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.

MAY 2020

INDEX

LCW NEWS

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

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

BULLYING AND HAZING

Student Who Withdrew Due To Bullying Entitled To Tuition Refund.

Craig Johnson was a student at Milford Academy, a private boarding school located in New York known for preparing student athletes for the academic demands of participating in postsecondary education. Johnson was a member of the Academy's football team.

Two weeks after beginning as a student at the Academy, 12-15 teammates broke into Johnson's dorm room at night. One of the players dumped a large bucket of water on Johnson's bed and challenged Johnson to a fight in the gym. Johnson and his teammate fought and after Johnson began bleeding from his head, he tried to end the fight. However, his teammate pursued Johnson as he walked towards the dorm rooms and struck Johnson a few more times in the head. There were no coaches present during the fight, but when a coach saw Johnson the next morning, he arranged for Johnson to go to the hospital where Johnson received 18 stitches on his face. The coach told the team that everyone would be "kicked out" of the Academy if there were any more fights.

About two weeks later, after the team had to run on the hill as punishment for missing a morning workout, one of Johnson's teammates ran down the hill at full speed, tackled Johnson to the ground, and punched Johnson until another teammate pulled the player off him. When the coaches saw what was occurring,

they told the players to stop fighting. The fight caused swelling on the right side of Johnson's face. Shortly thereafter, Johnson was involved in a third incident. After Johnson was unable to do a favor for his roommate, his roommate angrily body slammed Johnson to the floor. Another teammate broke up the fight a few minutes later.

After the third incident, the Academy moved Johnson to a dorm room on a different floor apart from his teammates. However, after spending one night in the new dorm room, Johnson did not feel that the move would make any difference in his safety.

Johnson's mother spoke with the Academy and asked for a guarantee that Johnson would be in no more fights. When the Academy did not make that guarantee, Johnson withdrew after being enrolled for only about six weeks. Johnson's mother requested a tuition refund from the Academy, but the Academy denied her request. The enrollment agreement that Johnson's mother signed stated that she was not entitled to a refund in the case of withdrawal.

Johnson's mother then filed a claim in small claims court for $5,000 based on breach of contract. While the full tuition amount for the school year was $20,000, the maximum amount one can recover in small claims court in New York is $5,000. Johnson's mother alleged that she was entitled to a tuition refund because Johnson endured three bullying incidents while at the Academy, the Academy failed to provide proper supervision, Johnson was seriously injured, Johnson withdrew because he did not feel safe, and the Academy failed to assure that it could protect Johnson in the future.

At trial, Johnson testified concerning the three incidents and explained that dumping buckets of water on students' beds, shooting bb guns, and fighting, including boxing and wrestling, were common at the Academy. Johnson refused to refer to the incidents as bullying, and instead stated that he was "chosen" and "targeted."

The witnesses for the Academy did not contradict Johnson's testimony and, in fact, verified that the incidents involving Johnson and the types of incidents Johnson described, including fighting, horseplay, and shooting bb guns, were occurring, but that no one was in danger at any time. The coaches testified that there was a "boys will be boys" culture at the Academy and that problems between students typically arose when the coaches were sleeping.

Two of the coaches also testified that students were disciplined for the incidents with Johnson and the other types of incidents that Johnson described, while one of the coaches was unaware of whether discipline was imposed. They noted that the punishments for breaking the rules varied depending on the severity of the violation, from taking privileges away to being removed from the Academy. However, the Academy did not produce a student code of conduct or disciplinary policy at trial. The coaches generally asserted that the Academy does everything in its power to keep all of the students in the program and that one of the coaches acted as a mentor to Johnson, who they asserted contributed to the altercations, and tried to keep him from having conflict with other players.

The coaches also testified that the Academy's no refund policy is important because the program budgets for a certain number of players each year, they cannot replace a player who leaves the program mid-year, and refunds would undermine the Academy's annual budget.

