LIEBERT CASSIDY WHITMORE

CLIENT UPDATE

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

DECEMBER 2020

INDEX

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.

FIRM VICTORIES

Court Upholds Two Peace Officer Terminations Following Use Of Excessive Force.

LCW Partner **Scott Tiedemann** and Associate Attorneys **Paul Knothe** and **Donald Le** successfully represented a city in a termination appeal involving two peace officers.

On July 5, 2011, multiple officers responded to a report that a man was checking car doors in a parking lot. At first, the man complied with the officers' requests to sit on the curb and to allow them to search his backpack. The interaction devolved into a struggle between the man and three police officers after the man began to resist. During the struggle, the officers swung their batons, struck the man multiple times, and applied prolonged pressure to his body. One officer deployed his taser against the man before using the taser to strike the man in the head multiple times. The man's condition worsened and he died at the hospital several days later.

The city retained an outside agency to investigate the incident. Based on the investigation findings, the chief of police terminated the three involved officers. Two of the officers sought administrative review before separate hearing officers. These two hearings yielded opposite results: one hearing officer recommended that city council uphold the discharge; and the other recommended that city council reverse the discharge.

Ultimately, the city council unanimously upheld the discharge of both officers based in part on a finding that they used excessive force in violation of city policies. The city council found that one of the officers used excessive force when he swung his baton at the man, struck the man in the head multiple times, and applied prolonged body pressure while the man was struggling on the ground. The city council found that the second officer used excessive force when he twice struck the man's head with his knee and repeatedly beat the man's face with a taser.

The two officers then went to court to file petitions for administrative writs of mandamus. The trial court confirmed the city council's decision to terminate both officers. The evidence established that both officers used excessive force. The findings of excessive force supported the city council's decision to uphold the terminations.

The court examined the excessive force findings as to each officer in light of the department's use of force policies. As to the first officer, the court found that swinging a baton at the man was not excessive force; rather it was reasonable conduct to control the man's resistance and to prevent him from escaping. The court also found there was no evidence that the officer struck the man in the head. However, the court found the officer did use excessive force by applying prolonged body pressure to the man because the man informed the officers 10 times he could not breathe and then became unconscious. Given this finding and

the public nature of the incident, the court found that the city council did not abuse its discretion in discharging the officer for excessive force.

As to the second officer, the court found that the evidence showed excessive force. The officer repeatedly beat the man's face with a taser, even though the man was not being aggressive either before or during the tasing that preceded the beating. Given the city's significant interest in maintaining a level of trust between peace officers and the public, the court found that the city council did not abuse its discretion in discharging the second officer for excessive force. Due to this finding, the court did not examine whether the second officer also used excessive force by kneeing the man in the head twice.

For these reasons, the court denied both officers' petitions and confirmed the city council's discharge of both officers.

Note:

The use of force at issue in this case was highly-publicized and publicly criticized. LCW is proud to have served as a trusted advisor to the department in making successful disciplinary determinations under these intense circumstances.

Peace Officer's Termination Upheld Following Multiple Uses of Excessive Force.

LCW Partner **Jack Hughes** and Associate Attorneys **Brian Hoffman** and **Savana Manglona** successfully represented a city in a peace officer's termination appeal. The officer violated the police department's use of force policies when he placed his hand around a suspect's throat.

In 2017, a peace officer was involved in three separate use of force incidents. The first occurred when the officer punched a suspect in the head with a closed-fist after the officer perceived the suspect was resisting arrest. The second occurred when the officer punched a suspect in the head after the suspect refused to exit a house. After reviewing both incidents, the department found that the officer did not use the most appropriate force, and decided not to discipline the officer. Instead, the department required the officer to attend a one-on-one refresher training on the department's use of force policies. In May 2017, the department's sergeant and primary use of force instructor administered the refresher training. The sergeant explained less extreme use of force techniques that the officer could use.

Approximately three months later, the officer was involved in third use of force. He slapped a suspect several times after the suspect resisted handcuffs. During the incident, the officer complained over body worn camera that the slaps were "weak and crappy" and he preferred to punch the suspect in the face. The sergeant later met with the officer to discuss those comments and advised that while the officer was not subject to discipline, his comments were inappropriate and unprofessional.

In March 2018, the officer was involved in another use of force incident. He placed his hand on a handcuffed suspect's throat, under the chin, using a C-clamp chokehold. A C-clamp chokehold occurs when an officer grabs a suspect by the front of the neck with his hand cupped in the shape of a "C." The officer then squeezes in a clamp-style motion. The department does not teach the C-clamp chokehold because of the heightened risk of serious bodily injury. When the officer used a C-clamp chokehold on the suspect, the suspect reacted with loud choking sounds and yelled, "You're choking me!" and "I can't breathe!" several times. Eventually, other officers placed the suspect in a full-body restraint system to prevent the suspect from moving. The suspect later asked the officer, "You like choking people, huh?" The officer responded, "When they need it." The officer's body camera footage captured this incident. After conducting its use of force review, the city immediately placed the officer on administrative leave.

The city conducted an internal affairs investigation into the officer's use of force. The city determined the officer violated the department's conduct and use of force policies and terminated him. The officer appealed. The officer persistently denied any wrongdoing, including squeezing the suspect's throat or applying any pressure on the suspect's airway.

