing Supervisory Skills for the First Line Supervisor” Mendocino County ERC Ukiah Kristin D. Lindgren
Oct. 10	“Moving Into the Future” and “The Art of Writing the Performance Evaluation” NorCal ERC San Ramon Lisa S. Charbonneau
Oct. 10	“Public Sector Employment Law Update” and “Risk Management Skills for the Front Line Supervisor” San Gabriel Valley ERC Alhambra Geoffrey S. Sheldon
Oct. 11	“Preventing Workplace Harassment, Discrimination and Retaliation” LA County HR Consortium Los Angeles Jolina A. Abrena & Elizabeth Tom Arce
Oct. 16	“Maximizing Supervisory Skills for the First Line Supervisor” Bay Area ERC Sunnyvale Kelly Tuffo
Oct. 16	“Leaves, Leaves and More Leaves” San Mateo County ERC Webinar Lisa S. Charbonneau
Oct. 17	“Preventing Workplace Harassment, Discrimination and Retaliation” Orange County Consortium Buena Park Jenny-Anne S. Flores
Oct. 17	“A Guide to Implementing Public Employee Discipline” South Bay ERC Palos Verdes Estates Jennifer Rosner
Oct. 17	“Maximizing Supervisory Skills for the First Line Supervisor” Ventura/Santa Barbara ERC Camarillo Kristi Recchia
Oct. 18	“A Guide to Implementing Public Employee Discipline” and “Supervisor’s Guide to Public Sector Employment Law” San Joaquin Valley ERC Lodi Jack Hughes
Oct. 18	“Maximizing Supervisory Skills for the First Line Supervisor” West Inland Empire ERC Rancho Cucamonga Kristi Recchia

Oct. 25	“The Art of Writing the Performance Evaluation” Mendocino County ERC Ukiah Jack Hughes
Customizing Training	
Sept. 10, 20	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Arcadia Lee T. Patajo
Sept. 11	“The Brown Act” Metropolitan Water District of Southern California Los Angeles Christopher S. Frederick
Sept. 12	“Preventing Workplace Harassment, Discrimination and Retaliation and Mandated Reporting” East Bay Regional Park District Castro Valley Erin Kunze
Sept. 12	“Laws and Standards for Supervisors” Orange County Probation Santa Ana Christopher S. Frederick
Sept. 13	“Performance Management: Evaluation, Documentation and Discipline” ERMA Tulare Kristin D. Lindgren
Sept. 13	“Meet and Confer” Port of Stockton Gage C. Dungy
Sept. 13	“Ethics in Public Service and Preventing Workplace Harassment, Discrimination and Retaliation” San Francisco Bay Area Rapid Transit District Oakland Joy J. Chen
Sept. 14	“Preventing Workplace Harassment, Discrimination and Retaliation” County of San Luis Obispo Christopher S. Frederick
Sept. 17	“Ethics in Public Service” City of Sunnyvale Erin Kunze
Sept. 18	“File That! Best Practices for Documents and Record Management” City of Concord Heather R. Coffman
Sept. 18	“Roles and Responsibilities for Staff with Elected Officials” City of Downey Danny Y. Yoo
Sept. 19	“Courageous Authenticity & Conflict Resolution, Do You Care Enough To Have Critical Conversations?” City of Pico Rivera Kristi Recchia
Sept. 20	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Laguna Beach Christopher S. Frederick
Sept. 20	“The Art of Writing the Performance Evaluation” Long Beach Water Jennifer Rosner
Sept. 24,25	“Ethics in Public Service” Merced County Michael Youril
Sept. 25	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Stockton Gage C. Dungy
Sept. 26	“Bias in the Workplace” ERMA Emeryville Suzanne Solomon
Oct.1	“Preventing Workplace Harassment, Discrimination and Retaliation” City of San Carlos Heather R. Coffman

