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.

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INDEX

LCW NEWS

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STUDENTS

TITLE IX SEXUAL HARASSMENT

Students Failed To Plead Viable Claims Against University For Liability For Student-On-Student Sexual Harassment.

Four female students (Plaintiffs) collectively brought a claim against Michigan State University alleging that the university's administration responded inadequately to their reports of sexual assault. Each of the Plaintiffs had reported an incident of sexual assault to the university and the university investigated the report and imposed discipline on the alleged perpetrator, as necessary. The Plaintiffs contended that the university's response was inadequate because they either (1) saw the alleged perpetrator around campus, (2) could have seen the alleged perpetrator around campus, or (3) were dissatisfied with the outcome of the investigation. The Plaintiffs asserted that the university's purported inadequate response caused them physical and emotional harm and, thus, denied them educational opportunities in violation of Title IX of the Educational Amendments of 1972 (Title IX), among other state and federal laws.

Title IX permits a student-victim of student-on-student sexual harassment to bring a lawsuit against a school that receives federal funding. Almost all public and private colleges and universities must abide by Title IX because they receive federal funding through the federal financial aid programs used by their students.

The U.S. Supreme Court's decision in *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, set the standard for when a school may be held liable for student-on-student sexual harassment under Title IX. A school is properly held liable where (1) a student-victim experienced actionable sexual harassment (i.e., severe, pervasive, and objectively offensive) by another student; and (2) the school had actual knowledge of the actionable harassment and the school's deliberate indifference to it resulted in further actionable harassment to the student-victim. Generally, for actionable harassment, "severe" means more than just juvenile behavior, teasing, or name-calling; "pervasive" means more than a single incident; and "objectively offensive" means behavior that would be offensive to a reasonable person under the circumstances.

To show that a school was deliberately indifferent, the student-victim must prove four elements (1) knowledge, (2) an act, (3) injury, and (4) causation. "Knowledge" means the school had actual knowledge of an incident of actionable sexual harassment that prompted or should have prompted a response. An "Act" means a response by the school that was clearly unreasonable in light of the known circumstances and demonstrates the school's deliberate indifference to the foreseeable possibility of further actionable harassment of the student-victim. "Injury" means deprivation of "access to the educational opportunities or benefits provided by the school," such as an inability to focus on studies, deteriorating grades, or fear of attending school. "Causation" means the student-victim suffered further actionable harassment because of the school's unreasonable response (i.e., deliberate indifference).

The court determined that the Plaintiffs did not suffer any incidents of actionable sexual harassment after the university's response to their claims of sexual assault. The Plaintiffs' concerns about seeing or possibly seeing their alleged perpetrator on campus or their dissatisfaction with the outcome of the investigation were insufficient to support their claims. Accordingly, the court held that the Plaintiffs were unable to meet the causation element needed to show the university was deliberately indifferent. The court dismissed each of the claims.

Kollaritsch v. Michigan State University Board of Trustees (6th Cir. 2019) 944 F.3d 613.

NOTE:

This case highlights the obligation of educational institutions to take reasonable steps to prevent sexual harassment among students once it learns that such conduct is occurring and to take appropriate corrective action where needed. This case may have turned out differently if the university had not undertaken all of those steps.

DISABILITY DISCRIMINATION

U.S. Department Of Justice And California Child Care Facility Reaches Settlement For Failure To Accommodate Child With Diabetes.

The U.S. Department of Justice entered into a settlement with Community First School Corp. (CFS), a California company that provides early education, childcare, and before- and after- school care, to resolve a complaint that CFS failed to accommodate a child with diabetes. According to the settlement agreement, a child attending CFS was diagnosed with type 1 diabetes. After the child's diagnosis, she required a continuous glucose monitor that provided electronic blood glucose readings on an iPhone application. The child's parents provided CFS with an iPhone and small remote transmitter and requested that CFS keep both devices within twenty feet of their child at all times so that her continuous glucose monitor could transmit readings of the child's blood glucose levels to the provided iPhone and the parents' iPhones. The child could have worn a belt with the small remote transmitter, which she did at another childcare facility. If an alarm rang on the iPhone indicating that the child's blood sugar was low, the parents requested that CFS give the child juice. CFS declined to provide the requested accommodations so the parents had to remove their child from the facility.

Title III of the Americans with Disabilities Act (Title III) prohibits places of public accommodation, such as schools, colleges, universities, and childcare facilities, from discriminating against or excluding individuals based on disability in the full and equal enjoyment of their goods and services. Under Title III, a public accommodation must make reasonable modifications in policies, practices, or procedures where such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the reasonable modification is a fundamental alteration to the nature of such goods and services.

The Department of Justice determined that CFS discriminated against the parents and their daughter in violation of Title III by failing to make reasonable modifications that were necessary for the parents and their daughter to participate in and benefit from CFS services, which forced the parents to remove their daughter from CFS.

As a condition of the settlement, CFS is required to make reasonable modifications for individuals with disabilities in the future and to adopt and implement written policies on nondiscrimination, the reasonable modification process, diabetes management consistent with the National Diabetes Education Program's Sample Diabetes Medical Management Plan, and information for parents or guardians of children with disabilities on how to request reasonable modifications. CFS must also provide live training to all employees on the nondiscrimination requirements of Title III, which includes training on diabetes management, considering requests for reasonable modifications, and providing reasonable modifications to enrolled children. CFS must also pay $15,000 to the parents and $2,500 to the United States Treasury.

NOTE:

While this settlement is only binding on CFS, it provides a valuable reminder of the obligations imposed by Title III on places of public accommodation, such as schools, colleges, universities, and childcare facilities, to provide reasonable modifications to permit individuals with disabilities to participate in their services.

NATIONAL ORIGIN/ANCESTRY DISCRIMINATION

Duke University And University Of North Carolina Sign Resolution Agreements Over Complaint Of Anti-Semitic Conference.

On April 17, 2019, Zionist Organization of America (ZOA) sent a letter to the U.S. Department of Education Office for Civil Rights requesting that the Department "investigate and determine whether the University of North Carolina (UNC) and Duke University (Duke) misused federal funds to promote a one-sided "academic" conference that was hostile to Israel and blatantly anti-Semitic." ZOA, which was founded in 1897, is the oldest pro-Israel organization in the United States and has offices throughout the United States and Israel.