After a five-day appeal hearing, the Administrative Law Judge (ALJ) found that the level of force the officer used was excessive and improper. The ALJ also found the officer's conduct did not comply with the department's policy and training on use of force. The videos from the officer's body camera showed the officer placing his hand on the suspect's throat more than once, and the suspect instantly choking or gagging. Other officers at the scene also said the officer placed his hands over the suspect's throat and applied pressure. Finally, the officer's comment to the suspect that he only choked people "when they need it" acknowledged his use of force. The ALJ found the department did not abuse its discretion in terminating the officer. This was not an isolated incident, but was the officer's fourth questionable use of force in just over a year. Moreover, the officer's comments indicated an inability to be rehabilitated.

Note:

This case illustrates how conducting a thorough investigation and building a solid administrative record helps to protect a city's final disciplinary ruling from

a court challenge. Agencies can count on LCW to be a trusted advisor throughout a peace officer investigation, discipline, and legal challenges.

OAH Upholds Faculty Member's Termination For Creating A Hostile Educational Environment.

LCW Partner **Eileen O'Hare-Anderson** and Associate Attorney **Jenny Denny** successfully represented a community college district in a tenured faculty member's disciplinary appeal before the California Office of Administrative Hearings (OAH).

The District received numerous student complaints against the faculty member that alleged harassing and discriminatory classroom conduct and generally inappropriate behavior. The District repeatedly issued the faculty member written warnings from his deans and the College President. An administrative investigation in 2018 confirmed the faculty member continued to violate these directives and District policies. The District placed the faculty member on paid administrative leave in December 2018 pending the Board of Trustees' final decision ending the faculty member's employment in February 2019.

The faculty member appealed. The District and faculty member, representing himself, set the appeal for a 10-day hearing in February 2020 before the OAH.

The faculty member, who is a licensed attorney, issued an extreme number of special interrogatories, several motions to compel discovery, a motion for sanctions, a motion to dismiss, motions to strike, and even a motion for summary judgment.

The District presented testimony from 20 witnesses. Most of the faculty member's witnesses were former students who had been enrolled in his classes and who were not offended by his conduct. In the end, the faculty member's own testimony proved that he was unfit for service and had persistently violated the District's policies and directives.

The Administrative Law Judge (ALJ) issued a 137-page ruling upholding the termination. The ALJ found a preponderance of evidence established that the faculty member: told a story about a former student in which he described her attire and breast size; repeatedly used the word "tard" (a truncation of the word "retard") to describe himself and students; referred to wives as "bitches;" and made a crude reference to political candidate performing sex acts. The ALJ found these comments cumulatively constituted hostile or offensive conduct in violation of District policy and procedure. The comments interfered with the learning or work activities of several students. Finally, the ALJ found that the First Amendment did not protect the faculty member's speech because: the District had a greater interest in maintaining a hostile-free learning environment; and the comments did not relate to the substance of the faculty member's lectures.

The ALJ concluded that the District's decision to dismiss the faculty member was reasonable and supported by the evidence. The ALJ affirmed the decision to terminate.

Note:

OAH conducts hearings for local government entities as well as educational institutions. Some matters can only be appealed through the OAH appeal process, such as CalPERS disability retirement appeals. LCW attorneys have a wealth of experience in handling OAH appeals.

DISCIPLINE

Sheriff's Termination Appeal Was No Longer Viable After Disability Retirement.

Martin Diero began working for the Los Angeles County Sheriff's Department in 1997. Diero was injured on duty on May 30, 2012, and he continued to work through October 3, 2013, after which he had the first of two surgeries. Diero was not able to return to work following his surgery, and he remained on leave thereafter.

On May 1, 2015, Diero applied to the Los Angeles County Employees Retirement Association (LACERA) for a service-connected disability retirement. Two months later, and before LACERA approved Diero's retirement application, the Department issued Diero a Notice of Intent to Terminate his employment for bringing discredit to him and the Department. After a pre-disciplinary meeting, the Department notified Diero it was terminating his employment effective August 12, 2015. Diero timely appealed the discharge to the Civil Service Commission (Commission), which referred the matter to a hearing officer.

A few months later, while the disciplinary proceedings were pending, LACERA granted Diero's application for a service-connected disability retirement. LACERA later issued a notice to Diero stating that the effective date of his retirement was August 13, 2015, the day after his discharge. Despite having retired, Diero and the Department participated in hearings on Diero's appeal of his discharge. The hearing officer ultimately recommended that Diero's discipline be reduced to a 30-day suspension, and the Commission's agenda included a proposed decision to accept the recommendation.

The Department later filed a motion to dismiss the appeal on the grounds that Diero had retired, and therefore, the Commission lacked jurisdiction over any appeal relating to his employment. The Commission granted the motion, and Diero filed a petition for writ of mandate seeking trial court review of the decision. In the writ petition, Diero asserted, for the first time, that if he were to prevail in his disciplinary appeal and be reinstated, any retroactive salary would change his disability retirement pension. The trial court denied the petition.

On appeal, the court determined that the Commission properly dismissed Diero's appeal. The court reasoned that the Commission's jurisdiction derives from the County's Charter, which defines an employee as "any person holding a position in the classified service of the county." Relying on this language and on previous decisions, the court concluded that Commission has no jurisdiction to order reinstatement or any form of wage relief, to a retired person whose "future status as an employee by definition is no longer at issue." The court affirmed the trial court's decision and awarded the Department its costs on appeal.

Deiro v. Los Angeles Cty. Civil Serv. Comm'n, 56 Cal.App.5th 925 (2020).

