LIEBERT CASSIDY WHITMORE

# CLIENT UPDATE

News and developments in employment law and labor relations for California Public Agencies

APRIL 2020

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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.

40 years
1980 - 2020

## THANK YOU TO OUR PUBLIC AGENCY CLIENTS

You are a first responder, an essential services employee or supervisor, a human resources professional working remotely, or an agency lawyer or administrator. Each of you is planning how to guide your family, agency, and community through some frightening worst-case scenarios. You are working at peak capacity through challenges you have never encountered before, and without any definitive end in sight.

We thank you sincerely for your work and dedication. We are also here to help. The attorneys at LCW are hard at work, answering your calls and emails and providing not only complimentary COVID-19 templates and information, but all of the other employment and labor relations advice and representation you may need.

For templates, special bulletins, explanations of the recent COVID-19 federal legislation that provides paid sick and family leaves, and the CARES Act, go to https://www.lcwlegal.com/responding-to-COVID-19.

## WAGE & HOUR

***Employer Liable For Payroll Employee's Willful FLSA Violations.***

Employer Solutions Staffing Group (ESSG) is a group of staffing companies that contracts with other companies to recruit employees and place them at jobsites. In 2012, ESSG contracted with Sync Staffing (Sync), which placed the recruited employees at a jobsite run by TBG Logistics (TBG). At TBG, the recruited employees unloaded deliveries for a grocery store. TBG maintained a spreadsheet of the employees' hours, which it sent to Sync. Sync then forwarded the spreadsheet to ESSG.

Michaela Haluptzok, an ESSG employee, was responsible for processing the TBG payroll. The first time Haluptzok received one of the spreadsheets, she sent a report to Sync showing that employees who had worked more than 40 hours per week would receive overtime pay for those hours. A Sync employee told Haluptzok to pay all of the hours as "regular hours," instead of overtime. Haluptzok complied, even though it meant she had to dismiss numerous error messages on the payroll software. Haluptzok processed all of the TBG spreadsheets in this same manner until ESSG's relationship with TBG and Sync ended in July 2014. Haluptzok admitted that she knew the recruited employees were not being paid overtime owed to them.

In August 2016, the U.S. Secretary of Labor sued ESSG, TBG, and Sync for violations of the Fair Labor Standards Act (FLSA). The Secretary reached settlements with TBG and Sync. The Secretary moved for judgment against ESSG

on the grounds that ESSG willfully violated the FLSA when Haluptzok failed to pay 1.5 times the FLSA regular rate of pay for hours worked in excess of 40 hours per workweek. The district court granted the Secretary's motion, and ordered ESSG to pay approximately $78,500 in unpaid overtime plus an equal amount in liquidated damages. ESSG appealed to the U.S. Court of Appeals for the Ninth Circuit.

First, ESSG argued that it could not be liable for the actions of a low-level employee such as Haluptzok. The Ninth Circuit disagreed. ESSG chose Haluptzok as its agent for payroll processing, so it could not disavow her actions merely because she lacked a specific job title or a certain level of seniority. Allowing ESSG to evade liability simply because none of its supervisors or managers processed the payroll would create a loophole that would be inconsistent with the FLSA's purpose of protecting workers.

Second, ESSG argued that the Secretary's lawsuit was not timely because its FLSA violations were not willful. Ordinarily, a two-year statute of limitations applies for claims under the FLSA. However, when a violation is willful, a three-year statute of limitations applies. A violation is willful when the employer either knew or showed reckless disregard for whether its conduct was prohibited by the FLSA. The Ninth Circuit concluded that ESSG acted willfully. Haluptzok dismissed the payroll software's repeated warnings about overtime pay, and she never received any explanation from Sync that justified dismissing the software error messages. The three-year statute of limitations applied for that willful violation, so the Secretary's lawsuit was timely.

Third, ESSG argued that liquidated damages were inappropriate because it acted in good faith. The FLSA mandates liquidated damages equal to the unpaid overtime compensation unless an employer acts in good faith. But because ESSG's actions were willful, they were not in good faith.

Finally, ESSG contended that it could seek indemnification or contribution from another employer for the damages the district court awarded. The Ninth Circuit, however, determined that the FLSA did not implicitly permit such indemnification for liable employers, and it declined to make new federal common law recognizing those rights.

