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.

January 2019

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LCW NEWS

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

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STUDENTS

Test Prep Service with Inaccessible Online Courses Settles with DOJ.

Teachers Test Prep, Inc. (TTP) is a private company that offers test preparation courses related to teacher credentialing exams. TTP offers both online courses and live classes. The DOJ investigated a complaint that TTP's online materials were inaccessible to deaf students because they did not contain a closed captioning option.

The settlement agreement provided that TTP would make sure all of its online courses were accessible to deaf and hard of hearing individuals by providing closed captioning. TTP also agreed to provide information to students and potential students about how to request accommodations. Once an accommodation was requested, TTP agreed to make a decision about granting or denying a request for accommodations within three days. TTP also paid $5,000 to the complainant in this matter.

For more information, see: https://www.ada.gov/ttp_sa.html.

INVESTIGATIONS

University's Single Investigator Model that Requires Individual to Investigate and Adjudicate Complaint Without Providing a Hearing and the Right to Confront Adverse Witnesses Does Not Provide Fair Hearings to Students.

John Doe, a freshman attending the University of Southern California ("USC") on a football scholarship, and Jane Roe, a senior and student athletic trainer, engaged in sexual intercourse in Doe's campus apartment in October 2014. Doe believed the encounter was consensual. Roe claimed it was not. Roe reported the alleged misconduct to USC's Title IX Office, and met with the investigator assigned to the investigation.

Roe reported she arrived at Doe's apartment "tipsy," they went out to get food and, when they returned, smoked marijuana in Doe's room. Roe reported that Doe then committed forcible sexual acts in his bedroom. Roe provided the investigator with photos of bruises on her thighs, chest, and arm, and screenshots of text messages with her roommates with whom she discussed the incident after it happened.

USC notified Doe of the report of sexual misconduct against him, and Doe met with the investigator the next week. During the meeting, Doe described another sexual encounter he had with Roe weeks before the reported misconduct. Doe provided the investigator text messages between him and Roe after the first encounter in which Roe stated she had "blacked out" and did not remember what happened. Doe denied he and Roe smoked marijuana at his apartment during the incident in question and denied he engaged in forcible sexual acts. In a second meeting with Doe, Doe changed his testimony regarding

when he smoked marijuana on the night in question but reiterated that Roe did not smoke. The investigator later opened a second case against Doe regarding the earlier incident.

During the course of the investigation, the investigator contacted all individuals the parties identified as potential witnesses but did not attempt to contact anyone who had been mentioned during the investigation but not fully identified. On February 10, 2015, the investigator permitted the parties to view the information she gathered during the interviews. The investigator closed the investigation the next day.

Under USC's Sexual Misconduct Policy, the Title IX investigator alone makes findings of fact and, using a preponderance of the evidence standard, determines whether the student violated the Student Conduct Code. USC does not conduct in-person hearings, and the accused student has no right to confront his or her accuser. The investigator imposes the sanction that he or she deems appropriate. Either party may appeal the result of the investigation, whereby an anonymous three-member panel reviews the appeal and decides solely based on documentation. The panel forwards its recommendation to the Vice Provost, who has unfettered discretion to accept or modify that recommendation based on his or her review of the record. The Vice Provost's decision is final.

Here, the investigator concluded Doe violated the Student Conduct Code and "more likely than not, engaged in unwanted sexual conduct…" The investigator determined the parties' conflicting accounts could not be reconciled, and found Roe's account more credible for several reasons that she explained in the report. The investigator determined that expulsion and an order prohibiting Doe from contact with Roe were appropriate sanctions. USC notified the parties of the investigator's findings and conclusions and their right to appeal.

Doe submitted an appeal to the Student Behavior Appeals Panel. The stated grounds for his appeal were that: (1) new evidence had become available which was sufficient to alter the decision and about which Doe was not aware and could not reasonably have obtained at the time of the original investigation; (2) procedural errors were committed that materially impacted the fairness of the investigation; and (3) the investigator's conclusions and sanctions were not supported by the findings, and were not supported by the evidence in light of the whole record.

