LIEBERT CASSIDY WHITMORE

EDUCATION MATTERS

News and developments in education law, employment law and labor relations for School and Community College District Administration

MARCH 2020

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LCW NEWS

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

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COVID-19 RESOURCES

U.S. Department Of Education Releases Additional Resources For Elementary And Secondary Schools And Higher Education Institutions Regarding Students With Disabilities, Student Privacy, And Federal Student Aid During COVID-19 Response.

The U.S. Department of Education released additional resources to help public education institutions across the nation navigate changes during the national COVID-19 outbreak and response.

The resources for elementary and secondary schools include a fact sheet for serving students with disabilities, guidance on protecting student privacy, information on flexibilities that will allow students to access meal service during school closures, and recommendations for environmental cleaning.

The Office for Civil Rights also published a fact sheet for education leaders on how to protect students' civil rights as school leaders take steps to keep students safe and secure. The fact sheet presents information on the rights of students with disabilities during school closures and includes tips for preventing incidents of discrimination. It also includes information on ensuring that no student is discriminated against based on race, color, or national origin. The document reminds schools of their legal obligation to comply with non-discrimination obligations under civil rights laws, including Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, and provides tools to assist schools in facilitating distance learning for all students.

The resources for higher education institutions include guidance on accreditation flexibilities, guidance from U.S. Immigration and Customs Enforcement regarding international students affected by COVID-19 closures, and information regarding interruptions of study related to COVID-19.

The Office of Federal Student Aid also issued guidance for students, borrowers, and parents. FSA announced that federal student loan borrowers can be placed in an administrative forbearance, which allows the borrower to temporarily stop making monthly loan payments.

To view the resources, visit: https://www.ed.gov/coronavirus.

NOTE:

LCW has also published many Special Bulletins regarding responding to the COVID-19 outbreak including FAQs on student and employee issues for community college districts and public K-12 school districts. Learn more here: https://www.lcwlegal.com/responding-to-COVID-19.

STANDARDIZED TESTING

U.S. Department Of Education Offers States Waivers From Standardized Testing During COVID-19 Response.

U.S. Secretary of Education Betsy DeVos announced that states affected by school closures due to the coronavirus (COVID-19) pandemic can request a waiver from the Department for relief from federally mandated testing requirements for this school year.

States unable to assess its students may seek a waiver from federal testing requirements by completing a form available at oese.ed.gov. Additionally, because statewide accountability systems include measures on student performance on the statewide assessments, any state that receives a one-year waiver may also receive a waiver from the requirement that this testing data be used in the statewide accountability system due to the national emergency.

On March 18, 2020, California Gov. Gavin Newsom issued an executive order to waive, pending federal approval, this year's statewide testing for California's more than 6 million students in K-12 schools.

To read the Department's announcement, visit: https://www.ed.gov/news/press-releases/helping-students-adversely-affected-school-closures-secretary-devos-announces-broad-flexibilities-states-cancel-testing-during-national-emergency?

To read Gov. Newsom's executive order, visit: https://www.gov.ca.gov/2020/03/18/governor-newsom-issues-executive-order-to-suspend-standardized-testing-for-students-in-response-to-covid-19-outbreak/?

TITLE IX

U.S. Department Of Education Announces Initiative To Combat Sexual Assault In K-12 Public Schools.

The U.S. Department of Education announced a new Title IX enforcement initiative to combat the rise of reported sexual assault in K-12 public schools. The Department's Office for Civil Rights enforces Title IX, which prohibits discrimination based on sex in education programs and activities operated by recipients of federal financial assistance. Title IX's prohibition of discrimination includes sexual harassment and assault, which interferes with students' rights to receive an education free from discrimination based on sex.

Under the initiative, the Department's Office for Civil Rights will undertake the following activities:

- Compliance Reviews: OCR will conduct nationwide compliance reviews in schools and districts examining how sexual assault cases are handled under Title IX, including sexual incidents involving teachers and school staff.
- Public Awareness and Support: OCR will make information available to educators, school leaders, parents, and families regarding sexual assault in K-12 schools.
- Data Quality Reviews: OCR will conduct review the sexual assault/offenses data submitted by school districts through the Civil Rights Data Collection and ensure districts accurately record and report incidents of sexual assault/sexual offenses through the CRDC.
- Proposed CRDC Data Collection: OCR proposed to collect more detailed data on sexual assault for the 2019-2020 Civil Rights Data Collection. The proposed data collection includes incidents perpetrated by school staff or school personnel.

Read the Department's press release here: https://www.ed.gov/news/press-releases/secretary-devos-announces-new-civil-rights-initiative-combat-sexual-assault-k-12-public-schools.

