LCW Liebert Cassidy Whitmore

Client Update

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

April 2019

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LCW NEWS

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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PUBLIC SAFETY

LCW Leads County to Victory in POBR Case.

In a case handled by LCW Partner Jesse Maddox, the California Court of Appeal dismissed a case a district attorney's investigator brought against a county for violation of the Public Safety Officers Procedural Bill of Rights Act ("POBR").

The County suspended the investigator for dishonesty, and he appealed the decision to the County's Employment Appeals Board ("EAB"). After an evidentiary hearing, the EAB upheld the suspension. The investigator did not ask the Superior Court to reverse the EAB's final decision pursuant to Code of Civil Procedure section 1094.5. That law authorizes a superior court to review the record of an administrative tribunal, like the EAB, for certain errors.

Instead, the investigator waited over 10 months before requesting the trial court to issue an order compelling the EAB to overturn its decision under Code of Civil Procedure section 1085. A request under section 1085 asks a court to compel an agency to follow its obligations under the law. The investigator claimed that the County violated his POBR rights when it did not provide him with all of the materials related to the investigation that led to his suspension. The County had provided the investigator with a copy of the Internal Affairs investigation into his conduct, but it did not provide certain documents the County had designated as confidential under section 3303(g) of the POBR.

The trial court dismissed the investigator's claims. The Court of Appeal affirmed the trial court's decision. The Court of Appeal concluded that the investigator used the wrong procedures to ask the court to reverse the EAB's decision. The investigator could have raised his POBR claim with the trial court either before the EAB's final administrative appeal decision, or in conjunction with a request seeking judicial review of the EAB proceedings under section 1094.5. Because the investigator raised his claim after the final EAB decision and did not file a request pursuant to section 1094.5, the court found that the investigator was barred from relitigating the EAB's finding that there was cause for his suspension.

NOTE:

LCW Partner Jesse Maddox is one of many LCW attorneys who provide expert POBR advice and litigation defense. They know how to successfully discipline a peace officer and all of the procedural ins and outs of POBR litigation.

LABOR RELATIONS

County Violated MMBA by Removing Leadership Duties from Hospital Division Chief.

Jeffrey Reese began working for the County of Santa Clara as a urologist in 1990. In 1996, Reese began serving as the division chief of urology in the surgery department at Santa Clara Valley Medical Center ("SCVMC"), a County hospital. Reese reported to Gregg Adams, the chair of the surgery department.

In 2010, Valley Physicians Group ("VPG") became the exclusive representative for the County's physician bargaining unit. Between November 2011 and April 2012, Reese participated in the joint labor-management committee focused on implementing the negotiated terms of the first memorandum of understanding ("MOU") between VPG and the County. In the fall of 2013, Reese joined VPG's bargaining team for successor MOU negotiations.

Starting in 2012, Jeffrey Arnold served as SCVMC's chief medical officer. The chief medical officer is a physician who is primarily responsible for managing the provider staff, hiring and firing physicians, and determining their salaries. Arnold participated as a member of the County's bargaining team from late 2013 through late 2014.

In the negotiations for a successor MOU between the County and VPG, Arnold indicated that physician workload needed to increase. Members of the VPG bargaining team, including Reese, expressed their concerns that if physician workloads became excessive, patient safety and service quality would be at risk. After bargaining, Reese continued to raise these concerns with Arnold.

After one of SCVMC's five urologists left and approximately 50,000 new patients were eligible to be served by the County health system, Arnold vetted urologist Dr. Tin Ngo for hire. Arnold offered Ngo a position without consulting or notifying Reese. Ngo was not Medical Board-certified at the time.

Before Ngo officially began work, Arnold told Adams that Reese was not the "correct" person to be chief and suggested that Ngo replace Reese. Adams objected to Arnold's plan because it would violate his department's policies, which required a division chief to be Medical Board-certified. Adams also thought the decision to replace Reese was premature.

Arnold then informed Adams that he was proposing to have Ngo named as "interim chief." Once again, Adams rejected Arnold's proposal because Ngo was not yet Medical Board-certified. Instead, Arnold decided to install Ngo as a "medical director," and give Ngo most of Reese's authority as chief. Arnold increased Ngo's pay to equal Reese's. While Reese did not suffer a pay loss, 90% of his leadership duties were removed.

To prove that an employer has discriminated or retaliated against an employee in violation of the Meyers-Milias Brown Act ("MMBA"), the employee must show that: 1) he or she exercised rights under the MMBA; 2) the employer had knowledge of the exercise of those rights; 3) the employer took adverse action against the employee; and 4) the employer took the action because of the exercise of those rights. If the employee proves these elements, the burden shifts to the employer to demonstrate that it would have taken the same action, even in the absence of the protected conduct.

The Public Employment Relations Board ("PERB") concluded that the County removed Reese's division chief duties because of his involvement with VPG, which violated the MMBA. PERB noted that "Reese first contested Arnold's stated interest in increasing the physicians' workload during successor MOU bargaining and thereafter continued to advocate for additional staffing to ease the urology staff's workload." PERB also noted that removing Reese's duties as division chief limited his ability to oppose Arnold's plan to increase physicians' workload. Thus, "Arnold's managerial concerns about Reese were directly related to the very matters he had raised in the course of his protected conduct."

PERB rejected the County's argument that it would have taken the same action, even in the absence of Reese's protected conduct, because of the urgent need for Ngo as a medical director.

County of Santa Clara (Reese), PERB Decision No. 2629-M (2019).

Note:

A critical fact in PERB's decision was that management stripped the doctor of most of his leadership duties. Those duties included managing the very workload and safety issues that the doctor raised during collective bargaining and thereafter. The fact that the doctor retained the same pay was irrelevant. Among other things, this decision shows that taking leadership duties away can be an adverse action.

