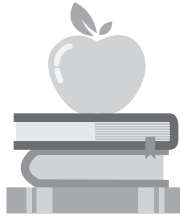
LIEBERT CASSIDY WHITMORE

PRIVATE EDUCATION MATTERS



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

June 2020

INDEX

STUDENTS
Duty of Care 1
College Admissions Scandal 3

EMPLOYEES
Labor Relations 3
Title VII 5
Attorney's Fees 6

BENEFITS CORNER
Cafeteria Plans 7
COBRA 7

LCW Best Practices Timeline 8
Consortium Call Of The Month 9

LCW NEWS

Firm Activities 10
COVID-19 Updates 10
LCW Return to Work and School Toolkit 11

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.

THANK YOU TO OUR PRIVATE EDUCATION CLIENTS!

You are a College President, Head of School or Principal, Business Officer, Division Head, Dean, Administrator, Human Resources Director or Board Member. Each of you is working at peak capacity navigating through new challenges and handling situations you have never encountered before. You are planning how to guide your school, college, or university though frightening and uncertain times while working to reassure your school community. You are facilitating the transition to distance learning, meeting the needs of your students, making difficult decisions about staffing needs, analyzing new state and federal laws and entitlements, and navigating complex contract issues related to the current public health emergency.

We thank you sincerely for your work and dedication. We are also here to help. LCW is monitoring the changing information and laws regarding the coronavirus closely. For templates, special bulletins, and explanations of some of the recent COVID-19 federal legislation, go to www.lcwlegal.com/responding-to-COVID-19/responding-to-the-coronavirus-covid-19-for-independent-schools.

STUDENTS

DUTY OF CARE

Boarding School Did Not Breach Duty Of Care Owed To Student.

Abrielle Kira Bartels began attending the Milton Hershey School, a cost-free, not-for-profit, residential academy, in kindergarten. When Abrielle was in eighth grade, she began meeting with the School's psychologist, Dr. Benjamin Herr, and expressed feelings of anxiety, depression, and self-harm. She told Dr. Herr that she had been experiencing suicidal ideations since at least sixth grade and had attempted suicide in the past. Abrielle also shared specific information about past suicide attempts and that she planned to stab herself with a knife in the near future. Because of her statements, Abrielle was repeatedly admitted to the School's student health center, but Abrielle continued to express "intense suicidal ideations." As a result, Dr. Herr drove Abrielle to an inpatient mental health facility, where Abrielle's mother, Julie Wartluft, signed Abrielle into the facility.

After Abrielle was discharged from the inpatient mental health facility, she returned to the School, but her suicidal thoughts continued. She was once again admitted to the School's student health center where she was assessed by a psychiatric consultant. The psychiatric consultant recommended that Abrielle be admitted to a psychiatric hospital. Dr. Herr drove Abrielle to a psychiatric hospital, where Wartluft met them. Abrielle signed herself in for voluntary hospitalization.

Dr. Herr and Abrielle's treating physicians at the psychiatric hospital consulted about Abrielle's condition during her stay at the hospital. Ultimately, it was decided that the School could not meet Abrielle's psychological needs and Abrielle would be released to her mother to live at home until she was stable enough to return to the School. The School's home-life administrator determined that Abrielle was not permitted to attend her on-campus eighth grade graduation or after-party. Ten days after Abrielle was released to her mother, she hanged herself in a bedroom closet and passed away.

Abrielle's parents, Wartluft and Frederick Bartels, Jr., sued the School. Wartluft and Bartels alleged that the School, among other things, failed to comply with their own applicable policies and procedures for dismissing a student for psychological reasons when they dismissed Abrielle from the School and barred her from attending her eighth-grade graduation and the after-party. Wartluft and Bartels also alleged that the School was negligent when is dismissed Abrielle from their care thereby forcing her into an unstable family environment that resulted in her death, and alleged intentional infliction of emotional distress, wrongful death, and survival actions. Wartluft and Bartels filed a motion for summary judgment in an effort to obtain a ruling in their favor on the merits of their allegations without having to go to trial. The School similarly filed a motion for summary judgment in an effort to dispose of the parents' claims without a trial.