NOTE:

The U.S. Department of Education is currently evaluating public comments on its proposed Title IX regulations. The proposed regulations may change an educational entity's legal obligation under Title IX to respond to incidents of sexual violence. LCW is tracking the regulations and will continue to provide updates.

LITIGATION

The Reason A Petitioner Submits To Justify Granting Relief From The Government Code's Claim Presentation Requirement Must Be The Same As The Reason Advanced In The Underlying Application To The Agency.

During high school football team tryouts, a minor student collapsed due to extreme exhaustion and dehydration after the coach denied him water. The student suffered permanent injuries as a result. The student's mother filed a lawsuit on behalf of her son three months later for gross negligence and negligent misrepresentation against the District, its superintendent, the school principal, and the football coach.

The California Government Code requires an individual suing a public agency based on a personal injury to first submit a written claim to the agency no more than six months after the injury—a process called the claim presentation requirement. If the individual misses

this six-month window, she must submit a written application to the agency asking for leave to present the new claim. The agency must allow leave when the failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect and the agency was not prejudiced in its defense of the claim.

Here, seven months after the injury occurred, the mother asked the District to allow her to file her own claims against the District because her son's injuries negatively affected her ability to work. The District did not act on the mother's application, so it was deemed denied after 45 days.

The mother then petitioned the trial court for relief from the claim presentation requirement based on "mistake, inadvertence, surprise, or excusable neglect." Her petition stated she missed the six-month window because she was originally unaware of the nature and extent of her son's injuries until after the window closed. The District opposed the mother's petition and argued the mother had not established excusable neglect.

The court issued a tentative ruling denying the mother's petition on the grounds she failed to demonstrate excusable neglect. The court found the mother was aware that her son's injuries caused her financial problems of some significance shortly after they occurred and she had been thinking of these problems.

However, the parties participated in an oral argument and additional briefing. Contrary to the mother's original argument, the mother's attorney submitted a declaration that stated the reason the mother failed to file her claims on time was his own mistake, neglect, inadvertence, or excusable neglect. The trial court found the mother met her burden of proof to demonstrate her neglect was excusable and granted the mother's petition. The District appealed.

The Court of Appeal found that although the mother had the right to present additional evidence at the oral argument, state law did not allow her to present additional reasons for the excusable neglect. In other words, the reason the mother offered to the trial court regarding her excusable neglect and to the agency must be the same. The Court of Appeal also held that the agency must have the opportunity to consider the mother's reasons for filing a late claim, so the reasons cannot change in the mother's appeal to the trial court. Here, the mother presented additional evidence about a new reason for her excusable neglect, and she only did this after the trial court issued the tentative decision ruling against the her.

Accordingly, the trial court abused its discretion to eliminate the statutory claims presentation requirement. The Court of Appeal ordered the trial court to vacate its order on behalf of the mother and deny her requested relief.

Lincoln Unified Sch. Dist. v. Superior Court of San Joaquin Cty. (2020) __ Cal.App.5th __ [2020 WL 1024682].

EQUAL PAY ACT

Ninth Circuit Court Of Appeals Rules Employers Cannot Consider Prior Pay In Determining Employee's Pay.

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

Under the Equal Pay Act, an employee must first prove that he or she received different wages for equal work. The burden then shifts to the employer to show the 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 Office of Education conceded that Rizo received lower pay for equal work. But, the County Office of Education argued that its consideration of Rizo's prior salary was permitted as a "factor other than sex." The trial court rejected the County Office of Education's argument and held that a "factor other than sex" could not be prior salary. The County Office of Education appealed.

In its 2017 opinion, the Court of Appeals analyzed its previous opinion in *Kouba v. Allstate Insurance Co.* in which the Court 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 Office of Education 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 Office of Education; (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 of Appeal sent the case back to the trial court to evaluate the County Office of Education's reasons. Then, the Court of Appeals granted a petition for rehearing before all of the judges of the court to clarify the law, including the continued effect of *Kouba.*

In the rehearing in 2018, the Court of Appeals considered which factors an employer could consider to justify a salary difference between employees under the "factors other than sex" exception to the Equal Pay Act. 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 of Appeals 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" within the meaning of the Equal Pay Act. The Court of Appeals 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 Office of Education failed to set forth an affirmative defense for why it paid Rizo less than her male colleagues for the same work.

However, before the Court of Appeals 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 Court of Appeal's previous opinion in *Kouba*. Although the five living judges agreed in the ultimate judgment, they did so for different reasons.

The County Office of Education 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 U.S. Supreme Court ruled that because the judge was no longer a judge at the time the decision by the entire Ninth Circuit was filed, the Court of Appeals erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. Therefore, the Supreme Court vacated the opinion written by the deceased judge and sent the case back to the Court of Appeals for further proceedings.