In its letter, ZOA stated that UNC hosted and Duke co-sponsored a conference titled "Conflict over Gaza: People, Politics and Possibilities" from March 22-24, 2019, using grant money from the U.S. Department of Education. ZOA explained that the conference was one-sided and hostile to Israel and featured a rapper named Tamer Nafar who prefaced his performance by saying "this is my anti-Semitic song." In a video of Mr. Nafar's performance shared online by filmmaker Ami Horowitz, the audience is seen standing, clapping, and singing along with Mr. Nafar as he encourages them to be anti-Semitic with him. According to ZOA, in the days following the conference, swastikas were found drawn on the UNC campus and anti-Semitic posters were found on bookshelves and tables in a UNC library.

UNC signed a resolution agreement with the U.S. Department of Education on October 14, 2019, and on December 3, 2019, Duke signed a similar resolution agreement with the Department. Under the terms of the resolution agreements, neither university admit liability or concede that they violated the law.

However, the resolution agreements require the universities to issue statements to all students, faculty, and staff that acts of discrimination or harassment, and specifically anti-Semitic harassment and discrimination, will not be tolerated and that students who believe he or she had been subjected to such harassment or discrimination should report it to the university. The universities are also required to revise their policies on discrimination and harassment to define anti-Semitism and "provide a description of the forms of anti-Semitism that can manifest in the University environment."

Further, the universities must host at least one meeting during each of the 2019-2020 and 2020-2021 academic years to provide students, faculty, and staff the opportunity to discuss with university administrators any concerns they may have about incidents of harassment and discrimination. The universities must investigate any specific incidents identified during the meeting. Finally, the universities must include a component on anti-Semitic harassment in orientations and trainings for students, faculty, and staff on their discrimination or harassment policies.

EMPLOYEES

FIRM VICTORY

LCW Obtains Summary Judgment For Private University In Response To Employee's Claims For Wrongful Termination, Wage And Hour Violations, And Workplace Violence.

Plaintiff Cory Scott was employed in Azusa Pacific University's (APU) Department of Campus Safety (DCS) since August 2006 in various campus safety positions. In 2012, Scott was promoted to Manager Department of Campus Safety, Student Workers, where he directly supervised a total of about 120 employees. In 2014, Scott was promoted to Lieutenant in DCS, where he was responsible for overseeing all operations of the Department. In 2015, Scott applied for a promotion to a new Deputy Chief (DC) position but was not selected for the position. One month later, Scott left work on medical leave on October 6, 2015, never returned to work, and resigned from his employment at APU on June 22, 2017. APU kept Scott's position open for nearly two years before he resigned.

During his employment, Scott and his supervisor, the Chief, frequently socialized, including going to see movies together at least 61 times. Scott and the Chief were both attending different graduate school programs at other schools. Scott sometimes did the Chief's homework. It was not until after he did not get the promotion to DC and had been off work on leave for several months that Scott disclosed to APU that he was doing the Chief's homework. Scott also alleged that the Chief threatened to kill him if he ever told anyone, and that he was afraid he would lose his job and his tuition benefits for his children attending APU. As soon as APU became aware of Scott's complaints about the Chief, it promptly investigated and took corrective action.

Scott filed a lawsuit seeking overtime compensation for the time spent doing the Chief's homework and the time he spent going to the movies and socializing with the Chief, and on-call pay for all hours that he was not working on campus. In addition, Scott brought claims for wrongful termination, sexual harassment, emotional distress, and workplace violence against the University.

LCW attorneys **Brian Walter** and **Alison Kalinski** vigorously litigated this lawsuit on behalf of APU. LCW initially obtained dismissal of Scott's claims for sexual harassment and retaliation under the Fair Employment and Housing Act on the basis that the school is a religious corporation.

In April 2019, the trial court granted APU partial summary adjudication on the following causes of action: (i) retaliation in violation of Labor Code Section 98.6, because Scott never complained to APU about any unpaid overtime and because he voluntarily resigned; (ii) intentional infliction of emotional distress, because the alleged conduct was either time-barred or outside the scope and course of employment so APU could not be responsible; (iii) wrongful termination in violation of public policy because Scott voluntarily resigned; and (iv) violation of Bane Act, Civil Code Section 52.1, a workplace violence statute, because the only alleged threat of violence was outside the statute of limitations.

As to Scott's wage and hour claims, the trial court agreed with LCW's arguments that Scott was an exempt executive employee. However, the court found that there was a triable issue of fact as to whether he should be compensated for the hours he spent on call. Because an employee who is exempt cannot obtain overtime, even for being on-call, LCW filed a petition for a writ of mandate with the Court of Appeal challenging the trial court's decision. After the Court of Appeal ordered further briefing from the parties asking for any authority for the proposition that an exempt employee could still recover overtime, the Court of Appeal issued a notice to the trial court stating its intention to grant the peremptory writ of mandate. In response, the trial court scheduled a further hearing, and then granted summary judgment to APU in its entirety.

FMLA

School District Had Adequate Notice Of Employee's Need For FMLA Leave Through Her Communications With Her Supervisor And Her Conduct At Work.

The Seventh Circuit Court of Appeals recently upheld a jury verdict of $12,000 in favor of an employee who alleged that her employer interfered with her rights under the Family and Medical Leave Act (FMLA) by failing to provide her with notice or information about her right to take job-protected leave. The facts are as follows:

For six years, Noemi Valdivia worked as an administrative assistant to the associate principal at a high school in Township High School District 214 (District). According to her supervisors, she was an invaluable, dependable, and meticulous employee, who received excellent performance evaluations, never received discipline, and rarely took sick days. Valdivia applied and received a promotion to serve as the administrative assistant to the principal at a different high school in the District.

Shortly after Valdivia began working in that position, she experienced worsening adverse health symptoms, including insomnia, weight loss, uncontrollable crying, racing thoughts, an inability to concentrate, and exhaustion. These symptoms led to a dramatic change in Valdivia's job performance. She often arrived late, cried uncontrollably at work, could not complete work tasks, refused new assignments, and left work early.

Valdivia had seven or eight conversations with her supervisor about the way her symptoms were affecting her ability to work. Valdivia also asked her supervisor for a 10-month assignment instead of her current 12-month assignment to give her some time away from work, but her supervisor denied her request. Valdivia also told her supervisor that she was considering leaving her position for medical reasons.

After about two months in the position, Valdivia resigned. Less than two weeks later, she was diagnosed with major depressive and generalized anxiety disorders and was hospitalized for four days. Valdivia filed a claim against the District for interfering with her rights under the FMLA by failing to provide her with notice or information about her right to take job-protected leave.