Note:

This case shows that timing is everything. Local rules may prevent an employee from appealing discipline after the date of disability retirement.

WAGE AND HOUR

City Sanitation Workers Are Not In The "Transportation Industry" Under Wage Order No. 9.

The City of Los Angeles employs wastewater collection workers in the City's Wastewater Collection Systems Division (Wastewater Division) of its Bureau of Sanitation (Sanitation Bureau). The City's wastewater collection crews remove debris and storm water from the City's catch basins, sidewalk culverts, low flow sewage, and storm drain systems. They transport the debris to collection and treatment facilities. Some of the trucks the used to complete these duties are classified as commercial vehicles, which requires the driver to hold a commercial driver's license with tanker and air brake endorsements. The work involves substantial driving each day, sometimes more than 100 miles to as many as 90 work and disposal sites.

Three wastewater collection crew members sued the City on behalf of themselves and all other Wastewater Division employees, alleging that the City denied them meal and rest breaks from June 2, 2011 to the present in violation of Labor Code sections 226.7 and 512 and Wage Order No. 9. The employees alleged the City restricted their meal and rest breaks by requiring them to: "remain on-call at all times; refrain from sleeping on the job; refrain from returning to their yard until the end of their shift; refrain from leaving the work locations during their shift; refrain from using City vehicles for personal business, including traveling to lunch breaks; refrain from congregating with other Wastewater Division employees during their shift; and refrain from leaving their work vehicles during their shift." In general, Wage Order No. 9 explicitly requires public entities to provide meal and rest breaks to "commercial drivers" in the "transportation industry."

After many years, the City filed a motion to dismiss the employees' Wage Order No. 9 claims, arguing that Wage Order No. 9 did not apply because they did not work in the transportation industry. Alternatively, the City argued that Wage Order No. 9 applied only to those wastewater collection employees who were permitted to drive the City's commercial vehicles. The trial court concluded that Wage Order No. 9 applied only to workers in the transportation industry, and that undisputed evidence indicated that the Wastewater Division's primary purpose was to maintain the City's sanitary and storm sewer systems. The court noted that any driving performed by its employees was incidental to that primary objective. The trial court entered judgment in the City's favor, and denied the employees' the opportunity to assert new federal claims. The employees appealed.

On appeal, the court rejected the employees' arguments and affirmed the trial court's ruling. The court noted that the main purpose of the business, and not the job duties of the employee, determines which wage order applies. The court relied on the language of Wage Order No. 9 stating that a business whose purpose is transportation is considered to be in the transportation industry. The court reasoned that to conclude that the incidental activities the Wastewater Division employee performed involving transportation "would read the word 'purpose' right out of the order." Although some employees were required to operate commercial vehicles to carry out the Sanitation Bureau's purpose, the purpose of the Wastewater Division was to clean the City's sewers. Thus, the trial court properly entered judgment in the City's favor.

Miles v. City of Los Angeles, 56 Cal.App.5th 728 (2020).

Note:

While the meal and break provisions of California's Wage Orders generally do not apply to public agencies, Wage Order No. 9 provides an exception for transportation industry employees. Public agencies should ensure they are providing meal and rest breaks to covered public

transportation employees. LCW attorneys can assist agencies in determining which job classifications qualify as "Transportation Industry" employees.

County Does Not "Employ" Homecare Workers So It Is Not Required To Pay Them.

California operates programs, funded in part through the federal government, that provide domestic in-home services to the elderly and disabled. These homecare providers help with daily activities including housework, meal preparation, and personal care. Since 1974, these services have been provided under California's In-Home Supportive Services (IHSS) plan. The program is administered partially by California counties, including the County of Los Angeles (the County).

The State, counties, and IHSS recipients all play roles in implementing the IHSS program. For example, the State sets the rules for the program, creates standardized guidelines, and identifies specific services authorized under the program. The counties process recipient applications, handle day-to-day administration, and "act as or establish an employer" for purposes of collective bargaining. Recipients of the IHSS program "retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services for them" and are responsible for setting their provider's schedule.

The County makes a direct payment to program recipients for the purchase of IHSS services. Any IHSS providers in the County are paid directly by the State. The State is responsible for collecting time cards, maintaining timekeeping records, and issuing paychecks drawn on the State's treasury. The County also created the Public Assistance Services Counsel (PASC) to act as the employer of record for collective bargaining, to establish a registry of potential providers, and provide access to training for providers and recipients. The PASC bills the County for its services.

On January 1, 2015, the federal regulations changed to provide overtime payments to IHSS providers under the Fair Labor Standards Act (FLSA). To implement this change, the State provided letters and guidance to the counties. The County used the State's letters and training materials to develop handouts, FAQs, and instructions for IHSS providers. In 2017, two homecare providers filed a lawsuit on behalf of themselves and all other similarly situated homecare providers alleging the County and State failed to pay them overtime compensation in violation of the FLSA. After the homecare providers dismissed the State, the County filed a motion to dispose of the lawsuit arguing that it is not an employer of IHSS providers. The trial court agreed and entered judgment in favor of the County.

Under the FLSA, an "employer" must pay overtime compensation to certain employees. An employer is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee." Two or more employers may be "joint employers," and both are individually responsible for compliance with the FLSA. To determine whether an entity is an employer, courts look to the "economic reality" behind the relationship and whether the alleged employer: 1) had the power to hire and fire the employees; 2) supervised and controlled employee work schedules or conditions of employment; 3) determined the rate and method of payment; and 4) maintained employment records.

