LCW LIEBERT CASSIDY WHITMORE

PRIVATE EDUCATION MATTERS

News and developments in education law, employment law and labor relations for California Independent and Private Schools and Colleges.

APRIL 2018

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Los Angeles | Tel: 310.981.2000
San Francisco | Tel: 415.512.3000
Fresno | Tel: 559.256.7800
San Diego | Tel: 619.481.5900
Sacramento | Tel: 916.584.7000

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STUDENTS

NEGLIGENCE

Universities Have a Special Relationship With Their Students and a Duty to Protect Them From Foreseeable Violence During Curricular Activities.

Damon Thompson was a transfer student at UCLA. After enrolling, Thompson began to experience problems with other students in both classroom and residence hall settings. On multiple occasions, Thompson complained to professors, a dean, and a teaching assistant about the alleged harassing behavior of other students and professors during class and in his residence hall.

UCLA urged Thompson to seek help at the university's Counseling and Psychological Services (CAPS), but Thompson's complaints of hearing voices and threats from other students only increased. After a discussion with his residence hall director, campus police escorted Thompson to the emergency room for a psychiatric evaluation where doctors diagnosed Thompson with possible schizophrenia and major depressive disorder. Thompson agreed to take medication and begin outpatient treatment at CAPS. UCLA was informed about the incident and Thompson's mental evaluation.

However, Thompson discontinued the medication and continued to report hearing voices and being harassed by other students. At a psychiatric session, he admitted to thinking about harming others, although he had no identified victim or plan. CAPS staff agreed that Thompson did not meet the criteria for an involuntary psychiatric hold, and Thompson later withdrew from outpatient treatment.

A few months later in June 2009, Thompson accused a dormitory resident of making too much noise and pushed the resident. UCLA expelled Thompson from university housing and ordered him to return to CAPS in the fall quarter.

Throughout the summer session and fall quarter, Thompson continued to experience auditory hallucinations in the classroom and again agreed to start treatment at CAPS. In one incident in a chemistry lab, Thompson accused a specific unnamed student as one of his alleged tormentors. UCLA decided to investigate whether Thompson was having similar difficulties in other classes. The same day, Thompson missed a scheduled session at CAPS.

Two days after the incident in the chemistry lab, Thompson, without warning or provocation, stabbed fellow student Katherine Rosen in the chest and neck with a kitchen knife. Rosen survived the life-threatening injuries. Thompson admitted to campus police that he stabbed someone because the other students had been teasing him. He pleaded not guilty by reason of insanity to a charge of attempted murder, and after admission to a state hospital was diagnosed with paranoid schizophrenia.

Rosen sued Thompson, the Regents of the University of California and several UCLA employees for negligence. Rosen alleged UCLA had a special relationship with her as

an enrolled student, which entailed a duty "to take reasonable protective measures to ensure her safety against violent attacks and otherwise protect her from reasonable foreseeable criminal conduct, to warn her as to such reasonable foreseeable criminal conduct on its campus and in its buildings, and/or to control the reasonably foreseeable wrongful acts of third parties/ other students." She alleged UCLA breached this duty because, although aware of Thompson's "dangerous propensities," it failed to warn or protect her or to control Thompson's foreseeably violent conduct.

UCLA argued the case should not proceed because: (1) colleges have no duty to protect their adult students from criminal acts; (2) if a duty does exist, UCLA did not breach it in this case; and (3) UCLA and one employee were immune from liability under certain Government Code provisions. Rosen argued UCLA owed her a duty of care because colleges have a special relationship with students in the classroom, based on their supervisory duties and the students' status as "business invitees"—in this case, a person invited into the classroom to receive an education. Rosen also claimed UCLA assumed a duty of care by undertaking to provide campus-wide security.

The trial court ruled against UCLA and concluded a duty could exist under each of the grounds Rosen identified, there was a question about whether UCLA breached that duty, and the immunity statutes did not apply. UCLA appealed the ruling, and a divided panel of the Court of Appeal granted the appeal.

The majority held that UCLA owed no duty to protect Rosen based on her status as a student or business invitee or based on the failure of its campus-wide security program. The court also rejected Rosen's new theories of duty based on contract and labor laws regarding violence in the workplace. Rosen sought review in the California Supreme Court, which granted review of the decision.

