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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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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.

40 years
1980 - 2020

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

DISCRIMINATION

Private School That Received School Meals From Local Public High School Was Not Recipient Of Federal Funding For Purposes Of Rehabilitation Act Liability.

The parents of a student expelled from a private Christian school located in Northern California filed a lawsuit against the school alleging that the school violated Section 504 of the Rehabilitation Act of 1973 when it expelled the student for inappropriate sexual remarks, inappropriate sexual conduct, and other misconduct, which the parents attributed to the student's Attention-Deficit/Hyperactivity Disorder (ADHD). Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination against a qualified individual with a disability by any program or activity receiving federal financial assistance.

The private school received no federal financial assistance directly from the state or federal government. However, the private school had an arrangement with a local public high school in which the local public high school prepared meals using National School Lunch and School Breakfast Program funds it received from the California Department of Education and delivered those meals to the private school for distribution to eligible students. The National School Lunch and School Breakfast Program provides free and low-cost meals to eligible students,

typically those from low-income families. The parents argued that through this arrangement, the private school received federal financial assistance for purposes of Section 504 liability.

The court disagreed, finding instead that while eligible students of the private school received a benefit from a recipient of federal financial assistance, i.e., the meals from the local public high school, this benefit did not mean that the private school itself was a recipient of federal financial assistance. The court found that the relationship between the federal funding received by the local public high school and the meals received by eligible private school students was too attenuated to create liability for the private school under Section 504. The court dismissed the parents' claim.

C.G. by and through Graham v. Redding Christian School (E.D. Cal., Mar. 17, 2020, No. 219CV00348MCEDMC) 2020 WL 1275617.

NOTE:

While the private school here was not found to be a recipient of federal financial assistance for purposes of Section 504 liability, this case is an important reminder that accepting state or federal funds may require private schools to comply with, and may create liability under, state and federal laws that these schools may not otherwise be subject to.

Private School Reaches Settlement With Justice Department Over Restraining Student With Autism.

Anova Center for Education operates two K-12 schools in Sonoma County for students with autism spectrum disorders, neurodevelopmental impairments, emotional disturbances, and learning disabilities. Anova receives the majority of its students from public school districts through Individuals with Disabilities Education Act (IDEA) placements. The IDEA permits public schools to place IDEA-eligible children with an Individualized Education Program (IEP) in private schools at the public's expense, when necessary to provide special education and related services to the child.

After the U.S. Department of Justice (DOJ) received a complaint that Anova prone restrained a student (i.e., simultaneously immobilized the student's hands and feet against the floor or another surface) with Autism Spectrum Disorder 77 times over the course of several months, it opened an investigation and a compliance review. The DOJ stated that its investigation and compliance review revealed that Anova failed "to reasonably modify its policies, practices and procedures, [which] led to unnecessary and inappropriate reliance on classroom exclusion and restraint to manage [the] behavior" of students with Autism Spectrum Disorder who had difficulties adhering to Anova's behavioral standards due to their disability. The DOJ asserted that Anova declined to utilize resources provided by parents and local schools to "mitigate escalating behavior, facilitate class participation, and reduce Anova's reliance on restraint."

The settlement agreement expresses the DOJ's conclusion that Anova's conduct discriminated against students in violation of Title III of the Americans with Disabilities Act (Title III), but states that Anova "firmly denies that it has ever discriminated against any of its students or has ever declined to apply available resources." As part of the settlement agreement, Anova is required to reasonably modify its behavioral standards according to any individualized supports or interventions to mitigate behavior that may be in a student's IEP and to involve a student's IEP team if the student engages in negative behavior that affects his/her ability to participate in the school's programming successfully. Anova is also required to revise the Employee Manual on the topic of physical management of challenging behavior to remedy the unnecessary use and reliance on restraint as well as the following:

- Create a reasonable modification policy and procedure that includes a procedure for parents or guardians to make requests for behavioral supports and interventions and for Anova to consider and respond to those requests;
- Create a policy for Anova to identify and implement needed behavioral supports and interventions for children with disabilities affecting behavior;
- Require a meeting between Anova employees, parents or guardians and IEP team members after each use of restraint to assess the effectiveness of the supports and interventions taken before restraint was utilized and to consider changes to the supports and interventions in the future; and
- Provide live training for employees on the nondiscrimination requirements of Title III and designate and maintain an ADA Compliance Officer.

NOTE:

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.

While this settlement is only binding on Anova, 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, to reevaluate those modifications for effectiveness, and make adjustments when reasonable and appropriate.

https://www.ada.gov/anova_sa.html#_ftn1

STUDENT WORKERS

UC Berkeley Must Pay Retroactive Tuition Remission Benefits To Teaching Assistants.

On January 13, 2020, an arbitrator ruled in favor of the United Auto Workers, Local 2865 (UAW 2865) a union that represents tutors, graduate student instructors, and teaching assistants at University of California schools, in a grievance UAW 2865 filed against the University of California Berkeley in August 2017. The grievance stemmed from Berkeley's appointment practices for the graduate student instructors and teaching assistants in its electrical engineering and computer science departments.

Specifically, Berkeley placed graduate student instructors and teaching assistants on either eight-hour or ten-hour a week appointments. According to the collective bargaining agreement between Berkeley and UAW 2865, graduate student instructors and teaching assistants on eight-hour appointments received just an hourly salary, while graduate student instructors and teaching assistants on ten-hour appointments also received tuition remission and child care benefits and became eligible for health benefits as well. UAW 2865 contended that Berkeley employed too many graduate student instructors and teaching assistants on eight-hour, rather than ten-hour, appointments to avoid providing the additional benefits.

The arbitrator's ruling requires Berkeley to hire all graduate student instructors and teaching assistants for ten-hour appointments and to stop denying tuition remission going forward. The ruling also requires Berkeley to distribute retroactive fee remission benefits to affected current and former graduate student instructors and teaching assistants, which according to UAW 2865 are those who taught in the electrical engineering and computer science departments in 2017 or later.

EMPLOYEES

DISCRIMINATION

U.S. Supreme Court Confirms A But-For Causation Standard For Section 1981 Discrimination Claims.

African-American entrepreneur Byron Allen owns Entertainment Studios Network (ESN), which operates seven television networks. For years, ESN sought to have Comcast Corporation (Comcast), a cable television conglomerate, carry its channels. However, Comcast refused and cited lack of demand, bandwidth constraints, and other programming preferences for its decision. ESN then sued Comcast under 42 U.S.C. section 1981 (Section 1981). Section 1981 guarantees that all persons have the same right to make and enforce contracts as is enjoyed by white citizens. ESN alleged that Comcast systematically disfavored "100% African American-owned media companies" and that the reasons Comcast cited for refusing to carry its channels were pretextual.

The case made its way up to the U.S. Supreme Court to resolve a split among the U.S. Circuit Court of Appeals regarding what type of causation is required to prevail in a Section 1981 claim. Some circuits, including the Ninth Circuit, maintain that a plaintiff must only show that race played "some role" in the defendant's decision-making process. Other circuits, however, have held that a plaintiff needs to establish that racial animus was a "but-for" cause of the defendant's conduct. Under that standard, a plaintiff must demonstrate that if not for the defendant's unlawful conduct, its alleged injury would not have occurred.

The Court concluded that in a Section 1981 claim, the plaintiff bears the burden of showing that race was the but-for cause of its injury. The Court examined the statute's language, structure and legislative history to determine that a Section 1981 claim requires but-for causation. For example, the Court noted that when it first inferred a private cause of action under Section 1981, it described it as "afford[ing] a federal remedy against discrimination . . . on the basis of race," which strongly supports a but-for causation standard. The Court also noted that the neighboring statute, 42 U.S.C. section 1982, demands the same causation standard.