All judges of the Ninth Circuit reheard the case again in September 2019. On appeal, the County Office of Education 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, and employers were not allowed to rely on prior pay to justify wage disparities for employees of the opposite sex.

The Court of Appeals again examined the 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 employers cannot consider prior pay as factor in determining an employee's pay. Accordingly, prior pay, alone or in combination with other factors, cannot serve as a defense to an Equal Pay Act claim. However, the 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 (2019) 950 F.3d 1217.

NOTE:

This decision is binding precedent in California, but it conflicts with Court of Appeals decisions in other circuits. This conflict makes this case ripe for consideration by the United Stated Supreme Court. LCW will continue to monitor any developments.

BUSINESS & FACILITIES

To Recover Under Public Contract Code Section 5110, A Contractor Must Demonstrate That The Public Entity Caused A Defect In The Competitive Bidding Process, Not Merely That It Caused The Contract To Be Invalidated.

In March 2015, the California Department of Corrections and Rehabilitation (CDCR) issued an invitation for contractors to bid on a $100 million heating, ventilation, and air conditioning (HVAC) system project.

In April 2015, Hensel Phelps submitted its bid for the project with a price just over $88 million. As part of its bid, Phelps provided required information pertaining to the subcontractors it intended to use and the percentage of the contract work that it estimated each subcontractor would perform. CDCR determined that Phelps was the lowest bidder.

In May 2015, after the deadline for bids expired, Phelps submitted an amended bidder declaration, revising the subcontractor percentages and contractor rates. CDCR took the position that, while a bidder could amend information concerning the contractors, bidders could not revise the subcontractor percentages or rates, which CDCR considered material terms of the bid. CDCR therefore rejected Phelps's May 1 amendment, and returned the amendment to Phelps.

In the meantime, West Coast Air Conditioning Company (West Coast), the second-lowest bidder, sent CDCR a complaint regarding Phelps's bid.

On the same day that CDCR issued a notice of intent to award the project to Phelps, Phelps learned that CDCR rejected its amended bidder declaration. Nevertheless, Phelps executed the contract with the understanding that CDCR had rejected the amended bid.

West Coast then filed a petition in the Superior Court seeking to invalidate the contract and prohibit Phelps from constructing the project. With the challenge pending, CDCR executed the contract with Phelps and issued Phelps a notice to proceed. Phelps promptly commenced work on the project.

In September 2015, the superior court invalidated the contract between CDCR and Phelps due to the "numerous arithmetical/typographical mistakes which required CDCR to reject the bid as non-responsive." The court explained that these errors were material to bid and CDCR could not waive them and award the contract to Phelps. In October 2015, the court issued a restraining order, halting work on the project.

In August 2016, Phelps filed a complaint against CDCR, bringing a cause of action based on Public Contract Code section 5110, which, in pertinent part, provides for a contractor's recovery if "the contract is later determined to be invalid due to a defect or defects in the competitive bidding process caused solely by the public entity." Phelps sought its unpaid costs on the project, alleging that its contract was determined to be invalid as a direct result of CDCR's actions and decisions during the competitive bidding process.

In pre-trial proceedings, CDCR argued that Phelps could only prevail on its section 5110 cause of action if it established that the contract was invalidated "[d]ue to a defect or defects in the competitive bidding process caused solely by" CDCR. CDCR argued that Phelps could not do so. CDCR argued that the superior court invalidated the contract because Phelps's bid contained material non-waivable errors.

Phelps argued that the trial court's invalidation of the contract was a prerequisite to its action, and that the contract was, in fact, invalidated due to a defect in the bidding process. Phelps argued that CDCR's failure to find Phelps's bid non-responsive after West Coast's bid protest and CDCR's decision to award the contract to Phelps constituted defects in the bidding process chargeable to CDCR. After a seven-day trial, the trial court ruled in favor of Phelps.

The trial court rejected CDCR's argument that the ruling on West Coast's protest controlled the result in this case. The court found that Phelps's bid "lawfully consisted" of both the April bid and the May amended bidder declaration, and, as constituted, "fully complied" with the bid solicitation. The court found that CDCR erred in rejecting the May amended bidder declaration and that, if CDCR had accepted the amendment, the contract would not have been invalidated by the superior court. The trial court then entered judgment in favor of Phelps. CDCR appealed the decision.

On appeal, the Court of Appeal analyzed Public Contract Code section 5110. The Court questioned which of two statutory interpretations should apply: (1) recovery is possible if "the contract is invalidated for a defect or defects in the competitive bidding process caused solely by the public entity" or (2) recovery is possible if, "after the contract is invalidated, it is determined that the invalidation finding itself was due to a defect or defects in the competitive bidding process caused solely by the public entity." CDCR advocated the former interpretation and Phelps the latter.