Fire Protection District Violated MMBA When It Denied Represented Employees Longevity Differential.

The Public Employment Relations Board ("PERB") found that a County Fire Protection District violated the Meyer-Milias Brown Act ("MMBA") when it granted unrepresented employees a longevity differential but denied the benefit to employees represented by the union.

In 2006, the Contra Costa County Board of Supervisors passed a resolution that provided about 600 classifications of County employees a longevity differential consisting of a 2.5% increase in pay for 15 years of service. The resolution described the eligible County employees as "Management, Exempt and Unrepresented Employees."

The United Chief Officers Association ("Association") represented the Fire Management Unit of the Contra Costa County Fire Protection District ("District"), one of the County's special districts. In subsequent labor negotiations between the Association and the District, the Association demanded the same longevity differential previously granted to unrepresented management employees. The District rejected the Association's proposal, and admitted on several occasions that it did so to ensure that unrepresented employees are paid more than represented employees.

In 2008, the County Board of Supervisors adopted a resolution that extended the 2.5% longevity differential for 15 years of service to more than 1,000 unrepresented supervisory and managerial employees of the District. This effectively extended the differential to all unrepresented management employees of the District, except those in the represented Fire Management Unit. The Association filed a grievance, but the matter was not resolved. Subsequently, the Association filed an unfair practice charge alleging that the District interfered with the union and employee rights, and discriminated against them by treating them differently based on protected activity.

PERB discussed the difference between interference and discrimination charges. PERB noted that for interference, the focus is on the actual or reasonably likely harm of an employer's conduct to the protected rights of employees or employee organizations. Thus, to establish interference, the employee or employee organization does not need to prove the employer's motive, intent, or purpose. PERB

noted that an interference violation will be found when the resulting harm to protected rights outweighs the business justification or other defense asserted by the employer.
In contrast, the employer's unlawful motive, intent, or purpose is necessary to establish a case for discrimination. A charge of discrimination will be sustained if the employee shows that the employer would not have taken the complained-of conduct but for an unlawful motivation, purpose, or intent.

PERB found that the District interfered with the Association and employee's protected rights in violation of the MMBA. PERB noted that the District expressly distinguished between represented and unrepresented employees as the basis for granting employment benefits. Thus, the District's conduct discouraged employees from participating in organization activities, which is a quintessential protected right under the MMBA. PERB rejected the District's affirmative defenses outright, and concluded that the resulting harm outweighed the District's explanations.

PERB also found that the District discriminated against employees by treating Association-represented employees differently from unrepresented employees. The District only offered the differential to unrepresented employees in order to maintain "separation" in employment benefits between represented and unrepresented employees. Thus, PERB concluded that the District's conduct provided direct evidence of motive and inherently discriminatory conduct sufficient to support a discrimination allegation.

PERB ordered the District to pay each eligible current and former member of the District's Fire Management Unit the 2.5% longevity differential for 15 years of service.

Contra Costa County Fire Protection District, PERB Decision No. 2632-M (2019).

NOTE:

This case illustrates that it is significantly easier for a union to establish interference rather than discrimination because the union does not need to prove the employer's motive. The employer's stated desire to pay represented and unrepresented groups differently because of their represented status, however, was sufficient evidence of a discriminatory motive in this case. LCW attorneys can advise agencies how to avoid or defend claims brought by unions for both interference and discrimination.

WAGE AND HOUR

California Minimum Wage Law Applies to Counties and Charter Cities.

Two hundred employees of the City of Long Beach alleged that the City paid them less than the state minimum wage requires. The trial court dismissed the employees' case, and the employees appealed.

The California Court of Appeal had to decide whether California's minimum wage law is a matter of statewide concern applicable to counties and charter cities, or an unconstitutional interference with their purely municipal affairs. Under the California Constitution, counties and charter cities have the exclusive authority to regulate and determine their own municipal affairs without state interference. Previously, California courts have found that setting the wages of charter city employees, capping those wages, and outsourcing the determination of such wages to a third party were all municipal affairs not subject to state interference. While counties and charter cities have the exclusive authority to regulate their own municipal affairs, the California Legislature has the power to regulate matters of statewide concern.

The Court found that the state minimum wage law is a matter of statewide concern that applied to counties and charter cities. The Court reasoned that it was the Legislature's intent to broadly apply the state minimum wage to all employees throughout the state in every industry, both private and public. The Court also noted that the state minimum wage law protects Californians by keeping "families above the poverty line." Thus, a state minimum wage "serves the fundamental purpose of protecting health and welfare of workers," which is a matter of statewide concern.

However, the Court of Appeal was careful to the distinguish the minimum wage from the prevailing wage. The Court noted that the California Supreme Court has struck down some aspects of the prevailing wage laws because they effectively set wages and salaries at the prevailing rate, which has a greater impact on local control than minimum wage laws, which only set the floor for "the lowest permissible hourly rate of compensation."

The Court pointed out that the minimum wage law does not completely deprive counties or charter cities of their authority to determine wages. While the minimum wage law sets a floor for the lowest permissible pay, counties and charter cities retain the authority to provide wages for their employees above that minimum as they see fit.

Marquez v. City of Long Beach, 32 Cal.App.5th 552 (2019).

Note:

LCW previously reported on this case in a Special Bulletin published on February 26, 2019. All agencies must ensure they pay their non-exempt employees at least the state minimum wage for all hours worked. Currently, the state minimum wage is $12.00 per hour for employers with more than 25 employees and $11.00 per hour for employers with 25 or less employees.

Ninth Circuit to Reconsider "Factor Other than Sex" Exception to EPA After Judge Dies Before Opinion Filed.