The panel met to review the case file, rejected Doe's contentions, and upheld the sanction of expulsion. The Vice Provost accepted the panel's recommended sanction of expulsion and expelled Doe. Doe filed a petition in trial court asking the court to review USC's decision. The trial court rejected Doe's contentions that he was denied due process, that the investigator or the Vice Provost were biased, and that there was insufficient evidence to support the investigator's findings. The trial court denied the petition. Doe appealed.

The Court of Appeal found Doe did not provide evidence to demonstrate that the investigator's findings and conclusions were premised on actual bias against him or generally against anyone accused of sexual assault, or that there was a high probability of such bias. However, the Court concluded USC's process was fundamentally flawed.

The Court held that in a case such as Doe's, in which a student faces serious discipline for alleged sexual misconduct, and the credibility of witnesses is central to the adjudication of the charge, fundamental fairness requires that the university must at least permit cross-examination of adverse witnesses at a hearing in which the witnesses appear in person or by some other means (such as means provided by technology like videoconferencing) before one or more neutral adjudicator(s) with the power independently to judge credibility and find facts. The factfinder may not be a single individual with the divided and inconsistent roles occupied here by the Title IX investigator in the USC system.

This case turned on witness credibility, and there were inconsistent accounts from Roe and Doe about whether their sexual encounter was consensual. Evaluation of the credibility of the only witnesses to the event was pivotal to a fair adjudication.

The Court found the investigator used her discretion to determine credibility in questionable ways—rejecting Doe's explanation for Roe's motive in claiming sexual misconduct despite investigative leads that, if pursued, would lend support to Doe's theory and weaken Roe's credibility. The investigator did not follow up with presumably identifiable and available witnesses who might have filled in holes in the investigation, thus providing a fuller picture from which to make credibility determinations. The investigator also failed to follow up with the Athletic Department to determine its policies and practices regarding sexual relations between student trainers and athletes that were relevant to assessing the witnesses' credibility.

Overall, the Court found USC's system, which places in a single individual the overlapping and inconsistent roles of investigator, prosecutor, factfinder, and sentencer failed to provide Doe a fair hearing. Accordingly, USC's findings that Doe committed sexual misconduct in violation of the Student Conduct Code cannot stand.

Ultimately, the Court of Appeal reversed the trial court's decision and directed the trial court to grant Doe's petition for writ of administrative mandate as far as it sought to set aside the findings that he violated USC's student conduct code.

Doe v. Allee (2018) __ Cal.App.5th __ [2019 WL 101616].

NOTE:

> *This case is yet another in a line of similar cases whereby a private university's investigation process has been deemed fundamentally unfair. This standard of fundamental fairness is different from the due process required of public institutions. Private K-12 schools may have their disciplinary and investigative processes assessed by similar standards if ever challenged in a court of law.*

CONCUSSIONS

Athletic Organization's Behavior was Grossly Negligent where Student-Athlete Returned to Play After Head Injury.

Alice Mayall brought this claim as a class action against USA Water Polo (USAWP) as a representative of her minor daughter, H.C. H.C. was a healthy and bright honors student who played for a youth water polo team governed by USAWP. During a game in which she was playing goalie, H.C. was injured by a ball to the head. She felt dazed, and swam over to the side of the pool. The coach, who had no training about concussions, asked her a few questions and then sent her back to play. She was hit in the head again and never evaluated by a medical professional during the tournament.

As a result of the head injuries, H.C. suffered severe symptoms of dizziness, fatigue, and headaches so strong that she could not attend school. She became unable to attend public school due to the severity of her post-concussion syndrome, which was eventually diagnosed by a neurologist.