The Court of Appeal, after reviewing the statutory language at issue and considering the language in the rest of the statute, concluded that CDCR's argument was the reasonable one. The Court of Appeal then considered the legislative history of the statute. The Court concluded that the purpose of the language at issue was to provide payment to a contractor for work already performed if the contractor relied in good faith on the public agency and the agency then invalidated the contract. The Court concluded that, in enacting the Public Contract Code section 5110, the Legislature agreed to provide an exception to established law that had placed all the risk of public contract invalidation on the contractor. The Court found that, in the final version of the bill, the exception was limited to those cases where that defect was solely the fault of the public entity. The

Court determined that it is the defect for which the contract is invalidated – not the invalidation itself – which must be the fault of the public entity.

The Court then applied its statutory analysis to the facts at issue between Phelps and CDCR, and found that the contract was invalidated for a material error in Phelps's bid, not for any defect in CDCR's competitive bidding process. As a result, the Court of Appeal held that Public Contract Code section 5110 cannot provide a basis for recovery.

The Court then remanded the case to the trial court to vacate its prior order and issue a new and different order in CDCR's favor.

Hensel Phelps Construction Company v. Department of Corrections and Rehabilitation (2020) 45 Cal.App.5th 679.

Property Encroachments Are Not Subject To Three-Year Statute Of Limitations Unless the Encroachment Is Permanent And Cannot Be Remedied At A Reasonable Cost.

Ali Madani and Michael Rabinowitz are next door neighbors in Los Angeles. Rabinowitz had lived on his property since 1979 and Madani, who purchased his property in 2000, began living there in 2015.

Madani's parcel is mostly located behind Rabinowitz's except for a 10-foot wide "flagpole" of land that extends out to the street.

Since Rabinowitz moved onto his property, a fence has run alongside the driveway separating the driveway from an adjacent property. Rabinowitz has used the driveway to store old and inoperable cars he owned. In 2015, Rabinowitz replaced the original fence with a new one in the same location.

In April 2015, Madani asked Rabinowitz to move the cars parked on his driveway in order for Madani to repair the driveway. In June 2015, Madani sent Rabinowitz a letter reiterating his request. Rabinowitz did not respond. In July 2015, Madani mailed a second letter, again requesting that Rabinowitz move his cars from the driveway. In August, Rabinowitz responded, stating that he was "unwilling to forfeit [his] right to park" on the driveway.

Madani commissioned a survey of his property, which confirmed that the portion of the driveway where Rabinowitz parked his cars was Madani's property. The survey also revealed that Rabinowitz's fence encroached onto Madani's property by approximately two feet.

In March 2016, Madani filed a complaint against Rabinowitz, claiming that the fence and cars constituted a trespass and a nuisance. Madani sought to remove a portion of Rabinowitz's fence which encroached on his property, and to enjoin Rabinowitz from parking his cars on the driveway. In turn, Rabinowitz filed a complaint against Madani, seeking to claim title to Madani's driveway based on the theories that he had an easement to use the driveway and improved the property in good faith.

At trial, Rabinowitz raised a statute of limitations defense to Madani's claims. Rabinowitz argued that the fence constituted a permanent encroachment, which is subject to a three-year statute of limitations that began to run on the date that the encroachment began. Madani countered that both the fence and the cars constituted continuing, rather than permanent, encroachments, and that his claims against Rabinowitz were not subject to the three-year statute of limitations.

After a court trial, the court found: (1) Madani's trespass and nuisance claims were not barred by the statute of limitations, as Rabinowitz's fence and vehicles were continuing rather than permanent encroachments; and (2) Rabinowitz did not prove he was entitled to judgment based on his prescriptive easement and good faith improver claims. The trial court issued an injunction requiring Rabinowitz to remove his fence and cars from Madani's property. Rabinowitz appealed.

On appeal, the Court of Appeal first considered whether Rabionwitz's encroachment was continuing or permanent and whether Madani's claims were time-barred.

The Court concluded that a continuing nuisance is a series of successive injuries. A permanent nuisance is a permanent injury to property. For continuing nuisances, each repetition of the nuisance is a separate wrong, and begins a new statutory period during which the injured person may sue based upon the new injury. By contrast, the statute of limitations for a permanent nuisance begins to run when the nuisance begins and bars all claims after the passage of the three-year period.

Rabinowitz argued that the encroachment of the fence constituted a permanent encroachment because it was erected prior to 1979. In support of this position, Rabinowitz contended the fence was intended to be a permanent structure and has been affixed to posts or poles cemented into the ground where, for over 30 years, it has served as a boundary marker. He argued that Madani's claims were therefore barred by the statute of limitations.