While ESN argued that the "motivating factor" causation test found in Title VII of the Civil Rights Act should apply, the Court declined to extend that standard to Section 1981 claims. The Court noted that Section 1981 predates the Civil Rights Act by nearly 100 years and does not reference "motivating factors." The Court explained: "[We] have two statutes with two distinct histories, and not a shred of evidence that Congress

meant to incorporate the same causation standard." The Court also dismissed ESN's argument that the motivating factor test should apply only at the pleading phase of a case.

The Court found that to prevail on a Section 1981 claim, a plaintiff must initially plead and ultimately prove that but-for race, the plaintiff would not have suffered the loss of a legally protected right.

Comcast Corporation v. National Association of African American-Owned Media (2020) 140 S.Ct. 1009.

NOTE:

It is far more challenging to establish the but-for causation standard than the motivating factor causation standard. Because the Ninth Circuit previously applied the motivating factor causation standard, this Supreme Court decision makes it more challenging for plaintiffs to win a Section 1981 claim.

Eighth Circuit Holds That Potential Future Disabilities Are Not Covered By The ADA.

Kimberly Lowe worked as a massage therapist at Massage Envy-South Tampa (Massage Envy), a franchise of Massage Envy, a national spa and wellness company. Lowe requested to have time off from work to visit her sister in the West African country of Ghana. Lowe's supervisor initially approved her request, but three days before her trip, one of the franchise owners, Ronald Wuchko, told Lowe that he would terminate her employment if she went on the trip. Wuchko stated that he was concerned that if Lowe went on the trip, she would contract the Ebola virus and would "bring it home to Tampa and infect everyone." Lowe refused to cancel her trip and Wuchko terminated her. Lowe did not contract Ebola while on her trip and, in addition, there were no confirmed cases of Ebola in Ghana during the year Lowe traveled to the country.

When Lowe returned home, she filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), claiming that Massage Envy terminated her because Wuchko believed she would encounter a person having Ebola and possibly contract the virus. She claimed Massage Envy discriminated against her because Wuchko perceived her as having or having the potential to become disabled.

The EEOC investigated and found there was reasonable cause to believe that Wuchko terminated Lowe's employment because he "regarded" her as disabled, in violation of the Americans with Disabilities Act (ADA). The ADA prohibits an employer from discriminating against a qualified individual based on disability concerning any term, condition, or privilege of employment. Under the ADA, a disability is (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment.

The EEOC filed a lawsuit against Massage Envy after conciliation efforts failed. In its complaint, the EEOC alleged that Massage Envy violated the ADA when Wuchko terminated Lowe because of his fear that she would contract Ebola during her trip to Ghana. The District Court dismissed the EEOC's lawsuit, finding that Massage Envy did not perceive Lowe as having Ebola at the time Wuchko fired her and declining to extend the ADA's "regarded as having" prong of the disability definition to cases in which an employer fires an employee at a time when it "perceives [the] employee to be presently healthy with only the potential to become disabled in the future due to voluntary conduct." The EEOC appealed.

On appeal, the EEOC, Lowe, and Massage Envy agreed that Lowe did not have an existing disability or a record of an existing disability when Massage Envy fired her. The issue before the court was whether Massage Envy "regarded" her as having a disability when it fired her. The EEOC argued that Massage Envy "regarded" Lowe as having a disability because it believed she would contract Ebola if she traveled to Ghana. Message Envy countered that Wuchko did not regard or perceive Lowe as having Ebola when he terminated her. Instead, Wuchko perceived her as having the potential to become infected in the future if she traveled to Ghana, which amounted to a perception that she could become disabled in the future.

The court meticulously analyzed the language of the ADA and relevant case law. The court noted that the "relevant time period for assessing the existence of a disability, so as to trigger the ADA's protections, is the time of the alleged discriminatory act" or "the adverse employment action." And, in "regarded as" cases, "a plaintiff must show that the employer knew that the employee had an actual impairment or perceived the employee to have such an impairment at the time of the adverse employment action" and the "impairment must not be 'transitory and minor.'" Further, "[a]n employer does not fire or otherwise discriminate against an employee "because of" a perceived physical impairment unless the employer actually perceives that the employee has the impairment." Also, the court found that the heightened risk of developing a disease in the future due to voluntary travel did not constitute a present physical impairment.

Ultimately, the court found that the definition of disability under the ADA did not cover a circumstance where "an employer perceives a person to be presently healthy with only a potential to become ill and disabled

in the future due to the voluntary conduct of overseas travel," and it upheld a lower court's dismissal of the EEOC's case.

Equal Employment Opportunity Commission v. STME, LLC (11th Cir. 2019) 938 F.3d 1305.

NOTE:

This case turned on whether a potential future disability was covered by the ADA. It is important to note that similar facts could possibly support other causes of action against an employer. We recommend consulting with legal counsel before making a termination decision.

WAGE & HOUR

Employer Liable For Payroll Employee's Willful FLSA Violations.

Employer Solutions Staffing Group (ESSG) is a group of staffing companies that contracts with other companies to recruit employees and place them at jobsites. In 2012, ESSG contracted with Sync Staffing (Sync), which placed the recruited employees at a jobsite run by TBG Logistics (TBG). At TBG, the recruited employees unloaded deliveries for a grocery store. TBG maintained a spreadsheet of the employees' hours, which it sent to Sync. Sync then forwarded the spreadsheet to ESSG.

Michaela Haluptzok, an ESSG employee, was responsible for processing the TBG payroll. The first time Haluptzok received one of the spreadsheets, she sent a report to Sync showing that employees who had worked more than 40 hours per week would receive overtime pay for those hours. A Sync employee told Haluptzok to pay all of the hours as "regular hours," instead of overtime. Haluptzok complied, even though it meant she had to dismiss numerous error messages on the payroll software. Haluptzok processed all of the TBG spreadsheets in this same manner until ESSG's relationship with TBG and Sync ended in July 2014. Haluptzok admitted that she knew the recruited employees were not being paid overtime owed to them.

In August 2016, the U.S. Secretary of Labor sued ESSG, TBG, and Sync for violations of the Fair Labor Standards Act (FLSA). The Secretary reached settlements with TBG and Sync. The Secretary moved for judgment against ESSG on the grounds that ESSG willfully violated the FLSA when Haluptzok failed to pay 1.5 times the FLSA regular rate of pay for hours worked in excess of 40 hours per workweek. The district court granted the Secretary's motion, and ordered ESSG to pay approximately $78,500 in unpaid overtime plus an equal amount in liquidated damages. ESSG appealed to the U.S. Court of Appeals for the Ninth Circuit.

First, ESSG argued that it could not be liable for the actions of a low-level employee such as Haluptzok. The Ninth Circuit disagreed. ESSG chose Haluptzok as its agent for payroll processing, so it could not disavow her actions merely because she lacked a specific job title or a certain level of seniority. Allowing ESSG to evade liability simply because none of its supervisors or managers processed the payroll would create a loophole that would be inconsistent with the FLSA's purpose of protecting workers.

Second, ESSG argued that the Secretary's lawsuit was not timely because its FLSA violations were not willful. Ordinarily, a two-year statute of limitations applies for claims under the FLSA. However, when a violation is willful, a three-year statute of limitations applies. A violation is willful when the employer either knew or showed reckless disregard for whether its conduct was prohibited by the FLSA. The Ninth Circuit concluded that ESSG acted willfully. Haluptzok dismissed the payroll software's repeated warnings about overtime pay, and she never received any explanation from Sync that justified dismissing the software error messages. The three-year statute of limitations applied for that willful violation, so the Secretary's lawsuit was timely.