USAWP's "Policies and Guidelines" state that it is committed to creating a safe and healthy environment and the organization is responsible for health and safety issues. Three years prior to H.C.'s injuries, USAWP developed a detailed concussion policy for its national team, but the organization did not require other teams, such as H.C.'s youth team, to follow this standard. During those three years, USAWP received numerous emails describing incidents with concussions and requesting a formal policy. USAWP did maintain a set of Rules Governing Conduct that applied to youth teams. While those Rules briefly discussed not returning to play athletes who had suffered head injuries, it did so in fine print in a section about sportsmanship and abuse. The district court found that USAWP did not have a duty to H.C. and therefore could not be found negligent. Mayall appealed.

To prevail on the negligence cause of action, Mayall needed to show that USAWP had a duty to H.C. and breached that duty, thus causing her damages. California law holds that where certain conditions may be inherent in a sport or activity, an entity does not owe a duty of care to eliminate those risks. However, the entity does have a duty not to increase the risks. Mayall did not argue that USAWP is liable for the initial blow to the head H.C., suffered, only the subsequent injuries that resulted from returning her to play after she was dazed by the first injury. The court found that these subsequent injuries were not inherent in the sport of water polo. The coach knew H.C. had been hit in the head, had time to evaluate her, and should have known that returning her to play greatly increased the odds of serious injury.

While an entity does not under the law have a duty of care that would require it to alter the nature of the sport, this argument could not be used by USAWP with any sort of sincerity. This is because USAWP itself maintained a detailed concussion-management protocol for use at the national level. Applying this protocol to youth teams under its jurisdiction would not have altered the game if it did not do so at higher levels. The Rules document that USAWP did maintain barely mentioned concussions and only did so as a subsection of abuse and sportsmanship, whereas the national protocols and industry standards are precise, specifically addressed to head injury situations, and mandate safe steps to protect athletes. Given these existing standards of care, USAWP did not satisfy its duty of care to the youth team athletes under its jurisdiction.

Mayall's claim also claimed gross negligence on the part of USAWP. The court defined gross negligence as an extreme departure from the ordinary standard of conduct, or a want of even scant care. Given that USAWP had been contacted repeatedly for guidance on concussion protocols, and that many states, including California, maintained laws regarding returning athletes to play, the organization's behavior did amount to gross negligence under California law.

Mayall v. USA Waterpolo, Inc. (2018) 909 F.3d 1055.

NOTE:

California law requires student athletes to receive information about concussion risks and for schools to have procedures in place regarding return-to-play after an athlete is injured in competition. Private schools and colleges should make sure they have properly trained coaching staff and appropriate processes in place to ensure that a student-athlete who suffers a head injury and exhibits symptoms of concussion is not returned to play prematurely. This case also provides insight on how a rejection or ignorance of best practices in a sport around dealing with injuries can be found to constitute gross negligence.

SCHOOL SAFETY

Federal Commission on School Safety Releases Report.

After the tragic school shooting in Parkland, Florida in 2017, a Federal Commission on School Safety was convened to study the problem of violence in schools and determine how these issues can best be addressed and prevented. Although this study and report was conducted in the public school setting, its findings and conclusions can also be helpful for the private school community as all types of schools work to prevent these types of incidents from occurring on campus.

For the full report, go to: https://www2.ed.gov/documents/school-safety/school-safety-report.pdf.

EMPLOYEES

MINISTERIAL EXCEPTION

Ministerial Exception Does Not Apply to Religion Teacher's ADA Claim.

Kristin Biel received her teaching credential in 2009 and went on to work for various tutoring companies and as a substitute at several public and private schools. In March 2013 she was hired by St. James, a Catholic parish school in Los Angeles, first as a long-term substitute and then as the full-time fifth grade teacher. Biel is Catholic, and while St. James prefers to hire Catholic teachers, it is not a job requirement. Biel received a half-day of training in Catholic pedagogy.

Biel taught fifth graders in all their subjects, including religion, which she taught 30 minutes a day, four days a week, using a workbook issued by the school. She joined students at prayer and Mass but did not lead them. Biel's contract stated she would work within the school's "overriding commitment" to Church doctrine and promote behavior in accordance with Church teachings. Her November 2013 evaluation was positive, but also identified a few areas for improvement.