The court concluded that under these factors, the County was not an employer of the home health care providers. The court noted that the County plays only an administrative role on behalf of the State, and that the County has no power, absent State authority, to hire or fire IHSS providers. For example, the County does not have the ability to deviate from the State's onboarding tasks or independently determine whether to hire IHSS providers. In addition, the court found that the County did not exercise control over an IHSS provider's employment because the recipient, not the County, is responsible for setting a provider's work schedule, deciding when a provider should come and go, and paying the provider should the recipient want more services than the hours they were allotted. Further, the court noted that the State pays providers directly and that the County "does not control the purse strings." Finally, the court noted that there was no evidence that the County maintained providers' employment records.

Thus, the providers could not maintain their lawsuit against the County.

Ray v. California Department of Social Services, 2020 WL 6784527 (Oct. 27, 2020).

Note:

Although Los Angeles County was not the employer in this case, FLSA liability can be tremendous. As always, public agencies should ensure they are properly classifying workers to reduce the risk of FLSA liability.

RETALIATION

Employer's Failure To Investigate Whether A Conviction Was Judicially Dismissed Indicates Retaliation.

Tracey Molina was hired by Premier Automotive Imports of CA, LLC (Premier), an automobile retailer, in January 2014. On her job application, Molina did not disclose a dismissed conviction for misdemeanor grand theft. The application asked if the applicant had ever pleaded

guilty, or been convicted of, a misdemeanor or felony. But it also instructed that "the question should be answered in the negative as to any conviction for which probation has been successfully completed . . . and the case has been dismissed."

After passing a background check indicating that she had not sustained any felony or misdemeanor convictions in the past seven years, Molina began working at Premier in February 2014. However, after four weeks with the company, the Department of Motor Vehicles (DMV) mistakenly reported to Premier that Molina had an active criminal conviction for grand theft. Molina's conviction was officially dismissed in November 2013, but the Department of Justice did not enter the dismissal in its database until March 25, 2014. Premier double-checked its background report, which indicated that Molina did not have any convictions. But Premier did not investigate the discrepancy between its background report and the DMV's report, nor did it contact the DMV for more information. Premier terminated Molina for falsification of her job application, despite Molina's several explanations that her conviction had been judicially dismissed. When the DMV issued Premier a corrected notice three weeks later, Premier did not rehire Molina.

Molina filed a retaliation complaint with the Labor Commission in April 2014. In December 2016, the Labor Commissioner determined that Premier had unlawfully discharged Molina and ordered Premier to reinstate her with back pay. Premier refused to comply with the order. The Labor Commissioner then filed an enforcement action on Molina's behalf for violations of Labor Code Sections 98.6 and 432.7. The trial court found in favor of Premier on the grounds that there was no evidence Premier was aware at the time it terminated Molina that her conviction had been judicially dismissed. The Labor Commissioner appealed.

Labor Code Section 432.7 prohibits an employer from asking a job applicant to disclose any conviction that has been judicially dismissed, and bars an employer from using any record of a dismissed conviction as a factor in the termination of employment. Section 98.6 prohibits an employer from retaliating against an applicant or employee because the applicant or employee exercised a right afforded to him or her under the Labor Code.

The Court of Appeal determined the trial court erred because the Labor Commission had presented sufficient evidence to prove that: 1) Premier was aware or had reason to believe that Molina's criminal conviction had been judicially dismissed; 2) Premier retaliated against Molina for failing to disclose her dismissed conviction; and 3) the company used the dismissed conviction as an impermissible factor in her termination.

The court noted that Premier had credible information – in the form of its own background check – that suggested the DMV letter Premier received was incorrect or incomplete. Molina also testified that she explained to Premier several times that her conviction was dismissed. However, Premier took no steps to contact the DMV or otherwise investigate the discrepancy before terminating Molina on the basis of a "falsified" job application.

Further, the court noted that there was sufficient evidence to establish that Premier's employment decision was substantially motivated by Molina's failure to disclose her dismissed conviction on her job application. For example, the court pointed to evidence that when Molina was gathering her belongings to leave, she apologized and her supervisor responded, "You should have told me." Premier also explicitly indicated that Molina was fired for "falsification of job application" just days after it received the DMV letter, and the company refused to rehire her even after the DMV corrected its mistake. For these reasons, the Court determined that the trial court improperly entered judgment in Premier's favor on the Labor Commissioner's claims. The court remanded the case for a new trial.

Garcia-Brower v. Premier Auto. Imports of CA, LLC, 55 Cal. App. 5th 961 (2020).

Note:

This case serves as an important reminder that criminal records and DMV notices can be inaccurate. Public agencies should ensure they investigate any discrepancies regarding an employee's criminal records before making any employment decision. In addition, California's Fair Chance Act (Gov. Code Section 12952) requires employers to conduct an analysis as to whether an applicant's criminal history is relevant to the job, and requires employers to allow an applicant to explain a conviction before disqualifying that applicant.

FAMILY AND MEDICAL LEAVE ACT

Employee Did Not Show Employer Willfully Violated Her FMLA Rights.

Andrea Olson contracted to work with the Bonneville Power Administration (BPA) as a Reasonable Accommodation Coordinator in 2010. In this role, Olson assisted employees in need of accessibility accommodations at work, trained managers and employees on their rights and responsibilities, and maintained records and documentation. In late 2011, BPA declined to renew Olson's contract for another year. Instead, BPA required Olson to work through

MBO Partners, a payroll service provider that had a master services agreement with BPA to facilitate certain independent contractors.