The court explained that in every contract for the performance of services, the parties are obligated to perform in an objectively reasonable manner under the circumstances. The court further explained that in every contract, there is an implied covenant of good faith and fair dealing and that in the educational setting, this requires an academic institution to act in good faith in its dealings with its students.

Applying this to the facts of the case, the court held that the Academy breached its implied covenant to act in good faith towards Johnson. The Academy lacked a written student code of conduct, lacked a written disciplinary protocol, failed to supervise the students appropriately, and failed to provide an environment where Johnson felt safe. The court explained that the Academy's breach gave Johnson's mother a legitimate and reasonable reason to withdraw her son from the Academy. Accordingly, the court held that Johnson's mother was entitled to the $5,000 partial tuition refund.

Johnson v. Milford Academy (N.Y. City Ct. 2018) 67 Misc.3d 1206(A).

Note:

While this case was decided out of a small claims court in New York and is not binding in California, its subject is relevant because all schools owe a duty of care to protect their students from foreseeable harm. Schools must maintain suitable and appropriate policies and protocols governing student conduct and discipline, must enforce those policies and protocols consistently and fairly, and must take steps to protect their students from foreseeable harm while on campus and while participating in school related-activities off campus.

EMPLOYEES

AGE DISCRIMINATION

Employees Need Not Establish But-For Causation To Prevail Under The ADEA.

Noris Babb, who was born in 1960, is a clinical pharmacist at the U.S. Department of Veterans Affairs Medical Center in Bay Pines, Florida. In 2014, Babb sued the Secretary of Veterans Affairs (VA) alleging, among other claims, a violation of the federal Age Discrimination in Employment Act (ADEA).

Babb's age discrimination claim was based on the following personnel actions: (1) in 2013, the VA took away Babb's "advanced scope" designation, which made her ineligible for a promotion; (2) also in 2013, she was denied training opportunities and passed over for positions in the hospital's anticoagulation clinic; and (3) in 2014, Babb was placed in a new position, which reduced her holiday pay. Babb also alleged that her supervisors made a variety of age-related comments.

The district court dismissed Babb's claims finding, that while Babb established a prima facie case of discrimination, the VA had legitimate reasons for its actions and no jury could reasonably conclude those reasons were pretextual. The case made its way to the U.S. Supreme Court.

The ADEA provides that "all personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." On appeal, the VA argued that this provision imposes liability only when age is a but-for cause of an employment decision. In other words, the alleged unlawful conduct would not have occurred but for the employee's age. Babb, on the other hand, argued that this ADEA language prohibits any adverse consideration of age in the decision-making process. Accordingly, Babb argued that but-for causation of a challenged employment decision was not needed.

Ultimately, the Supreme Court relied on the plain meaning of the statutory language to determine that age did not need to be a but-for cause of an employment decision in order for there to be a violation of the ADEA. The Supreme Court reasoned that while age needed to be a but-for cause of discrimination, it did not need to be a but-for cause of the personnel action itself. It noted that if age discrimination plays any part in the way a decision is made, then the action is not "free from" any discrimination as required by the ADEA. Thus, the Supreme Court found that the ADEA does not require proof that an employment decision would have turned out differently if age had not been taken into account.

However, the Supreme Court found that but-for causation is important in determining the appropriate remedy for an ADEA claim. It reasoned that employees who demonstrate only that they were subjected to unequal consideration cannot obtain reinstatement, back pay, compensatory damages, or other forms of relief related to the end result of an employment decision. To obtain such remedies, these employees must show that age discrimination was a but-for cause of the employment outcome.

Babb v. Wilkie (2020) 140 S.Ct. 1168.

NOTE:

In our April 2020 Private Education Matters newsletter, we reported on Comcast Corp. v. National Association of African American-Owned Media, *another Supreme Court case discussing the causation necessary to prevail on a discrimination claim. In Comcast, the Supreme Court confirmed a but-for causation standard for Section 1981 discrimination claims. Accordingly, schools should take note that different types of discrimination claims use different causation standards.*

DISABILITY DISCRIMINATION

ADA Case Dismissed After Employer Learned Employee Did Not Meet The Job Prerequisites.