*Scalia v. Employer Sols. Staffing Grp., LLC*, 951 F.3d 1097 (9th Cir. 2020).

***Note:***

*The employer in this case tried to avoid liability because a rank and file employee completed the payroll instead of a manager or supervisor. Our FLSA audit work has shown that the majority of agencies use rank and file employees to process payroll. Agencies can properly pay employees and avoid liability by training payroll employees how to comply with the FLSA.*

## MEYERS-MILIAS-BROWN ACT

***Agency Must Meet And Confer About Privacy Concerns In Response To Union's Request For Unredacted Investigation Report.***

Employee A worked for the City and County of San Francisco and was the subject of a disciplinary investigation. As a result of the investigation, Employee A received a written warning regarding disruptive behavior.

The Service Employees International Union (SEIU) filed a grievance on Employee A's behalf. On November 9, 2018, a SEIU Field Representative requested "a copy of interview questions to all witnesses named in the written warning . . . a copy of the interview answers of all witnesses of [sic] the written warning . . . [and] [a]ny other evidence, such as notes, internal complaints, email communications, etc.." The Field Representative noted that the information was needed so that SEIU could "investigate the grievance."

On November 20, 2018, the City sent the Field Representative a copy of the investigative report that had seven pages redacted. When the Field Representative requested a description of the redacted information, a City administrator noted that the redacted information was unrelated and not used to support Employee A's written warning.

In December 2018, a Field Representative requested a full, unredacted version of the investigation report because SEIU needed the information to conduct an investigation and make its own assessment. A City administrator responded that the investigative report belonged to the City Attorney and he would forward the representative's request.

The Field Representative sent another request to the City for the report in January 2019. The Field Representative filed an Unfair Practice Charge in February 2019. In March 2019, a City administrator sent the Field Representative another version of the investigation report. This version had only five redacted pages. The administrator said that the City was providing that version of the report "on a non-precedent setting basis, after carefully weighing the privacy interest of the witnesses." This copy of the report had redactions in the Background section of the report. The City said that the

redacted information pertained to another investigation that was not relevant and would violate the privacy interest of another employee. At no time did the City offer to meet and confer about the redactions, or indicate that the City would be willing to negotiate about them.

The Public Employment Relations Board (PERB) held that the MMBA duty to meet and confer extends to union requests for information during a contractual grievance process. The City argued that it had no duty to meet and confer because SEIU never made such a request. PERB disagreed, noting that SEIU attempted to get clarification from the City about the redactions, but that the City replied in a conclusory matter. Each time the City provided another copy of the investigation report, it decided unilaterally what to redact. PERB held that a union has no duty to request meet and confer if the employer has unilaterally decided what to redact and has presented its decision as a *fait accompli* rather than a proposal.

*City and County of San Francisco*, PERB Dec. No. 2698M (2020).

***Note:***

*A union has a right to information that is necessary and relevant to represent its members, as well as the right to meet and confer with the employer over alleged privacy concerns that may arise regarding investigation reports. This decision reiterates that the employer should discuss privacy concerns that arise from investigation reports before unilaterally deciding what to redact.*

## DISCRIMINATION

### *U.S. Supreme Court Confirms A But-For Causation Standard For Section 1981 Discrimination Claims.*

African-American entrepreneur Byron Allen owns Entertainment Studios Network (ESN), which operates seven television networks. For years, ESN sought to have Comcast Corporation (Comcast), a cable television conglomerate, carry its channels. However, Comcast refused and cited lack of demand, bandwidth constraints, and other programming preferences for its decision. ESN then sued Comcast under 42 U.S.C. section 1981 (Section 1981). Section 1981 guarantees that all persons have the same right to make and enforce contracts as is enjoyed by white citizens. ESN alleged that Comcast systematically disfavored "100% African American-owned media companies" and that the reasons Comcast cited for refusing to carry its channels were pretextual.

The case made its way up to the U.S. Supreme Court (the Court) to resolve a split among the U.S. Circuit Court of Appeals regarding what type of causation is required to prevail in a Section 1981 claim. Some circuits, including the Ninth, say that a plaintiff only needs to show that race played "some role" in the defendant's decision-making process. Other circuits, however, have held that a plaintiff needs to establish that racial animus was a "but-for" cause of the defendant's conduct. Under that standard, a plaintiff must demonstrate that if not for the defendant's unlawful conduct, its alleged injury would not have occurred.