Third, ESSG argued that liquidated damages were inappropriate because it acted in good faith. The FLSA mandates liquidated damages equal to the unpaid overtime compensation unless an employer acts in good faith. Because ESSG's actions were willful, they were not in good faith.

Finally, ESSG contended that it could seek indemnification or contribution from another employer for the damages the district court awarded. The Ninth Circuit, however, determined that the FLSA did not implicitly permit such indemnification for liable employers, and it declined to make new federal common law recognizing those rights.

Scalia v. Employer Solutions Staffing Group, LLC (9th Cir. 2020) 951 F.3d 1097.

NOTE:

It is essential to properly train employees who are responsible for payroll on how to comply with your schools' legal obligations under state and federal wage and hour laws and provide oversight to avoid liability for expensive wage and hour violations.

FMLA

Employee's Leave To Care For Children Of Seriously Ill Sister Does Not Qualify As FMLA Leave.

Edward Brede was a full time employee of Apple Computer Inc. (Apple), working at an Apple store in Ohio. After Brede's sister was diagnosed with a serious health condition, he requested intermittent leave under the Family and Medical Leave Act (FMLA) to care for his niece and nephew, who were minors, one day every two weeks. Apple granted the request. Over the next year, Brede alleges that Apple denied him a promotion and gave him a negative rating on a performance evaluation due to his attendance. Brede then renewed his intermittent FMLA leave. Shortly thereafter, Apple reprimanded Brede for violating company policy on maintaining custody of a customer's hard drive. Apple then terminated him for violating that policy.

Brede filed a claim against Apple alleging that his termination interfered with his FMLA rights and was in retaliation for his exercise of FMLA rights. Apple filed a motion to dismiss Brede's claims. Apple essentially argued that Brede was unable to show that he was entitled to FMLA leave. Brede countered that he was entitled to FMLA leave because he served in loco parentis to his niece and nephew due to his sister's serious health condition.

The FMLA permits an eligible employee to take a total of 12 workweeks of leave during a 12-month period for specified reasons, including to care for the employee's spouse, son, daughter, or parent if they have a serious health condition. Under the FMLA, a "son or daughter" is defined as a biological child, adopted child, foster child, stepchild, or a legal ward. A "son or daughter" also means a child of a person standing in loco parentis who is under 18 years of age or who is over 18 years of age and incapable of self-care because of a mental or physical disability.

After examining the plain language of the FMLA, the court determined that Brede was unable to show that the intermittent leave he used to care for his niece and nephew was FMLA-qualifying. The court explained that even if Brede stood *in loco parentis* to his niece and nephew, it was sister, and not his niece and nephew, who had the serious health condition that required his care. Further, the court noted that even if Brede's care for his niece and nephew somehow constituted care for his sister, the FMLA does not entitle an employee to leave to care for a sibling with a serious health condition. Because Brede could not show that he was entitled to FMLA leave to care for his sister's children, the court granted Apple's motion and dismissed the case.

Brede v. Apple Computer Inc. (N.D. Ohio, Jan. 23, 2020, No. 1:19-CV-2130) 2020 WL 377696.

LABOR RELATIONS

NLRB Issues New Rule For Determining Joint Employer Status.

On February 26, 2020, the National Labor Relations Board (NLRB) published the final version of its rule for determining whether affiliated businesses are joint employers as defined in Section 2(2) of the National Labor Relations Act (NLRA). The new rule reverts to an earlier and more stringent standard for determining whether affiliated businesses are joint employers, and requires that, in order to be considered a joint employer, the business must exercise "substantial direct and immediate control" over another company's workers.

The new rule replaces the test adopted in the NLRB's 2015 decision *Browning Ferris Industries*, 362 NLRB No. 186 (2015). Under the *Browning Ferris* standard "[t]he Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." Under *Browning Ferris,* the primary question is whether the purported joint-employer possesses the actual or potential authority to exercise control over the primary employer's employees, regardless of whether the company has in fact exercised such authority. Further, the *Browning Ferris* standard provided that a business could be deemed a joint employer if it exhibited "indirect control" over the primary employer's employees. Many employers viewed the liberal construction of the *Browning Ferris* standard as friendly to employees and employee organizations.

Following months of rulemaking, the NLRB's new joint employer rule reverts to a more employer-friendly standard. The rule applies the common law test for determining whether an employer-employee relationship exists as a predicate to finding a joint-employer relationship. The rule also requires that the purported joint-employer must possess and exercise substantial direct and immediate control over the employees' essential terms of employment. The NLRB stated that these essential terms are exclusively defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

The standard used to determine joint employer status constitutes a significant issue for both labor and management because the determination will affect not only bargaining obligations, but also liability for potential labor violations.

The new rule, which is classified as a major rule, will take effect on April 27, 2020.

NLRB Issues Advice Memos Regarding Discipline Of Employee Who Criticized Google's Diversity And Inclusion Policies.

On February 14, 2020, the Office of the General Counsel of National Labor Relations Board (NLRB) made public two guidance memoranda issued by the Board's advice division concerning Google's discipline of a conservative engineer who complained about the company's diversity policies and the treatment of employees who opposed those policies. Both memoranda, one from 2016 and the other from 2018, address legal issues posed by NLRB field officials to the advice division concerning the same case.

In the case at issue, a software engineer at Google filed an unfair practice charge against the company stemming from the engineer's use of an internal discussion forum to discuss controversial social issues.

The engineer used the forum to post a message concerning the topic of women and minorities in the tech industry. In the post, the engineer questioned whether employees can criticize the company's workplace diversity and inclusion policies and complained that workers bully conservative employees who express such viewpoints.

Google subsequently issued the engineer a written warning, discouraging the use of the forum to post such messages and threatening disciplinary action against the engineer for engaging in such conduct.

In the 2016 advice memo, the NLRB staff concluded that the engineer's posts made constituted concerted activity under the National Labor Relations Act (NLRA) since they involved concerns that were shared among a group of employees. The memo therefore found that Google violated the NLRA by issuing the engineer a written warning and threatening the employee for engaging in the protected activity.

Google then requested that the advice division reconsider its initial conclusion that the engineer's conduct was protected and that the company violated the NLRA.

In the 2018 memorandum, the advice division considered Google's argument on reconsideration that the engineer's conduct "could lead to a hostile workplace" and that the company's written warning to the engineer constituted a lawful attempt by the company "to 'nip in the bud' [that] kind of employee conduct. The 2018 memorandum acknowledged that the engineer's comments about workplace diversity and inclusion were insensitive towards minority groups. However, the memo provided that the engineer did not use derogatory, abusive, or discriminatory language and that no reasonable employer would regard such comments as creating a hostile work environment at Google. Therefore, the advice division again concluded again that the engineer's conduct constituted protected concerted activity under the NLRA and that Google could not permissibly discipline the employee for engaging in such conduct.

The NLRB General Counsel released the memoranda following a settlement between the parties.

Google, Inc. (May 30, 2018) Case 32-CA-164766.

NOTE:

The memoranda are a good reminder to employers to exercise caution when considering whether to discipline an employee that makes statements critical of the employer's workplace policies and practices, even when such conduct is disruptive to the employer's normal business operations.

NLRB Finds Nursing Facility Violated The Act By Discouraging Employees From Discussing Wages And Disciplining Employee Who Complained About Working Conditions.