Aileen Rizo worked as a math consultant with the Fresno County public schools. Rizo sued, alleging that the County violated the U.S. Equal Pay Act ("EPA") and other laws by paying her less than her male colleague for the same work. In a hearing before all of the judges of the Ninth Circuit for the U.S. Court of Appeals, the Court considered which factors an employer could consider to justify a salary difference between employees under the "factor other than sex" exception to the EPA. The Court concluded that "any other factor other than sex" was limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. Therefore, prior salary was not a permissible "factor other than sex" within the meaning of the EPA.

However, before the Ninth Circuit could file its written opinion, a judge who participated in the case and authored the opinion died. Without the deceased judge, the opinion attributed to him would have been approved by only five of the ten members of the panel who were still living when the decision was filed. Although the other five living judges agreed in the ultimate judgment, they did so for different reasons.

The U.S. Supreme Court stated that because the judge was no longer a judge at the time when the en banc decision was filed, the Ninth Circuit erred in counting him as a member of the majority. According to the U.S. Supreme Court, that practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. Therefore, the U.S. Supreme Court vacated the judgment and sent the case back to the Ninth Circuit for further proceedings.

Yovino v. Rizo, 139 S.Ct. 706 (2019).

NOTE:

LCW previously reported on the Ninth Circuit's decision in this case in the May 2018 Client Update. This case involves the U.S. Equal Pay Act and does not affect California's own Fair Pay Act. California's Fair Pay Act is much more employee-friendly and provides that "[p]rior salary shall not justify any disparity in compensation." (Cal. Labor Code § 1197.5(a)(4).)

RETIREMENT

Opportunity to Purchase "Air Time" is Not A Vested Contractual Right.

In 2003, the California Legislature enacted Government Code section 20909, which gave eligible CalPERS members the option to purchase up to five years of service credit. This meant that participating employees could receive pension benefits as if they had actually worked for up to an additional five years. To exercise this option, CalPERS members would pay an amount arrived at by actuarial estimates to cover the member and employer's liability for the additional service credit. This optional benefit was known as "air time."

Ten years later, the Legislature eliminated a member's option to purchase air time in the California Public Employees' Pension Reform Act of 2013 ("PEPRA"). However, the change did not apply retroactively. Thus, those who purchased air time while it was available retained the additional service credit.

State firefighters brought suit through their union asserting that the opportunity to purchase air time was a vested right protected by the contract clause of the California Constitution and could not be eliminated during their employment. Under the "California Rule," public employee pension benefits vest on the first day of service and cannot be reduced at any time during employment absent the introduction of an equally advantageous benefit.

The case presented two issues: 1) whether the opportunity to purchase air time was a constitutionally protected vested right; and 2) if so, whether PEPRA's elimination of the air time benefit constituted an unconstitutional impairment of public employees' contractual rights.

After deciding only the first of the two issues presented, the California Supreme Court held that the opportunity to purchase air time was not a vested right protected by the contract clause of the California Constitution. The Court reasoned that the 2003 statute did not reflect the Legislature's intent to create a contractual right for public employees. The option for air time was not, unlike ordinary pension benefits, a contractually binding offer to induce an employee's continued service. The Court found no basis to conclude that the opportunity to purchase air time was a form of deferred compensation for an employee's work during any period of employment. The amount of additional credit was at the employee's discretion and not dependent on a corresponding amount of public service.

In its decision, the Court stated that "[w]e have never held, however, that a particular term or condition of public employment is constitutionally protected solely because it affects in some manner the amount of a pensioner's benefit." In doing so, the Court reaffirmed prior decisions holding that "a term and condition of public employment that is otherwise not entitled to protection under the contract clause does not become entitled to such protection merely because it affects the amount of an employee's pension benefit."

Because the Court held that the opportunity to purchase air time was not a vested right, it did not reach the second issue of whether PEPRA's elimination of the air time benefit unconstitutionally impaired the contractual rights of public employees. Addressing this issue would have given the Court the opportunity to modify, abandon, or affirm the California Rule. Therefore, the California Rule remains untouched.

Cal Fire Local 2881 v. California Public Employees' Retirement System, 244 Cal.Rptr.3d 149 (2019)..

Note:

LCW previously reported on this case in a Special Bulletin drafted by Frances Rogers and Amit Katzir. In this case, the California Supreme Court declined to decide whether the California Rule for modifying pension benefits should remain intact. However, a number of additional cases involving the California Rule are awaiting review by the California Supreme Court. LCW will continue to update you regarding any new developments.

BROWN ACT

Individual Had Valid Claim After He Was Denied Opportunity to Comment at a Special Meeting.

On December 15, 2015, the Los Angeles City Council's Planning and Land Use Management Committee ("Committee") held an open meeting. The Committee listened to comment from members of the public, including Eric Preven, regarding a proposed real estate development project near Preven's residence. The Committee voted unanimously to make a recommendation of approval for the project to the full City Council.

On December 16, 2015, the full City Council held a special meeting to decide, among other things, whether to approve the recommendation of the Committee. A "special" meeting is a meeting called by a legislative body to handle an urgent matter. In contrast, a "regular" meeting is one that occurs on a regular basis. Preven also attended the December 16th special meeting and requested to address the full City Council. However, the City Council rejected his request because he had the opportunity to comment at the Committee meeting the previous day.

Preven then claimed that the City violated the Brown Act, which gives the public the right to attend and participate in meetings of local legislative bodies. He also claimed that similar violations had occurred at special City Council meetings in May and June 2016. Additionally, Preven asserted the City violated the California Public Records Act ("CPRA").