In general, people have a duty to act with reasonable care under the circumstances. A duty to control, warn, or protect may be based on a defendant's relationship with either the person whose conduct needs to be controlled or with the foreseeable victim of that conduct. Specifically, a duty to control may arise if a party has a special relationship with the foreseeably dangerous person that entails an ability to control that person's conduct. One example of this type of relationship is the parent-child relationship. Similarly, a duty to warn or protect may be found if a party has a special relationship with the potential victim that gives the victim a right to expect protection. One example of this type of relationship is innkeepers and their guests.

Prior to this case, the California Supreme Court held that high schools have a duty to protect students from an assault on campus, but it had not extended that duty to institutions of higher education in the same context. In this case, the Court had to decide whether postsecondary institutions have a special relationship with students while they are engaged in activities that are part of the institution's curriculum or closely related to its delivery of educational services. The Court considered the level of dependence that college students have on a college and the level of control the college has over its students and campus. Ultimately, the Court concluded the college-student relationship fits within the paradigm of a special relationship but only in the context of college-sponsored activities over which the college has some measure of control. The duty extends to activities that are tied to the university's curriculum but not to student behavior over which the university has no significant degree of control. UCLA did not owe a duty to the public at large but only to enrolled students who are at foreseeable risk of being harmed in a violent attack while participating in curricular activities at the UCLA. Moreover, universities are not charged with a broad duty to prevent violence against their students. Such a duty could be impossible to discharge in many circumstances. Rather, UCLA's duty is to take reasonable steps to protect students when it becomes aware of a foreseeable threat to their safety. The reasonableness of a university's actions in response to a potential threat is a question of breach.

Whether a university was, or should have been, on notice that a particular student posed a foreseeable risk of violence is a case-specific question, to be examined in light of all the surrounding circumstances. Such case-specific foreseeability questions are relevant in determining the applicable standard of care or breach in a particular case, but they do not determine that a duty exists.

In this case, the incident occurred in a chemistry laboratory while class was in session, which was a place where a student could reasonably expect their university to provide some measure of safety. UCLA argued that imposing a duty of care in this situation would discourage colleges from offering comprehensive mental health and crisis management services and incentivize postsecondary institutions to expel anyone who might pose a remote threat to others. However, the Court stated that recognizing the duty could encourage postsecondary institutions to take steps to avoid violent episodes, which serves the policy of preventing future harm. Thus, UCLA did owe a duty to protect Rosen.

Ultimately, the Court reversed the Court of Appeal's decision with regard to the duty UCLA owed Rosen, but it sent the case back to the Court of Appeal to decide the

remaining issues, including a determination of whether UCLA reasonably could have done more to prevent the assault.

Regents of the University of California v. Superior Court (2018) __Cal.4th __ , 2018 WL 1415703.

DISABILITY DISCRIMINATION

After School Program Settles with DOJ Regarding Student with Autism.

Bar-T is a private organization that provides summer and school year care programs in Maryland for kids from kindergarten through eighth grade. The organization operates at around 30 public school locations. Under Title III of the ADA, organizations like Bar-T are prohibited from discriminating against individuals with disabilities and must make reasonable accommodations for those individuals.

Bar-T was accused of discriminating against a child because he suffered from autism and displayed behavior associated with that disability. They dismissed him from the program without considering or providing reasonable modifications to their program that could have mitigated their concerns about the child's behavior.

Although the settlement does not give any specific information about the child's behaviors or what modifications could have been made to the program, the actions agreed to by Bar-T give insight into how organizations can best comply with Title III. Here, Bar-T had to agree to consult with a child's parent or guardian about reasonable modifications or auxiliary aids before suspending or terminating, on behavioral grounds, a child whose disability impacts behavior. The settlement also requires Bar-T to engage in individualized assessments of accommodations requests and establish a set process and point person for handling such requests. Bar-T also had to pay the family $13,500.

For more see: https://www.ada.gov/bar-t_sa.html.

Note:

The focus on individualized assessments and established processes highlights the importance of having procedures in place to handle accommodations requests in a consistent and appropriate manner. Some children have disabilities, such as autism, which impact their behavior, and in those cases modifications must be considered if they can assist with mitigating the behavioral issues while still allowing the child to participate in the school's program.

EMPLOYEES

SEX DISCRIMINATION/ TRANSGENDER

Termination of Employee Because Of Her Transgender and Transitioning Status is Discrimination on the Basis of Sex, and Violates Title VII.

A federal appellate court with jurisdiction over the area including the State of Michigan has found that transgender status is a protected status under Title VII. The court found that an employer discriminated on the basis of sex when it terminated a transgender woman because she wished to identify as female and wear a uniform designated for women.