Pruitthealth Veteran Services operates nursing facilities. At one such facility, Justin Morrison serves as the administrator and Ricky Edward Hentz as a certified nursing assistant. Shortly after Hentz started work at the facility, friction developed between him and Morrison.

Hentz initially worked as a scheduler, a job that brought him into contact with many other employees and thus gave him the opportunity to hear their complaints about terms and conditions of employment. Often, Hentz's fellow employees would complain to him about work-related matters, including wages and understaffing. Hentz, who is African-American, also perceived racial prejudice against African-Americans by management at the facility, including management disciplining African-American employees for conduct that white employees engaged in without incident.

Hentz somewhat regularly informed Morrison of his concerns about workplace issues, including those related to understaffing certified nursing assistants and

regarding his and others' perception of racial prejudice at the facility. Morrison was not welcoming of Hentz's commentary on workplace issues, and instructed Hentz to "stay in your lane."

Hentz then filed a complaint alleging racial prejudice at the facility with Pruitthealth's corporate-level human resources department. Pruitthealth commenced an investigation and assigned an investigator to inquire as to Hentz's allegations. However, the investigator was skeptical of Hentz's claims and ultimately dismissed his allegations.

Over a period of several months, Morrison initiated a series of escalated disciplinary actions against Hentz, including written reprimands, reassignments, and ultimately the termination of Hentz's employment with Pruitthealth. In support of the adverse actions taken against Hentz, Morrison cited alleged complaints about Hentz's poor performance and attendance issues. However, Morrison did not retain any records supporting his assertions that other employees complained about Hentz's performance or that there were any issues with Hentz's attendance.

In January 2017, following his dismissal, Hentz, filed an unfair labor practice charge with the NLRB against Pruitthealth. Hentz argued that by complaining to Morrison and corporate-level officials, he was seeking relief not merely for himself but also for other employees also affected by the racial prejudice. Hentz contended that his conduct constituted concerted activity protected by Section 7 of the NLRA. Hentz further alleged that the Respondent unlawfully discharged Hentz because he engaged in this protected, concerted activity.

Pruitthealth disputed Hentz's contention that he was speaking on behalf of anyone other than himself and therefore argued that the NLRA did not protect Hentz. Pruitthealth further argued that, in any event, it did not discharge Hentz because he complained to corporate officials but for failure to comply with the Pruitthealth's attendance rules.

Hentz's first charge was unrelated to his dismissal, but alleged that the Pruitthealth's managers told employees not to disclose their wage rates to other employees. Hentz's complaint alleges that in September 2016, the Pruitthealth director of health services directed him not to discuss his wages with other employees and that a Pruitthealth human resources/ payroll coordinator provided a similar instruction. Pruitthealth denied these allegations, but did not produce evidence to contradict Hentz's statements. On this un-contradicted evidence, the presiding Administrative Law Judge determined that Pruitthealth had a practice of informing employees not to discuss their salaries with other employees, which violates the NLRA.

Hentz's second allegation concerns interference with representational rights regarding employees' concerns with staffing and racial discrimination. The Administrative Law Judge determined that Hentz engaged in protected activities by discussing working conditions with fellow employees and expressing their concerns about those conditions to management and that Pruitthealth's management clearly knew about these activities. The Administrative Law Judge then determined that Hentz's protected activity was a motivating factor in Pruitthealth's taking action against him and that Pruitthealth's warnings to Hentz regarding his performance and attendance were part of a pretextual scheme designed to conceal the actual reason for discharging Hentz.

The NLRB affirmed the Administrative Law Judge's conclusions of law and order to Pruitthealth to cease and desist from instructing employees not to discuss their wages, instructing employees not to express other employees' complaints about working conditions, and disciplining employees because they complained about wages, hours, or working conditions.

Pruitthealth Veteran Services-N. Carolina, Inc. & Ricky Edward Hentz (Feb. 5, 2020) 369 NLRB No. 22.

PRIVATE ATTORNEYS GENERAL ACT

California Supreme Court Holds Employees Retain Standing To File PAGA Claims Even After Settling And Dismissing Their Individual Labor Code Claims.

The California Supreme Court recently addressed the issue of whether an employee, Justin Kim, retained standing to bring a claim under the Private Attorneys General Act (PAGA) after settling his own Labor Code claims against his employer, Reins International California, Inc. (Reins). Kim, who worked as a training manager and was classified as an exempt employee, filed a class action against Reins, alleging that he and other training managers were misclassified. Kim asserted causes of action for failure to pay overtime wages, provide meal and rest breaks, and provide accurate wage statements as well as waiting time penalties, unfair competition, and civil penalties under PAGA.

Because Kim's claims were subject to an arbitration agreement between the parties, Reins filed a motion to compel arbitration, dismiss the class claims, and stay the PAGA claim until after arbitration was complete, which the court granted. Kim and Reins then settled all of Kim's individual claims and Kim's PAGA claim proceeded. However, Reins successfully argued that Kim's PAGA claim could not proceed because, while Kim initially had

standing to bring the PAGA claim, he lost his standing once he settled his individual claims because was no longer an "aggrieved employee." Kim appealed.

PAGA allows aggrieved employees to pursue civil penalties against an employer for certain violations of the Labor Code on the state's behalf. An aggrieved employee is one "who was employed by the alleged violator and against whom one or more of the alleged violations was committed." To sue under PAGA, an aggrieved employee must first notify the employer and the Labor and Workforce Development Agency (LWDA) of the facts and basis for the claim and, if the LWDA does not investigate, issue a citation, or respond with 65 days, the employee may sue. While an aggrieved employee is the party that brings a PAGA claim, it is not a dispute between the employee and the employer; rather, it is "a dispute between an employer and the state."

The Court concluded that Kim met the requirements to have standing to bring the PAGA claim because Kim was an employee of Reins and he alleged he suffered a Labor Code violation committed by Reins. The Court also found that the settlement of Kim's individual claims did not strip him of standing to pursue a PAGA claim on behalf of the state.

The Court explained that the Legislature intended PAGA to have an expansive approach to standing to serve the state's interest in vigorous enforcement. To that end, the Legislature defined PAGA standing in terms of violations and not whether an individual's claims have or have not been already remedied. The Labor Code violations Reins committed against Kim were not nullified by Kim's settlement; i.e., "[t]he remedy for [the] Labor Code violation, through settlement or other means, is distinct from the fact of the violation itself." Kim remained an aggrieved employee because Reins' violation remained. The Court held that Reins' argument that Kim lost standing when he settled his individual claims was inconsistent with the Legislative intent, Legislative history, and statutory language of PAGA. Accordingly, the Court remanded the case to the trial court for further proceedings on Kim's PAGA cause of action.

Kim v. Reins International California, Inc. (2020) 9 Cal.5th 73.

NOTE:

Employers should be aware that the decision in Kim v. Reins International California *allows employees to bring PAGA claims against their employer even after the parties resolve Labor Code violations through settlement, arbitration, or other means. Therefore, employers may still be exposed to liability for civil penalties even after resolution of employees' individual claims.*

ANTI-TRUST

Federal Trade Commission Announces It Is On Alert For Anti-Competitive Collusion Among Employers.

On April 13, 2020, the Federal Trade Commission (FTC) and Department of Justice's (DOJ) Antitrust Division issued a Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets (Statement). In the Statement, the FTC and DOJ remind employers that "COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms … essential service providers on the front lines of addressing the crisis."