The Court of Appeal found that the Brown Act does not permit a governing body to limit comment at special city council meetings because an individual has already commented on the issue at a prior, distinct committee meeting. First, the court noted that the so-called "committee exception" of the Brown Act did not apply to special meetings. Under the committee exception, a legislative body does not need to allow public comment if a committee of legislative body members has previously considered the item at a meeting during which interested members of the public had the opportunity to comment. Using methods of statutory interpretation, the court concluded that the committee exception applied only to regular meetings, not special meetings. Second, the court noted that the public's Brown Act right to address a special meeting "before or during the legislative body's consideration" of the item did not restrict public comment based on a prior, distinct meeting. The court relied on the legislative history of the Brown Act to conclude that the "before or during" language concerns only the timing of comments within a particular meeting. Accordingly, Preven alleged a valid claim under the Brown Act.

However, the court dismissed Preven's CPRA claim. Preven conceded that he was not suing to enforce the CPRA claim and that he did not make a request for records.

Preven v. City of Los Angeles, 244 Cal.Rptr.3d 364 (2019).

Note:

LCW attorneys regularly advise public agencies about the Brown Act. If the amount of time necessary to hear public comment is an issue, local boards and councils can put reasonable limits on the amount of time each member of the public may speak on a topic.

FIRST AMENDMENT

Statements Made During Internal Investigation Were Protected Under Anti-SLAPP Statute, But University's Decision to Investigate Was Not.

Dr. Jason Laker is a professor at San Jose State University. A student told Dr. Laker that the then-Chair of his department sexually and racially harassed her. The student brought a formal Title IX complaint against the Chair, and after investigation, the University sustained the charges against the Chair. The University disciplined the Chair, and later, the University announced it was looking into how the matter was handled.

University administrators received an e-mail a few months later from the student. She stated she experienced ongoing stress and anxiety relating to the issue. The student noted the investigative report stated that at least two professors were aware of the behavior before her complaint. The Associate Vice President responded to the student and agreed it was concerning that other faculty members appeared to have received information regarding troubling behavior and did not notify administrators. Laker was one of those faculty members.

Separately, the University received and investigated three complaints into Laker's alleged conduct.

After exhausting administrative remedies, Laker filed a lawsuit against the University and the Associate Vice President for defamation and retaliation arising from the internal investigations. Laker alleged he was falsely accused of knowing about the sexual harassment and failing to report it. Laker also alleged the Associate Vice President and other University officials called him a "liar" when he said other students had complained of sexual harassment by the Chair. Laker also argued the University and others retaliated against him because he both opposed the Chair's harassment and assisted the student with her complaint.

The University responded to Laker's lawsuit with an anti-SLAPP motion, which is a special motion that allows a court to strike a lawsuit that attacks the defendant's protected free speech in connection with a public issue. The University argued Laker's complaint should be stricken because his claims arose from protected activity under the Anti-SLAPP law, and Laker had no probability of prevailing on either claim.

Courts evaluate anti-SLAPP motions using a two-step process: 1) whether the nature of the conduct that underlies the allegations is protected under California's anti-SLAPP statute; and 2) whether the plaintiff can show likely success on the merits of the claim.

The University argued that Laker's defamation claim arose from the statements made by the Associate Vice President and others during the investigation into the complaint against the Chair. The University claimed that Laker's retaliation claim arose from the University's investigation of the three complaints against Laker. Laker argued, in part, that the anti-SLAPP statute did not protect the University's decision to pursue three investigations into his conduct.

The Court of Appeal concluded Laker's defamation claim involved conduct protected under the anti-SLAPP statute. The statements, including the Associate Vice President's email response to the student, were made during and in connection with the ongoing internal investigation and were protected as an "official proceeding authorized by law." Furthermore, these statements formed the crux of Laker's defamation claim. The Court of Appeal concluded Laker could not demonstrate a probability of success on the merits of his defamation claim because statements made during the investigation were privileged under Civil Code section 47. Thus, the University met its burden as required by the anti-SLAPP statute to strike this part of Laker's claims.

The Court of Appeal concluded the University could not show that the part of Laker's retaliation claim, which was based on the allegations that the

University pursued three meritless investigations of him, arose from any protected conduct. As a result, the University could not defeat this part of Laker's retaliation claim using the anti-SLAPP statute. The Court noted that this part of the retaliation claim was based on the University's decisions to investigate and not on communicative statements by University officials. The Court also noted that the California Supreme Court had recently granted review of several appellate decisions that addressed whether an employer's allegedly discriminatory or retaliatory motive in conducting an investigation was anti-SLAPP protected activity.

Because the University successfully struck one of the claims, it was a prevailing party under the anti-SLAPP statute and eligible for attorney's fees and costs, which the trial court would determine. The Court of Appeal ordered the trial court to enter a new order partially granting the University's motion and striking some language from Laker's complaint.

Laker v. Board of Trustees of California State University, 32 Cal. App.5th 745 (2019).

Note:

This case reaffirms that communicative statements made during a public agency's internal investigations into claims of discrimination receive protection from the anti-SLAPP statute. Whether an employer's decision to investigate, by itself and without some form of communication, is protected by the anti-SLAPP statute is less clear after the Laker and other decisions. Watch for future issues of Client Update for the results of the California Supreme Court's review of other anti-SLAPP decisions involving whether an employer's allegedly discriminatory or retaliatory motives to conduct an investigation are protected under the anti-SLAPP statute.

School's Decision to Discipline Student for Off-Campus Speech was Permissible.

CLM was a high school sophomore at public school in Oregon who created a hit list in his personal journal. The list included 22 students who "must die." His mother discovered the list and graphic depictions of violence. She told a therapist, who then informed the police.

When the police searched the family's home, officers found and confiscated several weapons, including a rifle and ammunition belonging to CLM. However, the officers did not find anything "to indicate any planning had gone into following through with the hit list."

CLM admitted he created the list and that "sometimes he thinks killing people might relieve some of the stress he feels," but he denied he would ever carry out the violence. The police declined to bring charges against CLM, but they informed the District of CLM's list, the fact the police had seized guns from his house, and that CLM's journal contained additional entries that graphically depicted school violence.