The Court concluded that in a Section 1981 claim, the plaintiff bears the burden of showing that race was the but-for cause of its injury. The Court examined the statute's language, structure and legislative history to determine that a Section 1981 claims requires but-for causation. For example, the Court noted that when it first inferred a private cause of action under Section 1981, it described it as "afford[ing] a federal remedy against discrimination . . . on the basis of race," which strongly supports a but-for causation standard. The Court also noted that the neighboring statute, 42 U.S.C. Section 1982, demands the same causation standard.

While ESN argued that the "motivating factor" causation test found in Title VII of the Civil Rights Act should apply, the Court declined to extend that standard to Section 1981 claims. The Court noted that Section 1981 predates the Civil Rights Act by nearly 100 years and does not reference "motivating factors." The Court explained: "[We] have two statutes with two distinct histories, and not a shred of evidence that Congress meant to incorporate the same causation standard." The Court also dismissed ESN's argument that the motivating factor test should apply only at the pleading phase of a case.

The Court found that to prevail on a Section 1981 claim, a plaintiff must initially plead and ultimately prove that but-for race, it would not have suffered the loss of a legally protected right.

*Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 2020 WL 1325816 (U.S. Mar. 23, 2020).

***Note:***

*It is far more challenging to establish the but-for causation standard than the motivating factor causation standard. Because the Ninth Circuit previously applied the motivating factor causation standard, this Supreme Court decision moves the goal post to win a Section 1981 claim further down the field.*

### *Nurses' Jury Verdict Vacated For Failure To Exhaust DFEH Administrative Remedies.*

Three nurses, Judy Alexander, Johann Hellmannsberger, and Lisa Harris, worked in the Behavioral Health Unit of the Community Hospital of Long Beach (Community

Hospital). Community Hospital contracted with Memorial Psychiatric Health Services (MPHS) to operate its Behavioral Health Unit. Pursuant to the contract, MPHS provided administrative services for the unit and employed and managed its director, Keith Kohl. Community Hospital separately contracted with Memorial Counseling Associates (MCA) to provide physicians for the unit.

One of the nurses complained multiple times to Community Hospital's Director of Education that Kohl discriminated against her in favor of male staff, particularly gay male staff. The nurse also indicated she wanted to file a formal complaint, but the Human Resources Director told her the last person who complained no longer worked there. The nurse never filed a formal complaint and instead transferred to a different shift to avoid Kohl.

Later, the three nurses were wrongly accused of using a physical restraint on a patient without a doctor's order. Kohl subsequently terminated the three nurses. While the nurses found new employment, they were terminated from their jobs after the Department of Justice arrested them for the prior incident at Community Hospital. A jury later acquitted them of criminal charges.

Following the nurses' terminations, a number of other Community Hospital staff complained that Kohl had created a hostile work environment by favoring male employees. Eventually, Community Hospital demanded that MPHS remove Kohl from his position. The three nurses then filed a lawsuit against Community Hospital and MCA for various claims, including violations of the Fair Employment and Housing Act (FEHA). They later amended their civil complaint to name MPHS as a defendant but never filed a Department of Fair Employment and Housing (DFEH) administrative complaint against MPHS.

After testimony regarding Kohl's conduct and favoritism towards gay, male staff, the jury found against Community Hospital on all of the nurses' claims, and found in favor of MCA. It also found against MPHS on the nurses' causes of action for negligent supervision and FEHA violations. The jury awarded damages totaling $4,734,973.

On appeal, MPHS argued that the court should reverse the judgment against it on the FEHA claims. MPHS argued that because the nurses did not mention MPHS in their DFEH complaint, they never exhausted their administrative remedies. Under the FEHA, a person claiming to be aggrieved by an alleged unlawful practice must first file an administrative complaint with the DFEH stating "the name and address" of the employer alleged to have engaged in the unlawful conduct.

While the nurses tried to argue for an exception to the exhaustion requirement, the court dismissed their argument. Since the nurses did not mention MPHS in their DFEH complaint, they could not bring a civil lawsuit against MPHS for violations of the FEHA. The court also found insufficient evidence to support the negligent supervision verdict against MPHS.