Aimee Stephens is a transgender woman who was born biologically male and assigned the male gender at birth. She began working at R.G. & G.R. Harris Funeral Homes as an apprentice in 2007. At that time, she presented as a male and identified herself using her legal name, William Stephens. In 2013, Stephens provided her employer with a letter stating that she had "a gender identity disorder" her "entire life," and told Funeral Home owner Thomas Rost that Stephens had "decided to become the person that [her] mind already is." More specifically, Stephens stated that she "intend[ed] to have sex reassignment surgery," and noted that she would live and work as a woman. The letter said that, after returning from a prescheduled vacation, she would identify as "Aimee" Stephens and would be dressed "in appropriate business attire."

Two weeks later, before Stephens departed for her vacation, Rost terminated Stephens, stating "this is not going to work out." The only reason the Funeral Home provided for the termination was that its customers would not be accepting of Stephens' transition. Rost later admitted that he fired Stephens because Stephens "was no longer going to represent himself as a man. He wanted to dress as a woman." Rost did not have any work performance concerns. Rost also stated that he believed that an individual's sex is "immutable," and that Rost would not permit Funeral Home employees to "deny their sex," while representing the funeral home, just as Rost would "not allow a male funeral director to wear a uniform for females while at work."

Stephens filed a discrimination complaint with the EEOC asserting that the Funeral Home terminated her because she was transitioning from the male to the female gender and her employer believed the public would not be

accepting of her transition. The EEOC investigated and found there was reasonable cause to believe that the Funeral Home terminated Stephens due to her female sex and gender identity. The EEOC then brought a lawsuit against the Funeral Home after informal settlement efforts failed. The federal trial court found that transgender status is not a protected characteristic under Title VII, and ruled that the EEOC could not sue for discrimination based solely on transgender and/or transitioning status. Stephens appealed.

On appeal, the Sixth Circuit became the first federal appellate court to explicitly hold that an employee's transgender and transitioning status are protected under Title VII, and that taking adverse action against an employee because of that protected status is unlawful discrimination on the basis of sex. The court reasoned, "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex. …discrimination 'because of sex' inherently includes discrimination against employees because of a change in their sex." The court also found that discrimination based on transgender status also constitutes unlawful sex stereotyping because "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align."

In so holding, the court rejected the Funeral Home's arguments that its decision to terminate Stephens was rooted in Rost's religious beliefs and was, therefore, a protected exercise of religion under the federal Religious Freedom and Restoration Act. The Sixth Circuit also rejected the Funeral Home's argument that Stephens' transition to the female gender and use of a uniform designated for women would be a "distraction" for Funeral Home customers. The court relied on the Ninth Circuit's decision in *Fernandez v. Wynn Oil Co.*, which found that customer preferences or bias are not a legally valid justification for taking adverse employment actions against employees on the basis of the sex, even if evidence indicates that the employer's business would indeed be hurt as a result of the discriminatory preferences of customers.

California employers should take note that the state's Fair Employment and Housing Act includes "transgender" and "transitioning" statuses as protected categories, and prohibits discrimination and harassment based on sex, gender identity and gender expression. Under the FEHA, "transgender" refers to an individual "whose gender identity differs from the sex they were assigned at birth," while "transitioning" refers to a process some transgender individuals go through to begin living as the gender with which they identify including, for example, changes in name, pronoun usage, or undergoing hormone therapy, surgery or other medical procedures. As of January 1, 2018, California employers with 50 or more employees must post information about the rights of transgender employees in the workplace and must provide training on the prevention of sexual harassment and abusive conduct, including the prevention of harassment based on gender identity and expression.

Stephens v. R.G. & G.R. Harris Funeral Homes, Inc. (6th Cir. 2018) 2018 WL 1177669.

Note:

Discrimination on the basis of transgender or transitioning statue is already illegal in California under state law. Employers should be aware that transgender and transitioning individuals as are members of a protected class and that, handbooks, training sessions, hiring protocols and other personnel procedures reflect these evolving standards. More information about the rights of transgender employees under the FEHA is available here: https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/11/DFEH_E04P-ENG-2017Nov.pdf.

IMMIGRATION

U.S. Department of Justice Sues the State of California Over Newly Enacted Immigration Laws.