The District suspended CLM pending an expulsion hearing. The school's principal recommended that CLM be expelled for one year because news of his list "significantly disrupted the learning environment at school," which would only be increased by CLM's return. At the expulsion hearing, the hearing officer adopted the principal's recommendation for expulsion, largely based on "the significant disruption" CLM's list caused in the school environment.

CLM and his parents filed a lawsuit alleging the District violated the Free Speech Clause of the First Amendment and other constitutional protections. CLM claimed that the District lacked authority under the First Amendment to discipline CLM for his hit list.

The Ninth Circuit Court of Appeals stated that although public school students enjoy greater freedom to speak when they are off campus, their

off-campus speech is not necessarily beyond the reach of a district's regulatory authority. The Court reviewed: 1) whether the District could regulate CLM's off-campus speech; and if so; 2) whether the District's decision to expel CLM violated the First Amendment standard for school regulation of speech set out in *Tinker v. Des Moines Independent County School District* (1969) 393 U.S. 503.

In deciding the first issue, the Court had to determine whether CLM's speech had a sufficient nexus to the school. The Court considered: 1) the degree and likelihood of harm to the school caused by the speech; 2) whether it was reasonably foreseeable that the speech would reach and impact the school; and 3) the relation between the content and context of the speech and the school. There is a sufficient nexus between the speech and the school if a district reasonably concludes that it faces a credible, identifiable threat of school violence.

Here, the District reasonably determined CLM presented a credible threat. The District knew CLM identified specific targets, accentuated his hit list with the phrases "I am God" and "All These People Must Die," lived in a gun-owning home close to the school, and had had thoughts of suicide. The District knew the journal contained other graphic depictions of school violence. This evidence was sufficient to render the District's determination reasonable and to give it authority to regulate CLM's speech.

Once it learned of the list, the District could reasonably foresee that news of the threat would reach and impact the school and disrupt the school environment. Although it was not foreseeable to CLM that his speech would reach the school, a lack of intent to share speech is of minimal weight when, as here, the speech contains a credible threat of violence directed at the school.

Finally, the content of the speech involved the school. CLM's hit list contained the names of 22 students, and thus, presented a particular threat to the school community. Ordinarily, schools may not discipline students for the contents of their private, off-campus journal entries, any more than they can punish students for their private thoughts, but schools have a right to address a credible threat of violence involving the school community.

In sum, the Court of Appeals concluded the District could regulate CLM's off-campus speech without violating his First Amendment rights.

McNeil v. Sherwood School District 88J, 2019 WL 1187223.

NOTE:

Although this case does not directly apply to determining whether there is a credible threat in a non-school workplace, the case does provide some guidance for determining whether there is a nexus between an off-duty threat of violence and the workplace.

ELECTIONS

California Law Requiring Candidates For County Sheriff to be Qualified is Permissible.

Bruce Boyer filed an application to be placed on the ballot for Ventura County Sheriff in the upcoming primary election. Four days later, the County Clerk informed Boyer that he had not submitted the documentation required under California law to establish his qualifications.

Under California election law, in order to be a candidate for county sheriff, an individual must provide prove that he or she meets the qualifications listed in Government Code section 24004.3. That law provides that a candidate for sheriff must possess one of five combinations of education and law enforcement experience: 1) an active or inactive advanced certificate issued by the Commission on Peace Officer Standards and Training; 2) one year of full-time, salaried law enforcement experience and a master's degree; 3) two years of full-time, salaried law enforcement experience and a bachelor's degree; 4) three years

of full-time, salaried law enforcement experience and an associate's degree; or 5) four years of full-time, salaried law enforcement experience and a high school diploma.

Boyer argued that the election law and section 24004.3 were unconstitutional and that the County Clerk's refusal to place Boyer's name on the ballot denied citizens of their right to vote for officials of their own choosing. Boyer filed a request with the Ventura County Superior Court to command the County Clerk to name Boyer as a candidate.

The Superior Court denied Boyer's request, and the Court of Appeal affirmed. The Court of Appeal concluded that the candidacy requirements were not unconstitutional. First, the court noted that the California Constitution expressly gives the Legislature the power to set requirements for the elected office of county sheriff. Second, the court concluded that the requirements did not violate the First Amendment of the U.S. Constitution because they were nondiscriminatory and politically neutral. The court noted that the state has strong interest in assuring that individuals desiring to hold office are qualified. Thus, Boyer was not entitled to be placed on the ballot.

Boyer v. Ventura County, 2019 WL 1236050.

Note:

This case upholds the California Legislature's authority to require candidates for elected office to have relevant education and experience.

DID YOU KNOW....?

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

- The EEOC and DOJ are now scrutinizing public employers and have formally agreed to cooperate to be more efficient in the enforcement of Title VII employment discrimination claims against state and local governments. (EEOC/DOJ Memo, 12/21/2018.)
- Employers can still enforce their drug free workplace policies even though the use of marijuana is legal in California. (*See Health and Safety Code section 11362.45(f).*)
- California law generally prohibits conducting pre-employment credit checks, except for specific categories of employees. (*See Labor Code section 1024.5.*)

CONSORTIUM CALL OF THE MONTH

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

Question: A human resources manager contacted LCW to ask whether an agency can ask applicants about their salary expectations during the hiring process.

Answer: The attorney explained that AB 2282, which became effective January 1, 2019, allows an employer to ask an applicant about salary expectations for the position sought. The attorney explained that this is one of the exceptions to Labor Code section 432.3, which generally prohibits an employer from relying on an applicant's salary history information as a factor in determining salary.

BENEFITS CORNER

Plan Administrators May Encounter Issues with FSA Debit Cards.