In 2013, Olson began experiencing anxiety, and in March 2014, Olson made a formal accommodation request through MBO Partners. Among other things, Olson requested to telework. MBO Partners subsequently informed BPA's Director of Human Resources of Olson's request. Shortly thereafter, Olson's anxiety increased, and she informed BPA she would be out of the office for two weeks. Olson then formally invoked leave under the Family and Medical Leave Act (FMLA) through MBO Partners, and she requested that MBO Partners inform her before sharing information about her condition or leave with BPA. Olson informed BPA that she would be out of the office for two more weeks and that she hoped to start a transition plan soon.

While on leave, Olson performed limited teleworking for which she billed BPA. However, because BPA did not have an expected date for Olson's return, it began exploring whether an existing employee could take on Olson's responsibility. After Olson contacted BPA's Equal Employment Opportunity office to discuss filing a complaint, BPA sent Olson an email stating that her network access had been terminated in accordance with security policies. Despite termination of her network access, Olson still billed BPA for three hours of her time the next month.

In early May 2014, Olson told BPA that she intended to attempt a trial work period that she and her physician had agreed upon. BPA responded that she was under a "stop work" order and that she would have to meet with a BPA manager before returning to work. On May 27, 2014, Olson formally filed an EEO complaint alleging that BPA had violated her FMLA rights. While BPA agreed to allow Olson to telework more on June 11, 2014, she did not accept the offer and did not return to work. Nearly three years later, on March 13, 2017, Olson filed a lawsuit claiming that BPA willfully interfered with her rights under the FMLA.

The district court concluded that BPA never provided Olson with notice of her FMLA rights. However, it also found that Olson's lawsuit was untimely because BPA's conduct was not willful. Specifically, the court noted that that BPA consulted with its legal department about how to proceed during Olson's FMLA leave, opted not to terminate her, offered her a trial work period, and made efforts to restore her to an equivalent position. Olson appealed.

In general, the FMLA provides job security to employees who must be absent from work because of their own illness or to care for family members who are ill. FMLA interference can take many forms, such as using FMLA leave as a negative factor in hiring, promotions, and disciplinary actions. Employers also have a duty to inform employees of their entitlements under the FMLA. However, failure to provide notice alone is not a cause of action; rather, employees must prove that the employer interfered with their exercise of FMLA rights.

On appeal, Olson argued that BPA's lack of notice interfered with her FMLA rights because she would have structured her FMLA leave differently had she been given notice and because BPA's actions during her FMLA leave exacerbated her FMLA-qualifying condition of anxiety.

The Ninth Circuit panel, however, determined that it did not need to decide whether BPA's failure to give notice constituted inference. Under the FMLA, a lawsuit must generally be brought within two years "after the date of the last event constituting the alleged violation". This deadline is extended to three years for "willful" violations. The court reasoned that because the "last event constituting the alleged violation" occurred no later than June 11, 2014 (when BPA emailed Olson allowing her to telework more), she would have to show that BPA's conduct was willful to avoid the statutory time bar for her March 2017 lawsuit.

The Ninth Circuit concluded that the district court was correct in finding Olson could not prove willfulness. For a willful violation to occur, the employee must show the employer knew or showed reckless disregard for whether its conduct was prohibited by statute. The court noted that the district court applied this standard and found little evidence that BPA knew or showed reckless disregard for whether it was violating Olson's FMLA rights. Accordingly, the Ninth Circuit concluded that Olson's claim was indeed barred by the statute of limitations.

Olson v. United States by & through Dep't of Energy, 2020 WL 6864653 (9th Cir. Nov. 23, 2020).

Note:

The willfulness standard applied in FMLA cases is the same standard used for the Fair Labor Standards Act. The willfulness standard is very difficult to meet.

CALIFORNIA PUBLIC RECORDS ACT

Records Requestors Can Be Required To Post A CCP Section 529 Undertaking.

In 2007, the City of Sacramento adopted a resolution approving the destruction of records as allowed under the Government Code and authorizing its city clerk to adopt a new records retention policy. In 2010, the city clerk did so. The new records retention schedule allowed for the destruction of all correspondence, including emails, older than two years old, subject to certain exceptions.

Despite adopting this policy in 2010, the City lacked the technology to automatically delete older emails until 2014. In December 2014, the City informed various media and citizen groups that it would begin automatically deleting emails under its 2010 policy starting July 1, 2015. Less than one week before the City planned to begin automatically deleting emails, Richard Stevenson and Katy Grimes (Requestors) each submitted California Public Records Act (CPRA) requests for records that were set for destruction. Stevenson's request concerned 53 million records, and Grimes' request concerned approximately 64 million. The City objected and estimated it would take over 20,000 hours to comply with the requests.

Requestors then initiated a lawsuit against the City for refusing to provide them access to the records they requested in violation of the California Public Records Act. They also sought and obtained a temporary restraining order barring the City from deleting records potentially responsive to their requests. After obtaining their temporary injunction, they submitted new, narrower requests, concerning approximately 15 million potentially responsive e-mails.