Last month, the United States Department of Justice (DOJ) filed a lawsuit in federal court against the State of California, alleging that three laws enacted by the State between June and October 2017 – Senate Bill (SB) 54 and Assembly Bills (AB) 103 and 450 – are unconstitutional.

SB 54 and AB 450 address law enforcement agencies and private employers' abilities to cooperate with federal immigration authorities.

- SB 54, or the "California Values Act," which amended Sections 7282 and 7282.5 of the Government Code, added Chapter 17.25 to the Government Code, and repealed Section 111369 of the Health & Safety Code, prohibits state and local law enforcement agencies, including school police and security departments, from using their resources to carry out immigration enforcement activities. Such activities include, but are not limited to, making arrests based on civil immigration warrants; performing

the functions of an immigration officer; inquiring into an individual's immigration status; and providing an individual's personal information to federal immigration authorities. Despite these limitations, local and state law enforcement agencies continue to be permitted to share with federal immigration authorities information about an individual's criminal history; make inquiries necessary to grant visas to potential victims of crime or trafficking; respond to a notification request by federal immigration authorities regarding persons currently serving sentences for violent felonies; and participate in a joint law enforcement task force with federal agencies, so long as the primary purpose of that task force is not immigration enforcement.

- AB 450, which added Sections 7285.1 through 7285.3 to the Government Code and Sections 90.2 and 1019.2 to the Labor Code, places significant limitations on a private employer's, including private schools, ability to cooperate with federal immigration authorities and imposes fines for violating those limitations. These laws prohibit a private employer from giving voluntary consent for an immigration enforcement agent to enter nonpublic areas of the workplace, except as required by federal law or a judicial warrant. They also prohibit a private employer from giving voluntary consent for an immigration enforcement agent to access, review, or obtain employee records, except as required by federal law or a subpoena or court order. The law further requires employers to post a notice to employees when federal immigration authorities have given notice of an inspection of I-9 Employment Eligibility Verification forms and the written results of any such inspection to affected employees. Finally, private employers are now prohibited from re-verifying a current employee's employment eligibility at a time or in a manner not required by federal law.

SB 54, AB 450 and AB 103 — popularly known as California's so-called "sanctuary laws," – became effective January 1, 2018.

The DOJ's lawsuit specifically alleges that these newly enacted laws violate the "Supremacy Clause" of the United States Constitution and other federal immigration laws. The Supremacy Clause, codified in Article VI, Clause 2 of the Constitution, establishes that the Constitution and federal laws enacted pursuant to the Constitution are the "supreme law of the land." Because of the Supremacy Clause, states cannot make laws that are "contrary" to federal law. The Supreme Court of the United States has interpreted the Supremacy Clause to prohibit the enactment of state laws that stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." To the extent that state laws are found to be an "obstacle," such laws are considered to be "preempted" by federal law and are therefore unconstitutional.

In the instant lawsuit, the DOJ alleges that AB 103, AB 450, and SB 54 endanger federal immigration officials and therefore constitute an "obstacle" to the enforcement of federal law. The DOJ's complaint asks the court to do two primary things. First, it asks that the court issue a "preliminary" injunction" against the State prohibiting it from implementing the provisions of these laws until the Court determines whether the newly enacted laws themselves are preempted by federal law. Second, it asks the court to find that these laws violate the Supremacy Cause and other federal immigration laws, thus making them unconstitutional, and that the court because of this, permanently prohibit the State from implementing the laws.

If the Court determines that AB 450 is unconstitutional, private employers in California will have more autonomy to voluntarily share employment data and provide federal immigration officers with access to their employees. Private employers may continue to adhere to the new laws if and until the Court grants the DOJ's preliminary or permanent injunctions. However, whatever the outcome of the District Court's ruling, it is likely that the "losing" party will appeal the matter to the Ninth Circuit and ultimately, the Supreme Court of the United States.

We will monitor this case and update you as it proceeds.

EQUAL PAY

Ninth Circuit Rules That Prior Salary Cannot Be Used to Justify Wage Gap Between Men and Women Under Equal Pay Act.

In our May 2017 issue we reported that a three judge panel of the Ninth Circuit held that a County may consider an employee's prior salary as a factor other than sex when analyzing a pay gap between a female and male employee. Here, the full Ninth Circuit revisited this topic and clarified its position, ultimately holding that the employer could not rely on past salary.