The IRS issued an Information Letter (No. 2018-0032) responding to an inquiry regarding an FSA debit card that a medical facility, without a valid merchant category code ("MCC"), rejected. The letter addressed the question: Why didn't the IRS recognize the facility as qualified to receive the debit card payment? The IRS first explained that plan administrators must limit use of the FSA debit card to qualified medical providers, as identified by a certain MCC. An MCC is a four-digit number assigned to businesses for tax reporting purposes. The "MCC assigned to any provider is determined by the provider and the debit card issuer." The IRS suggested the plan participant contact the plan administrator to explore other options for medical expense reimbursement, such as submitting a claim for reimbursement supported by third-party information.

This Information Letter is an example of a practical issue those administering Section 125 cafeteria plans may encounter. If a plan participant raises questions or issues regarding a rejected FSA debit card transaction, it is likely due to an invalid MCC. Plan administrators should direct the participant to the debit card issuer to resolve the issue.

When Can an Employer Recoup Mistaken Contributions to a Health Savings Account?

The IRS issued an Information Letter (No. 2018-0033) explaining the circumstances under which an employer may recoup mistaken contributions to a Health Savings Account ("HSA"). An HSA allows non-taxable employer contributions to pay for qualified medical expenses for those enrolled in High Deductible Health Plans. The general rule is that an employer cannot recoup deposited contributions to an HSA. However, the IRS noted some exceptions where an employer can recoup HSA contributions:

- When an employee was never eligible to enroll in an HSA to begin with;
- When an employer's contributions exceed the IRS maximum annual contribution limit, the employer can recoup the excess;
- When the employer maintains clear documentary evidence showing an administrative or process error. The IRS gave the following examples:

    1. An amount withheld and deposited an amount into an employee's HSA for a pay period greater than the amount indicated on the employee's HSA salary reduction election.
    2. An employer contributed an incorrect amount due to an incorrect decimal position, resulting in a greater contribution than intended.
    3. An employer mistakenly contributes due to an incorrect spreadsheet or employees with similar names are confused with each other.
    4. A payroll administrator incorrectly enters the amount.

5. An employer or payroll administrator transmits duplicate payroll files resulting in a second HSA contribution.
6. A change in employee payroll elections is not timely processed.
7. The system incorrectly calculates the contribution.

Employers in these situations could seek to correct the administrative errors and recoup contributions from the administering financial institution. The IRS emphasized that employers "should maintain documentation to support their assertion that a mistaken contribution occurred." Employers will still need to work with the HSA account administrator to request and actually recoup the contributions.

When Can Qualified Moving Expenses Be Excluded from Income?

Before the Tax Cuts and Jobs Act ("TCJA") employer's reimbursements for employees' qualified moving expenses would be nontaxable to employees and not reportable on the Form W-2. When the TCJA was enacted, it suspended this rule for tax years 2018 through 2025 (except for employees on active military duty).

In IRS Notice 2018-75, the IRS explained that moving expense payments for an employee's move in 2017 could be excluded from income if: (1) the expenses would have qualified for the moving expense deduction if paid for by the employee in 2017; and (2) the employee has not taken a deduction for the expenses.

IRS Notice 2018-190 then explained that individuals who relocated in 2017, but received a reimbursement from their employer in 2018, could also exclude those qualifying moving expenses from the employee's 2018 wages.

However, for qualified moving expenses incurred during the 2018 tax year (and through 2025), employers can no longer exclude these expenses from reporting on an employee's Form W-2. In other words, employer's reimbursements for an employee's qualified moving expenses are now taxable wages to the employee.

§

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

April 10 **"Human Resources Academy I"** & **"Workplace Bullying: A Growing Concern"**
North State ERC | Red Bluff | Kristin D. Lindgren

April 10 **"Human Resources Academy II"** & **"Legal Issues Regarding Hiring and Promotion"**
San Gabriel Valley ERC | Alhambra | Christopher S. Frederick

April 11 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Gateway Public ERC | South Gate | Jenny-Anne S. Flores

April 11 **"Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety"**
Imperial Valley ERC | Brawley | Jeremy Heisler, Goldman Magdalin & Krikes

April 11 **"Nuts & Bolts Navigating Common Legal Risks for the Front Line Supervisor"**
LA County HR Consortium | Los Angeles | Danny Y. Yoo

April 11 **"Public Service: Understanding the Roles and Responsibilities of Public Employees"**
Monterey Bay ERC & San Mateo County ERC | Webinar | Heather R. Coffman

April 11 **"Introduction to the FLSA"**
South Bay ERC | Inglewood | Jennifer Palagi

April 16 **"Navigating the Crossroads of Discipline and Disability Accommodation"** & **"Legal Issues Regarding Hiring and Promotion"**
North San Diego County ERC | Vista | Mark Meyerhoff

April 17 **"Public Sector Employment Law Update"** & **"Human Resources Academy II"**
Central Valley ERC | Los Banos | Shelline Bennett

April 17 **"Difficult Conversations"** & **"Managing the Marginal Employee"**
NorCal ERC | Alameda | Casey Williams

April 17 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Orange County Consortium | Fountain Valley | Ronnie Arenas & Mark Meyerhoff

April 17 **"Legal Issues Regarding Hiring and Promotion"** & **"Human Resources Academy I"**
Ventura/Santa Barbara ERC | Camarillo | Danny Y. Yoo

April 18 **"Human Resources Academy II"** & **"Leaves, Leaves and More Leaves"**
San Joaquin Valley ERC | Ripon | Gage C. Dungy

April 23 **"The Disability Interactive Process"** & **"Case Study for Managing Illnesses or Injuries"**
Bay Area ERC | Hayward | Morin I. Jacob

April 25 **"Managing the Marginal Employee"** & **"Difficult Conversations"**
Mendocino County ERC | Ukiah | Casey Williams