The superior court granted Requestors a preliminary injunction and ordered the City to preserve the 15 million potentially responsive emails. However, the court conditioned the injunction on Requestors posting an $2,349.50 undertaking pursuant to Code of Civil Procedure Section 529 (Section 529). Pursuant to Section 529, a court generally must require a party who has obtained a preliminary injunction to post an undertaking, or a sum given as a security, in case a court later determines the injunction was improper. Courts set the amount of the undertaking based on an estimate of the harmful effect the injunction is likely to have on the restrained party. If a court later concludes that the injunction was wrongly issued, it may require some or all of this amount to be distributed to the restrained party to compensate it for the harm it suffered.

Requestors appealed arguing that they did not have to provide a Section 529 undertaking because it: 1) conflicted with the CPRA; and 2) was an unlawful prior restraint under the First Amendment. The Court of Appeal disagreed with both arguments.

First, the Court noted that compliance with Section 529's requirements is a necessary condition to obtain a valid preliminary injunction. While certain statutes expressly exempt certain parties from Section 529's requirements, the CPRA does not.

Next, the Court determined that Section 529's undertaking requirement does not conflict with the CPRA. The Court reasoned that Section 529 provides a general rule: in the event the court grants an injunction, it must require the party that obtained the injunction to post an undertaking. However, the CPRA says nothing on the topic of undertakings. The Court also noted that the just because CPRA applicants can be required to pay copying costs and, in frivolous cases, court costs and attorney's fees, it does not follow that CPRA requestors are exempt from other generally applicable requirements. Further, the Court reasoned that requiring an undertaking for CPRA injunctions did not conflict with the statute's purpose of allowing the public broad access to public records.

Finally, the Court of Appeal concluded that requiring a party seeking records under the CPRA to post a bond is not an "unlawful prior restraint" in violation of the First Amendment. For First Amendment purposes, a "prior restraint" forbids certain communications in advance of the time that such communications are to occur. However, in this case, the City did not forbid Requestors from any communications. It simply asked them to post an undertaking pursuant to Section 529. Thus, the Court of Appeal affirmed the trial court's decision.

Stevenson v. City of Sacramento, 55 Cal. App. 5th 545 (2020).

NOTE:

The superior court initially set the undertaking at $80,000 based on the City's estimate it would cost $80,000 each year to retain all its emails indefinitely. However, the undertaking was reduced to $2,349.50 after the City later determined it would spend as little as $2,349.50 to comply with the injunction.

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.

- A public agency does not have to provide a final paycheck to a terminated public employee until the next regularly scheduled payday. While Labor Code Section 201(a) requires an employer to pay a terminated employee "the wages earned and unpaid at the time of discharge" immediately, Labor Code Section 220 explicitly excludes counties, cities, and other municipal corporations from this requirement.

- Employers are now prohibited from requiring gender or sex-related information from applicants and employees, including seeking proof of an applicant's or employee's gender or gender identity. (2 C.C.R. § 11032.)

- Cal/ OSHA has adopted temporary regulations that require public agencies to prepare implement, and maintain a written COVID-19 Prevention Program (CPP) by November 30, 2020. Public employers can purchase a template CPP from LCW that they can use to customize their CPP at https://www.lcwlegal.com/responding-to-COVID-19/responding-to-the-coronavirus-covid-19-public-agencies.

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 elected officials are required to undergo sexual harassment prevention training.

Answer: The attorney advised the manager that elected officials or members of local agency legislative bodies do need to complete sexual harassment prevention training if the local agency provides any of its elected officials any type of compensation, salary, or stipend. (Government Code Section 53237.) The attorney noted that elected officials and members of local legislative bodies need to complete the training within six months of taking office and every two years thereafter.

BENEFITS CORNER

CalPERS Applies COVID-19 Relief Rule Regarding Timeframe Extensions For Special Enrollment Periods And COBRA Elections During The Federally Declared National Emergency Period.

On May 5, 2020, the IRS and U.S. Department of Labor published the "COVID-19 Relief Rule" (85 FR 26351), providing extended health insurance enrollment periods and coverage for certain plans. Specifically, the COVID-19 Relief Rule extends the 60-day window periods for: 1) providing evidence of a specific qualifying event (such as new enrollment due to loss of coverage or adding a dependent due to marriage, birth, adoption, or placement for adoption) for enrolling for health coverage after the initial enrollment period (i.e., a "special enrollment period"); and 2) to elect continued health coverage through COBRA. These extensions will run from March 1, 2020 until 60 days after the announced end of the national emergency.

Note, these extension of time frames are not mandatory for non-Federal governmental plans, although government agencies such as the U.S. Department of Health and Human Services are encouraging plan sponsors of non-Federal governmental plans to provide relief to participants and beneficiaries similar to that specified in the COVID-19 Relief Rule. If a local government plan decides to implement these extensions, we recommend doing so for all employees to avoid potential discrimination claims, or at the very least based on the criteria outlined in the COVID-19 Relief Rule. Employers will need to carefully work with their insurance provider companies to arrange for these extensions if they decide to do so.

CalPERS has waived the 60-day limitations for special enrollment periods and COBRA elections during the national emergency period and confirmed all contracted health plan partners would comply with the COVID-19 Relief Rule. (See, CalPERS Circ. Letter 600-039-20; https://www.calpers.ca.gov/page/coronavirus/annuitant.)

CalPERS stated that members may execute and submit a signed and notarized CalPERS Affidavit of Marriage/ Domestic Partnership if they are unable, due to extenuating circumstances, to produce a marriage certificate or domestic partnership registration. Additionally, if a member is unable to obtain a government-issued birth certificate for a dependent child due to COVID-19, the member may provide a hospital birth record to facilitate the enrollment and provide the government issued birth certificate once it is available.