The FTC and DOJ note that they are "on alert" for employers who are engaging in "collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries for hours worked." The Statement warns that the DOJ may criminally prosecute employers and individuals who enter into wage-fixing and no-poach agreements and may pursue civil enforcement actions against those who invite others to collude in anticompetitive conduct. The Statement also warns that employers involved in "hiring, recruiting, retention, or placement of workers should be aware that anticompetitive conduct runs the risk of civil and/ or criminal liability. "

The Statement is a timely, significant reminder for schools dealing with the innumerable challenges related to employees, students, and business operations that COVID-19 is generating. As the Statement indicates, schools may implicate antitrust issues through discussions with other schools about employee related matters, e.g., reducing or modifying wages, benefits, or hours, or agreeing not to "poach" employees. However, schools may also implicate antitrust issues through discussions with other schools about student related financial matters, e.g., collaborating on whether to provide refunds, to lower or maintain tuition and fee amounts, or to reduce financial aid offered. Schools with specific questions about antitrust issues should consult with legal counsel.

The Statement is available **here**.

EQUAL PAY

Employer Cannot Consider Prior Pay To Set Salary Under U.S. Equal Pay Act.

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

Under the U.S. Equal Pay Act, an employee must first prove the receipt of different wages for equal work because of sex. The burden then shifts to the employer to show the wage disparity falls under one of the following exceptions: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a factor other than sex.

When Rizo began working for the County Superintendent of Schools, the Superintendent used Standard Operation Procedure 1440 (SOP 1440) to determine her starting salary. SOP 1440 was a salary schedule that consisted of levels and "steps" within each level. New employees' salaries were set at a step within Level 1. To determine the appropriate step, the County considered Rizo's prior salary and added five percent. That calculation resulted in a salary lower than the lowest step within Level 1, so the County started Rizo at the minimum Level 1, Step 1 salary, and added a $600 stipend for her master's degree.

The County conceded that Rizo received lower pay for equal work. The County argued, however, that its consideration of Rizo's prior salary was permitted as a "factor other than sex." The trial court rejected the County's argument and held that a "factor other than sex" could not be prior salary. The County appealed.

In its 2017 opinion, the Ninth Circuit Court of Appeals analyzed its previous opinion in *Kouba v. Allstate Insurance Co.*, which held that a prior salary can be a "factor other than sex" if the employer: (1) showed it to be part of an overall business policy; and (2) used prior salary reasonably in light of its stated business purposes.

The County offered four business reasons to support its use of Rizo's prior salary to set her current salary: (1) it was an objective factor; (2) adding five percent to starting salary induced employees to leave their jobs and come to the County; (3) using prior salary prevented favoritism; and (4) using prior salary prevented waste of taxpayer dollars. The trial court did not evaluate those reasons under the *Kouba* factors, so the court sent the case back to the trial court to evaluate the County's reasons. Then, the court granted a petition for rehearing before all of the judges of the court to clarify the law, including the effect of *Kouba*.

In the rehearing in 2018, the Ninth Circuit considered which factors an employer could consider to justify a salary difference between employees under the "factors other than sex" exception. Prior to this decision, the law was unclear whether an employer could consider prior salary, either alone or in combination with other factors, when setting its employees' salaries. The court concluded that "any other factor other than sex" is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. Therefore, prior salary is not a permissible "factor other than sex." The court stated that the language, legislative history, and purpose of the Equal Pay Act made it clear that Congress would not create an exception for basing new hires' salaries on those very disparities found in an employee's salary history—disparities, the court noted, Congress declared are not only related to sex, but caused by sex. This decision overruled *Kouba*. Accordingly, the County's affirmative defense for why it paid Rizo less than it paid her male colleagues for the same work failed.

However, before the court issued its opinion, a judge who participated in the case and authored the opinion died. Without that judge's vote, the opinion only had approval of five of the ten living members of the panel when the decision was filed, which did not create a majority sufficient to overrule the previous opinion in *Kouba*. Although the five living judges agreed in the ultimate judgment, they did so for different reasons.

The County appealed to the U.S. Supreme Court and asked whether a federal court may count the vote of a judge who died before the decision was issued. In a February 2019 opinion, the Supreme Court ruled that the Ninth Circuit erred in counting the deceased judge as a member of the majority. The Supreme Court vacated the opinion and sent the case back to the Ninth Circuit for further proceedings.

All judges of the Ninth Circuit Court of Appeals reheard the case in September 2019. The County argued its policy of setting employees' wages based on their prior pay was based on a factor other than sex. Rizo argued the use of prior pay to set prospective wages perpetuated the gender-based pay gap.

The Ninth Circuit again examined the U.S. Equal Pay Act's four exceptions: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a factor other than sex. Using principles of statutory construction, the court ruled that because the first three exceptions were all job-related, Congress's use of the phrase "any other factor other than sex" signaled the fourth exception was also limited to job-related factors.

Ultimately, the court held that employers cannot consider prior pay as a factor in determining an employee's pay. Accordingly, prior pay, alone or in combination with

other factors, cannot serve as a defense to a U.S. Equal Pay Act claim. However, the U.S. Equal Pay Act does not prohibit employers from considering prior pay for other purposes, such as in the course of negotiating job offers.

Yovino v. Rizo (9th Cir. 2020) 950 F.3d 1217.

NOTE:

This decision will have little impact in California, because our State's Fair Pay Act prohibits using prior salary to justify compensation disparities between employees of different sexes, races, or ethnicities.

BUSINESS & FACILITIES

COPYRIGHT & FAIR USE

High School Show Choir's Use Of Rearranged Musical Work Deemed Fair Use.

Burbank High School has five nationally recognized, competitive show choirs led by vocal music director Brett Carroll. The Burbank High School Vocal Music Association Boosters Club, a nonprofit organization operated by parent volunteers, holds fundraising events, such as show choir competitions, to help fund the show choir program.

Carroll commissioned an outside music arranger to create custom sheet music for two shows, "Rainmaker" and "80's Movie Montage" for one of the show choirs, In Sync, to perform. "Rainmaker" is an eighteen-minute performance composed of multiple musical works, including a small, rearranged segment of the chorus and a small segment of another verse of the song "Magic." "80's Movie Montage" is a twenty-minute performance that contains a sixteen-second segment of the chorus of the song "(I've Had) The Time of My Life." In Sync performed the two shows on several occasions, including at the Burbank Blast choir competition fundraiser hosted by the Boosters Club. Also at Burbank Blast, the John Burroughs High School show choir competed with a choir performance, which contained segments of the songs "Hotel California" and "Don't Phunk With My Heart."

Following the Burbank Blast choir competition, Tresóna Multimedia, LLC, (Tresóna) filed a copyright infringement claim under the Copyright Act of 1976 (Copyright Act) against Carroll, the Boosters Club, and several Boosters Club parent volunteers. Tresóna alleged that it held the exclusive right to issue copyright licenses for four musical works, "Magic," "(I've Had) The Time of My Life," "Hotel California," and "Don't Phunk With My Heart," and the show choir failed to obtain licenses for its use of the copyrighted sheet music in the Burbank Blast performances.

The Copyright Act grants the right to the "legal or beneficial owner of an exclusive right under a copyright… to institute an action for any infringement of that particular right committed while he or she is the owner of it"; those who hold non-exclusive rights do not have standing to sue under the Copyright Act.

The trial court determined that Tresóna failed to produce evidence showing that it held an exclusive right to "(I've Had) The Time of My Life," "Hotel California," or "Don't Phunk With My Heart." Tresóna received its interests in "(I've Had) The Time of My Life" from PEN Music Group (PEN), which only controlled, and could only license, a 25 percent interest in the song. Similarly, Tresóna received its interests in "Hotel California" from PEN, which only controlled, and could only license, a 50 percent interest in the song. Moreover, Tresóna received its interests in "Don't Phunk With My Heart" from The Royalty Network, which only controlled, and could only license, a one-sixth interest in the song. Accordingly, the trial court found that Tresóna lacked standing to sue under the Copyright Act for infringement of those three songs because Tresóna did not hold exclusive rights in the musical works. However, the trial court found that Tresóna produced sufficient evidence to show that it had an exclusive right to "Magic" from PEN.