Community Hospital also appealed the jury verdict. It argued that the trial court made several errors and that there was insufficient evidence to support one of the nurse's FEHA and wrongful termination claims. The Court of Appeal agreed. The court reasoned that the trial court errors unfairly conveyed to the jury that Community Hospital was liable. The court also concluded that no evidence suggested that Kohl ever targeted one of the nurses who was a heterosexual male, or that the male nurse (Hellmannsberger) witnessed "severe or pervasive" conduct necessary to support a hostile work environment claim. Accordingly, the court determined that the nurse could not establish that the sexual favoritism was so severe or pervasive as to alter his working conditions or create a hostile working environment. Further, the court concluded that insufficient evidence supported the nurses' other common law claims for defamation and negligent supervision.

*Alexander v. Cmty. Hosp. of Long Beach*, 2020 WL 1149695 (Cal. Ct. App. Feb. 13, 2020).

***Note:***

*This case shows how an employee's failure to exhaust administrative remedies can eliminate a jury verdict. LCW's trial and appellate lawyers use this defense and several others to assist our clients.*

## EQUAL PAY

### *Agency Cannot Consider Prior Pay To Set Salary Under U.S. Equal Pay Act.*

Aileen Rizo worked as a math consultant with the Fresno County Office of Education (County). She sued the County under the U.S. Equal Pay Act after discovering the County paid her male colleagues more for the same work.

Under the U.S. Equal Pay Act, an employee must first prove the receipt of different wages for equal work because of sex. The burden then shifts to the employer to show the wage disparity falls under one of following exceptions: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a factor other than sex.

When Rizo began working for the County Superintendent of Schools, the Superintendent used Standard Operation Procedure 1440 (SOP 1440) to determine her starting salary. SOP 1440 was a salary schedule that consisted of levels and "steps" within each level. New employees' salaries were set at a step within Level 1. To determine the appropriate step, the County considered Rizo's prior salary and added five percent. That calculation resulted in a salary lower than the lowest step within Level 1, so the County started Rizo at the minimum Level 1, Step 1 salary, and added a $600 stipend for her master's degree.

The County conceded that Rizo received lower pay for equal work. The County argued, however, that its consideration of Rizo's prior salary was permitted as a "factor other than sex." The trial court rejected the County's argument and held that a "factor other than sex" could not be prior salary. The County appealed.

In its 2017 opinion, the Ninth Circuit Court of Appeals analyzed its previous opinion in *Kouba v. Allstate Insurance Co.*, which held that a prior salary can be a "factor other than sex" if the employer: (1) showed it to be part of an overall business policy; and (2) used prior salary reasonably in light of its stated business purposes.

The County offered four business reasons to support its use of Rizo's prior salary to set her current salary: (1) it was an objective factor; (2) adding five percent to starting salary induced employees to leave their jobs and come to the County; (3) using prior salary prevented favoritism; and (4) using prior salary prevented waste of taxpayer dollars. The trial court did not evaluate those reasons under the *Kouba* factors, so the court sent the case back to the trial court to evaluate the County's reasons. Then, the Court granted a petition for rehearing before all of the judges of the court to clarify the law, including the effect of *Kouba*.

In the rehearing in 2018, the Ninth Circuit considered which factors an employer could consider to justify a salary difference between employees under the "factors other than sex" exception. Prior to this decision, the law was unclear whether an employer could consider prior salary, either alone or in combination with other factors, when setting its employees' salaries. The court concluded that "any other factor other than sex" is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. Therefore, prior salary is not a permissible "factor other than sex." The court stated that the language, legislative history, and purpose of the Equal Pay Act made it clear that Congress would not create an exception for basing new hires' salaries on those very disparities found in an employee's salary history—disparities, the court noted, Congress declared are not only related to sex, but caused by sex. This decision overruled *Kouba*. Accordingly, the County's affirmative defense for why it paid Rizo less than her male colleagues for the same work failed.

However, before the court issued its opinion, a judge who participated in the case and authored the opinion died. Without that judge's vote, the opinion would have been approved by only five of the ten members of the panel who were still living when the decision was filed, which did not create a majority to overrule the previous opinion in *Kouba*. Although the five living judges agreed in the ultimate judgment, they did so for different reasons.