The FMLA entitles eligible employees to take up to twelve unpaid workweeks of leave during a twelve-month period if the employee is unable to perform the

functions of her position because of a serious health condition. A serious health condition is "an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." The FMLA prohibits an employer from interfering with, restraining, or denying an employee's exercise or attempt to exercise rights guaranteed by the FMLA. To prevail on an FMLA-interference claim, an employee must establish the following: (1) she was eligible for FMLA protections, (2) her employer was covered by the FMLA, (3) she was entitled to leave under the FMLA, (4) she provided sufficient notice of her intent to take leave, and (5) her employer denied her FMLA benefits to which she was entitled.

The District first argued that Valdivia was unable to show that she had a serious health condition during her employment because she was not diagnosed until after her resignation. However, the court found that an employee does not need to show that she was diagnosed with a serious health condition during her employment as long as the condition existed while she was employed. Here, Valdivia exhibited symptoms of a serious health condition during her employment and her medical records supported the fact that her condition did not arise for the first time on the day she was diagnosed. Therefore, the court found that there was sufficient evidence to support the jury's finding that Valdivia had a serious health condition that made her unable to perform the functions of her job while she worked for the District.

Second, the District argued that Valdivia was unable to show that she provided sufficient notice of her intent to take leave because she did not mention the FMLA in her communications with her supervisor. However, the court found that the District had notice of Valdivia's need for FMLA leave through her conduct and her communications with her supervisor despite the fact that she did not expressly mention the FMLA. In reaching its conclusion, the court cited its decision in *Byrne v. Avon Prods., Inc.* (7th Cir. 2003) 328 F.3d 379, which "held that clear abnormalities in an employee's behavior may be enough to alert the employer to a serious health condition. [citation] In such cases, 'observable changes in an employee's condition ... present an obvious need for medical leave, thereby obviating the need for an express request for medical leave.'" The court noted that when an employer knows of the employee's need for leave, the employee does not need to mention the FMLA or demand benefits under the FMLA.

Here, the dramatic changes to Valdivia's work performance, Valdivia's reports of her deteriorating mental health to her supervisor on numerous occasions, Valdivia's requests for an accommodation in the form of a 10-month rather than a 12-month position, and Valdivia's statements that she was incapable of accepting a new work assignment collectively indicated to her supervisor and the District that Valdivia needed FMLA leave. Accordingly, the court upheld the jury's finding that Valdivia's notice to the District was adequate.

Valdivia v. Township High School District 214 (7th Cir. 2019) 942 F.3d 395.

NOTE:

While this case is not binding in California, it does clearly reiterate the important point that employees need not expressly assert rights under the FMLA or the California Family Rights Act (CFRA) or even mention these statutes to be entitled to leave under either act. For specific questions, please consult with legal counsel.

LABOR RELATIONS

D.C. Circuit Rejects NLRB's Pacific Lutheran Test, Reasserts Great Falls Test For Determining NLRA Exemption For Religiously Affiliated Schools.

On January 28, 2020, the Court of Appeals for the District of Columbia Circuit held that the National Labor Relations Board (NLRB) lacks jurisdiction over Duquesne University because the school holds itself out as a religious institution and is religiously affiliated. The Court concluded that the NLRB, in reaching its decision that the school must recognize a recognition petition filed by a group of adjunct faculty seeking to unionize, applied the wrong standard for determining jurisdiction. The Court found that the Board improperly asserted authority over the school, which is properly exempt from the National Labor Relations Act (NLRA).

The decision was the result of a 2012 unionization effort by adjunct faculty at the University's liberal arts college who petitioned the NLRB to recognize the AFL-CIO as the exclusive bargaining representative. At the time of the election, a majority of the faculty voted for the Union. The University requested that the Board vacate the election and dismiss the Union's petition for recognition.

In its request, the University argued to the Board that the D.C. Circuit's decision in *Great Falls v. NLRB* (D.C. Circ. 2002) 278 F.3d 1335 (*Great Falls*) exempted the school from NLRB jurisdiction. In *Great Falls*, the Court established a three-part test whereby an employer would qualify for exemption from NLRB jurisdiction if: (1) it

holds itself out to students, faculty, and the community as providing a religious educational environment; (2) is organized as a nonprofit corporation; (3) and is owned by or affiliated with a religious organization.

The Board did not apply the D.C. Circuit's *Great Falls* test, but rather applied an alternative test, which it developed in *Pacific Lutheran University* (2014) 361 NLRB 1404 (*Pacific Lutheran*). The *Pacific Lutheran* test required that, in order to be exempt from NLRB jurisdiction, the employer must not only hold itself out as a religious educational environment, but also must "hold[] out the petitioned-for faculty members themselves as [] performing a specific role in creating or maintaining the college or university's religious educational environment." As a result, the *Pacific Lutheran* test imposed an additional requirement concerning the school's representations about its faculty and their role in the school's religious educational environment, which is absent in the *Great Falls* test.

Applying the *Pacific Lutheran* test, the Board concluded that the University was not exempt from NLRB jurisdiction, and rejected the University's request that the Board vacate the election and dismiss the Union's petition for recognition. The University then appealed the Board's decision to the D.C. Circuit.

In its analysis, the Court of Appeals first analyzed the Religion Clauses in the First Amendment, which provide certain protections to religious organizations, including schools. The Court then turned to jurisdictional questions concerning the NLRB, how the Board and Courts approach labor issues at religious organizations, and whether it is possible to disentangle labor issues from religious ones at such organizations without impermissibly impinging on rights guaranteed by the Religion Clauses.

The Court next discussed its bright line test for determining whether a religious organization is exempt from the NLRA in *Great Falls*. The Court explained that the test "will allow the Board to determine whether it has jurisdiction without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands."

Ultimately, a divided Court concluded on a 3-2 vote that the *Great Falls* test applied to the present circumstances, and that the NLRA therefore does not empower the Board to exercise jurisdiction over the University. As a result, the Court vacated the Board's decision certifying the election and recognizing the AFL-CIO as the exclusive bargaining representative for the adjunct faculty.

Duquesne University of the Holy Spirit v. National Labor Relations Board (D.C. Cir. 2020) 947 F.3d 824.