Less than six months after this evaluation (her first and only formal one) Biel was diagnosed with breast cancer. She informed the school she would need to take leave to undergo surgery and treatment. A few weeks later, the school informed her she would not get a new contract for the upcoming school year. Biel sued for discrimination under the ADA. St. James argued the ministerial exception was applicable and the trial court agreed, granting summary judgment to the school. Biel appealed.

The Ninth Circuit assessed Biel's argument by comparing her with the plaintiff in the landmark case on the ministerial exception, *Hosanna-Tabor*. The court went through each of the four factors used in that case: (1) whether the employer held the employee out as a minister, (2) whether the employee's title reflected ministerial training, (3) whether the employee held herself out as a minister, and (4) whether the employee's job duties included important religious functions. Here the court found that Biel did not meet the standards of the first through third factors. She had only secular training, except for one half-day conference upon being hired at St. James. The school had no religious requirements for her position and did not hold her out

as someone with special expertise in Church doctrine or pedagogy. There was nothing religious reflected in her title as fifth grade teacher. Nothing in the record indicated that Biel considered herself a minister either. The only factor she fulfilled was that part of her teaching duties including the religious curriculum. The court, however, found that the entire analysis under *Hosanna-Tabor* would be meaningless if they could rely on that single factor to find that the ministerial exception applied.

Ultimately, the court found that it would not be faithful to *Hosanna-Tabor* to hold that any school employee who teaches religion as any part of their duties would fall within the ministerial exception. The court also stated that the First Amendment "does not provide carte blanche to disregard antidiscrimination laws when it comes to other employees who do not serve a leadership role in the faith." The district court's granting of summary judgment was reversed.

Biel v. St. James School, (2018)—F.3d--, 2018 WL 6597221.

NOTE:

This is an important and somewhat surprising result. There was a strong dissent from one judge, and it remains to be seen whether the school will appeal this result, though it is likely. For now, this case makes it more difficult for religious schools in California, which is governed by the Ninth Circuit, to avail themselves of the ministerial exception defense.

EXCISE TAX

New Excise Tax Penalty on Nonprofits That Pay Employees over $1 Million in Compensation or Give Severance More than Three Times Base Pay.

One aspect of the new tax laws that went into effect in 2018 involves compensation paid by nonprofits to top-earning employees. Under new IRS Code section 4960, an employer is subject to a 21% excise tax if it pays a covered employee more than $1 million in compensation in a tax year or pays compensation that is contingent upon separation that is worth at least three times that employee's average pay. A covered employee is one who is one of the five highest paid employees for the current tax year, or who was a covered employee in any prior tax year after 2016.

Severance payments are likely considered compensation under this law. Furthermore, arrangements involving deferred compensation plans such as 457(f) plans complicate matters in terms of determining in which tax year the compensation is calculated. Private schools and college should consult with their tax professionals if they are close to reaching either of the thresholds stated in this new law.

For more information, see: https://www.irs.gov/pub/irs-drop/n-19-09.pdf

ARBITRATION AGREEMENTS

Class Action Waiver in Agreement Renders Agreement Invalid Where PAGA Claims Waived.

PennyMac is a mortgage servicing company where Richard Smigelski worked for six months. On his first day of work, he signed a document called the Employee Agreement to Arbitrate. That agreement references another document, called Mutual Arbitration Policy ("MAP"). The Agreement states the employee must utilize the MAP and states the employee waives any rights to bring claims on a representative or class basis. The MAP document also contains a class or representative or private attorney general waiver, unless the parties agree. The MAP contained a severance clause permitting the arbitrator or a court to sever any part of the MAP procedures that do not comport with the Federal Arbitration Act. The Agreement document did not contain a severance provision.