In ruling on the motions, the court first analyzed the parents' claim that the School failed to comply with their own policies and procedures when they dismissed Abrielle and prevented her from attending the eighth grade graduation and after-party. The parents asserted that the School had a six-step procedure for dismissing a student from the school for psychological reasons and that the School only partially complied with one of those steps. In response, the School asserted that they did follow applicable policies and procedures. The School also asserted that they did not dismiss Abrielle from School, but instead placed her on a temporary leave of absence. The court determined that a factual dispute existed as to whether the School followed their applicable policies and procedures and as to whether Abrielle was dismissed from School or on a leave of absence. Because of this factual dispute and some procedural issues with the parents' motion, the School denied the motions as to this claim and let the claim proceed to trial.

Next, the court analyzed the parents' claim that the School was "negligent in dismissing Abrielle from their care and in barring her from her eighth-grade graduation and from the subsequent after-party at her student family home thereby forcing her into an assertedly unstable home environment which resulted in her death." The School asserted that the duty of care a school owes to its students "is coextensive with the physical custody and control over the child and does not ordinarily extend beyond the area of control of school authority, so that the duty ceases when the child passes out of the orbit of the [school's] authority." Accordingly, the School contended that its duty of care to Abrielle ended when she checked into the psychiatric hospital, so the parents' negligence claim was without merit.

The parents contended that the duty of care a school owes to its students comes "'with an attendant independent social obligation to provide reasonable care for and to maintain the safety of vulnerable minor children in its care'—a duty which does not end simply because the student leaves campus." The parents asserted that the School had a continued duty to care for Abrielle after she checked into the psychiatric hospital and after she was released into her parents' care.

The court disagreed with the parents' expansive interpretation of the duty of care a school owes to its students. The court explained that finding such an expansive duty would mean that the School "could have been liable for practically anything that occurred to Abrielle, or that Abrielle did to another, at a time when, arguably, the [School] had no way of even knowing what she was doing." The court determined that the School's duty of care ended when Abrielle was admitted to the psychiatric hospital and then discharged into her parents' care. The court granted the School's motion for summary judgment as to the parents' negligence claim.

The court also found that summary judgment in the School's favor was appropriate as to the parents' intentional infliction of emotional distress, wrongful death, and survival actions. The court noted that "Abrielle's death is manifestly heartbreaking," but that it "simply [was] not an actionable demise."

Wartluft v. Milton Hershey School and School Trust (M.D. Pa., Mar. 18, 2020, No. 1:16-CV-2145) 2020 WL 1285332.

NOTE:

While this case is not binding in California, California schools owe a duty of care to their students to protect them from foreseeable harm during curricular activities or when in an "in loco parentis" status, such as students attending boarding school. Accordingly, schools must follow the policies and procedures they have in place to protect student safety and take appropriate steps to protect students from foreseeable harm during school-sponsored activities where the school has some measure of control over students and the activity. The court in Wartluft v. Milton Hershey School and School Trust, *noted that if the School had not provided Abrielle with an opportunity to seek professional medical help, they would have*

unquestionably breached their duty. This case further highlights the important need to follow all policies and procedures and to carefully document such compliance. In this decision, the case can proceed on the issue of whether the policies and procedures were complied with because the record was not clear.

COLLEGE ADMISSIONS SCANDAL

University Students Lack Standing To Bring Claim They Were Injured By College Admissions Scandal.

William "Rick" Singer operated a fraudulent university admissions scheme, which is now known as the "College Admissions Scandal." One of Singer's schemes included accepting financial contributions from parents to create a false sports profile for the parents' children to make it appear that the student was a superior student athlete. Singer would then bribe the coaches or managers in a university's athletic department to give the student one of the spots the university set aside for superior student athletes. The manager or coach would then bypass a legitimate superior student athlete who was qualified to fill the set aside spot in favor of a student with fraudulent athletic credentials created by Singer.

In a consolidated action, about thirty students (Students) sued Singer and numerous universities implicated in the College Admissions Scandal (Singer and the Universities), alleging that the Students were damaged because they paid college admissions application fees to the universities without knowing that unqualified candidates were "slipping in through the back door of the admissions process." The Students alleged that they suffered an economic harm because they paid the application fees, and were also harmed because they did not receive the fair and objective admissions process they were promised.