CalPERS also stated that health benefit officers (HBOs) are responsible for applying the extensions to eligible employees and family members and processing the transactions. HBOs should contact CalPERS for assistance with processing new enrollments due to loss of coverage and/or adding a newly acquired dependent if the event and date of received enrollment requests are more than 60 days apart.

IRS Releases Final 2020 Forms 1094 & 1095 And Related Instructions For ACA Reporting.

We noted in the October 2020 Benefits Corner that the IRS released drafts of Form 1094-C and Form 1095-C for Applicable Large Employers (ALEs) to use in reporting ACA compliance for the 2020 tax year. The IRS recently issued the final versions of Form 1094-C and Form 1095-C and related instructions. The forms and instructions remain mostly unchanged compared to the previous year except for some of the notable highlights below.

The 2020 Form 1095-C makes completion of the "Plan Start Month box" mandatory for the first time. The Form 1095-C instructions also explain that the affordability threshold for plan years beginning in 2020 is 9.78%. The forms also explain the indexed penalty for reporting failures increased from $270 to $280 per return, with calendar-year maximum penalties increasing from $3,339,000 to $3,392,000. The IRS also provided the following deadlines and updates regarding extensions:

- The due date for furnishing Form 1095-C to individuals was extended from January 31, 2021 to March 2, 2021. The IRS stated it will not grant any further additional extensions for providing individuals Form 1095-C.
- For calendar year 2020, ALEs must file Forms 1094-C and 1095-C by March 1, 2021, or March 31, 2021, if filing electronically.

ALEs should carefully read the forms and instructions when conducting required ACA reporting compliance. LCW remains available to assist employers through this process.

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New to the Firm

Megan Nevin is an Associate in Liebert Cassidy Whitmore's Sacramento office, where she represents public sector employers in all aspects of labor and employment law. Megan is an experienced litigator with a proven track record of success in motion practice and trials.

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Michael Gerst is an experienced litigator in Liebert Cassidy Whitmore's Los Angeles office. His has successfully argued several state and federal appellate matters, including before the United States Courts of Appeals for the Ninth, Fifth, Sixth and Third Circuits.

He can be reached at 310.981.2750 or mgerst@lcwlegal.com.

LCW 2021 VIRTUAL CONFERENCE FEBRUARY 18-19

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Upcoming Webinar

2021 Legislative Update for Public Agencies

Register here!

TUESDAY, DECEMBER 15, 2020 | 10:00 AM - 11:00 AM

California Governor Gavin Newsom signed into law a number of new bills passed in this year's Legislative Session that will impact California employers. Many of these new laws will go into effect on January 1, 2021. This webinar will provide an overview of key new legislation involving labor and employment laws that will impact California's public agencies.

Who Should Attend?
Management and Supervisory Personnel, Human Resources Staff and Agency Counsel.

PRESENTED BY
Che I. Johnson

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Dec. 9 **"Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety - Part 2"**
Coachella Valley ERC | Webinar | Jeremiah A. Heisler

Dec. 9 **"Workers Compensation: Managing Employee Injuries, Disability and Occupational Safety - Part 2"**
San Gabriel Valley ERC | Webinar | Jeremiah A. Heisler

Dec. 9 **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
North State ERC | Webinar | Jack Hughes

Dec. 9 **"Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor"**
San Joaquin Valley ERC | Webinar | Jack Hughes

Dec. 10 **"The Meaning of At-Will, Probationary, Seasonal, Part-Time and Contract Employment"**
Bay Area ERC | Webinar | Heather R. Coffman

Dec. 10 **"Disaster Service Workers - If You Call Them, Will They Come?"**
East Inland Empire ERC | Webinar | Brian J. Hoffman

Dec. 10 **"Disaster Service Workers - If You Call Them, Will They Come?"**
Imperial Valley ERC | Webinar | Brian J. Hoffman

Dec. 10 **"Managing COVID-19 Issues: Now and What's Next"**
San Diego ERC | Webinar | Peter J. Brown & Alexander Volberding

Dec. 16 **"MOU Auditing and The Book of Long Term Debt"**
Central Valley ERC | Webinar | Kristi Recchia

Dec. 16 **"Moving Into The Future"**
Gold Country ERC | Webinar | Erin Kunze

Dec. 16 **"Moving Into The Future"**
Napa/Solano/Yolo ERC | Webinar | Erin Kunze

Dec. 17 **"Exercising Your Management Rights"**
Central Coast ERC | Webinar | Melanie L. Chaney

Dec. 17 **"Exercising Your Management Rights"**
South Bay ERC | Webinar | Melanie L. Chaney

Dec. 17 **"Prevention and Control of Absenteeism and Abuse of Leave"**
LA County HR Consortium | Webinar | Danny Y. Yoo

Jan. 6 **"Introduction to the FLSA"**
Napa/Solano/Yolo ERC | Webinar | Lisa S. Charbonneau

Jan. 7 **"Managing the Marginal Employee"**
Bay Area ERC | Webinar | Ronnie Arenas

Jan. 7 **"Managing the Marginal Employee"**
Gateway Public ERC | Webinar | Ronnie Arenas