The Court considered Supreme Court precedent, which provides that the crucial test of the permanency of a trespass or nuisance is whether the trespass or nuisance can be discontinued or abated. Under this test, a trespass

or nuisance is continuing if it can be remedied at a reasonable cost by reasonable means. If not, the trespass or nuisance is permanent. The Court then considered that Rabinowitz replaced the fence in 2015, and that he testified the existing fence could be moved for a comparatively modest cost. On these undisputed facts, the Court concluded that the expense Rabinowitz would incur in moving his fence is not sufficient to regard the fence as permanent.

Accordingly, the Court of Appeal concluded that the trial court did not err in finding the fence was a continuing encroachment, and correctly concluded Madani's claims for trespass and nuisance based on the fence's encroachment were not barred by the statute of limitations. The Court of Appeal then affirmed the trial court's decision in Madani's favor, and ordered Rabinowitz's fence and cars removed.

Ali Madani v. Michael Rabinowitz (2020) 45 Cal.App.5th 602.

New Bid Limit Of $95,200 For School And Community College District Contracts.

As of January 1, 2020, the bid threshold over which community college district and school district governing boards must competitively bid and award certain contracts was raised to $95,200. This threshold level applies to the following types of contracts:

Purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district;
Services, other than construction services; and
Repairs, including maintenance as defined in Public Contract Code (PCC) sections 20115 and 20656, as applicable, which are not public projects as defined in PCC section 22002 subdivision (c).

PCC sections 20111 subdivision (a) and 20651 subdivision (a) require school and community college district governing boards, respectively, to competitively bid and award any contracts involving an expenditure of more than $50,000, adjusted for inflation, to the lowest responsible bidder. The State Superintendent of Public Instruction and the Board of Governors of the California Community Colleges must annually adjust the $50,000 amount specified in the PCC. Both entities have increased the bid limit 2.76% to $95,200 for 2020.

Contracts for construction of public projects, as defined in PCC section 22002 subdivision (c), still have a bid threshold of $15,000. Public projects include contracts for reconstruction, erection, alteration, renovation, improvement, demolition, and repair. This $15,000 threshold is not adjusted for inflation.

The notice adjusting the bid limits is on the California Department of Education's website here. The California Community Colleges Chancellor's Office also posted its notice adjusting the bid limits here.

DISCRIMINATION

Openly Gay CHP Officer Overcomes CHP's Statute Of Limitations Defense to FEHA Lawsuit.

Jay Brome began his employment with the California Highway Patrol (CHP) in 1996. During his nearly 20-year career, other officers subjected Brome, who was openly gay, to derogatory, homophobic comments, singled him out for pranks, repeatedly defaced his mailbox and refused to provide him with backup assistance during enforcement stops in the field.

Brome eventually transferred CHP offices seeking a better work environment, but the offensive comments about his sexual orientation continued. Officers at Brome's new office also frequently refused to provide Brome with backup assistance during enforcement stops, including high-risk situations that should be handled by at least two officers. Brome was the only officer who did not receive backup. Further, when Brome won an officer of the year award, the CHP never displayed his photograph, which was a break from practice.

Through 2014, Brome continued to complain to his supervisors. They told him they would look into it, but the problems continued, and Brome believed management refused to do anything about it. As a result, Brome feared for his life during enforcement stops, experienced headaches, muscle pain, stomach issues, anxiety and stress, and became suicidal. In January 2015, Brome went on medical leave and filed a workers' compensation claim based on work-related stress.

After Brome took leave, his captain sent him a letter stating that he hoped they could work together to resolve Brome's work-related issues. Brome's workers' compensation claim was eventually resolved in his favor, and on February 29, 2016, Brome took industrial disability retirement.

On September 15, 2016, Brome filed a complaint with the Department of Fair Employment and House (DFEH) asserting discrimination and harassment based on his sexual orientation and other claims under the Fair Employment and Housing Act (FEHA). The next day, Brome filed a civil lawsuit. The CHP sought to dismiss the lawsuit as untimely. Under the FEHA at the time of the lawsuit, an employee's DFEH complaint must have

been filed within one year of the alleged discriminatory or harassing conduct. While the crux of Brome's claims occurred before his medical leave in January 2015, Brome did not file his administrative complaint until September 15, 2016. Accordingly, the CHP argued that Brome could only sue based on acts occurring on or after September 15, 2015. While Brome argued that various exceptions to the one-year deadline applied, the trial court ultimately dismissed Brome's lawsuit. Brome appealed.

The court of appeal considered three exceptions that could extend the one-year deadline: equitable tolling, continuing violation, and constructive discharge.