Singer and the Universities filed motions to dismiss the Students' claims, contending that the Students lacked standing to bring the actions. To establish standing, the Students had to allege "(1) an injury in fact that is concrete and particularized, as well as actual or imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely (not merely speculative) that injury will be redressed by a favorable decision." Singer and the Universities alleged that the Students could not show that they were particularly affected by the allegedly fraudulent scheme.

The court agreed, finding that the Students only "alleged injury—that they applied to a school engaging in fraud and that they would not have applied had they known about the fraud—is not particular to them" and that any applicant or admitted student to one of these universities have the same harm. Further, the court explained that Singers' scheme affected the spots these universities reserved for superior student athletes, and the general admissions spots at the universities were unaffected. Because none of the Students alleged that they applied for, were being considered for, or were denied a spot set aside for superior student athletes, the Students could not show that Singers' scheme had a particular effect on their admissions applications. The court noted that without a link between Singer's scheme and the Students, their "harm collapses into a harm based on the wrongness of the scheme itself," which is insufficient to have standing.

Ultimately, the court dismissed the Students' claims because they failed to show that they were particularly affected by Singer's fraudulent scheme. The court also noted that its decision "should not be construed as condoning Singer's manipulation of the college admissions process."

Tamboura v. Singer (N.D. Cal., May 29, 2020, No. 5:19-CV-01405-EJD) 2020 WL 2793371.

EMPLOYEES

LABOR RELATIONS

NLRB Lacks Jurisdiction Over Teachers At Bona Fide Religious Educational Institutions.

Bethany College is a 501(c)(3) Lutheran liberal arts college located in Lindsborg, Kansas. Bethany College is a ministry of the Evangelical Lutheran Church in America (ELCA) and is owned and operated by the Central States Synod and the Arkansas-Oklahoma Synod of the ELCA. Bethany College faculty members Thomas Jorsch and Lisa Guinn filed unfair practice charges against the College with the National Labor Relations Board (NLRB or Board), which were subsequently consolidated. Jorsch and Guinn alleged that Bethany College violated the National Labor Relations Act (NLRA) by unlawfully maintaining an overly broad confidentiality rule, prohibiting employees from engaging in concerted activity for the purposes of mutual aid and protection, prohibiting employees from discussing terms and conditions of employment, and discharging employees for engaging in protected, concerted activities.

In the hearing before the administrative law judge, the judge applied the test articulated in *Pacific Lutheran University* (2014) 361 NLRB 1404, for when the Board may exercise jurisdiction over a religious institution.

Using the Pacific Lutheran Test, the judge held that the Board could exercise jurisdiction over self-identified religious institutions of higher education and found that Bethany College violated the NLRA by engaging in the activity alleged by Jorsch and Guinn.

Subsequently, the case went before the Board. The NLRB General Counsel urged the Board to reverse the judge's decision against Bethany College, dismiss the complaint against the College, overrule *Pacific Lutheran University*, and adopt the test articulated in *University of Great Falls v. NLRB* (D.C. Cir. 2002) 278 F.3d 1335, for when the Board may exercise jurisdiction over a religious institution. In determining whether to take the actions urged by the NLRB General Counsel, the Board analyzed the historical case law addressing the Board's jurisdiction over religious schools.

In 1979, the United States Supreme Court held in *NLRB v. Catholic Bishop of Chicago* (1979) 440 U.S. 490, that the NLRA did not authorize Board jurisdiction over church-operated schools and their lay teachers. The Supreme Court explained that doing so would pose a "'significant risk that the First Amendment will be infringed,' and the Court could be forced to 'resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.'"

After the *Catholic Bishop* decision, the Board continued to attempt to exercise jurisdiction over religiously affiliated schools if the school did not have a "substantial religious character." However, reviewing courts consistently rejected the Board's attempts to exercise jurisdiction over religiously affiliated schools using the "substantial religious character" test in light of the Supreme Court's decision in *Catholic Bishop.*

In one such case, the *University of Great Falls v. NLRB* (D.C. Cir. 2002) 278 F.3d 1335, the D.C. Circuit reviewed the Board's exercise of jurisdiction over the faculty of a Roman Catholic University using the "substantial religious character" test. The D.C. Circuit held that the test "involved the same 'intrusive inquiry' and same 'exact kind of questioning into religious matters which *Catholic Bishop* specifically sought to avoid,' with 'the NLRB trolling through the beliefs of the University, making determinations about its religious mission, and that mission's centrality to the 'primary purpose' of the University.'"