May 2 **"The Art of Writing the Performance Evaluation"** & **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
Monterey Bay ERC | Santa Cruz | Che I. Johnson

May 9 **"Leaves, Leaves and More Leaves"** & **"Privacy Issues in the Workplace"**
East Inland Empire ERC | Fontana | Mark Meyerhoff

May 9 **"Public Service: Understanding the Roles and Responsibilities of Public Employees"**
Gateway Public ERC | Long Beach | Laura Drottz Kalty & Jolina A. Abrena

May 9 **"Legal Issues Regarding Hiring and Promotions"**
LA County HR Consortium | Los Angeles | Geoffrey S. Sheldon

May 9 **"Labor Negotiations From Beginning to End"** & **"Human Resources Academy II"**
North State ERC | Chico | Gage C. Dungy

May 9 **"Supervisor's Guide to Public Sector Employment Law"**
San Diego ERC | Coronado | Stephanie J. Lowe

May 15 **"Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety"**
Sonoma/Marin ERC | Rohnert Park | Rick Goldman

May 16 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"** & **"Managing the Marginal Employee"**
Orange County Consortium | Tustin | Mark Meyerhoff

May 21 **"So You Want To Be A Supervisor"**
North San Diego County ERC | San Marcos | Kristi Recchia

May 22 **"Human Resources Academy I"** & **"The Future is Now - Embracing Generational Diversity and Succession Planning"**
NorCal ERC | Pittsburg | Lisa S. Charbonneau

May 23 **"Creating a Culture of Diversity in Hiring, Promotion and Supervision"** & **"Public Service: Understanding the Roles and Responsibilities of Public Employees"**
Coachella Valley ERC | Indio | Kristi Recchia

May 23 **"Difficult Conversations"**
San Mateo County ERC | San Mateo | Erin Kunze

May 23 **"Supervisor's Guide to Public Sector Employment Law"**
South Bay ERC | Torrance | Mark Meyerhoff

May 29 **"12 Steps to Avoiding Liability"** & **"Human Resources Academy II"**
Gold Country ERC | Elk Grove | Gage C. Dungy

May 30 **"Implicit Bias"** & **"Human Resources Academy II"**
Imperial Valley ERC | El Centro | Kristi Recchia

Customized Training

April 8,15,17 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Kristin D. Lindgren

April 11 **"Workplace Bullying: A Growing Concern"**
City of Campbell | Casey Williams

April 12 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
County of San Luis Obispo | San Luis Obispo | Danny Y. Yoo

April 16	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Glendale | Jenny Denny
April 16	**"Preventing Workplace Harassment, Discrimination and Retaliation and Ethics in Public Service"** Imperial Irrigation District | El Centro | Mark Meyerhoff
April 16	**"Introduction to the Fair Labor Standards Act"** Zone 7 Water Agency | Livermore | Lisa S. Charbonneau
April 17	**"POBR"** OC Parks | Silverado | James E. Oldendorph
April 17	**"Preventing Workplace Harassment, Discrimination and Retaliation"** Orange County Mosquito and Vector Control District | Garden Grove | Laura Drottz Kalty
April 17	**"Maximizing Supervisory Skills for the First Line Supervisor"** Port of Oakland | Oakland | Heather R. Coffman
April 18	**"Preventing Workplace Harassment, Discrimination and Retaliation"** County of Santa Barbara, Department of Social Services | Santa Maria | Jenny Denny
April 23	**"Preventing Workplace Harassment, Discrimination and Retaliation"** Conejo Recreation and Park District | Thousand Oaks | Danny Y. Yoo
April 24	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Stockton | Gage C. Dungy
April 24	**"Preventing Workplace Harassment, Discrimination and Retaliation"** Conejo Recreation and Park District | Thousand Oaks | Danny Y. Yoo
April 24	**"Legal Issues Update"** Orange County Probation | Santa Ana | Laura Drottz Kalty
May 2	**"MOU's, Leaves and Accommodations"** City of Santa Monica | Laura Drottz Kalty
May 6	**"Preventing Workplace Harassment, Discrimination and Retaliation"** Town of Truckee | Jack Hughes
May 7	**"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"** Sacramento Metropolitan Fire District | Mather | Gage C. Dungy
May 8,9	**"Performance Management and Evaluation Process"** Mendocino County | Ukiah | Jack Hughes
May 9	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Glendale | Jenny Denny
May 9,10	**"Preventing Workplace Harassment, Discrimination and Retaliation"** Merced County | Merced | Michael Youril
May 11	**"Harassment and Ethics"** Pike City Fire | North San Juan | Donna Williamson
May 13	**"Workplace Bullying: A Growing Concern"** City of Campbell | Casey Williams

May 14 **"Ethics in Public Service"**
City of Mission Viejo | Stephanie J. Lowe

May 22 **"Conducting Disciplinary Investigations: Who, What, When and How"**
City of Stockton | Gage C. Dungy

May 23 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Fremont | Jack Hughes

May 24 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment"**
Waldorf School of Orange County | Costa Mesa | Jenny Denny

May 28 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Glendale | Laura Drottz Kalty

May 29 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Joel R. Mogy Investment Counsel, Inc. | Beverly Hills | Jennifer Rosner

May 29,30 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Merced County | Merced | Che I. Johnson

May 30 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Morgan Hill | Casey Williams

Speaking Engagements

April 8 **"FLSA Update"**
National Public Employer Labor Relations Association (NPELRA) Annual Training Conference | Scottsdale | Lisa S. Charbonneau

April 8 **"Propelling Your District Forward in Challenging Situations"**
Special District Leadership Academy (SDLA) Spring Conference | San Diego | Stephanie J. Lowe

April 9 **"Defining Board & Staff Roles and Relationships"**
Special District Leadership Academy (SDLA) Spring Conference | San Diego | Stephanie J. Lowe