First, the court determined that Brome's workers' compensation claim could equitably toll the one-year deadline for filing his DFEH complaint. The equitable tolling doctrine suspends a statute of limitations to ensure fairness. To use equitable tolling, the employee has to prove: (1) timely notice; (2) lack of prejudice to the employer; and (3) his or her own good faith conduct. The court concluded that Brome could establish all of the elements. Brome's workers' compensation claim put the CHP on notice of his potential discrimination claims because it had to investigate the circumstances that caused him work-related stress. The court said that a reasonable jury could not find that applying the equitable tolling doctrine would prejudice the CHP. Finally, the court noted that Brome exhibited good faith and reasonable conduct in waiting to file his complaint until after the resolution of his workers' compensation claim.

Second, the court determined that the statute of limitations could be extended as a continuing violation. That doctrine allows liability for conduct occurring outside the statute of limitations if the conduct is sufficiently connected to conduct within the limitations period. To establish a continuing violation, an employee must show that the employer's actions are: (1) sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence. The homophonic conduct against Brome was ongoing and very common, and a jury could find that it was reasonable for Brome to seek a fresh start at a different office and request assistance from his supervisors there once similar problems arose. Further, Brome's supervisors consistently told him they would look into and address his concerns.

Finally, the court concluded that the constructive discharge theory could possibly apply. To establish constructive discharge, an employee must show that working conditions were so intolerable that a reasonable employee would be forced to resign. The court found that Brome raised a triable issue as to whether his working conditions were so bad a reasonable employee would have resigned. For example, Brome was routinely forced to respond to high-risk situations alone.
For these reasons, the court held that the trial court erred in dismissing Brome's lawsuit. The court remanded the case back to the trial court for further proceedings.

Brome v. California Highway Patrol (2020), 44 Cal.App.5th 786.

NOTE:

Effective January 1, 2020, the statute of limitations to file a DFEH claim has been extended from 1 to 3 years. Employers have a legal duty to promptly investigate claims of discrimination and harassment to not only limit liability, but to provide a safe and productive workplace for all employees.

WAGE & HOUR

Time Spent In Mandatory Exit Searches Constituted "Hours Worked" For Purposes Of California Minimum Wage Law.

Apple uses an "Employee Package and Bag Searches" policy. This policy imposes mandatory, thorough searches of employees' bags, packages, purses, briefcases, and personal Apple technology devices before the employees can leave an Apple retail store for any reason.

Under the policy, Apple employees must clock out before the exit search. Employees estimate that exit searches range from five to 20 minutes, depending on manager or security guard availability.

A number of Apple employees filed a lawsuit in federal court alleging that Apple failed to pay them minimum and overtime wages for their time spent waiting for and undergoing exit searches in violation of California law. Industrial Welfare Commission Wage Order 7 (Wage Order 7) requires employers to pay their employees a minimum wage for all "hours worked," which is defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." The first clause of the definition – "the time during which an employee is subject to the control of an employer" – is known as the "control clause."

The district court concluded that the time spent by employees waiting for and undergoing exit searches was not compensable as "hours worked" under California law. The court determined that the control clause required the employees to prove that: (1) the employer restrains the employees' action during the activity in question; and (2) the employees had no plausible way

to avoid the activity. The employees appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit asked the California Supreme Court to address the state law issue.

The California Supreme Court, however, determined that the employees' time related to exit searches was indeed "hours worked" under the control clause. The Court reasoned that the employees are clearly under Apple's control while waiting for and undergoing the exit searches. Apple employees are subject to discipline if they refuse the searches. Apple also confines its employees to the premises while they wait for and undergo the search, and requires employees to perform specific tasks such as locating a manager and unzipping compartments and removing items for inspection.

While Apple argued that the employee's activity had to be "required" or "unavoidable" in order to be compensable, the Court disagreed. The Court noted that those words did not appear in the control clause and that such a definition would be at odds with the wage order's fundamental purpose of protecting and benefitting employees. The Court also rejected Apple's argument that California precedent supports the notion that an activity has to be "unavoidable" in order to be compensable because the Court was not aware of any California case discussing the precise issue of whether time spent at the worksite relating to searches is compensable as "hours worked."

The Court noted that while exit searches may not be "required" in a formal sense because employees could choose not to bring personal belongings to work, as a practical matter they are. Employees have little genuine choice concerning whether to bring ordinary, everyday items such as a wallet, keys, and a cell phone to work. Indeed, Apple markets its iPhone as an "integrated and integral" part of the lives of its customers.

Ultimately, the Court concluded that the level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative of whether an activity is compensable under the "hours worked" control clause. The Court also concluded that courts should consider additional relevant factors, including the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures. Applying these factors to this case, the Court determined that it was clear the employees were subject to Apple's control during the exit searches and must be compensated for their time.

Frlekin v. Apple Inc. (2020) 8 Cal.5th 1038.