Carroll asserted the defenses of fair use and qualified immunity to the show choir's use of "Magic," while the Boosters Club and the parent volunteers asserted that they could not be held liable for direct or secondary copyright infringement. The trial court did not address Carroll's fair use defense, but found that Carroll was entitled to qualified immunity for the show choir's use of "Magic" and the Boosters Club and parent volunteers were not liable for direct or secondary copyright infringement. Carroll and the Boosters Club moved to recover attorney's fees, and the trial court denied the motion. Tresóna appealed the trial court's findings and Carroll and the Boosters Club appealed the denial of attorneys' fees.

On appeal, the Ninth Circuit Court of Appeal held that the trial court was correct in holding that Tresóna lacked standing under the Copyright Act to bring an infringement claim based on "(I've Had) The Time of My Life," "Hotel California," and "Don't Phunk With My Heart," because Tresóna only held non-exclusive licenses to those musical works.

The Court then turned to the show choir's use of the song "Magic" and the trial court's ruling in favor of Carroll on qualified immunity grounds. The Court of Appeal affirmed the judgment in favor of Carroll on the show choir's use of the song "Magic," but based on Carroll's defense of fair use and not on the ground of qualified immunity. The Court found the fair use question "begs to be answered" because the defense of qualified

immunity is only available to public school teachers. While the fair use defense would apply to both public and private school teachers.

Fair use is a defense that permits copyrighted works to be used "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." To determine whether the use of copyrighted material qualifies as fair use, Congress has directed the courts to consider at minimum, "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

Here, the Court said, "Carroll's use of the musical work was in his capacity as a teacher in the music education program at Burbank High School… and [s]uch an educational use weighs in favor of fair use." The Court then analyzed each of the four factors. First, the Court noted that "the purpose and character of the use" weighed strongly in favor of finding fair use. The segments of the song "Magic," used in the "Rainmaker" compilation was a transformative use of the song, which was performed by students as part of a music education program. The proceeds from the performance went to the nonprofit Boosters Club to further fund and support the school's music education program. Second, the Court found that the nature of the use of "Magic" in the "Rainmaker" compilation was "undoubtedly creative," which also supported a finding of fair use.

Third, the Court noted that the amount and substantiality of the portion of "Magic" used in the "Rainmaker" compilation was significant, because the "song's principle chorus, which is the central element of the musical work" was used and repeated in "Rainmaker" more than once. Nevertheless, the Court found that this factor did not weigh against a finding of fair use because those portions of the song were "embedded … into a larger, transformative showpiece that incorporated many other works." Fourth, the Court found that the use of "Magic" in "Rainmaker" did not affect the consumer market for sheet music of "Magic" because individuals truly interested in purchasing and performing "Magic" would not, instead, purchase sheet music for the transformative "Rainmaker."

The Court concluded that the choir's use of "Magic" for educational, nonprofit purposes in their transformative high school choir performance was a fair use based on the weight of the factors. The Court of Appeal also granted attorneys' fees to Carroll, the Boosters Club, and the parent volunteers to deter copyright holders with no reasonable infringement claim from bringing similar suits in the future in hopes that it would allow "for greater breathing room for classroom educators and those involved in similar educational extracurricular activities."

Tresóna Multimedia, LLC v. Burbank High School Vocal Music Association (9th Cir. 2020) 953 F.3d 638.

NOTE:

The decision in Tresóna *appears to broaden how schools may use copyrighted materials for educational purposes. Nevertheless, schools, colleges, and universities should thoughtfully analyze whether their use of copyrighted materials is legally compliant and become familiar with the boundaries of "fair use" in the educational setting. When in doubt, it is advisable to obtain written permission from the copyright holder.*

VENDOR CONTRACTS

Vendor Contracts: The Importance Of Force Majeure Provisions In Light Of The Coronavirus (COVID-19).

Schools should consider how the Coronavirus may affect the business contracts they have with vendors. Many schools are considering or have implemented school closures and are cancelling events, including upcoming international and domestic trips. Whether the school is entitled to a refund or whether it must pay the vendor upon cancellation, will depend on the specific contract terms, including whether the contract has a force majeure provision.

A force majeure provision excuses a party's performance of its obligations under a contract when certain events beyond the control of the parties take place. In light of the current pandemic, we recommend that force majeure provisions be drafted broadly to include outbreaks, epidemics, and pandemics, in addition to other standard force majeure events, such as any fire, flood, act of God, war, governmental action, act of terrorism, natural disaster, or any major event beyond the school's control. A force majeure provision should also clearly explain the obligations of the parties regarding payment for services when there is a force majeure event. If the force majeure provision does not clearly state that the school will not be liable to the vendor or third party for payment if the vendor or third party is not able to perform services, there is a possibility that the school may continue to be liable for payment despite not receiving the goods or services.

However, what if you've already signed the contract? Review the contract to determine the following:

- What is the timing for cancellation?
- What are the penalties?
- Does it have a force majeure clause and, if so, what does it say?
- Does the contract have termination provisions?

Whether a cancellation or closure related to Coronavirus will be considered a force majeure event that excuses performance of the contract obligations will not only depend on the wording of the force majeure clause, but also on whether the school was required to close or cancel based on the direction of local health officials or other government officials. For schools that decide to close or cancel without such direction from local public health officials or government officials, it will be more difficult for the school to argue that the closure was beyond the control of the school. Events that are not beyond the school's control are not considered force majeure events, and will not excuse performance of the contractual obligations.

If the contract does not have a force majeure provision or the provision does not allow for cancellation in the wake of this pandemic, there might be other options for the school.

- Consider cancelling the event sooner, rather than later, to avoid larger cancellation fees as the event approaches.
- Can you work with the business to postpone the event or services? If so, consider drafting an amendment to the original contract that modifies the original agreement to include a force majeure provision (in case the postponed event/service still cannot take place).
- If the contract has a termination for convenience clause, consider cancellation as an option.
- Most contracts include strict requirements to provide notice of force majeure events, cancellation or termination. Schools should follow the requirements for giving notice in the contract to make sure the action is legally effective.

If a business contract does not have a force majeure provision, courts excuse a breach of contract (and the corresponding obligations of the parties) when an unforeseeable event makes performance impracticable or impossible. The doctrine of impracticability excuses performance of a contract obligation when an unforeseeable event makes performance extremely difficult or expensive. The doctrine of impossibility excuses performance of a contract obligation when an unforeseeable event makes performance literally impossible. Whether performance of a contract obligation in light of the Coronavirus pandemic is impractical or possible will depend upon the facts of each case, but application of the doctrine may relieve the school from paying for services it has not received.

Future Business Contracts

Not all insurance companies insure financial losses that occur due to a pandemic. Therefore, schools should include force majeure provisions in their business contracts to explain how the parties would handle such a situation.

While a force majeure provision can afford a contracting party some relief, it can also create a problem if it is ambiguous or too restrictive. For example, a force majeure clause allowing nonperformance if an event occurs that makes performance "impossible" is a very high standard and may not excuse a party following government guidance. Similarly, a force majeure clause defining a force majeure as an "Act of God" without defining an "Act of God" or listing events, leaves the clause to varying levels of interpretation. A clause that defines a force majeure as a "pandemic" would be interpreted more strictly than one defining it as a "pandemic or threat of pandemic." Schools should carefully choose their words when drafting a force majeure provision.