NOTE:

The Duquesne University *decision is quite significant for religious educational institutions. When the NLRB established the* Pacific Lutheran *test in 2014, it made it easier for the NLRB to assert jurisdiction over religious educational institutions and for their employees to unionize. While the* Duquesne University *decision is not binding in California, it does provide persuasive reasoning that a California federal court may consider if a similar case is tried here.*

Employer Must Negotiate Changes To Grievance Arbitration Procedure And Cannot Unilaterally Impose Changes Even If Such Changes Are "Reasonable."

The case concerns a corporation, Transportation Services of St John, Inc., that provides ferry passenger transportation in the U.S. Virgin Islands, and the union that represents the crewmen on the ferries.

In 1998, the NLRB certified the Seafarers International Union as the exclusive representative for crewmen employed by the corporation purposes of collective bargaining. The corporation and union are parties to a collective bargaining agreement (CBA) covering the terms and conditions of employment of the unit, which has been extended since 2009 and remains in effect by mutual agreement of the parties.

The CBA contains a grievance arbitration provision, which has been unchanged since 1999. In practice, the provision provides that, after the union files a grievance, the parties will meet to discuss the grievance, and the corporation will file a written response. If the union is not satisfied, it can take the grievance to the next step and, ultimately, can demand arbitration. Demanding arbitration involves notice to the corporation and requesting a panel of federal arbitrators from which each side will strike names until a single arbitrator remains who will adjudicate the dispute. In the past 15 years, the parties have arbitrated only one dispute.

In December 2016, pursuant to the grievance arbitration provision of the CBA, the union filed a grievance concerning a two-week suspension of an employee for alleged poor performance and insubordination. Ultimately, the union requested that the matter be submitted to arbitration as outlined in the CBA. Thereafter, a lengthy dispute began concerning the expense of arbitration, which necessitated travel and accommodation expenses. During this dispute, the corporation rejected selection of arbitrators from the

panel of federal arbitrators, but rather proposed either arbitration by video conference or the selection of a local arbitrator. The union rejected both of these proposals.

The union then filed an unfair labor practice charge alleging that the corporation violated Section 8 of the National Labor Relations Act (NLRA) by failing to continue in effect the terms of the CBA. Before an Administrative Law Judge (ALJ), the corporation argued that the modifications that it proposed would be significantly less costly than the express terms of the CBA's grievance arbitration provision.

The ALJ analyzed NLRB precedent, which distinguishes between conduct that violates the terms of a CBA and conduct that reveals a party has unilaterally modified a contract provision. The ALJ concluded that, as a general proposition, a mere contract violation does not violate Section 8, but a unilateral contract modification regarding a mandatory subject of bargaining without the union's consent will violate Section 8. The ALJ found that a grievance arbitration provision is a mandatory subject of bargaining, and that an employer's refusal to arbitrate pursuant to a grievance-arbitration provision violates Section 8. The ALJ then applied the facts at issue, including: (1) that the terms of the parties' CBA were in effect at all relevant times; and (2) the corporation refused to meet its obligations under the CBA and required that the union consent to changing the terms of the CBA. Finally, the ALJ held that it was immaterial how "reasonable" the corporation's proposed changes may have been since the union was under no obligation to agree to changes during the term of the CBA.

In conclusion, the ALJ held that, by failing and refusing to continue in effect the terms of the parties' CBA by refusing to arbitrate grievances unless the union consented to modifications, the corporation engaged in an unfair labor practice. The NLRB then affirmed the ALJ's rulings, findings, and conclusions and adopted the recommended order.

Transp. Services of St. John, Inc. & United, Indus., Serv., Transp., Prof'l & Gov't Workers of N. Am., of the Seafarers Int'l Union of N. Am., Atl., Gulf, Lakes & Inland Waters Dist./nmu, Afl-Cio (Jan. 30, 2020) 369 NLRB No. 15.

NOTE:

Collective bargaining agreement provisions cannot be changed unilaterally during the term of a contract, whether or not they are reasonable, so it is imperative that employers consider the practical implications of any contract language prior to agreeing to it in a collective bargaining agreement.

Employer's Pre-Election Statements May Not Threaten Or Coerce Employees.

This case arises out of a union campaign to represent health and safety shift specialists (HSS specialists) at an oil and gas facility owned by the employer, Phillips 66. The complaint alleges that prior to and after a NLRB-conducted election in which the HSS specialists voted for union representation, the employer violated Section 8 of the NLRA.

In November 2011, the union filed a representation petition to include the HSS specialists in an existing statewide bargaining unit. The employer opposed the petition, arguing that the HSS specialists were supervisory employees. The Board's Regional Director rejected that argument and directed an election. However, the Regional Director did provide that the HSS specialists could permissibly direct and supervise the work of other employees when acting as incident commander.

In January 2012, four days before the election, the employer met with the HSS specialists. A human resources manager explained that the employer was certain that the HHS specialists' job duties were supervisory, that it would strip them of these duties if they joined the union, and that without such duties, the employer might not need to maintain the around-the-clock staffing of HSS specialists. Another management employee, the facility site manager, added that the employer might have to adjust the HSS specialists' overtime if they joined the union, and that the employer would review the HSS specialists' job duties to see if the employer required around-the-clock staffing rather than an alternative 8-hour daily shift schedule that could minimize overtime.

The union then won the election, and the NLRB certified the union as the exclusive representative of the HSS specialists.

In bargaining the terms and conditions of the HHS specialist classification, the employer took the position that it would be inappropriate for unit employees to perform incident commander duties and that without those duties, there was no need for an HSS specialist to be at the facility at all times. The employer then proposed to eliminate the HSS specialist classification and create a new health and safety coordinator (HSC) classification with fewer job duties, different work schedules, and lower wages. The union tentatively agreed that the HHS specialist would no longer perform incident commander duties, but otherwise rejected the employer' other proposals.

The parties continued to bargain until they reached impasse, at which time the employer presented the union with its final proposal. The proposal provided transferring two HSS specialists to HSC jobs and demoting the other three to operator jobs. The union rejected the proposal, and the employer then imposed the terms of its final offer.

The union then filed an unfair practice charge, alleging that the employer threatened adverse changes to HSS specialists' jobs if they voted for union representation in violation of Section 8 as well as other charges related to the employer's conduct in bargaining.

The ALJ assigned to the case found that the employer violated Section 8 of the NLRA by threatening adverse changes to the HHS specialists' jobs if they voted for the union. The ALJ based this decision on findings that the employer's human resources manager and site manager threatened the HSS specialists in January 2012.