The County appealed to the U.S. Supreme Court and asked whether a federal court may count the vote of a judge who died before the decision was issued. In a February 2019 opinion, the Supreme Court ruled that the Ninth Circuit erred in counting the deceased judge as a member of the majority. The Supreme Court vacated the opinion and sent the case back to the Ninth Circuit for further proceedings.

All judges of the Ninth Circuit Court of Appeals reheard the case in September 2019. The County argued its policy of setting employees' wages based on their prior pay was based on a factor other than sex. Rizo argued the use of prior pay to set prospective wages perpetuated the gender-based pay gap.

The Ninth Circuit again examined the U.S. Equal Pay Act's four exceptions: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a factor other than sex. Using principles of statutory construction, the court ruled that because the first three exceptions were all job-related, Congress's use of the phrase "any other factor other than sex" signaled the fourth exception was also limited to job-related factors.

Ultimately, the court held that employers cannot consider prior pay as a factor in determining an employee's pay. Accordingly, prior pay, alone or in combination with other factors, cannot serve as a defense to a U.S. Equal Pay Act claim. However, the U.S. Equal Pay Act does not prohibit employers from considering prior pay for other purposes, such as in the course of negotiating job offers.

*Yovino v. Rizo*, 950 F.3d 1217 (9th Cir. 2020).

***Note:***

*LCW previously reported on this case in April 2019 and May 2018. This decision will have little impact in California, because our State's Fair Pay Act prohibits using prior salary to justify compensation disparities between employees of different sexes, races, or ethnicities.*

## PUBLIC SAFETY

***Public Agency Not Liable For Off-Duty Officer's Accidental Shooting Of Bartender.***

Three off-duty Honolulu Police Department police officers stopped at a bar for drinks. After consuming several drinks, one of the officers, Officer Kimura, inspected his personal revolver, which the Department authorized him to carry, to ensure it was loaded. The other two officers watched an intoxicated Kimura attempt to load his already-loaded firearm. Kimura's revolver accidentally discharged, striking and severely injuring bartender Hyun Ju Park.

Park sued the three officers and the City and County of Honolulu (County) under 42 U.S.C. Section 1983 and Hawaii state law, alleging that they violated her substantive due process right to bodily integrity under the Fourteenth Amendment. Park also alleged that Kimura's handling of his firearm exhibited deliberate indifference to her personal safety, and the other two officers were liable for failing to intervene to stop Kimura.

To attempt to establish the County's liability under Section 1983, Park alleged two Department policies caused her injuries. First, Department policy required off-duty officers to carry a firearm at all times, except when an officer's "physical and/or mental processes are impaired because of consumption of alcohol." Second, Park alleged the Department promoted a "brotherhood culture of silence" that condoned police misconduct. Park settled her claims against Kimura. Thereafter, the district court granted the remaining defendants' motion to dismiss Park's Section 1983 claim. Park appealed.

The U.S. Court of Appeals for the Ninth Circuit found that the two bystander officers did not act or purport to act under color of state law. The Court disagreed with Park's claim that both officers were "effectively on-duty" the moment Kimura pulled out his firearm in the bar. The Court said that the question is not whether the officer is on or off duty. Instead, the inquiry is whether the officers exhibited or purported to exhibit their official duties during the events that led to Park's injuries. The Court answered no because the officers: were not in uniform; did not identify themselves as police officers; and did not pretend to exercise their official responsibilities in any way. The Ninth Circuit affirmed the dismissal of Park's Section 1983 claim against the bystander officers.

The Ninth Circuit also found that Park failed to plausibly allege that the County's inaction reflected deliberate indifference to her Fourteenth Amendment right to bodily integrity. Park could not allege the Chief of Police had actual or constructive notice that any deficiencies in Department policy would likely result in deprivation of Park's federally protected rights. There was no indication that the Chief was aware of any prior, similar incidents in which off-duty officers mishandled their firearms while drinking. Further, there was no indication that the Chief was aware of any "culture of silence" that operated to conceal officer misconduct. Since Park failed to plausibly allege that the Chief was deliberately indifferent to her federally protected rights, the Ninth Circuit affirmed the dismissal of her Section 1983 claim against the County.

*Park v. City and County of Honolulu*, 2020 WL 1225271 (2020).