In 2010, TRAX, a contractor for the Department of the Army, hired Sunny Anthony as a Technical Writer. Anthony had a history of post-traumatic stress disorder and related anxiety and depression. After her condition worsened, Anthony obtained leave under the Family and Medical Leave Act (FMLA) in April 2012. Anthony's physician indicated her condition would likely continue through May 30, 2012.

On June 1, 2012, Anthony requested to work from home, but TRAX denied her request. While TRAX extended her FMLA leave another 30 days, the Benefits Coordinator indicated Anthony would be fired if she did not receive a full medical release from her physician by the time her FMLA leave expired. After Anthony did not submit a full release, TRAX terminated her employment on July 30, 2012.

Soon after, Anthony filed a lawsuit against TRAX under the Americans with Disabilities Act (ADA) alleging that the company failed to conduct the legally

required interactive process with her and that she was terminated because of her disability. Over the course of the litigation, TRAX discovered that contrary to her representation on her employment application, Anthony lacked the bachelor's degree required for all Technical Writers. The district court dismissed Anthony's claims against TRAX, finding that in light of the after-acquired evidence that Anthony did not have a bachelor's degree, she was not a "qualified individual" entitled to protection under the ADA.

The ADA protects only "qualified individuals" from employment discrimination based on disability. The law defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The ADA's implementing regulations further expand this definition of the term "qualified." Under the regulations, there is a two-step inquiry for determining if the individual is qualified. First, the individual must satisfy the prerequisites of the job. Second, the individual must be able to perform the essential functions of the position, with or without reasonable accommodation.

On appeal, the Ninth Circuit affirmed the district court's dismissal of the case. Anthony argued that the U.S. Supreme Court case *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, precluded the use of after-acquired evidence to demonstrate that she was unqualified because she failed to satisfy the prerequisites prong. The court disagreed because Anthony's case was different. In *McKennon*, the employer had conceded it had unlawfully discriminated against the employee on the basis of age, so it could not use after-acquired evidence of employee wrongdoing to excuse its discrimination by asserting that the employee would have been fired anyway. The Ninth Circuit concluded that the limitation on the use of after-acquired evidence under the *McKennon* case did not apply to evidence that shows that an ADA plaintiff is not a "qualified individual."

Additionally, the Ninth Circuit found that TRAX had no obligation to have an interactive process with Anthony to identify and implement reasonable accommodations. The court noted that under the ADA, an employer is obligated to engage in the interactive process only if the individual is "otherwise qualified." The court reasoned that because it was undisputed that Anthony did not satisfy the job prerequisites for the Technical Writer position, she was not "otherwise qualified," and TRAX was not obligated to engage in the interactive process.

Anthony v. Trax International Corporation (9th Cir. 2020) 955 F.3d 1123.

NOTE:

Unlike the ADA, California's anti-discrimination statute does not specifically require that an employee be "otherwise qualified" in order to trigger the right to an interactive process. (Gov. Code § 12940 (n).) To prove a case of disability discrimination under California law, however, employees must show they are a "qualified individual. . . . who has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." (2 Cal. Code Regs. §§ 11065 (o) and 11066 (a).) This case highlights the importance of developing clear minimum qualifications for all positions and maintaining up to date job descriptions that identify the essential functions of the position.

FAIR EMPLOYMENT AND HOUSING ACT

Statute Of Limitations For Failure To Promote Begins On Date Employee Is Told Promotion Decision.

Bonnie Ducksworth and Pamela Pollock are customer service representatives at Tri-Modal Distribution Services (Tri-Modal). Both Ducksworth and Pollock applied for their positions at Tri-Modal through Scotts Labor Leasing Company, Inc. (Scotts), a staffing agency. Scotts hired Ducksworth and Pollock, and leased them to Tri-Modal in 1996 and 1997, respectively. In 2006, another staffing agency, Pacific Leasing, Inc. (Pacific), took over Scotts' role for Ducksworth and Pollock.