Aileen Rizo was a math consultant hired by Fresno County Office of Education. She learned that she was being paid substantially less for her work than male colleagues performing the same job. The court explained that the Equal Pay Act, passed in 1963, was designed to end the problem of women being paid less for the same work as men. Under the law some differentials in pay are acceptable, such as under merit systems, seniority systems, systems which measure earnings by quality or quantity, and a catchall exception of factors “other than sex.” The County argued its pay differential could be attributed to factors other sex, mainly the employee’s own salary history.

The court disagreed with that logic, explaining that allowing the use of past salary merely further perpetuates already-existing wage differentials between men and women. The whole purpose of the Equal Pay Act was to try to end those disparities. The catchall exception of a factor other than sex must, according to the opinion, pertain to job-related factors, such as shift differentials, hours of work, experience, or training. Therefore, employers may continue to use legitimate, job-related means of setting pay but may not use sex directly or indirectly to establish wages. The latter includes using past salary as a factor either on its own or in conjunction with other factors. Prior salary is not a legitimate measure of work experience and its use may well operate to perpetuate the wage disparities prohibited under the Equal Pay Act.

Rizo v. Yovino, (2018)—F.3d--, 2018 WL 1702982.

Note:

California already prohibits employers from asking about past salary directly and requires employers to provide a salary range if asked. Schools should set salary ranges in advance of job postings and should not rely on an applicant’s salary history when deciding on compensation. The court specifically noted that it was not ruling that past salary could never play a role in individual salary negotiation, only that it may not be used to justify a wage gap between male and female employees.

ARBITRATION AGREEMENTS

Ralph Act and Bane Act Claims Could Be Arbitrated Where Agreement Governed By FAA.

Gezel Saheli, a native of Iran who completed her medical training in that country, was enrolled in a medical residency program at White Memorial. There she reported alleged violations of HIPAA as well as unsafe patient care and conditions. Saheli alleges that in response to these reports, Dr. Juan Barrio began to retaliate against her by yelling and threatening to terminate her. She also alleged that he made derogatory references to her Iranian nationality. The hospital filed a petition to compel arbitration, as Saheli signed an arbitration agreement which states all disputes would be handled by arbitration under the Federal Arbitration Act (FAA). The arbitration agreement had a carve out for any claims under the NLRA, PAGA, workers’ compensation and “any claim that is non-arbitrable under applicable state or federal law.”

The trial court compelled Saheli to arbitrate all her claims except those brought under the Ralph Act and the Bane Act, as under California law, those two claims cannot be the subject of mandatory arbitration if the agreement is a condition of a contract for services. The hospital appealed, arguing the trial court erred by interpreting the arbitration agreement as incorporating California state law that is preempted by federal law. Here, the court explained, the agreement provided that a claim is arbitrable only if it is arbitrable under applicable state law. But the parties disagreed as to what that means. Saheli believes it means any applicable state law despite possible federal preemption, while the hospital argued it means applicable state law only to the extent it is not preempted by federal law.

Here the court interpreted the agreement to mean that the phrase “applicable state law” encompasses only California law that is not preempted by the FAA. The Ralph Act and Bane Act are both civil rights laws that protect people against adverse treatment such as hate crimes based on their protected classification. In 2014, the state legislature passed a bill which limited the circumstances under which an individual could waive their rights to sue under the Ralph or Bane Act. The revised law now states that any waiver of the right to sue in court must be made knowingly and voluntarily, and not as a condition of entering into a contract for services. If Saheli was forced to sign the arbitration agreement to enter into a relationship with the hospital, then under California law, she could not be forced to waive her rights to sue in court for Bane Act or Ralph Act claims.

This arbitration agreement was governed by the FAA, which embodies federal law's support of arbitration and prohibits states from singling out arbitration agreements for adverse treatment. Both the Ralph Act and Bane Act expressly single out arbitration agreements by placing special restrictions on individuals' right to waive their day in court for claims brought under those acts. Here the court ruled those restrictions in the law are preempted by the FAA. The court even cited the legislative history of the 2014 law to show that this special requirement was born from hostility to arbitration. The bill was directly inspired by a case involving a private school where the student and his parents were forced to arbitrate Ralph Act and Bane Act claims asserted against the school. The assembly report on the bill stated that the court in that case failed to acknowledge that forcing a party to arbitrate hate crime violations is a waiver of rights provided by those statues. The court here noted that "it is precisely this sort of hostility to arbitration that the FAA prohibits."