Instead of the "substantial religious character" test, the D.C. Circuit held that the Board must utilize a "bright-line" test based on objective facts to determine whether the *Catholic Bishop* exemption from Board jurisdiction over faculty members at an allegedly religiously affiliated school should apply. The D.C. Circuit then created a three-prong test. Under the test, the Board must decline to exercise jurisdiction over an institution that (1) holds itself out to students, faculty, and community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. The D.C. Circuit noted that the newly articulated *Great Falls* test allows 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," while assuring that the Catholic Bishop exemption is reserved for bona fide religious institutions.

In 2014, the Board addressed its jurisdiction over religious institutions again in *Pacific Lutheran University* (2014) 361 NLRB 1404. In *Pacific Lutheran*, the Board added a new component to the first prong to the *Great Falls* test, namely that a religious college or university must also show that "it holds 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 demonstrated by its representations to current or potential students and faculty members, and the community at large" in order to qualify for the *Catholic Bishop* exemption. In that case, the Board asserted jurisdiction over Pacific Lutheran University, because there was nothing in the University's "governing documents, faculty handbook, website pages, or other material" that would suggest to students, faculty, or the community that the faculty members at issue "perform any religious function."

In 2020, in *Duquesne University of the Holy Spirit v. NLRB* (D.C. Cir. 2020) 947 F.3d 824, the D.C. Circuit rejected the decision in *Pacific Lutheran*, holding that the *Pacific Lutheran* decision resulted in the Board second-guessing the religious institution's own views on what constitutes religious activity and risks infringement on First Amendment rights and conflict with the Religion Clauses of the Constitution.

In the instant case, and after reviewing the *Catholic Bishop* decision and the subsequent historical case law addressing the Board's jurisdiction over religious schools, the Board overruled *Pacific Lutheran*, finding that it was inconsistent with the Supreme Court's decision in *Catholic Bishop.* The Board noted that while the rights set forth in the NLRA are important, those rights are subordinate to the First Amendment of the Constitution, which prohibits Congress from making a law respecting an establishment of religion or prohibiting the free exercise of religion. The Board held that it lacks jurisdiction over matters concerning teachers or faculty at bona fide religious educational institutions.

The Board further held that the D.C. Circuit's *Great Falls* case is the correct test to use when determining whether it is proper for the Board to exercise jurisdiction over teachers or faculty at purported religious institutions because it "leave[s] the determination of what constitutes religious activity versus secular activity precisely where it has always belonged: with the religiously affiliated institutions themselves, as well as their affiliated churches and, where applicable, the relevant religious community." The Board also noted that the *Great Falls* test prevents the Board from making subjective judgments and intrusive inquiries into the nature of the institutions' activities or those of its faculty members. Finally, the Board noted that the *Great Falls* test provides "the Board with a mechanism for determining when self-identified religious schools are not, in fact, bona fide religious institutions, therefore protecting the rights of employees working for those institutions."

The Board then applied the *Great Falls* test to Bethany College and held that the College is exempt from the Board's jurisdiction. First, the Board found that the College meets the first prong of the *Great Falls* test because it holds itself out to students, faculty, and the community as providing a religious educational environment. The Board noted that the College's Handbook states that the:

> *… object and purpose of this Corporation shall be to establish and maintain a Christian institution of higher education to be known as 'Bethany College'; to serve Jesus Christ and His church by training men and women who seek a liberal arts education under Christian auspices; and to acquaint these students with the cultural, intellectual, and religious forces in the field of higher education.*

Also, the job postings that the College uses to recruit faculty members and employees notes that the College is a college of the ELCA with a mission "to educate, develop, and challenge individuals to reach for truth and excellence as they lead lives of faith, learning, and service."