Smigelski sued PennyMac for civil penalties under the Private Attorney General Act ("PAGA") for issues involving miscalculated overtime and failure to provide accurate wage statements. PennyMac filed a petition to compel arbitration pursuant to the Agreement and the MAP. Smigelski opposed that position, arguing that PAGA claims were not waivable under California law. The trial court denied PennyMac's motion. Smigelski then submitted an amended complaint, which added individual causes of action to his PAGA claims. PennyMac again attempted to compel arbitration. The court again denied the motion, explaining that the court already found that the MAP and the Agreement contained provisions that violated public policy and could not be severed, rendering the entire agreement to arbitrate unenforceable. PennyMac appealed.

PennyMac's argument was that if the waivers were illegal, they could be severed from the rest of the

agreement, and that the FAA preempts any state laws. The court explained that a PAGA action, where an individual acts on behalf of the state, is essentially a law enforcement action to benefit the public and not to benefit private persons. That is why 75% of the damages awards goes to the state. While a PAGA action and a class action are both "representative" actions, they are also different in that class actions seek to confer a private benefit on individual employees. California case law is clear that PAGA claims may not be forcibly waived under an arbitration agreement and this is not preempted by the FAA because a dispute under PAGA is between the employer and the state, not the employer and individual employee.

PennyMac tried to argue that the language waiving the right to bring representative or class actions was really only targeting class actions. The court did not accept that argument. By specifically stating the employee was waiving his right to bring any representative action, the agreement and MAP swept PAGA claims into the waiver and therefore rendered it unenforceable.

The court next analyzed whether the entire agreement was unenforceable, or if the unenforceable portion could be severed. Here the sloppy drafting of the Agreement and MAP hurt PennyMac. Only the MAP had a severability clause, but both documents contained the waiver language. Since the Agreement did not contain its own severability clause, the problematic language could not be severed. Furthermore, the language in the MAP stated that only provisions that did not comply with the FAA could be severed, but here it was a state law problem regarding PAGA waivers, not an FAA issue. Therefore, the entire Agreement and MAP were unenforceable.

Finally, PennyMac argued that the court could not decide on issues of arbitrability because the arbitration agreement delegated that role to the arbitrator. The court again disagreed, finding that in a PAGA case, the dispute is not between the individual employee and the company, but rather the state and the company. Therefore, even if Smigelski agreed to let an arbitrator decide the issue of arbitrability for individual claims, he cannot do so on behalf of the state of California. Regardless, the MAP stated that an arbitrator or court may sever portions of the agreement, indicating that a court has the power to decide certain issues related to arbitrability. The petition to compel arbitration was denied.

Smigelski v. PennyMac Financial Services et al., 2018 WL 6629406.

NLRB/HANDBOOK POLICIES

Policy Mandating Confidentiality in Investigations Ruled Illegal.

Lamb Weston, Inc. maintained several policies in its Employee Handbook that were challenged by the NLRB General Counsel as impermissible under the standard set forth in Boeing in 2017. That decision required an analysis of whether a rule was unlawful because its justification did not outweigh the adverse impact on employee's right to engage in concerted activity.

The first rule at issue in this case prohibited fighting, horseplay, or other words or conduct which would cause injury or interfere with the company's operations. The Administrative Law Judge (ALJ) found this rule was a category 1 rule, meaning it was legal because when interpreted in context it does not prohibit or interfere with an employee's NLRA rights. The reasonable interpretation is that this rule pertains to violence or other rough physical behavior that might cause injury.

The next rule stated all employees must courteously cooperate in any company investigation, including not discussing their interview with other employees unless given permission to do so. The company argued this prevents investigations from becoming tainted by employee chatter. The ALJ, however, found this to be an illegal category 3 rule under *Boeing* because it could be read as applying to NLRB unfair labor practice investigations. Employers may only question employees about such charges if it is on a voluntary basis. Other prior cases ruled that similar rules were permissible when the employer established legitimate and substantial business justifications and when the rule was not a blanket rule, but rather a specific decision about one particular investigation. The ALJ noted that the company here probably could have demanded confidentiality in certain investigation processes, but the rule as written was overbroad.

Another challenged rule was one which prohibited employees from engaging in activities that are detrimental to the company's reputation or interests. The ALJ found this rule did not infringe on NLRA rights because, while it could be read by an unsophisticated employee as prohibiting something like picketing, it was most reasonably interpreted as pertaining to off-duty conduct that impacts a company's general reputation in the community.