Both Scotts and Pacific were responsible for tracking and processing payroll, health insurance, workers' compensation, and other payments for employees leased to Tri-Modal. However, Scotts and Pacific were not involved in the day-to-day supervision of Ducksworth and Pollock. For example, Tri-Modal set their work schedules and provided them with their work assignments. The decision to give any employee leased by Scotts or Pacific to Tri-Modal a raise was made solely by Tri-Modal.

After failing to be promoted for decades, Ducksworth and Pollock sued Tri-Modal, Scotts, and Pacific for racial discrimination under the Fair Employment and Housing (FEHA) Act. Pollock also alleged sexual harassment against Tri-Modal and its executive vice president, Mike Kelso. Pollock alleged that after she ended a dating relationship with Kelso, he blocked her promotions. The trial court dismissed the racial discrimination claim against Scotts and Pacific because undisputed evidence

showed that Tri-Modal solely made the decision to promote an employee. The trial court also dismissed Pollock's sexual harassment claim against Kelso based on the statute of limitations. Ducksworth and Pollock appealed.

On appeal, the court affirmed the trial court's decision to dismiss the racial discrimination claim against Scott and Pacific. The court noted that because they were not involved in the decisions Ducksworth and Pollack attacked, they could not be liable for discrimination.

The court also confirmed that the trial court correctly dismissed Kelso from the action. Under the FEHA at that time, an employee was first required to file a complaint with the Department of Fair Employment and Housing (DFEH) within one year from the alleged misconduct. Pollock filed her DFEH complaint on April 18, 2018, so she could only bring claims for conduct occurring after April 18, 2017. While the decision to promote another employee over Pollock was made in March 2017, Pollock alleged that her DFEH complaint was still timely because the promotion did not take effect until May 1, 2017.

The court disagreed. The court noted that based on the language of the FEHA, the statute of limitations for a failure to promote claim runs from when the employer tells the employee they have been given (or denied) a promotion. Accordingly, because alleged misconduct occurred before April 18, 2017, Pollock's claim was barred by the statute of limitations.

Ducksworth v. Tri-Modal Distribution Services (2020) 47 Cal. App.5th 532, reh'g denied (Apr. 22, 2020).

NOTE:

It is important to carefully evaluate the statute of limitations for an employee alleging claims under the FEHA. This includes both the language of the statutes and the case law interpreting those laws. As of January 1, 2020, the time within which an employee must file a complaint with the DFEH has been expanded from one to three years from the date of the alleged discrimination. (Gov. Code § 12960 (e).)

LABOR RELATIONS

NLRB Finds Nursing Home Operator Violated Numerous NLRA Provisions Through Its Conduct During Bargaining With Newly Recognized Unit.

In 2010, Atlanticare Management acquired ownership of a nursing home. The nursing home employs employees in various classifications, including licensed practical nurses (LPNs), certified nursing assistants (CNAs), aides, and maintenance workers. These employees work on a full time, part time, or per diem basis.

In 2012, 1199 SEIU United Healthcare Workers East (Union) engaged in a organizing campaign at the nursing home. In 2012, then full time CNA Catherine Thomas participated in the Union organizing campaign and was among 10-20 employees who stood in the facility's driveway once a week and talked to employees in support of the Union as they arrived for work. In October 2012, the Union's withdrew its representation petition, and no election was conducted in connection with the 2012 campaign.

In 2015, the Union engaged in a second organizing campaign. In November 2015, the Union filed a representation petition for a unit of non-professional employees, including licensed practical nurses (LPNs), certified nursing assistants (CNAs), aides, and maintenance workers. Atlanticare Management opposed the Union's organizing campaign. However, in December 2015, the election was held and the Union was elected as the bargaining representative of unit employees. The Union was later certified as the bargaining representative of the unit.