Oct. 3	“Preventing Workplace Harassment, Discrimination and Retaliation and Mandated Reporting” East Bay Regional Park District Oakland Kelly Tuffo
Oct. 3	“HR for Non-HR Managers” ERMA Chowchilla Michael Youril
Oct. 5	“Ethics in Public Service” Merced County Che I. Johnson
Oct. 8, 16, 25	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Newport Beach Christopher S. Frederick
Oct. 8	“ADA” County of Humboldt Eureka Heather R. Coffman
Oct. 9	“Supervisory Skills for the First Line Supervisor” City of Glendale Laura Kalty
Oct. 11	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Campbell Erin Kunze
Oct. 16	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Carlsbad Stephanie J. Lowe
Oct. 16, 30	“Preventing Workplace Harassment, Discrimination and Retaliation” East Bay Regional Park District Oakland Erin Kunze
Oct. 16	“Performance Management: Evaluation, Discipline and Documentation” Fresno County Bass Lake Che I. Johnson
Oct. 17	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Pico Rivera Danny Y. Yoo
Oct. 17	“Mandated Reporting” City of Stockton Kristin D. Lindgren
Oct. 18	“Making the Most of Your Multi-Generational Workforce” ERMA Perris Christopher S. Frederick
Oct. 23	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Glendale Laura Kalty
Oct. 25	“Ethics in Public Service” City of La Mesa Stephanie J. Lowe
Oct. 25	“Preventing Workplace Harassment, Discrimination and Retaliation” City of Los Banos Gage C. Dungy
Oct. 26	“Embracing Diversity” Los Angeles Conservation Corps Los Angeles Jennifer Rosner

Speaking Engagements

Sept. 11	“Wage and Hour Issues in the Nonprofit World” Gallagher Insurance of California Westlake Village Danny Y. Yoo
Sept. 13	“It Can Happen to #YouToo: Harassment Claims against City Officials” League of California Cities 2018 Annual Conference Long Beach J. Scott Tiedemann & Kirsten Keith & Tammy Letourneau

Sept. 13	“Strategies to Manage Increasing Pension Costs” League of California Cities 2018 Annual Conference Long Beach Steven M. Berliner & Ken Domer
Sept. 20	“Labor Relations Training” California State Association of Counties (CSAC) Labor Relations Class Martinez Richard S. Whitmore & Richard Bolanos & Gage C. Dungy
Sept. 20	“10 Things You Can Do Now to Comply CalPERS Rules” Southern California Public Labor Relations Council (SCPLRC) Meeting Cerritos Steven M. Berliner
Sept. 26	“Tackling Challenges in Accommodating Mental Disabilities in the Workplace” Public Agency Risk Managers Association (PARMA) Chapter Meeting La Palma Danny Y. Yoo
Sept. 28	“Legal Update” Northern California HR Directors Conference Truckee Gage C. Dungy
Oct. 10	“Collective Bargaining in 2018 & Beyond; The Twists & Turns on Things You Need to Know!” Public Employer Labor Relations Association of California (PELRAC) Annual Conference Anaheim Peter J. Brown
Oct. 12	“Put Your Investigation in the Best Light - Common Areas of Attack in Investigations” Association of Workplace Investigators (AWI) Annual Conference 2018 Burlingame Morin I. Jacob & Megan Lewis
Oct. 19	“The Significant Impact of Janus v. AFSCME and S.B. 866 on Public Sector Labor Relations” Municipal Managers Association of Southern California (MMASC) Annual Conference Indian Wells Kevin J. Chicas
Oct. 24	“District Documentation- What to Look For” California Special District Association (CSDA) South Lake Tahoe Che I. Johnson
Oct. 25	“Labor and Employment Legal Update” County Counsels’ Association of California (CCAC) Employment Law Conference San Diego Mark Meyerhoff
Oct. 25	“U.S. Supreme Court Decision in Janus v. AFSCME - Impact and Tips for Counties” CCAC Employment Law Conference San Diego Mark Meyerhoff
Oct. 26	“Advanced Workplace Investigations” CCAC Employment Law Conference San Diego Stefanie K. Vaudreuil
Seminars/Webinars	
Sept. 12	“Releasing Probationary Employees --More Complex Than you Might Think” Liefert Cassidy Whitmore Webinar Suzanne Solomon
Sept. 13	“The Public Employment Relations Board (PERB) Academy” Liefert Cassidy Whitmore Citrus Heights Kristi Recchia & Che I. Johnson
Sept. 26	“How to Successfully Implement and Defend A Light or Modified Duty Assignment for Temporarily Injured or Ill Employees” Liefert Cassidy Whitmore Webinar Jennifer Rosner & Rachel Shaw
Oct. 1, 2	“FLSA Academy” Liefert Cassidy Whitmore Seminar Piedmont Richard Bolanos & Lisa S. Charbonneau
Oct. 11	“The Rules of Engagement: Issues, Impacts & Impasse” Liefert Cassidy Whitmore Fullerton Kristi Recchia & T. Oliver Yee
Oct. 30	“Bona Fide Plan Assessment & the Cash-In-Lieu Conundrum” Liefert Cassidy Whitmore Webinar Peter J. Brown

LCW LIEBERT CASSIDY WHITMORE

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