The company had a rule prohibiting solicitation and

the distribution of literature by non-employees at any time. While material could be distributed in break rooms or lunch rooms, the company banned any material which was obscene, profane, or political. The company representative argued that political literature was divisive. But the ALJ ruled that many issues which could be categorized as "political" involved clear Section 7 rights, like a ballot referendum about being a "right to work" state or minimum wage increase campaigns. This rule was found illegal, as the company's goal of avoiding divisive topics was not outweighed by the infringement of the employee's rights to discuss issues that affect the terms and conditions of their employment.

Finally, the company maintained a policy regarding protecting confidential information, including the personal information of other employees. The rule on its face was a category 1 rule. However, the company admitted that it made certain employees who were lower-level workers without any access to confidential employee data sign the agreement. As applied to those employees, this rule was not permissible. Such a worker, when seeing the reference to "payroll" information, would logically conclude this included his or her own wage information, since he or she did not otherwise have access to any payroll data. Such a rule should be narrowly applied to only those employees it actually affects.

Lamb Weston, Inc. and Amanda Dexter, Case No. 15-CA-2079241 (JD-75-18).

NOTE:

Private schools and colleges need to be thoughtful about each and every policy in the Employee Handbook. All employees have rights under the NLRA, even at non-unionized workplaces. Of particular interest in this case are the rules regarding cooperation with investigations and political issues at work, both of which are common issues faced by private schools and colleges.

WAGE AND HOUR

Employee Granted Damages for Unpaid Hours Worked Where Employer Failed to Keep Accurate Records.

Terry Furry worked for East Bay Express, a weekly newspaper in Oakland, since 1996. By 2009 he was a marketing manager, earning a base salary, plus commissions and bonuses. Furry normally worked from 8:30 or 9:00 a.m. until 5:30 or 6 p.m. He decided whether to take meal breaks and no one ever told him he could not. He also performed various work tasks on evening and weekends at various events and promotions sponsored by the paper.

In 2014, Furry brought a complaint against East Bay for failure to pay minimum wage and overtime, failure to provide meal and rest breaks, failure to provide accurate wage statements, and other causes of action. The trial court found that East Bay did not keep accurate records of Furry's hours and failed to meet its burden of showing that Furry was exempt from overtime. However, the trial court did not award Furry unpaid overtime damages, finding that Furry did not present sufficient evidence regarding the extent of his work hours. Furry appealed.

The appeals court found that the trial court erred in refusing to award damages for unpaid overtime. Furry did establish, through testimony of himself and witnesses, that he worked beyond the traditional 40-hour week, appearing at events and creating artwork for the paper. California precedent allows for employees to present "imprecise evidence" in order to shift the burden back to the employer to provide precise evidence of hours worked, or evidence to negate the reasonableness of the employee's evidence. Here East Bay did not do that.

The court also found that the trial court did not err in denying relief on the email break claim. Furry admits he was always provided with the opportunity to take a meal break, but sometimes he chose to eat at his desk. Employees are only entitled to the one-hour of premium pay for a missed meal break if the employer did not permit or allow the meal break. If the employer chooses to perform work during the break, then the employee must be paid straight time for that work. Furry failed to show that East Bay knew or should have known that he performed work during some lunch breaks.

Furry v. East Bay Publishing, LLC (2018) --Cal.Rptr.3d--, 2018 WL 6930903.

NOTE:

This decision demonstrates the importance of keeping accurate records for non-exempt employees, including their start and finish times, as well as their lunch breaks. A private school or college will have to satisfy the evidentiary burden of showing accurate time records in order to refute employee claims of missed payments for these legally required breaks. It is important to have a rule requiring employees to accurately track and record all worktime on their timesheet and to enforce that rule.

BUSINESS AND FACILITIES

LCW Obtains Early Dismissal of Americans with Disabilities Act Public Accommodation Lawsuit.