***NOTE:***

*Law enforcement agencies frequently have questions about whether they can be held liable for the off-duty conduct of their personnel. While this question requires careful analysis of the specific facts, as a general rule, there must be a plausible showing of deliberate indifference by a relevant policy maker.*

## 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 U.S. Families First Coronavirus Response Act (FFCRA) amends the Family and Medical Family Leave Act (FMLA) by providing FMLA Emergency Leave and provides emergency paid sick leave to employees for certain coronavirus, or COVID-19, related reasons.
- The FFCRA will take effect April 1, 2020 and ends on December 31, 2020.
- The U.S. Department of Labor's (DOL) guidance suggests employers have until April 17, 2020 to comply fully with the FFCRA if they have made reasonable, good faith efforts to do so, e.g., making necessary payroll modifications, completing calculations for coordinating leave accruals with FFCRA leave entitlements, etc. However, the DOL guidance indicates that employers will have to remedy and make employees whole for any noncompliance between April 1 and April 17, 2020. After April 17, 2020, the DOL guidance says it will begin fully enforcing violations of the FFCRA.

## 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 director called LCW to ask a question regarding the extent to which a member of the public can videotape public employees at City Hall while the employees are engaging in their official activities, if the individual is videotaping from areas that are generally available to the public. The human resources director indicated that some employees had expressed concerns about their own personal rights while being videotaped.

Answer: The LCW attorney said that the First Amendment protects the rights of the public to monitor their government in this way. With regard to the employees' personal rights, the attorney advised that employees could call the police if a member of the public threatened them, acted violently, or actually disrupted their ability to do their job. The attorney also indicated that the employees may retreat from the area being filmed, if the individual filming is not requesting services from that employee or if that employee's job does not require the employee to interact with the individual, supervise others in the area, or staff the area.

## BENEFITS CORNER

The Office for Civil Rights (OCR) at the U.S Department of Health and Human Services (HHS) announced its Notification of Enforcement Discretion (Notification) on March 17, 2020. According to OCR's Notification, effective immediately, it would exercise its enforcement discretion and waive potential penalties for HIPAA violations against health care providers serving patients through common communications technologies during the COVID-19 nationwide health emergency.

As described further below, healthcare providers can use these technologies in good faith for any telehealth treatment or diagnostic purpose, regardless of whether the telehealth service is directly related to COVID-19.

Following OCR's Notification, it issued guidance and FAQs on telehealth and remote communications. (See link below.) For example, OCR defined "telehealth" as "the use of electronic information and telecommunications technologies to support and promote long-distance clinical health care, patient and professional health-related education, and public health and health administration." OCR also explained that the entities covered by its Notification of Enforcement Discretion included all health care providers that are covered by HIPAA and provide telehealth services during the emergency (but not insurance companies). OCR also further clarified that its Notification applies to waiving penalties for violations of the HIPAA Privacy, Security, and Breach Notification Rules "that occur in the good faith provision of telehealth during the COVID-19 nationwide public health emergency." There is currently no expiration date for OCR's Notification until it provides further notice.

Typically, the mode of communication a telehealth provider uses must comply with various HIPAA rules, such as Security Rules meant to protect patients' electronically stored protected health information (ESPHI), by using appropriate administrative, physical and technical safeguards to ensure the confidentiality and integrity of the information. Accordingly, the HIPAA Security Rule has, until now, prohibited the use of unsecure everyday communications channels. The OCR's Notification removes concerns over financial penalties that could be assessed, if for example, there was a breach of ESPHI due to lack of HIPAA compliant security measures. By the same token, providers can, for the time being, use everyday available applications without risk that OCR may seek penalties.

According to OCR, covered health care providers "can use any non-public facing remote communication product that is available to communicate with patients." A "non-public facing" remote communication product is one that, as a default, allows only the intended parties to participate in the communication (typical criteria includes end-to-end encryption, individual user accounts, logins, passcodes, and options to record or mute). In contrast, public-facing products are not acceptable forms of remote communication for telehealth because they are designed to be open to the public or allow wide or indiscriminate access to the communication. The following chart provides examples of what OCR has indicated are acceptable/"non-public facing" vs. non-acceptable/"public facing" telehealth communication applications.