The court also disagreed with Saheli's argument that the special requirements are merely a codification of the doctrine of unconscionability and thus are subject to the FAA savings clause. The court explained that while the requirements potentially reflect elements of procedural unconscionability, they say nothing about substantive unconscionability. Following Saheli's logic would require the court to find that all agreements to arbitrate Ralph or Bane Act claims are substantively unconscionable. The court declined to do this. The order denying the motion to compel arbitration in part was reversed.

Saheli v. White Memorial Medical Center, (2018) 230 Cal. Rptr.3d 258.

Note:

This case supports the position that schools should maintain arbitration agreements that are governed by the FAA and not California state law. Since the underlying case that motivated the law about Ralph and Bane Act claims involved a dispute between a private school and a family, schools should be on notice that these types of claims may arise and if the school wants arbitration, the FAA provides a stronger support for that path.

DISCRIMINATION/INVESTIGATIONS

Summary Judgment Not Appropriate Where Terminated Employee Presented Evidence of Discriminatory Comments as Proof of Pretext.

Teresita Viana had worked for FedEx Corporate Services for 15 years when she was fired. She alleged it was due to her age, gender, and national origin. FedEx claimed she was fired for falsifying records and the district court granted summary judgment to FedEx, finding that the company had a legitimate reason for the termination and Viana could not show it was pretextual. Viana appealed.

The court explained that it was assuming Viana made the prima facie case of discrimination, causing the burden to shift back to FedEx to prove it had a legitimate business reason for terminating her. But the court found that Viana did provide enough evidence to show that the reasons given by FedEx might have been a pretext. For example, Viana presented evidence that Scott McMurray, who investigated the allegations against Viana, called Viana a "bitch" and used other sexist terms to refer to her. Viana also offered reasonable explanations for alleged mileage overages that McMurrey did not address at all. Furthermore, the record showed the investigation was conducted solely by McMurrey and Viana was never given the opportunity to respond to the allegations against her until after her termination.

The appeals court held that the district court should not have weighed the evidence of McMurrey's alleged discriminatory remarks as merely "stray" comments. Viana presented enough evidence to show the investigation and accusation of record falsification might have been pretext for discriminating against her. The summary judgment was vacated and the case remanded back to the district court.

Viana v. FedEx Corporate Services Inc. (2018) –Fed.Appx.--, 2018 WL 1417231.

Note:

This case provides insight into the importance of conducting thorough, objective investigations. Here, the court pointed to several areas of the employer's investigation report that were deficient, where the report did not address the employee's proffered explanations for her records discrepancies. This ultimately weighed in favor of the court's decision that the employee did provide evidence that the reason given for the termination was mere pretext. Investigators must provide an opportunity for the employee who is accused of misconduct to present his or her side of the story and present evidence in his or her favor.

BUSINESS AND FACILITIES

INDEPENDENT CONTRACTOR/ LIABILITY

Privette *Revisited: Property Owner Not Liable for Wrongful Death of Contractor's Employee Arising From Property Owner's Alleged Violation Of Safety Regulations.*

Television Center, Inc. (TCI) owns a three-story building in Hollywood, California. TCI contracted with Chamberlin Building Services (CBS), a licensed contractor, to wash the building's windows. Under the contract, CBS made all decisions regarding the window washing, and CBS owned, inspected, and maintained all the equipment used on the job.

Salvador Franco was a window cleaner for CBS. In the summer of 2011, while Franco was washing the building's windows, his descent apparatus detached and he fell to his death. Franco's survivors sued TCI for negligence alleging Franco died because TCI failed to equip the building with structural roof anchors to which window washers could attach their gear, in violation of Cal-OSHA.

TCI sought to dismiss the lawsuit. TCI argued that under the Supreme Court's decision in *Privette v. Superior Court* (1993) 5 Cal.4th 689, when a property owner hires an independent contractor, the property owner is not liable for injuries sustained by the contractor's employees unless the property owner's affirmative conduct contributed to the injuries. TCI argued that in accordance with *Privette*, TCI had contracted with CBS to wash the building's windows and TCI had not retained control over the manner in which CBS would perform.

Franco's survivors argued that *Privette* did not bar their claims because as a building owner, TCI had a statutory duty pursuant to Cal-OSHA to install roof anchors. According to Franco's survivors, TCI could not delegate this statutory duty to CBS, and its violation gave rise to liability not barred by the *Privette* doctrine.

The trial court agreed with TCI and dismissed the case.