Liebert Cassidy Whitmore recently obtained an early dismissal of an Americans with Disabilities Act public accommodation lawsuit on behalf of a private school client. The private school owns an event space, which it rents out for use by outside organizations. The plaintiff, who is hearing impaired, filed a lawsuit under the ADA against both a tenant of the event space and the private school for an alleged failure to provide plaintiff with an assisted listening device during a particular event presented by the tenant. The matter was in the Los Angeles County Limited Jurisdiction Court.

At the very outset of the case, we notified plaintiff's counsel of legal authority that a landlord in an ADA public accommodation lawsuit may be liable only in very limited circumstances – if the landlord has a policy that prevents the tenant from providing accommodations for disabled individuals. The school has no such policy. We sent a letter to plaintiff's counsel threatening to file a motion based on the legal authority that would allow the court to dismiss the school from the case early on in the lawsuit. Plaintiff's counsel responded by immediately dismissing the school from the lawsuit, making the filing of the motion unnecessary. We are pleased that not only did we obtain a victory for the client, but we did so in a manner that required the client to expend minimal legal fees and minimal time and attention to the defense of the lawsuit.

Had we not obtained the school's early dismissal from the lawsuit, we were prepared to demonstrate in the lawsuit that the school's event space does in fact have assisted listening devices and appropriate signage.

LCW partner Max Sank and senior counsel David Urban represented the private school in this matter.

IRS Mileage Rates for 2019.

The IRS issued 2019 rates for mileage reimbursement. The new rate is 58 cents per mile driven for business use, which is up 3.5 cents from the rate for 2018.

For more information, see: https://www.irs.gov/newsroom/irs-issues-standard-mileage-rates-for-2019.

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.

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, 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 called about a full-time non-exempt employee who was going to work as a coach in addition to his full-time administrative job. The school wanted to understand its obligations for overtime payments and how to figure out the rate of pay when the two different positions had two different pay rates.

RESPONSE: The attorney told the administrator that the School would be liable for overtime for all hours worked in excess of 8 hours a day, or 40 hours in a week. The School could pay this employee minimum wage for the coaching duties, if he agreed to it, but when calculating overtime, all hours worked by the employee must be combined.

The way to calculate the regular rate of pay for overtime purposes when an employee works two different positions at two different rates for an employer is by a weighted average of the different rates. As an example, the attorney explained that if this employee received a rate of $15 an hour for his coaching duties, and worked 10 hours on coaching duties during the workweek, and then he received a rate of $20 an hour for his administrative position, and worked 40 hours in this position for the week, the weighted average would be calculated as follows:

($15 x 10) + ($20 x 40)/50 hours (total hours worked during the week) = $19 an hour. $19 an hour would be the regular rate of pay and this number would need to be calculated every week, since it would change from week to week. Overtime is based on one and half times the regular rate of pay, so this figure would be used when calculating the amount of overtime owed to this employee.

The attorney also told the administrator that other types of pay are also required to be included in the regular rate of pay, such as cash in lieu payments, retroactive pay increases, educational and other incentive pay, standby pay, awards for performance on the job, and non-discretionary merit bonuses. These types of pay, however, are not very common in private school settings. Regular rate can be a complicated issue, and schools should feel free to reach out to an attorney for assistance when addressing these issues.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Feb. 12 **"Hiring"**
CAIS | Webinar | Linda K. Adler

Feb. 13 **"Student Waivers"**
Builders of Jewish Education Consortium | Webinar | Grace Chan

Customized Training

Feb. 4 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment"**
Crossroads School | Santa Monica | Julie L. Strom

Feb. 25 **"Mandated Reporting and Understanding Professional Boundaries"**
Keys School | Palo Alto | Grace Chan

Speaking Engagements

Feb. 2 **"Annual Legal Update"**
California Association of Independent Schools (CAIS) Trustee/Head of School Conference | Westlake Village | Michael Blacher & Donna Williamson