The NLRB, in reviewing the ALJ decision, rejected some of the rationales for the ALJ's decision, but concluded that the employer's managers' statements were, in fact, coercive.

Phillips 66 & United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, Afl-Cio-Clc (Jan. 31, 2020) 369 NLRB No. 13.

NOTE:

Statements made by the employer and its representatives during organizing or negotiations are closely scrutinized when there are allegations of coercion or intimidation. While the employer's substantive proposals in bargaining, which were consistent with its pre-election statements, were lawful, the pre-election statements themselves were coercive and therefore unlawful.

VICARIOUS LIABILITY

Employer Was Not Liable For Accident That Occurred On Employee's Commute To Work.

Kim Rushton worked for the City of Los Angeles as a chemist at one of the City's water treatment plants. In 2015, while Rushton was commuting to work in his own car, he struck and killed pedestrian, Ralph Bingener, who was stepping off the curb into a crosswalk. Rushton was not performing any work for the City at the time, and his job did not require him to be in the field or drive his personal car. The City did not compensate Rushton for his commute time.

At the time of the accident, Rushton was receiving treatment for chronic health problems, including neuropathy in his feet, a tremor, and occasional seizures. However, Rushton testified that his conditions were controlled and did not contribute to the accident in any way. Additionally, two months before the accident, Rushton was injured on the job. Rushton's physicians prescribed various work restrictions when he returned to work, but they did not place any restrictions on his driving.

Bingener's surviving brothers sued. They alleged the City was vicariously liable for Rushton's negligence. An employer is vicariously liable for the wrongful acts its employees commit within the scope of their employment. However, an employee is generally not acting within the scope of employment when going to or coming from the regular place of work, with some exceptions. This rule is known as the "going and coming" rule. The City moved for summary judgment based on the coming and going rule, and the trial court agreed. Bingener's brothers appealed.

On appeal, the court concluded that the going and coming rule applied. Rushton was on his normal morning commute, and his work did not require him to use his personal car. Rushton worked in a water treatment plant, and he never went out in the field. Further, nothing about Rushton's job as a chemist made the chance that he would hit a pedestrian during his ordinary commute a foreseeable risk for the City.

While Bingener's brothers argued that the "work-spawned risk" exception to going and coming rule applied, the court disagreed. The work-spawned risk exception applies if an employee endangers others with a risk arising from or related to work. The brothers claimed that Rushton's driving to work was a foreseeable risk to the City's. However, the court noted that there was no evidence that the City knew or should have known that Rushton was a dangerous commuter. In fact, Rushton testified that his conditions did not contribute to the accident, and his physician, not the City, approved Rushton's return to work without limitation on his driving. Accordingly, the court concluded that the accident was not a foreseeable event as is required to hold an employer vicariously liable.

Bingener v. City of Los Angeles (2019) 44 Cal.App.5th 134.

NOTE:

While employers are generally not liable for wrongful acts that happen on an employee's commute to work, employers can be liable for injuries an employee causes while driving within the scope of employment. LCW can help employers evaluate the risks associated with employees driving.

ADMINISTRATION & GOVERNANCE

RELIGIOUS SCHOOLS

US Department Of Education Proposes Rule Regarding Equal Treatment Of Faith-Based Education Institutions.

On January 16, 2020, the U.S. Secretary of Education Betsy DeVos announced a proposed rule to revise the current regulations regarding the eligibility of faith-based entities to participate in grant programs offered through the Department of Education, including Direct Grants, State-Administered Formula Grants, and discretionary grants authorized under Title III and V of the Higher Education Act of 1965, as amended (HEA), and the eligibility of students to obtain certain benefits under those programs. In the press release, Secretary DeVos stated "Our actions today will protect the constitutional rights of students, teachers, and faith-based institutions… The Department's efforts will level the playing field between religious and non-religious organizations competing for federal grants, as well as protect First Amendment freedoms on campus and the religious liberty of faith-based institutions."

Among the proposed rules are modifications clarifying that faith-based organizations would be eligible to apply for and receive grants under Department of Education programs on the same basis as any other private organization; removing requirements on faith-based organizations that receive grants to provide assurances or notices that are not imposed on non-faith-based organizations; and clarifying that "a faith-based organization that participates in Department-funded programs retains its autonomy, right of expression, religious character, and independence from Federal, State, and local governments."

The proposed rules would also add a non-exhaustive list of criteria that offers religious institutions different methods to demonstrate that they are "controlled by a religious organization" in order to be exempt from Title IX of the Education Amendments of 1972 and its implementing regulations to the extent Title IX and its implementing regulations would not be consistent with the institutions' religious tenets.

The proposed rules would amend regulations governing the Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and University Program, and Strengthening Historically Black Graduate Institutions Program by removing language that prohibits use of such funds for otherwise allowable activities if they relate to "religious worship" and "theological subjects" and replace it with language that more narrowly defines the limitations.

The proposed rules would also require public colleges and universities to comply with the First Amendment, and private colleges and universities to comply with their institutional policies regarding freedom of speech and academic freedom, as a condition of receiving Federal research or education grants. The proposed rules would also prohibit public colleges and universities receiving certain grants from denying to a "faith-based student organization any of the rights, benefits, or privileges that are otherwise afforded to non-faith-based student organizations, as a material condition of the grant."

According to the Department of Education, the proposed changes were prompted by the Department's desire to fulfill the requirements of Executive Order 13798 - *Promoting Free Speech and Religious Liberty* (82 FR 21675) and Executive Order 13864 - *Improving Free Inquiry, Transparent, and Accountability at Colleges and Universities* (84 FR 11401) and to align its regulations with the Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) 137 S.Ct. 2012, and the U.S. Attorney General Memorandum on Federal Law Protections for Religious Liberty (October 6, 2017).

The comment period for the proposed rule ended on February 18, 2020. The Department of Education received 17,767 comments. LCW will be watching this matter closely and will report if and when the proposed rule is adopted and finalized.

The complete proposed rule is available here: https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/fedreg-draft-20200116.pdf.

NOTE:

The receipt of federal funds from the Department of Education may require faith-based organizations, as a condition of receiving those funds, to comply with federal laws from which they may otherwise be exempt. We advise reviewing the conditions for receipt of federal funds through grant programs with legal counsel before agreeing to any terms and accepting any funds.

NACAC SETTLEMENT

NACAC Removes Recruiting Rules From Code Of Ethics And Professional Practices In Light Of DOJ Investigation And Potential Litigation And Signs Consent Decree.