Jan. 7	**"Current Developments in Workers' Compensation"** Imperial Valley ERC | Webinar | Richard Goldman
Jan. 7	**"Current Developments in Workers' Compensation"** San Mateo County ERC | Webinar | Richard Goldman
Jan. 13	**"Labor Negotiations from Beginning to End"** Central Valley ERC | Webinar | Che I. Johnson
Jan. 13	**"Current Developments in Workers' Compensation"** Ventura/Santa Barbara ERC | Webinar | Richard Goldman
Jan. 14	**"Public Sector Employment Law Update"** East Inland Empire ERC | Webinar | Richard S. Whitmore
Jan. 14	**"Public Sector Employment Law Update"** San Diego ERC | Webinar | Richard S. Whitmore
Jan. 14	**"Public Sector Employment Law Update"** West Inland Empire ERC | Webinar | Richard S. Whitmore
Jan. 14	**"Managing the Marginal Employee"** LA County HR Consortium | Webinar | Christopher S. Frederick
Jan. 20	**"A Guide to Implementing Public Employee Discipline"** North State ERC | Webinar | Stephanie J. Lowe
Jan. 20	**"A Guide to Implementing Public Employee Discipline"** South Bay ERC | Webinar | Stephanie J. Lowe
Jan. 21	**"Employees and Driving"** San Joaquin Valley ERC | Webinar | Michael Youril
Jan. 27	**"Public Sector Employment Law Update"** Coachella Valley ERC | Webinar | Richard S. Whitmore
Jan. 27	**"Public Sector Employment Law Update"** Gold Country ERC | Webinar | Richard S. Whitmore
Jan. 27	**"Public Sector Employment Law Update"** San Gabriel Valley ERC | Webinar | Richard S. Whitmore
Jan. 27	**"Public Sector Employment Law Update"** Ventura/Santa Barbara ERC | Webinar | Richard S. Whitmore
Jan. 28	**"Maximizing Performance Through Evaluation, Documentation and Corrective Action"** Bay Area ERC | Webinar | Christopher S. Frederick
Jan. 28	**"Maximizing Performance Through Evaluation, Documentation and Corrective Action"** North San Diego County ERC | Webinar | Christopher S. Frederick

Customized Training

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

Dec. 7 **"Skelly Training"**
City of Bakersfield | Webinar | Che I. Johnson

Dec. 8 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Glendale | Webinar | Jenny Denny

Dec. 8 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Webinar | Shelline Bennett

Dec. 8 **"Ethics in Public Service"**
City of National City | Stacey H. Sullivan

Dec. 9 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Webinar | Kristin D. Lindgren

Dec. 11 **"Harassment/Diversity Training"**
City of Clovis | Webinar | Che I. Johnson

Dec. 11 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Town of Truckee | Webinar | Jack Hughes

Dec. 14 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Tracy | Webinar | Erin Kunze

Dec. 15 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Mojave Water Agency | Apple Valley | I. Emanuela Tala

Dec. 15 **"Preventing Workplace Harassment, Discrimination and Retaliation in the Workplace"**
City of Redwood City | Webinar | Kristin D. Lindgren

Dec. 15 **"Key Legal Principles for Public Safety Managers - POST Management Course"**
Peace Officer Standards and Training - POST | San Diego | Stefanie K. Vaudreuil

Jan. 5 **"Key Legal Principles for Public Safety Managers - POST Management Course"**
Peace Officer Standards and Training - POST | San Diego | Mark Meyerhoff

Jan. 6 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
ERMA | Webinar | Michael Youril

Jan. 6 **"FLSA"**
Los Angeles World Airports (LAWA) | Webinar | Elizabeth Tom Arce

Jan. 13 **"Ethics in Public Service"**
Chino Basin Water Conservation District | Webinar | Stacey H. Sullivan

Jan. 21 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Hesperia | Joung H. Yim

Jan. 27 **"Law and Standards or Supervisors"**
Orange County Probation Department | Webinar | Mark Meyerhoff

Speaking Engagements

Dec. 7 **"FLSA Hot Topics & Legal Updates"**
League of California Cities 2020 Municipal Finance Institute | Webinar | Richard Bolanos & Lisa S. Charbonneau

Dec. 8, 9 **"2020 Government Tax and Employee Benefits Webinar"**
Government Tax Seminars (GTS) Annual Government Tax and Employee Benefits Webinar | Webinar | Heather DeBlanc

Dec. 10 **"Telecommuting Policies"**
California Special District Association (CSDA) Webinar | Webinar | Alysha Stein-Manes

Dec. 10 **"Legislative and Legal Update"**
League of California Cities Fire Chiefs Department Business Meeting | Webinar | Morin I. Jacob

Dec. 11 **"Negotiating Retirement and Health Benefits in Tough Economic Times"**
League of California Cities 2020 Municipal Finance Institute | Webinar | Steven M. Berliner & Michael Youril & Robert Neiuber

Dec. 15 **"Legal Update"**
International Public Management Association for Human Resources (IPMA-HR) Sacramento-Motherlode Webinar | Webinar | Shelline Bennett

Dec. 16 **"Legal Update"**
International Public Management Association for Human Resources (IPMA-HR) Central California Chapter | Webinar | Shelline Bennett

Dec. 17 **"The Diverse and Inclusive City"**
League of California Cities 2020 City Clerks New Law & Elections Seminar | Webinar | Anthony Suber & Shelline Bennett

Seminar/Webinars

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

Dec. 15 **"2021 Legislative Update for Public Agencies"**
Liebert Cassidy Whitmore | Webinar | Geoffrey S. Sheldon

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