**Acceptable/Non-Public Facing Telehealth Communication Applications:**

- Apple FaceTime
- Facebook Messenger
- Google Hangouts
- Whatsapp
- Skype
- Signal
- Jabber
- Skype for Business*
- Updox*
- VSee*
- Zoom for Healthcare*
- Doxy.me*
- Google G Suite Hangouts Meet*
- Cisco Webex Meetings/Webex Teams*
- Amazon Chime*
- GoToMeeting*

**Service Providers representing they provide HIPAA-compliant video communication products and will enter into Business Associate Agreements with providers in the future.*

**Non-acceptable/Public Facing Telehealth Communication Applications:**

- TikTok
- Facebook Live
- Twitch
- Chat room applications such as Slack

Many public agencies are considered covered health care providers who may benefit from OCR's relaxing of HIPAA compliance rules when providing telehealth under the circumstances. It is important to keep in mind, however, that OCR clarified that its announcement on enforcement discretion only applied to direct providers of health care. Health insurance companies, and by a similar token, self-insured entities, are not covered. Therefore, plan administrators should ensure they continue to follow all applicable HIPAA privacy and security rules for all covered health care transactions. Further, it is worth noting that OCR only encouraged but did not require health care providers to notify patients that the third-party applications potentially poses privacy risks. Regardless, health care providers to the extent possible should notify patients of the potential privacy risks and enable all available encryption and privacy modes settings when using more common applications. Additionally, to date, the State of California has not issued any guidance indicating that it is waiving any enforcement provisions under the CMIA or other state medical privacy laws. As these laws address the release of private information—and not just the handling of records—care should be taken to protect the health information that may be revealed in the course of delivering telehealth services to patients.

For the most part, public education entities will not be affected by OCR's enforcement discretion announcement. This is because HIPAA does not generally apply to schools because either they are not HIPAA covered entities performing covered transactions such as billing a health plan electronically for services, or if they are, they mostly maintain health information on students that are considered "education records" under FERPA and excepted from the HIPAA Privacy Rule. (See 45 C.F.R. Section 160.103.) The public education entity would, however, need to comply with FERPA's privacy requirements regarding its education records, including obtaining the requisite consent before disclosing such information. However, if a public education entity employs a health care provider, and that provider engages in certain administrative or financial actions such as electronically transmitting health care claims to a health plan for payment, the public education entity is considered a HIPAA covered entity for such purposes and is subject to HIPAA's Security Rules with regard to the electronic transmission of EPHA. Presumably, in that situation, the public education entity would be able to benefit from OCR's enforcement discretion announcement.

Related website links are found below:
OCR's Notification of Enforcement Discretion on telehealth remote communications: https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html

OCR's Guidance and FAQs on Telehealth and HIPAA: https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf

OCR's February 2020 bulletin on HIPAA and COVID-19: https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf

Centers for Medicare & Medicaid Services FAQs on Availability and Usage of Telehealth Services through Private Health Insurance Coverage: https://www.cms.gov/files/document/faqs-telehealth-covid-19.pdf

California Board of Behavioral Services Announcement of OCR's Enforcement Discretion: https://www.bbs.ca.gov/pdf/bbs_stmt_hhs_telehealth.pdf

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# Join us for our Upcoming Webinar:


## Management Training Workshops

### Firm Activities

**Consortium Training**

**Apr. 8** **"Legal Issues Regarding Hiring"**
Central Coast ERC | Webinar | Shelline Bennett

**Apr. 8** **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
San Gabriel Valley ERC | Webinar | James E. Oldendorph