The National Association for College Admission Counseling (NACAC) is a professional organization whose members consist of high schools and their guidance counselors, and colleges and their admissions personnel who assist students transitioning from high school to college. NACAC maintains a Code of Ethics and Professional Practices (CEPP) that sets forth mandatory rules governing how its members are permitted to engage in college admissions.

On December 12, 2019, after a two-year investigation, the U.S. Department of Justice (DOJ) filed an antitrust complaint against NACAC alleging that the CEPP contained three recruiting rules that restrained competition between colleges for the recruitment of first-year and transfer students in violation of the Sherman Act, which prohibits activities that unreasonably restrain interstate commerce and competition in the marketplace. The three CEPP rules at issue include (1) the Transfer Student Recruiting Rule, (2) the Early Decision Incentives Rule, and (3) the First-Year Undergraduate Recruiting Rule (Recruiting Rules). The DOJ asserted that the Recruiting Rules "substantially reduced competition among colleges for college applicants and potential transfer students and deprived these consumers of the benefits that result from colleges vigorously competing for students … [and] denied American college applicants and potential transfer students access to competitive financial aid packages and benefits and restricted their opportunities to move between colleges."

The Transfer Student Recruiting Rule prevented colleges from recruiting transfer students unless the student first initiated a transfer inquiry or the colleges first ensured (1) that the student was not currently enrolled in a college or (2) that the student attended a college that permitted transfer recruitment from other colleges. The DOJ alleged that the rule prevented students from learning about transfer opportunities at potentially lower priced or higher quality colleges and restrained competition for transfer students among colleges.

The Early Decisions Incentives Rule prevented colleges from offering any incentives, such as scholarships, preferential housing, or early course registration, to students applying under early decision. An early decision is an application in which students "commit to a first choice college and, if admitted, agree to enroll and withdraw their other college applications." The DOJ alleged that the rule prohibited colleges from competing for early decision students and prevented students who elected to apply through early decision from receiving possibly valuable benefits.

The First-Year Undergraduate Recruiting Rule prevented colleges, beginning on May 1 of each year, from improving their recruitment offers to first year students. Specifically, the rule prohibited colleges from knowingly recruiting or offering "enrollment incentives to students who are already enrolled, registered, have declared their intent, or submitted contractual deposits to other institutions." The rule also prohibited colleges from offering or implying that additional financial aid or other benefits were available to students who had not withdrawn their applications unless the student first affirmed that they were not enrolled elsewhere and were still interested in discussing fall enrollment. The DOJ alleged that the First-Year Undergraduate Recruiting Rule significantly restrained a college's ability to compete for first year students, which also deprived students of receiving potentially beneficial offers from colleges.

In September 2019, NACAC's Assembly of Delegates voted to delete the Recruiting Rules from the CEPP effective immediately in light of the DOJ's investigation and potential litigation.

Simultaneously to the DOJ's civil lawsuit, the DOJ Antitrust Division filed a proposed consent decree between the DOJ and NACAC, under which NACAC agreed to remove the Recruiting Rules from the CEPP, not to establish or enforce similar rules in the future, and to increase its antitrust compliance training with employees and members. The consent decree has been submitted to the United States District Court for the District of Columbia for approval. Upon the court's approval, the consent decree will resolve the DOJ's claims against NACAC.

In a press release issued on December 12, 2019, NACAC stated it "continues to believe that the now deleted provisions provided substantial aid and protection to students in their process of choosing and moving from high school to college. However, the association understands its obligations under the decree and intends to strictly implement and abide by its provisions."

United States of America, Plaintiff, v. National Association for College Admission Counseling, Defendant., 2019 WL 6790660 (D.D.C.).

NOTE:

The changes to the recruiting rules in the NACAC Code of Ethics and Professional Practices provide a good opportunity for college and universities that are NACAC members to review and update their recruitment policies and practices for first year and transfer students.

COPYRIGHTED CURRICULUM

License To Use Publisher's Copyrighted Math Curriculum Did Not Prohibit Licensee From Employing Third Party Commercial Printing Service.

Great Minds is a nonprofit organization that publishes copyrighted math curriculum called "Eureka Math." Great Minds sells Eureka Math in print form and also permits any member of the public to download Eureka Math online free of charge under a limited public copyright license (License). The License permits individuals or entities to reproduce and share Eureka Math for non-commercial purposes. Under the License, a non-commercial purpose is one that is "not primarily intended for or directed towards commercial advantage or monetary compensation." The License grants Great Minds the right to collect royalties from individuals or entities that use Eureka Math for a commercial purpose.

Public schools, school districts, and other educational institutions (Licensee-Schools) often utilize Office Depot and other commercial print shops to make copies of Eureka Math materials for their own use. Office Depot charges the Licensee-Schools a fee to make copies of the materials.

Great Minds filed a copyright infringement claim against Office Depot, alleging that Office Depot infringed Great Minds copyright by "reproducing and distributing Eureka Math for profit without Great Minds' authorization." Great Minds contended that the provision in the License limiting reproduction and sharing of Eureka Math for non-commercial purposes only prohibited Office Depot from making copies of the materials on behalf of the Licensee-Schools at a profit. Great Minds also asserted that the License required Office Depot, as a commercial print shop, to pay a royalty to Great Minds in order to make copies of Eureka Math on behalf of the Licensee-Schools at a profit.

The court disagreed with Great Minds' arguments, finding that the License permitted the Licensee-Schools using Eureka Math for non-commercial purpose to employ third parties like Office Depot to make copies of Eureka Math curriculum on their behalf. The court noted that following Great Minds' interpretation and reaching the opposite conclusion would cause "absurd results" such as permitting a teacher to copy Eureka Math on an Office Depot copier for a fee, but prohibiting her from having an Office Depot employee copy the materials for her, or permitting "a school [to] pay a copy machine provider a monthly fee to keep a machine on site to copy Eureka Math, but [prohibiting paying] Office Depot employees to make the same copies." Also, the court noted that it would "prevent proper non-commercial licensees from using relatively common means of reproduction to share, engage with, and exercise their rights to the licensed work in a way that would contravene the intent of the License and undermine its utility."

Accordingly, the court determined that Office Depot was not prohibited under the License from making copies of Eureka Math at a profit for the Licensee-Schools. Similarly, the court held that the Licensee-Schools may hire a third-party contractor, including those working for commercial gain, to help implement the License at their direction and in furtherance of their own rights under the License.