Second, the Board found that the College meets the second prong of the *Great Falls* test because it is a 501(c)(3) nonprofit organization. Third, the Board found that the College meets the third prong of the *Great Falls* test because the College is "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion." Specifically, the College is owned and operated by the Central States Synod and the Arkansas-Oklahoma Synod of the ELCA.

Because the Board determined that Bethany College met all three prongs of the *Great Falls* test, the Board found that it could not exercise jurisdiction over the College and it dismissed the complaint alleging unfair labor practices committed against specific faculty members.

Bethany College and Thomas Jorsch and Lisa Guinn (June 10, 2020) 369 NLRB No. 98.

NOTE:

> *Under the* Great Falls t*est, it is easier for a religious institution to show that the NLRB lacks jurisdiction over its employees. In the March 2020 Private Education Matters newsletter, Liebert Cassidy Whitmore wrote an article about the decision in* Duquesne University of the Holy Spirit v. National Labor Relations Board (*D.C. Cir. 2020) 947 F.3d 824. The article is available* here.

TITLE VII

The U.S. Supreme Court Rules That Title VII Protects LGBTQ Workers.

On June 15, 2020, the United State Supreme Court ruled that Title VII of the 1964 Civil Rights Act protects gay and transgender employees from discrimination. The Court's decision was 6-3 and the opinion was authored by Justice Gorsuch, who was joined in the decision by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor and Kagan.

Title VII of the 1964 Civil Rights Act is the federal law that prohibits discrimination in employment on the bases of race, color, religion, sex and national origin. At issue before the Court was whether the word "sex" in Title VII protects employees from discrimination on the basis of their sexual orientation or transgender status. Before the Court were appeals of three cases where the employers allegedly fired long-term employees for being homosexual or transgender. First, in *Bostock V. Clayton County, Georgia*, a county employee was fired for conduct "unbecoming" a county employee after he joined a gay softball league. Second, in *Altitude Express, Inc., et al. v. Melissa Zarda and William Allen Moore, Jr.*, a skydiving company fired an instructor days after he said he was gay. Third, in *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, et al.*, a funeral home fired an employee who presented as a male when she was hired after she informed her employer that she planned to "live and work full-time as a woman."

The Court ruled that the plain language of the statute – prohibiting discrimination "because of" sex – incorporates discrimination based on sexual orientation or transgender status. The Court stated: "An employer

who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." For example, if an employer fires a male employee for being attracted to men, but does not fire a female employee for being attracted to men, the employer's decision is based on sex. The Court explained that "homosexuality and transgender status are inextricably bound up with sex . . . . because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."

Concluding that the plain meaning of the text of the statute is clear, the Court found no need to look to legislative history or other sources to interpret the law. However, the Court rejected the employers' arguments that prohibiting discrimination on the basis of homosexuality or transgender status was not the intent of Congress at the time the law was passed in 1964: "But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms."

Finally, the Court noted two other issues raised by the employers relating to the impact of this decision, but concluded they were not before the Court at this time. First was the balance between religious liberty and Title VII. The Court explained that while in the future employers may be able to raise an argument that free exercise of their religion interferes with their compliance of Title VII, none of the employers before the Court had presented that argument. Second, employers raised concerns that extending Title VII to protect transgender employees will cause societal upheaval with bathrooms, locker rooms and dress codes. Indeed, this was a large focus of the oral argument on these cases. However, the Court stated that this issue was not before the Court and did not address whether a sex-segregated bathroom would violate Title VII: "Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.' … Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these."

The Court's decision is a landmark ruling for LGBTQ employees throughout the United States.

Bostock v. Clayton County, Georgia (U.S., June 15, 2020, No. 17-1618) 2020 WL 3146686.

NOTE:

Under California law, the Fair Employment and Housing Act already prohibits discrimination against employees based on sexual orientation, gender identity, and gender expression, including transgender status. Thus, this ruling does not change the legal landscape for California employers, but it will allow homosexual and transgender California employees who believe they were discriminated against by their employers to bring lawsuits under Title VII. In addition, under California law, employers (1) must allow an employee to use the restroom or locker room that corresponds to the employee's gender identity or expression; (2) are required to refer to employees using the employee's preferred name, gender, and pronouns, and (3) may not enforce dress codes more harshly against an employee based on their gender identity/expression.