Franco's survivors appealed and the Court of Appeal affirmed the trial court's decision. In doing so, the Court of Appeal rejected the survivors' claim that TCI's duty to install statutorily-required roof anchors was not delegable. The Court held that under *Privette* and its progeny, TCI properly delegated its legal duty to provide a safe workplace to CBS. "[W]hen TCI hired CBS, an independent contractor, to provide window washing services, it delegated to CBS its duty to provide a safe workplace for CBS's employees. Accordingly, TCI's alleged breach of a statutory duty to provide safety anchors did not give rise to liability to the decedent or his survivors."

Delgadillo v. Television Center, Inc. (2018) 20 Cal.App.5th 1078.

AFFORDABLE CARE ACT (ACA)

IRS Releases Sample ACA Penalty Notice Following Earlier Release of Proposed Penalty Forms.

The IRS has released a sample version of Notice CP 220J. This Notice will inform Applicable Large Employers (ALEs) that they are being charged an Employer Shared Responsibility Payment (Penalty) pursuant to the Affordable Care Act's Employer Mandate.

The IRS may assess a Penalty where, in any month, the ALE failed to offer Minimum Essential Coverage (MEC) to at least 70% (95% after 2015) of its full-time employees and their dependents, or offered MEC to at least 70% (95% after 2015) of its full-time employees, but the coverage offered did not provide minimum value or was not affordable.

The trigger for the Penalty occurs when a full-time employee purchases coverage through Covered California and receives a premium tax credit. The sample Notice is specifically for the 2015 tax year.

However, it is important to note that before an ALE receives the Notice, it will first receive Letter 226J from the IRS. This Letter is the initial notification from the IRS that it intends to assess a Penalty. There will be two forms included with the Letter (Forms 14764 and 14765). An employer must complete Form 14764 to inform the IRS as to whether it agrees or disagrees with the Penalty. If the ALE agrees with the proposed amount, it should sign and return the form in the envelope provided. If the ALE disagrees with the proposed penalty liability, it must provide a full explanation of the disagreement and indicate changes, if needed, on Form 14765.

If your school receives a Notice CP 220J, it should pay

the Penalty assessment amount to avoid being charged interest. Employers disagreeing with the assessment may file a claim for refund on Form 843. Alternatively, for an employer wanting to take its case to court immediately, the Notice requests that the employer include a written request for the IRS to issue a Notice of Claim Disallowance.

LCW BEST PRACTICES TIMELINE

Each month, LCW will present a monthly timeline of best practices for private and independent schools. The timeline runs from the fall semester through the end of summer break. LCW encourages schools to use the timeline as a guideline throughout the school year.

FEBRUARY - APRIL

- Post job announcements and conduct recruiting.
- Resumes should be carefully screened to ensure that applicant has necessary core skills and criminal background and credit checks should be done, along with multiple reference checks.

MARCH - END OF APRIL

- The budget for next school year should be approved by the Board.
- Prepare/Issue contracts to existing staff for the next school year.
- Issue letters to current staff who the School is not inviting to come back the following year.
- Assess vacancies in relation to enrollment.
- If summer program will be offered, identify the nature of the program and anticipated staffing and other requirements; advise staff of summer program and opportunity to apply to work in the summer, that hiring decisions will be made after final enrollment numbers are determined in the end of May.
- Distribute information on summer program to parents and set end date for registration by end of April.
- Ensure construction contractor begins and completes all necessary pre-construction work and services to summer construction project may begin on time.

MAY

- Complete hiring of new employees for next school year.
- Complete hiring for any summer programs.
- If service agreements expire at the end of the school year, review service agreements to determine whether to change service providers (e.g. janitorial services if applicable).
  - Employees of a contracted entity are required to be fingerprinted pursuant to Education Code Section 33192, if they provide the following services:
    - School and classroom janitorial.
    - Schoolsite administrative.
    - Schoolsite grounds and landscape maintenance.
    - Pupil transportation.
    - Schoolsite food-related.
  - A private school contracting with an entity for construction, reconstruction, rehabilitation, or repair of a school facilities where the employees of the entity will have contact, other than limited contact, with pupils, must ensure one of the following:
    - That there is a physical barrier at the worksite to limit contact with pupils
    - That there is continual supervision and monitoring of all employees of that entity, which may include either:
      - surveillance of employees of the entity by School personnel; or
      - supervision by an employee of the entity who the Department of Justice has ascertained has not been convicted of a violent or serious felony (which may be done by fingerprinting pursuant to Education Code Section 33192). (See Education Code Section 33193).
- If conducting end of school year fundraising:
- Raffles:
  - Qualified tax-exempt organizations, including nonprofit educational organizations, may conduct raffles under Penal Code Section 320.5.
  - In order to comply with Penal Code Section 320.5, raffles must meet all of the following requirements:

- Each ticket must be sold with a detachable coupon or stub, and both the ticket and its associated coupon must be marked with a unique and matching identifier.
- Winners of the prizes must be determined by draw from among the coupons or stubs. The draw must be conducted in California under the supervision of a natural person who is 18 years of age or older
- At least 90 percent of the gross receipts generated from the sale of raffle tickets for any given draw must be used by to benefit the school or provide support for beneficial or charitable purposes.

- Auctions:
  - The school must charge sales or use tax on merchandise or goods donated by a donor who paid sales or use tax at time of purchase.
    - Donations of gift cards, gift certificates, services, or cash donations are not subject to sales tax since there is not an exchange of merchandise or goods.
    - Items withdrawn from a seller's inventory and donated directly to nonprofit schools located in California are not subject to use tax.
      - Ex: If a business donates items that it sells directly to the school for the auction, the school does not have to charge sales or use taxes. However, if a parent goes out and purchases items to donate to an auction (unless those items are gift certificates, gift cards, or services), the school will need to charge sales or use taxes on those items.
- Plan potential construction projects for the following summer (to be performed in approximately one year.)

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more.

Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

ISSUE: A school administrator called and told an attorney that the school wants to do Google searches of job applicants, including looking at any public social media pages, but they heard an attorney had said not to do this. The administrator was wondering why that would be a bad idea, since it would help the school find out potentially important information about the candidates.

RESPONSE: The attorney explained there were definite risks to having the school conduct pre-employment social media/Google searches on applicants. For example, the school could potentially acquire knowledge of the applicant's membership in certain protected classes. If the applicant were in a wheelchair for example, and the school was nervous about having a disabled employee, that might influence their decision, even though such decision-making based on disability is against the law. On the flip side, the attorney acknowledged that in this day and age, it might be considered risky not to do such a search. If the school wants to use these public sources to get information on applicants, there are a few steps that would be prudent to take to take advantage of the benefit of this information without creating unnecessary risk for the school. The school should appoint someone to do the search who is not actually involved in the decision-making process. That way, this person could weed out any information the school should not be considering (race, gender identity, disability) and only pass on information that might be relevant. Of course, much information online is unverified and should not always be relied upon as fact. The person conducting the search should consult with legal counsel if they find any concerning information and are unsure about if it should be passed on or not. The person should only search sites that are available to the public, and by law may never require an applicant to provide their own social media passwords. The employee should never use false information or an alias to try to gain access to protected information. Only information that is relevant to the job position should be considered. Schools also should only rely on the DOJ Live Scan results for confirmation of criminal background, since that is verified information.

Management Training Workshops

Firm Activities

Consortium Training

May 15 **"On the Road Again: Day Trips and Domestic Overnights"**
ACSI | Webinar | Julie L. Strom

May 17 **"Litigious Parents"**
CAIS Consortium | Webinar | Linda K. Adler

Customized Training

May 16 **"Healthy Boundaries for Employees with Students"**
Marymount High School | Los Angeles | Michael Blacher

May 24 **"Legal Training"**
Presidio Knolls School | San Francisco | Judith S. Islas

Speaking Engagements

May 6 **"Leaves of Absence"**
California Independent Schools Business Officers Association (Cal-ISBOA) Pre-Conference Human Resources Workshop HR Seminar | San Francisco | Donna Williamson

May 7 **"Best Practices When Schools Contract with Vendors"**
Cal-ISBOA Human Resources Conference | San Francisco | Heather DeBlanc & Daniel Rothbauer & Darrow Milgrim

May 16 **"Sound Advice for Common Tripping Spots: Navigating Potential Potholes Legally and Skillfully"**
Bay Area Directors of Admissions (BADA) Symposium | Petaluma | Grace Chan

Private Education Matters is available via e-mail. If you would like to be added to the e-mail distribution list, please visit www.lcwlegal.com/news.

Please note: by adding your name to the e-mail distribution list, you will no longer receive a hard copy of ***Private Education Matters***.

If you have any questions, call Sherron Pearson at 310.981.2753.

6033 West Century Blvd., 5th Floor | Los Angeles, CA 90045

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