Feb. 2 **"Safety and Security in Our Schools"**
CAIS Trustee/Head of School Conference | Westlake Village | Heather DeBlanc & Jane Davis

Feb. 27 **"Legal Update"**
CAIS Accreditation Directors | Long Beach | Michael Blacher

Feb. 28 **"Courageous Authenticity - Reimaging Critical Conversations"**
National Association of Independent Schools (NAIS) Annual Conference | Long Beach | Michael Blacher & Elizabeth Tom Arce & Rose Helm & Rebecca Rowland

Seminars/Webinars

Feb. 15 **"Train the Trainer: Harassment Prevention"**
Liebert Cassidy Whitmore | Fresno | Shelline Bennett

Feb. 19 **"Wage & Hour 101 for Private Schools"**
Liebert Cassidy Whitmore | Webinar | Brian P. Walter

Feb. 19 **"Train the Trainer: Harassment Prevention"**
Liebert Cassidy Whitmore | San Diego | Judith S. Islas

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New to the Firm

Kaylee Feick is an Associate in our Los Angeles Office where she provides representation and counsel to clients in all matters pertaining to labor, employment, and education law. She provides support in litigation claims for discrimination, harassment, retaliation, wage and hour disputes, and other employment matters. Kaylee has experience in litigation procedures such as drafting pleadings and discovery. She also has experience in trial preparation, including researching and drafting pretrial motions and preparing witnesses for trial. She can be reached at 310-981-2735 or kfeick@lcwlegal.com.

LCW LIEBERT CASSIDY WHITMORE

BECOME A CERTIFIED HARASSMENT PREVENTION TRAINER FOR YOUR SCHOOL

LCW Train the Trainer sessions will provide you with the necessary training tools to conduct the mandatory AB 1825, SB 1343, AB 2053, and AB 1661 training at your own school.

NEW California Law (AB 1825, SB 1343) requires employers with five or more employees to provide harassment prevention training to all employees **by the end of 2019**. Supervisors **must** participate in a 2-hour course, and now, non-supervisors **must** participate in a 1-hour course.

QUICK FACTS ON LCW TRAIN THE TRAINER PROGRAM

- ✓ Trainers will become certified to train both supervisors and non-supervisors
- ✓ One-day sessions provide 6 hours of instruction
- ✓ Attendees receive updated LCW materials for 2 years
- ✓ Pricing: $2,000 per person ($1,800 for ERC members)

UPCOMING DATES

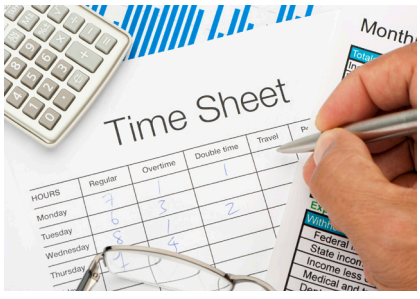
Fresno - February 15, 2019
San Diego - February 19, 2019
San Francisco - March 13, 2019
Los Angeles - April 10, 2019
9:00 a.m. - 4:00 p.m.

TO REGISTER

Contact Anna Sanzone-Ortiz
ASanzone-Ortiz@lcwlegal.com
310.981.2051
LCWLEGAL.COM

LCW WEBINAR: WAGE & HOUR 101 FOR PRIVATE SCHOOLS

Tuesday, February 19, 2019 | 10 AM - 11 AM



Join us for a one-hour webinar to learn the basics and delve into the details of wage and hour issues for private schools. Whether you consider yourself a new student of wage and hour law or want a refresher course to further your expertise, this webinar is for you. No prior knowledge of wage and hour law is needed! We will cover hours worked, minimum wage, white collar and teacher exemptions, overtime, and recordkeeping. This webinar is specifically for private schools and the everyday wage and hour challenges they face.

Presented by:

Brian P. Walter

Who Should Attend?

Administrators, Business Officers, and Payroll Specialists/Technicians

Workshop Fee:

Consortium Members: $75, Non-Members: $150

Register Today: www.lcwlegal.com/events-and-training

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