NOTE:

While Wage Order 7 does not apply to the public sector, the hours worked section of Wage Order 4 is applicable to public agencies and contains the same language the Court interpreted in this case. Accordingly, this decision offers guidance to public agencies as to how California courts would interpret the "hours worked" language in Wage Order 4.

CONFLICT OF INTEREST

Individual Could Not Simultaneously Serve As Mayor And Director Of Water Replenishment District.

Albert Robles served as a member of the board of directors of the Water Replenishment District of Southern California (WRD). The WRD ensures that a reliable supply of groundwater is available throughout the region and is responsible for monitoring and testing the groundwater supply. As a WRD director, Robles represented a geographic division that included Carson, California.

The WRD board of directors charges a "replenishment assessment" to fund its operating expenses and other activities. The replenishment assessment is levied on the production of groundwater within the district during the ensuing fiscal year. The City of Carson contracts with two private companies to provide its pumped groundwater. The companies pay the WRD's replenishment assessment and pass on the cost in the water rates they charge.

Robles was a WRD director in 2013 when he was elected to a city council seat in Carson. The District Attorney notified Robles that he was holding two incompatible offices under Government Code section 1099, but Robles continued to occupy both. Section 1099 makes it unlawful to simultaneously hold incompatible public offices, meaning, offices for which "there is a significant clash of duties or loyalties" based on the powers and jurisdiction of the positions. In April 2015, Robles was appointed to fill the vacant office of mayor of Carson. As mayor, Robles continued to sit on the city council.

Subsequently, the District Attorney requested approval from the Attorney General to sue Robles in *quo warranto*, a Latin term for a legal proceeding that demands a person show by what authority he or she holds a public office. The Attorney General granted the District Attorney's application, and the District Attorney filed a *quo warranto* complaint alleging that Robles' two offices were incompatible under section 1099 "because the WRD and City of Carson have overlapping territories, duties, and responsibilities, and a clash of duties is likely to arise in the exercise of both offices simultaneously." The

WRD then passed resolutions expressly authorizing directors to hold positions in other governmental agencies. But the trial court agreed with the District Attorney and removed Robles from the office of WRD director. Robles appealed.

The California Court of Appeal affirmed the trial court's decision that Robles was holding incompatible offices. The court noted that Robles was setting the water replenishment assessment for his Carson constituents. As mayor and a councilmember, Robles had an electoral incentive to minimize the amount of the replenishment assessment. However, as a WRD director, Robles' duties required him to focus on ensuring the adequacy of the groundwater supply, not the financial impact of the assessment on Carson's residents. The court reasoned that section 1099 forbids this sort of conflicted arrangement by making it unlawful to hold multiple public offices when there is a "possibility of a significant clash of duties or loyalties" between them.

The court was not persuaded by any of Robles' arguments to the contrary. While Robles challenged the District Attorney's authority and process for bring a *quo warranto* proceeding, the court concluded that the District Attorney's actions were lawful. Further, the court noted that there was no "law" expressly authorizing Robles to hold both offices. Section 1099 allows an individual to hold two incompatible offices if "simultaneous holding of the particular offices is compelled or expressly authorized by law." While Robles argued that WRD passed resolutions expressly authorizing a director to hold positions in other agencies, the court determined that the Legislature's reference to "law" meant state, not local law.

People ex rel. Lacey v. Robles (2020) 44 Cal.App.5th 804.

NOTE:

This case highlights the potential conflict of interest that arises when an agency official holds multiple offices. WRD's resolutions expressly authorizing directors to hold positions in other governmental agencies did not override state law prohibiting incompatible offices.

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.

CA Attorney General Becerra issued an opinion on February 7, 2020 giving a firefighters' union approval to sue under the *quo warranto* procedure regarding the City of Palo Alto's action to rescind the binding interest arbitration provision in its city charter. (Attorney General Opinion No. 19-701.)

If litigation has been threatened outside a local agency's public meeting, it may be discussed in closed session under Government Code §54956.9(e)(5) only if a record of the threat is made before the meeting. (Fowler v. City of Lafayette, 2020 WL 612870 (Cal. Ct. App. February 10, 2020.)

A qualifying disability for Industrial Disability Retirement must be permanent or "extended and uncertain," meaning that the disability will last at least 12 months. (CalPERS Circular Letter 200-018-17 (Mar. 30, 2017).)

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 called LCW to ask whether the district could request a doctor's note from an employee who called in sick for the third consecutive day.

Answer: The attorney explained that California's Paid Sick Leave law is silent as to whether employers can request medical verification. There is a risk of liability for violating this law if the employer insists on getting a doctor's note before it permits the use of this type of paid sick leave. This law requires employers to provide employees with paid sick leave upon oral or written request, and allows the employee to determine how much sick leave to use. It further provides that employers cannot deny the right to use sick leave.