ATTORNEY'S FEES

Trial Court Improperly Applied Local Market Rate When Calculating Fee Award.

Augustine Caldera is a prison correctional officer at the California State Institute for Men in San Bernardino County. After Caldera's supervisor and other prison employees mocked and mimicked Caldera's stutter, Caldera filed a formal grievance with the California Department of Corrections and Rehabilitation (CDCR) in 2008. The CDCR rejected Caldera's grievance finding that his stutter was not a recognized disability.

After the CDCR rejected Caldera's grievance, Caldera contacted numerous local lawyers in the Inland Empire. However, all of the attorneys Caldera contacted declined to take on his case. An attorney in Pasadena, Todd Nevell, eventually agreed to represent Caldera on a contingency basis. Caldera then brought suit against the CDCR and his supervisor for various causes of action, including discrimination in violation of the Fair Employment and Housing Act (FEHA). After many years of litigation and multiple appeals, a jury returned a verdict in favor of Caldera.

Subsequently, Caldera filed a motion for attorney's fees. Under the FEHA, a court has the discretion to award reasonable attorney's fees and costs to the prevailing party. In calculating the fee award, courts generally multiply the number of hours spent on the case by the attorney's applicable hourly rate. Courts also frequently increase this amount by applying a multiplier to account

for other factors such as the difficulty of the litigation and the novelty of the issues. While Caldera requested $2,468,365 in attorney's fees, the court ultimately awarded him only $810,067.50. This was in part because the court found that Nevell's requested $750 hourly rate was well above the average $450 to $550 hourly rate for attorneys in San Bernardino County. Caldera appealed.

On appeal, the court concluded that if an employee must hire out-of-town counsel, the trial court, when setting the hourly rate, must consider the attorney's home market rate, rather than the local market rate. The court reasoned that there was unrefuted evidence that Caldera was unable to find an attorney who would take his case in the Inland Empire, and it noted that the hourly rate the trial court applied was lower than similarly experienced attorneys in Los Angeles County. Thus, the court directed the trial court to recalculate the fee award based on Nevell's home market rate.

Caldera v. Dep't of Corr. & Rehab. (2020) 48 Cal.App.5th 601.

NOTE:

This case demonstrates how substantial attorney's fee awards can be in employment litigation. Attorney's fees can be far greater than expected if the employee has to use legal counsel from outside the area.

BENEFITS CORNER

CAFETERIA PLANS

New Options To Increase Flexibility For Section 125 Cafeteria Plan Benefits.

In response to COVID-19, a new IRS notice allows employers to amend their IRC Section 125 cafeteria plan to provide employees with increased flexibility for the remainder of 2020. The Notice loosens restrictions on mid-year election changes for employer-sponsored health coverage and extends deadlines for applying unused funds under a Health Flexible Spending Arrangement (Health FSA) or Dependent Care Assistance Program (DCAP). Employers looking to incorporate either option into their plan must adopt a plan amendment.

Mid-Year Election Changes

For mid-year elections made during calendar year 2020, a plan may permit employees who are eligible to make salary reduction contributions under the plan to make the following changes:

Employer-Sponsored Health Coverage Elections

- Make a new election on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage;
- Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis; or
- Revoke an existing election on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.

Health FSA or DCAP

- Revoke an election;
- Make a new election; or
- Decrease or increase an existing election.

Deadlines for Applying Unused Funds

For unused amounts remaining in a Health FSA or DCAP as of the end of a grace period or plan year ending in 2020, the plan may permit employees to apply the unused amounts to pay or reimburse medical care expenses or dependent care expenses, respectively, incurred through December 31, 2020.

Employers should refer to the IRS notice for additional information.

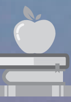
COBRA

Temporary Extension Of COBRA And Special Enrollment Periods.

Guidance from the Department of Labor and the IRS extends certain COBRA and special enrollment periods due to the Coronavirus National Emergency. The extensions correspond to a coronavirus "Outbreak Period" from March 1, 2020 until 60 days after the end of the Coronavirus National Emergency or such other date announced in future guidance.