**Apr. 9** **"Ethics For All"**
Coachella Valley ERC | Webinar | Kristi Recchia

**Apr. 9** **"Ethics For All"**
Imperial Valley ERC | Webinar | Kristi Recchia

**Apr. 9** **"Firefighters Procedural Bill of Rights Act"**
San Diego ERC | Webinar | Stefanie K. Vaudreuil

**Apr. 9** **"Ethics For All"**
NorCal ERC | Webinar | Kristi Recchia

**Apr. 9** **"Ethics For All"**
South Bay ERC | Webinar | Kristi Recchia

**Apr. 10** **"Management Guide to Public Sector Labor Relations"**
San Joaquin Valley ERC | Webinar | Jack Hughes

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| **Apr. 14** | **"Moving Into the Future"**<br>San Mateo County ERC \| Webinar \| Erin Kunze |
| **Apr. 15** | **"File That! Best Practices for Document and Record Management"**<br>Central Coast ERC \| Webinar \| Che I. Johnson |
| **Apr. 15** | **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**<br>Humboldt County Consortium \| Webinar \| Jack Hughes |
| **Apr. 15** | **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**<br>Orange County Consortium \| Webinar \| Jack Hughes |
| **Apr. 16** | **"Leaves, Leaves and More Leaves"**<br>Bay Area ERC \| Webinar \| Gage C. Dungy |
| **Apr. 16** | **"Workplace Bullying: A Growing Concern"**<br>Imperial Valley ERC \| Webinar \| Stephanie J. Lowe |
| **Apr. 16** | **"Leaves, Leaves and More Leaves"**<br>Monterey Bay ERC \| Webinar \| Gage C. Dungy |
| **Apr. 16** | **"Workplace Bullying: A Growing Concern"**<br>Coachella Valley ERC \| Webinar \| Stephanie J. Lowe |
| **Apr. 16** | **"Leaves, Leaves and More Leaves"**<br>Mendocino County ERC \| Webinar \| Gage C. Dungy |
| **Apr. 22** | **"Navigating the Crossroads of Discipline and Disability Accommodation"**<br>Monterey Bay ERC \| Webinar \| Che I. Johnson |
| **Apr. 22** | **"Navigating the Crossroads of Discipline and Disability Accommodation"**<br>San Diego ERC \| Webinar \| Che I. Johnson |
| **Apr. 22** | **"Navigating the Crossroads of Discipline and Disability Accommodation"**<br>San Gabriel Valley ERC \| Webinar \| Che I. Johnson |
| **Apr. 23** | **"Managing the Marginal Employee"**<br>San Mateo County ERC \| Webinar \| Laura Drottz Kalty & Antwoin D. Wall |
| **Apr. 23** | **"Technology and Employee Privacy"**<br>Humboldt County ERC \| Webinar \| Jack Hughes |
| **Apr. 23** | **"Navigating the Crossroads of Discipline and Disability Accommodation"**<br>LA County Human Resources Consortium \| Webinar \| T. Oliver Yee |
| **Apr. 23** | **"Managing the Marginal Employee"**<br>Orange County Consortium \| Webinar \| Laura Drottz Kalty & Antwoin D. Wall |
| **May 7** | **"Maximizing Supervisory Skills for the First Line Supervisory - Part 1"**<br>Imperial Valley ERC \| Webinar \| Kristi Recchia |
| **May 7** | **"Maximizing Supervisory Skills for the First Line Supervisory - Part 1"**<br>North State ERC \| Webinar \| Kristi Recchia |
| **May 7** | **"Maximizing Supervisory Skills for the First Line Supervisory - Part 1"**<br>Sonoma/Marin ERC \| Webinar \| Kristi Recchia |
| **May 7** | **"Maximizing Supervisory Skills for the First Line Supervisory - Part 1"**<br>NorCal ERC \| Webinar \| Kristi Recchia |

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

**May 14** **"Public Service: Understanding the Roles and Responsibilites of Public Eemployees"**
LA County Human Resources Consortium | Webinar | Ronnie Arenas

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

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

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

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

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

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

**Customized Training**

**Apr. 23** **"Train the Trainer Refresher: Harassment Prevention"**
Liebert Cassidy Whitmore | Webinar | Christopher S. Frederick

**Speaking Engagements**

**Apr. 2** **"Managing Human Resources During a Public Health Crisis"**
Institute for Local Government (ILG) | Webinar | Peter J. Brown & Alexander Volberding

**May 7** **"Workplace Disability - Legal Trends and Update"**
County Counsels' Association of California (CCAC) Health and Welfare Conference | San Diego | Mark H. Meyerhoff

**Seminars/Webinars**

**Apr. 7** **COVID-19: Constantly Changing Rules!**
Liebert Cassidy Whitmore | Webinar | Steven M. Berliner, Peter J. Brown, J. Scott Tiedemann & Alexander Volberding

**Apr. 15** **"Exploring the Challenges and Best Practices of Industrial Disability Retirement"**
Liebert Cassidy Whitmore | Webinar | Jennifer Rosner



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