April 11 **"Legal Update"**
Southern California Public Management Association - Human Resources (SCPMA-HR) Speaking Engagement | Long Beach | J. Scott Tiedemann

April 12 **"Post Janus Case Developments and Legislation"**
California Lawyers Association's Labor and Employment Law Section Annual Public Sector Speaking Engagement | Sacramento | Che I. Johnson & Scott Kronland & Sheena Farro

April 24 **"Human Resources Boot Camp for Special Districts"**
California Special Districts Association (CSDA) | Simi Valley | Joung H. Yim

May 3 **"Civility, Communication, Conflict Management in the Workplace"**
Community College League of California (CCLC) Executive Assistants Workshop | Olympic Valley | Kristin D. Lindgren

May 7 **"Life After Retirement: Succession Planning and Hiring retired Annuitants"**
Association of California Water Districts (ACWA) 2019 Legal Briefing & CLE Workshop | Monterey | Michael Youril & Cyrus Torabi

May 7 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
California Sanitaton Risk Management Authority (CSRMA) Conference| Oakland | Lisa S. Charbonneau

May 7 **"Guide to Lawful Termination"**
California Sanitation Risk Management Authority (CSRMA) Conference| Oakland | Casey Williams

May 7 **"Must Have Employment Polices"**
California Sanitation Risk Management Authority (CSRMA) Conference | Oakland | Lisa S. Charbonneau

May 7 **"Legal Issues Regarding Hiring and Promotions"**
California Sanitation Risk Management Authority (CSRMA) Conference | Oakland | Casey Williams

May 7 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
California Sanitation Risk Management Authority (CSRMA) Speaking Engagement | Oakland | Casey Williams

May 9 **"Shots Fired! How to Respond to an Officer Involved Shooting"**
League of California Cities City Attorneys' Conference | Monterey | J. Scott Tiedemann & Jeb Brown

Seminars/Webinars

April 8 **"Mandated Ethics for Public Officials"**
Liebert Cassidy Whitmore | Webinar | Michael Youril

April 10 **"Your Managers Just Organized – What Do You Do? Labor Relations & Your EERR"**
Liebert Cassidy Whitmore | Webinar | Che I. Johnson

April 15 **"Cafeteria Plan Compliance – Mid-Year Election Changes and More"**
Liebert Cassidy Whitmore | Webinar | Heather DeBlanc & Stephanie J. Lowe

April 19 **"Train the Trainer: Harassment Prevention"**
Liebert Cassidy Whitmore | Los Angeles | Laura Drottz Kalty

April 23 **"Best Practices for Conducting Fair and Legally Compliant Internal Affairs Investigations (Day 1)"**
Liebert Cassidy Whitmore | Citrus Heights | Jack Hughes & Suzanne Solomon

April 24 **"Best Practices for Conducting Fair and Legally Compliant Internal Affairs Investigations (Day 2)"**
Liebert Cassidy Whitmore | Citrus Heights | Jack Hughes & Suzanne Solomon

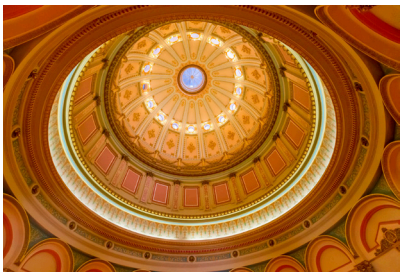
May 1 **"Mandated Reporter Training"**
Liebert Cassidy Whitmore | Webinar | Julie L. Strom

May 7 **"Hot Topics in FLSA Litigation & Settlements"**
Liebert Cassidy Whitmore | Webinar | Elizabeth T. Arce

May 14 **"Payroll Processing & Regular Rate of Pay Calculations"**
Liebert Cassidy Whitmore | Citrus Heights | Richard Bolanos & Lisa Charbonneau

May 16 **"The Public Employment Relations Board (PERB) Academy"**
Liebert Cassidy Whitmore | Fresno | Che I. Johnson & Kristi Recchia

LCW Webinar: Mandated Ethics for Public Officials



Presented by:

Michael Youril

Monday, April 8, 2019 | 9 AM - 11 AM

Government Code Section 53234 (also known as AB1234) mandates that ethics training be provided by any local agency that pays any type of compensation, salary, or stipend to, or provides reimbursement for the expenses of, a member of a legislative body. The training must be provided to each member of a legislative body, each elected official, and any employees who may be designated by an agency to receive the training.

The training must be completed by any individual holding office as of January 6, 2006, and ***every two years thereafter***. This interactive training covers all topics required to be covered by AB 1234 including conflicts of interest, gift limitations, honoraria prohibitions, and conduct upon leaving office.

Who Should Attend?

Local Agency Officials (any member of a local agency legislative body or any elected local agency official who receives any type of compensation, salary or stipend or expense reimbursement incurred in the performance of official duties); Any employee designated by a local agency body to receive the training (this is usually listed in an agency's Conflict of Interest Code).

Workshop Fee: *Consortium Members: $100, Non-Members: $200*

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

LCW Webinar: Your Managers Just Organized – What Do You Do? Labor Relations & Your EERR

Presented by:

Che I. Johnson

Wednesday, April 10, 2019 | 10 AM - 11 AM

This session will cover a wide range of issues related to representation with a new bargaining unit, including governing procedures and rules and compliance with the agency's Employer-Employee Relations Resolution and PERB regulations. The session will also focus on the importance of remaining neutral and other agency responsibilities. The session will include examples of best practices in order to navigate the obligations of an agency whose managers have organized.

Who Should Attend?

City Managers, Chief Administrative Officers, Legal Counsel and Human Resources, Finance and Payroll Personnel.

Workshop Fee: *Consortium Members: $75, Non-Members: $150*

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

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