Most notably, during the term of the Outbreak Period, the clock stops on the following key COBRA deadlines (among others) and then restarts after the Outbreak Period ends:

- The 44-day deadline after a qualifying event for the employer (if also the plan administrator) to provide a COBRA election notice;
- The subsequent 60-day period for a qualified beneficiary to elect COBRA continuation coverage;



- The 45-day deadline for making an initial COBRA premium payment following the initial election; and
- The 30-day deadline for making subsequent monthly COBRA premium payments, which follows the first day of the coverage period for which payment is being made; and

The guidance provides several examples, including the following:

> *Individual A works for Employer X and participates in X's group health plan. Due to the National Emergency, Individual A experiences a qualifying event for COBRA purposes as a result of a reduction of hours below the hours necessary to meet the group health plan's eligibility requirements and has no other coverage. Individual A is provided a COBRA election notice on April 1, 2020. What is the deadline for A to elect COBRA?*
>
> *Answer: Individual A is eligible to elect COBRA coverage under Employer X's plan. The Outbreak Period is disregarded for purposes of determining Individual A's COBRA election period. The last day of Individual A's COBRA election period is 60 days after June 29, 2020, which is August 28, 2020.*

The Outbreak Period likewise extends special enrollment periods required under HIPPA, during which an eligible employee or dependent may enroll in the employer's group health plan following a qualifying event (e.g., loss of other coverage). Generally, group health plans must allow such individuals to enroll if they are otherwise eligible and if enrollment is requested within 30 days of the qualifying event (or within 60 days in certain circumstances).

Employers should refer to the guidance for additional information and sample scenarios.

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.

JUNE

□ Conduct exit interviews
- Conduct at the end of the school year for employees who are leaving (whether voluntarily or not). These interviews can provide great information about staff perspective and can be used to help defend a lawsuit if a disgruntled employee decides to sue.

MID-JUNE THROUGH END OF JULY

□ Update Employee and Student/Parent Handbooks:
- The handbooks should be reviewed at the end of the school year to ensure that the policies are legally compliant, and consistent with the employee agreements, and the tuition agreements that were executed. The school should also add any policies that it would like to implement.

□ Conduct review of the school's Bylaws (does not necessarily need to be done every year).

□ Review of insurance benefit plans:
- Review the school's insurance plans, in order to determine whether to change insurance carriers. Insurance plans expire throughout the year depending on your plan. We recommend starting the review process at least three months prior to the expiration of your insurance plan.
  - Workers Compensation Insurance plans generally expire on July 1.
  - Other insurance policies generally expire between July 1 and December 1.

AUGUST

Conduct staff trainings, which may include:

□ Sexual Harassment Training:
- A school with five or more employees, including temporary or seasonal employees, must provide sexual harassment training to both supervisory and nonsupervisory employees every two years. Supervisory employees must receive at least two hours and nonsupervisory employees must receive at least one hour of sexual harassment training. (California Government Code § 12950.1.)

- Mandated Reporter Training:
  - Prior to commencing employment, all mandated reporters must sign a statement to the effect that they have knowledge of the provisions of the Mandated Reporter Law and will comply with those provisions. (California Penal Code § 11166.5.)
- Risk Management Training such as Injury, Illness Prevention, and CPR.
- Distribute Parent/Student Handbooks and collect signed acknowledgement of receipt forms, signed photo release forms, signed student technology use policy forms, and updated emergency contact forms.

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 called an LCW attorney and explained that most of the school's employees are working remotely. The school is located in an area where only the California minimum wage rate applies, but some of the employees are working from home in cities that have a minimum wage ordinance with a higher minimum wage rate. The administrator asked whether the wage rate where the school is located or the wage rate where the employee is performing the work, *i.e.*, his/her home, applies.

RESPONSE: The LCW attorney explained that the school should check the local minimum wage ordinance applicable in the location where the employee lives and is working remotely. Each local minimum wage ordinance has different eligibility and coverage parameters.

Generally, when a city or county has a local minimum wage ordinance, the wage rate is applicable to any employee who performs a certain amount of work, such as two hours, within the geographic boundaries of the city or county. Further, a local minimum wage ordinance typically covers employers who employ employees who perform work within the geographic boundaries of the city or county. Employees covered by a local minimum wage ordinance, must earn no less than the applicable minimum wage rate.