Educational Travel Organization Contracts

It is especially important for schools to have a force majeure provision in any travel vendor agreement so that the school can receive a refund or release from payment obligations when the trip is cancelled due to a force majeure event.

As an alternative, the agreement may provide that if the trip cannot take place due to a force majeure event, the trip will be postponed. Schools will need to decide if that alternative provision is agreeable, since postponement of the trip could result in a different group of students in a subsequent school year participating in the trip.

If the school directly collects payment from parents for the trip and, in turn, pays the travel vendor, schools should also coordinate the provisions and force majeure language in their agreement with parents with such provisions in the travel vendor agreement.

Schools may also consider purchasing trip insurance for all participating students, or require families to purchase trip insurance as part of any domestic overnight or international field trip. In some cases, trip insurance permits schools or families to cancel the trip for any reason.

CONSTRUCTION PROJECTS

Local Public Agencies Issue COVID-19 Safety Guidance for Construction Projects.

Several cities and counties across the state have issued orders limiting construction projects or requiring contractors and project owners to develop and implement safety guidance and COVID-19 exposure control plans for ongoing construction projects. On March 30, 2020, the Bay Area Counties of Alameda, Contra Costa, Marin, Santa Clara, San Francisco, and San Mateo, and the City of Berkeley, issued orders halting construction projects, including private works construction projects, except for those necessary to ensure that residences or buildings containing essential businesses are safe, sanitary, or habitable, or to secure construction sites that must be shut down.

Private construction may continue in other areas of the state. However, several other cities and counties issued guidance for increased safety requirements that contractors and owners must implement to control exposure to COVID-19. For example, the City of Los Angeles issued an or-der that contractors must provide personal protective equipment (PPE) as appropriate, projects must have hand sanitizer and wash stations, and workers must practice social distancing by keeping at least six feet of distance from each other at all times.

Construction project safety guidance is constantly evolving during the current COVID-19 pandemic. Private schools engaged in construction projects should regularly check their local city or county orders and ensure their contractors are following any required safety guidance or COVID-19 exposure control methods.

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.

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.

MAY

- □ Complete hiring of new employees for next school year.
- □ Complete hiring for any summer programs.
- □ If service agreements expire at the end of the school year, review service agreements to determine whether to change service providers (e.g. janitorial services if applicable).
  - Employees of a contracted entity are required to be fingerprinted pursuant to Education Code sections 33192, if they provide the following services:
    - School and classroom janitorial.
    - School site administrative.
    - School site grounds and landscape maintenance.
    - Pupil transportation.
    - School site food-related.
  - A private school contracting with an entity for construction, reconstruction, rehabilitation, or repair of a school facilities where the employees of the entity will have contact, other than limited contact, with pupils, must ensure one of the following:

◦ That there is a physical barrier at the worksite to limit contact with pupils.
◦ That there is continual supervision and monitoring of all employees of that entity, which may include either:
- surveillance of employees of the entity by School personnel; or
- supervision by an employee of the entity who the Department of Justice has ascertained has not been convicted of a violent or serious felony (which may be done by fingerprinting pursuant to Education Code section 33192). (See Education Code section 33193).

If conducting end of school year fundraising:
□ Raffles:
- Qualified tax-exempt organizations, including nonprofit educational organizations, may conduct raffles under Penal Code section 320.5.
- In order to comply with Penal Code section 320.5. raffles must meet all of the following requirements
- Each ticket must be sold with a detachable coupon or stub, and both the ticket and its associated coupon must be marked with a unique and matching identifier.
- Winners of the prizes must be determined by draw from among the coupons or stubs. The draw must be conducted in California under the supervision of a natural person who is 18 years of age or older
- At least 90 percent of the gross receipts generated from the sale of raffle tickets for any given draw must be used by to benefit the school or provide support for beneficial or charitable purposes.

□ Auctions:
- The school must charge sales or use tax on merchandise or goods donated by a donor who paid sales or use tax at time of purchase.
  ◦ Donations of gift cards, gift certificates, services, or cash donations are not subject to sales tax since there is not an exchange of merchandise or goods.
  ◦ Items withdrawn from a seller's inventory and donated directly to nonprofit schools located in California are not subject to use tax.

Ex: If a business donates items that it sells directly to the school for the auction, the school does not have to charge sales or use taxes. However, if a parent goes out and purchases items to donate to an auction (unless those items are gift certificates, gift cards, or services), the school will need to charge sales or use taxes on those items.

CONSORTIUM CALLS 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. This month, we will feature two Consortium Calls of the Month in our newsletter, describing interesting calls and how the issue was resolved. All identifiable details will be changed or omitted.

CONSORTIUM CALL ONE

ISSUE: A Human Resources Director for a private school sent an email to an LCW attorney asking whether certain employees are entitled to Emergency Paid Sick Leave (EPSL) under certain circumstances. The LCW attorney talked through and provided advice to the Human Resources Director regarding those specific circumstances.

RESPONSE:
Employee One: The first employee is the Dean of Students. She is a full time, exempt employee who is responsible for student attendance, safety, and discipline. Due to the transition to remote learning, there is not enough work for her to continue working a full-time schedule. The school has converted her to a non-exempt employee and reduced her scheduled work hours. The Human Resources Director asked whether the Dean of Students is entitled to EPSL because of her reduced work hours. The LCW attorney explained that because the Dean of Students' reduced work schedule is because of a lack of work, this reason alone does not qualify for EPSL. However, the Dean of Students may qualify for EPSL for other qualifying reasons provided that there is work for her to perform. Also, the Dean of Students may be entitled to unemployment benefits under this circumstance.

Employee Two: The second employee is an English teacher, who is a full-time, exempt employee. The English teacher is working and teaching remotely through the school's new distance learning program. The English teacher notified the school that he needs intermittent leave one day a week to care for his daughter whose childcare provider is unavailable due to COVID-19, but is able to teach his regular classes on the other days. The Human Resources Director asked whether the English teacher is entitled to EPSL for the days he is unable to telework due to the need to care for his daughter. The LCW attorney explained that the English teacher is likely entitled to

EPSL because there is work for him to do, but he is unable to work/ telework because of a qualifying reason for EPSL.

Employee Three: The third employee is a Facilities Manager. She is a full-time, non-exempt employee who has continued to perform work on campus maintaining the cleanliness and safety of the school facilities for those employees facilitating the school's distance learning program. The Facilities Manager has an underlying medical condition, diabetes, and her doctor has recommended that she remain at home. There is work for her to do on campus, but she is unable to perform this work because of her doctor's recommendation. She is also unable to work remotely due to the nature of her position. The LCW attorney explained that in this situation, the Facilities Manager is likely entitled to EPSL because she is unable to work/ telework due to a qualifying reason for EPSL.