Great Minds v. Office Depot, Inc. (9th Cir. 2019) 945 F.3d 1106.

NEGLIGENCE & PREMISES LIABILITY

Court Finds Private School Owed Parent A Duty To Exercise Reasonable Care To Prevent Injury On School Premises, But Declines To Find School Liable For Parent's Injuries.

Maritza Torres arrived at Our Lady of Guadalupe Academy (OLGA) 30 minutes before classes were dismissed to make a tuition payment and wait for her daughter to be released from class. After making the payment, Torres walked down the hallway towards a bench near the administrative offices. While walking, a first grade student pulling a rolling backpack ran in front of Torres. Torres caught her foot on the backpack and tripped forward, landing on her right arm and sustaining a fracture and dislocation injury. There were no staff members in the hallway at the time, but another parent witnessed the backpack strike Torres's foot and cause her to fall. Torres filed an action against OLGA for premises liability and negligence based on failure to supervise.

To prove her negligence and premises liability claims, Torres had to plead (1) OLGA owed her a duty of care; (2) breach of that duty; and (3) the breach as the proximate or legal cause of her injury. To show OLGA owed her a duty of care, Torres had to demonstrate that she and OLGA shared a special relationship. Generally, special relationships may exist between common carriers and their passengers, innkeepers and their guest, businesses or landowners and their invited guests, and a school with its students. Torres first argued that the special relationship between a school and its students supports a duty to nonstudents who are on the school's premises. The court disagreed and held that the special relationship between a school and its students "does not impose a duty on OLGA to monitor and control its students for the benefit and protection of a nonstudent like Torres."

Second, Torres argued that a special relationship existed between her and OLGA due the common law duty that parents owe third parties to supervise and control the conduct of their children. However, the court found that even if the "same parental duties and standards could be extended to OLGA," that duty is only triggered by knowledge of specific dangerous tendencies in the child and there was no evidence that the child in the case had any dangerous tendencies.

Third, Torres argued that a special relationship existed between OLGA and "tuition paying parents," who pay money in exchange for OLGA's provision of a parochial education. The court agreed that "[t]he relationship between a possessor of land and an invitee is a special relationship giving rise to a duty of care." Having agreed that OLGA owed Torres a duty of care as an invitee onto the school premises to exercise reasonable care to prevent her from being injured on the premises, the court then analyzed whether Torres had shown that OLGA breached that duty.

Torres first contended that OLGA breached the duty by releasing a student early, failing to warn her that a child would be released early, and failing to warn her to be on the lookout for students in the hallway. However, the court found that it would have been unreasonable for OLGA to refrain from releasing children early to their parents and unreasonable to require OLGA to tell visitors that children might be running in the hallway.

Torres next contended that OLGA breached the duty by failing to properly supervise the student who was released early. However, the court found that OLGA had policies in place to prevent students from running in the hallways and regularly reminded students of those policies. Further, the court noted that OLGA did not have a duty to provide one-on-one supervision of students at all times.

Finally, the court concluded that Torres was unable to demonstrate causation, i.e., that OLGA's closer supervision of the child would have prevented the student from tripping Torres and causing her injuries. Torres could not recall where she was looking immediately prior to the time she tripped, and the accident occurred so quickly that Torres did not even see the boy beforehand. Accordingly, the court affirmed the judgment in favor of OLGA.

Torres v. Pastor of Our Lady of Guadalupe Catholic Parish Calexico (Cal. Ct. App., Dec. 13, 2019, No. D074233) 2019 WL 6799758 (unpublished).

NOTE:

While this unpublished case is not binding, it does provide a helpful reminder that schools owe a duty of care to parents or other individuals that are on the school campus to protect them from foreseeable harm.

IRS MILEAGE RATE

IRS Releases Standard Mileage Rates For 2020.

The Internal Revenue Service (IRS) released the 2020 optional standard mileage rates for taxpayers to use to calculate the deductible costs of operating an automobile for business, charitable, or other purposes effective January 1, 2020. The standard mileage rate for transportation or travel expenses is 57.5 cents per mile for all miles of business use. The standard mileage rate is 14 cents per mile for use of an automobile in rendering gratuitous services to a charitable organization. For more information, visit: https://www.irs.gov/newsroom/irs-issues-standard-mileage-rates-for-2020.

LCW BEST PRACTICES TIMELINE

Each month, LCW presents 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.

JANUARY/FEBRUARY

- □ Review and revise/update annual employment contracts.
- □ Conduct audits of current and vacant positions to determine whether positions are correctly designated as exempt/non-exempt under federal and state laws.

FEBRUARY- EARLY MARCH

- □ Issue enrollment/tuition agreements for the following school year.
- □ Review field trip forms and agreements for any spring/summer field trips.
- □ Tax documents must be filed if School conducts raffles:
  - Schools must require winners of prizes to complete a Form W-9 for all prizes $600 and above. The School must also complete Form W-2G and provide it to the recipient at the event. The School

should provide the recipient of the prize copies B, C, and 2 of Form W-2G; the School retains the rest of the copies. The School must then submit Copy A of Form W2-G and Form 1096 to the IRS by February 28th of the year after the raffle prize is awarded.

MARCH- END OF APRIL

- □ The budget for next school year should be approved by the Board.
- □ 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.
- □ 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.
- □ Consider whether summer program will be offered and if so, 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 and 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.

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: An administrator of an independent school asked an LCW attorney whether there were any exemptions to the requirement that schools conduct a criminal background check of employees if the employee is under the age of 18.

RESPONSE: The LCW attorney explained that under California Education Code Section 44237, private schools are required to conduct background checks for positions in which the applicant will be in contact with minor students and there is no specific exemption to this requirement for employees under age 18. However, there are two exemptions that may apply in certain situations. First, Education Code Section 44237 specifically states that it does not apply to a secondary school pupil working at the school he or she attends. Therefore, to the extent a minor employee is also a student of the school, the school need not conduct a criminal background check of that student employee. Second, the criminal background check requirement only applies to applicants for employment in a position that requires "contact with minor pupils." Second, the term "contact with minor pupils" is very broad, so the requirements of Section 44237 will likely apply to most school employees.

If neither of the exemptions apply, the school is required to conduct a criminal background check of an applicant, even if the applicant is a minor. While there does not appear to be any specific statute or regulation that would require the school to obtain parental consent prior to fingerprinting a minor, we recommend notifying the minor's parents of the statutory requirement and obtaining parental consent. Some Livescan operators require either a letter from a parent or a parent to be present before a minor's fingerprints are taken, and we also believe it is a best practice.