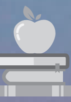
Therefore, if the school has any employees working remotely in a city or county with a local minimum wage ordinance, the school should check the ordinance and determine whether the employee is covered by the ordinance. If the employee is covered, the school should ensure that it is paying the employee at least the local minimum wage rate for all hours of work the employee performs within the geographic boundaries of that city or county.

Some cities and counties have additional paid sick leave ordinances as well. The school should also check to see whether any employees are working remotely in a city or county with a paid sick ordinance and determine whether the employee is covered by the ordinance. If the employee is covered, the school should also ensure that it is abiding by the ordinance and providing the employee any paid sick leave to which the employee may be entitled.

NOTE:

For more information on California cities and counties with minimum wage ordinances, see this article, titled "Minimum Wage Increases in 13 California Localities and Employers Must Post New Notices," from the May 2020 LCW Private Education Matters newsletter.

PLEASE NOTE: We will not have a newsletter for the month of July and will resume in August.



Management Training Workshops

Firm Activities

Customized Training

Jul. 7 **"Labor Training"**
Escuela Bilingue Internacional | Webinar | Donna Williamson

Jul. 28 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment"**
Bentley School| Webinar | Heather R. Coffman

Sept. 22 **"Waivers for Field Trips and School Activities"**
ACSI Consortium| Webinar |Julie L. Strom

Oct. 20 **"The Right to Privacy Under Federal and California Law"**
ACSI Consortium| Webinar |Stacy L. Velloff

Consortium Training

Sept. 22 **"Waivers for Field Trips and School Activities"**
ACSI Consortium| Webinar |Julie L. Strom

Oct. 20 **"The Right to Privacy Under Federal and California Law"**
ACSI Consortium| Webinar |Stacy L. Velloff

Speaking Engagements

Jul. 8 **"Hindsight is 2020: What We Didn't See Coming This Year!"**
Pacific Southwest District School Ministries Administrators (PSDSMA) | Webinar | Michael Blacher

Oct. 20 **"The Right to Privacy Under Federal and California Law"**
ACSI Consortium| Webinar |Stacy L. Velloff

Seminars/Webinars

Jul. 31 **"Independent School Return to Work & School: Part 2"**
Liebert Cassidy Whitmore | Webinar | Brian P. Walter

For the latest COVID-19 information, visit our website: www.lcwlegal.com/responding-to-COVID-19

Independent School Return to Work & School Toolkit

GET YOURS TODAY!

Second Webinar FRIDAY, July 31, 2020 | 10:00 AM - 12:00 PM

The COVID-19 pandemic is having an immense and wide-ranging impact on schools, their employees, and their students and families. Just as schools needed to address new and complex issues related to the sudden closure of physical campuses and the transition to distance learning to complete the school year, schools must now look forward to what the fall might look like. In planning for the fall, schools will need to consider federal, state, and local orders, guidance, and legal obligations and many other variables to decide how best to continue educating their students while promoting a safe and healthy school for school employees, students, and families alike.

Our Return to Work and School Toolkit is designed to help independent schools plan for a safe and healthy reopening by providing policies and protocols that schools may want to consider adopting.

The Toolkit includes:

- 38 template checklists, policies, and forms.
- Recording of the June 19th Return to Work and School Webinar which addresses how to implement the policies and protocols included in the Toolkit as well as common issues facing schools as they plan to reopen.
- July 31st webinar where we will update you on any revised or new federal, state, or local guidelines for the safe and healthy reopening of schools.

Pricing:

Consortium Members:
Toolkit and Live Stream: $399
Toolkit and Recording: $399
Toolkit, Live Stream and Recording: $449

Non-Consortium Members:
Toolkit and Live Stream: $499
Toolkit and Recording: $499
Toolkit, Live Stream and Recording: $549

Each additional live webinar registrations: $75

PURCHASE TODAY:
WWW.LCWLEGAL.COM/EVENTS-AND-TRAINING

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. To contact us, please call 310.981.2000, 415.512.3000, 559.256.7800, 619.481.5900 or 916.584.7000 or e-mail info@lcwlegal.com.