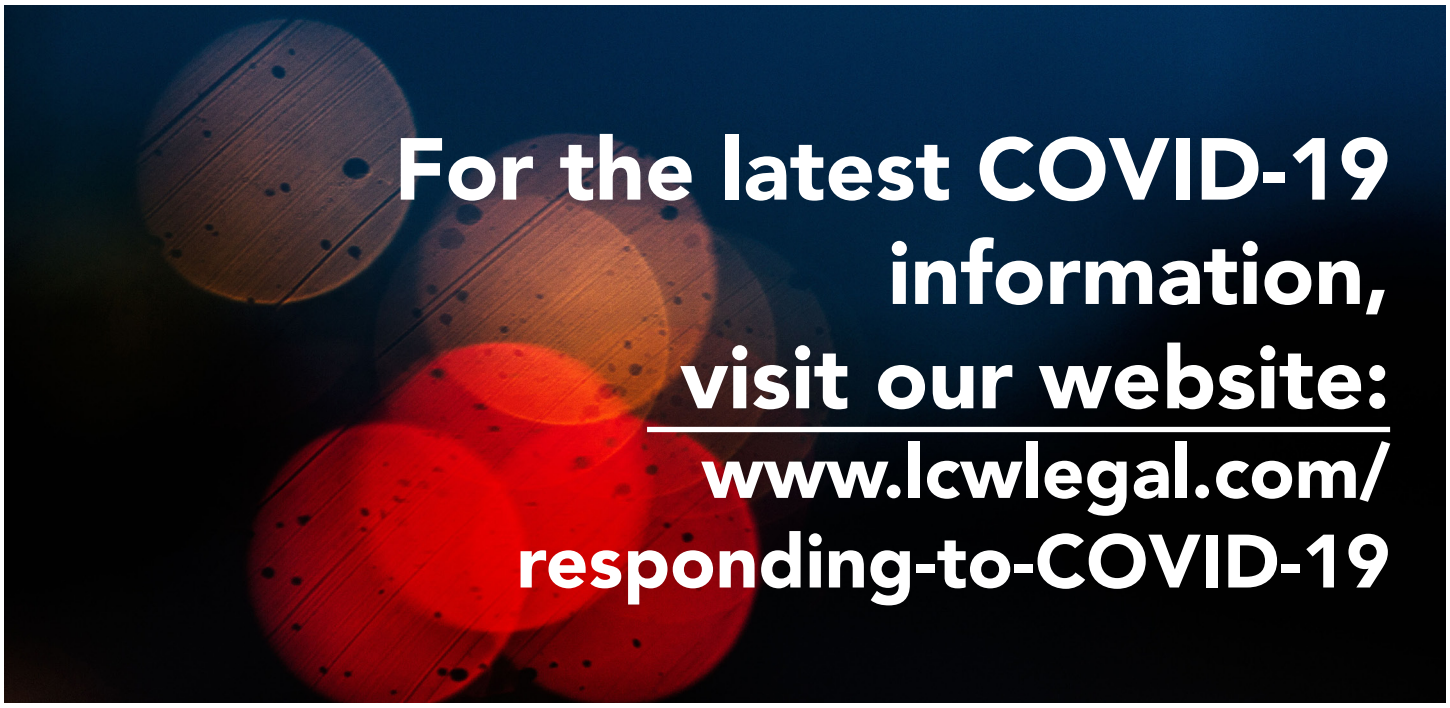
Employee Four: The fourth employee is the Assistant Director of Admissions. He is a full-time, non-exempt employee. He has an underlying medical condition, severe asthma, and he has been advised by a healthcare provider to stay at home. He is able to complete all of his job duties remotely and work his regular, full-time schedule. The LCW attorney explained that in this situation, the employee is not entitled to EPSL because he is able to telework.

CONSORTIUM CALL TWO

ISSUE: An administrator for an independent school called an LCW attorney and asked how to calculate the regular rate of pay for its full-time, exempt employees for purposes of the Emergency Paid Sick Leave (EPSL) and the Expanded Family and Medical Leave (EFML) leave and pay entitlements under the Families First Coronavirus Response Act (FFCRA).

RESPONSE: The LCW attorney explained that for full-time, exempt employees, the regular rate of pay for EPSL and EFML purposes is calculated by taking the annual salary for the employee, and dividing the annual salary by 52 to obtain the weekly salary amount. Once the weekly salary amount is calculated, that amount is divided by 40 hours to obtain the employee's hourly wage. For example, if an employee is paid a salary of $60,000 a year, the weekly salary amount is $1153.85. Dividing that weekly salary amount by 40 results in an hourly wage of $28.85. If the employee does not receive any compensation from the school other than his/ her annual salary, the employee's hourly wage is his/ her regular rate of pay for EPSL and EFML purposes.

Typically, full-time, exempt employees do not receive additional compensation from the school other than their annual salary. However, if the employee receives any additional compensation from the school other than his/her annual salary, the calculation will differ slightly. In this case, the school would take the additional compensation the employee receives and complete a similar calculation as above to determine the weekly value of the additional compensation. The school would then add that amount to the employee's weekly salary amount from above, and divide the result by the total number of hours worked during the workweek. The resulting amount would be the employee's regular rate of pay for EPSL and EFML purposes.



LCW UPCOMING WEBINARS

Understanding State Unemployment and Unemployment Programs Under the CARES Act

TUESDAY, MAY 5, 2020 | 10:00 AM - 11:00 AM

As unemployment claims continue to rise in California, employers who may be reducing hours of work or issuing layoff notices should understand the three unemployment compensation programs under the CARES Act: Federal Pandemic Unemployment Compensation (FPUC), Pandemic Emergency Unemployment Compensation (PEUC), and Pandemic Unemployment Assistance (PUA) and how these programs interact with state unemployment insurance and compensation. This webinar will provide an overview of eligibility for unemployment benefits, benefit calculation, the impact of partial wage payments on weekly benefits, and the applicability of the provisions of the three new programs under the CARES Act. If it has been a while since your school has responded to unemployment claims or if you need to understand how employment decisions will impact unemployment eligibility and/or benefits, don't miss this webinar!

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

Who Should Attend: All California Employers, including: Public Agencies, Public Schools and Colleges, Private Schools and Colleges (including religious schools) and Nonprofit entities.

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PRESENTED BY:
ALEXANDER VOLBERDING & ANNI SAFARLOO

5 THINGS SERIES

Five Things California Private Schools Need to Know About: Employee Records

TUESDAY, MAY 19, 2020 | 9:00 AM - 9:30 AM

Everyone knows that employers must keep personnel records for their employees, but there are many questions about what exactly belongs in the file and what should be excluded. Schools also need to be aware of how to manage access to these records and their value in supporting employment decisions. Please join us for a 30-minute webinar to discuss the top five things private schools need to know about these employee records.

Workshop Fee:
Consortium Members: $50,
Non-Members: $70

PRESENTED BY:
JULIE L. STROM

Who Should Attend: Chief Financial Officers, Business Managers, and Human Resources Managers

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Fresno Partner **Shelline Bennett** and Sacramento Associate **Lars Reed** authored an article for *Bloomberg Law* titled "Employer Tips for Accommodating Non-Binary Workers."

Management Training Workshops

Firm Activities

Speaking Engagements

May 3 **"Getting Workplace Investigations Right"**
California Independent Schools Business Officers Association (Cal-ISBOA) Annual Conference | Webinar | Brian P. Walter & Linda K. Adler & Jim Smith

May 3 **"Navigating Sticky Tricky Leaves of Absence"**
California Independent Schools Business Officers Association (Cal-ISBOA) Pre-Conference Human Resources Virtual Workshop | Webinar | Grace Chan

May 4 **"New Laws Impacting California Independent Schools"**
California Independent Schools Business Officers Association (Cal-ISBOA) Annual Conference | Webinar | Michael B. Blacher & Donna Williamson

May 12 **"Ask the Expert"**
Bay Area Directors of Admission (BADA) 2020 Symposium | Webinar | Grace Y. Chan

Seminars/Webinars

May 5 **"Understanding State Unemployment and Unemployment Programs Under the CARES Act"**
Liebert Cassidy Whitmore | Webinar | Anni Safarloo & Alexander Volberding

May 19 **"Five Things California Private Schools Need to Know About: Employee Records"**
Liebert Cassidy Whitmore | Webinar | Julie L. Strom

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