If one of the exemptions listed above applies, the school may still wish to conduct a criminal background check. If that is the case, the school may not request or consider an applicant's criminal history until after the school has made a conditional offer of employment. The school must then make an individualized assessment about whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. In doing so, the school must consider the nature and gravity of the offense, the length of time that has passed, and the nature of the job sought.

Nevertheless, the benefit of completing the criminal background check despite an applicable exemption is that it may help the school avoid liability for a claim of "negligent hiring." For example, if the employee were to harm someone in the school community, the school could show that it undertook due diligence in the hiring process to determine whether the employee presented a risk of harm. The Livescan background check can also be useful for jobs that require duties such as driving or working with School funds. Convictions for offenses like embezzlement or driving-related offenses would appear on a Livescan background check and could provide some insight regarding the employee's ability to safely and reasonably carry out those duties.

FIRM PUBLICATIONS

To view these articles and the most recent attorney-authored articles, please visit: **www.lcwlegal.com/news.**

Los Angeles Partner **Peter Brown** and Sacramento Associate **Lars Reed** authored an article for *Bloomberg Law* titled "What Employers Should Know About the New Overtime Rate Regulations."

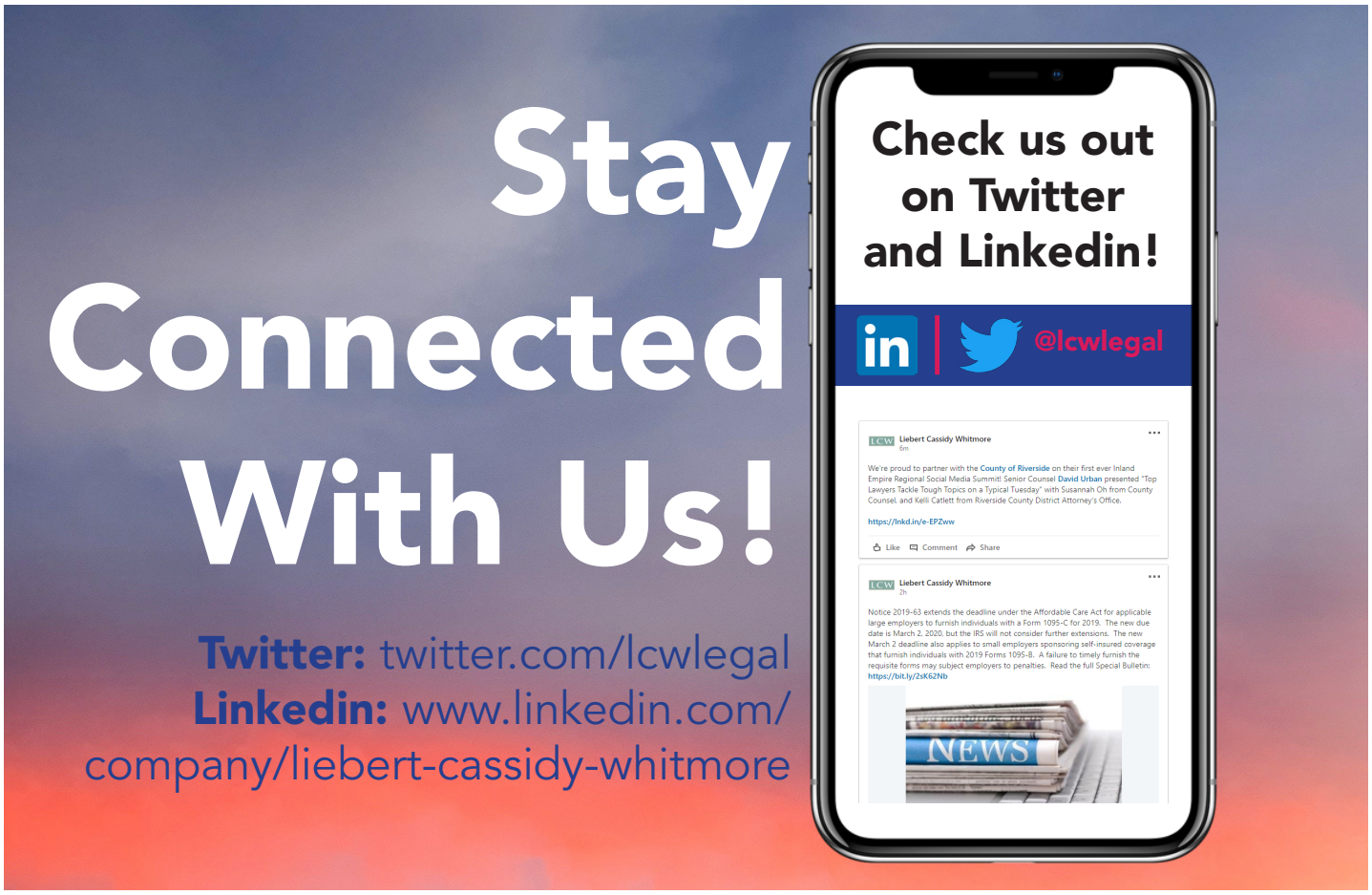
Partners **Scott Tiedemann**, **Donna Williamson**, **Linda Adler**, **Suzanne Solomon** and **Liz Arce** were quoted in the *Santa Monica Observer* in an article regarding new California laws for 2020 that affect private schools, public agencies and police departments.

San Diego Partner **Frances Rogers** and Los Angeles Associate **Kate Im** authored an article for *The Recorder* titled "Cannabis in the Classroom: Navigating the Administration of Medical Marijuana on Campus Under New California Law."

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, contact **Jaja Hsu** at jhsu@lcwlegal.com.



Management Training Workshops

Firm Activities

Consortium Training

Mar. 17	**"Legal Update"** CAIS Consortium | Webinar | Grace Chan
Mar. 17	**"Coaches, Stipends and Headaches"** Golden State Independent Schools Consortium | Webinar | Stephanie J. Lowe
Mar. 24	**"Reasonable Accommodation of Students"** ACSI Consortium | Webinar | Grace Chan
Apr. 2	**"Emerging Legal Issues for Private Schools"** Builders of Jewish Education Consortium | Los Angeles | Michael Blacher
Apr. 28	**"Facilities Use Agreements - When Your School Leases Out Its Space to Others"** CAIS Consortium | Webinar | Heather DeBlanc

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