An employer's insistence on medical verification for this type of paid sick leave is risky because employees could claim a denial of their paid sick leave entitlement. The employer's risk in requiring verification, however, would most likely only apply to the first 24 hours or 3 days of

paid sick leave used in a 12-month period. After this type of sick leave is used, any other type of sick leave provided by an employer through an MOU or internal policy, however, could be subject to medical verification requirements.

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Management Training Workshops

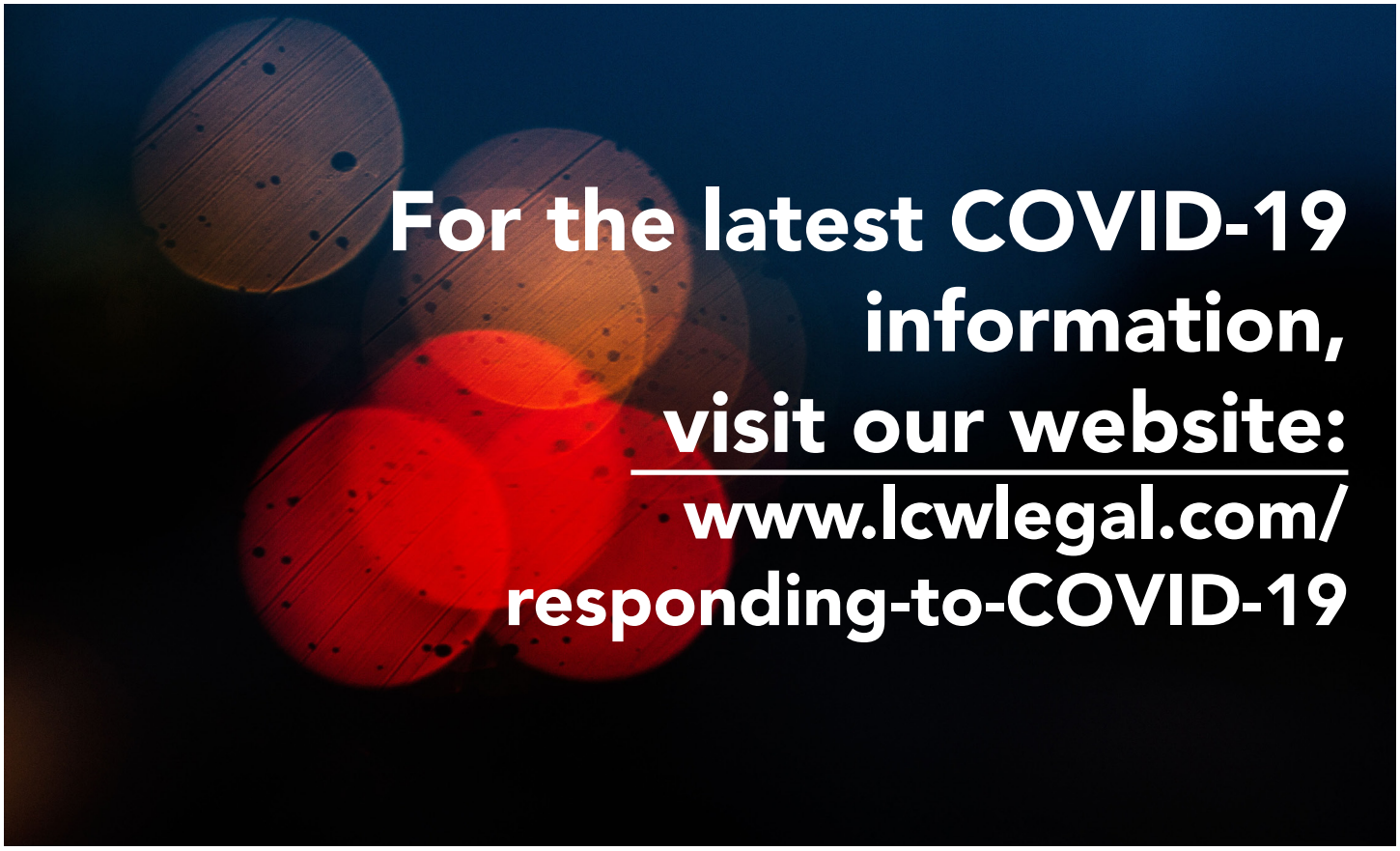
Firm Activities

Consortium Training

Apr. 2 **"Supervisor's Guide to Public Sector Employment Law"**
Gold County ERC | Webinar | Che I. Johnson

Apr. 2 **"Maximizing Performance Through Evaluation, Documentation and Corrective Action"**
San Joaquin Valley ERC | Webinar | Jack Hughes

Apr. 3 **"Temporary Faculty Members"**
Central CA CCD ERC | Webinar | Alysha Stein-Manes



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