Prior to the election, Thomas, who was working on a per diem basis, requested a per diem shift on the day of the election, so she would not have to come to work just to vote. Atlanticare Management informed Thomas the facility was fully staffed and that it did not need her to work that day. When Thomas came to the facility to vote in the election, two CNAs told her the facility was understaffed that day.

Shortly after the election was conducted, Atlanticare Management cancelled its annual Christmas party even though it had already paid a deposit on the location where the party was to be held. In January 2016, Atlanticare Management changed its practice of providing wage increases of 2 percent, 2.25 percent, and 2.5 percent for overall annual appraisal ratings of good, very good, and outstanding, respectively, to wage increases of 1.25 percent, 1.5 percent, and 1.75 percent for ratings of good, very good, and outstanding, respectively.

The parties began negotiations for an initial collective-bargaining agreement in March 2016. In advance of negotiations, the Union requested certain information necessary for bargaining. Atlanticare Management sent the Union some, but not of all, of the information it requested. Despite repeated attempts to obtain the requested information, Atlanticare Management refused to provide the requested information.

During bargaining, Atlanticare Management refused to bargain economic issues between March and October 2016. When Atlanticare Management began to bargain economic issues, the company took the position that any current wages and benefits not specifically covered by its proposals would be eliminated. Atlanticare Management then engaged in regressive bargaining on the economic issues.

Atlanticare Management posted a memorandum on employee bulletin boards. The first stated that Union business should not be conducted on the facility property or during work hours and continuation of this practice would result in discipline and possible termination.

The Union filed an unfair practice charge alleging that Atlanticare Management: (1) unilaterally reduced the annual wage increases of unit employees and did so because employees elected the Union as their bargaining representative; (2) failed to provide the Union with requested information, delayed the production to the Union of other requested information, failed to meet and bargain with the Union at reasonable times, and engaged in bad faith surface bargaining; (3) discharged Catherine Thomas by ceasing the assignment to Thomas of per diem shifts; and (4) promulgated and maintained (a) an overly broad rule forbidding employees from engaging in union business on company property or during work.

Based on the evidence provided during the trial on the charge, the presiding Administrative Law Judge (ALJ), in December 2018, ruled in the Union's favor on each of the allegations described above. Regarding the wage reduction claim, the ALJ held that Atlanticare Management violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally changing its practice of granting employee wage increases in the range of 2 percent-2.5 percent depending upon the employee's appraisal rating. The ALJ concluded that Atlanticare Management unilaterally changed the "status quo" as it pertained to wage increases, and did not provide the union notice or an opportunity to bargain the change.

The ALJ also concluded that Atlanticare Management violated Section 8(a)(5) and (1) of the Act by refusing to furnish certain information and unreasonably denying the production of other information. The ALJ held that an employer must provide requested information that is "presumptively relevant" to the union's performance of its role as collective-bargaining representative and that Atlanticare Management failed to provide such information.

The ALJ concluded that Atlanticare Management discharged Thomas by refusing to assign her per diem shifts because of her union activity. The ALJ found that Thomas was an active and open Union supporter during the 2012 organizing campaign and that antiunion animus was a substantial or motivating factor in the employment action against her.

Regarding the memorandum, the ALJ concluded that the memo violated Section 8(a)(1) of the Act by posting an overbroad rule, which prohibited employees from engaging in union business on company property or during work hours. The ALJ concluded that the memorandum was not "facially neutral," but rather "explicitly restricts activities protected by Section 7."

The National Labor Relations Board considered the ALJ's decision and affirmed the judge's rulings, findings, and conclusions.

Atlanticare Mgmt. LLC d/b/a Putnam Ridge Nursing Home & 1199 Seiu United Healthcare Workers E. (Feb. 11, 2020) 369 NLRB No. 28.

ADMINISTRATION/GOVERNANCE

Minimum Wage Increases In 13 California Localities And Employers Must Post New Notices.

On July 1, 2020, the minimum wage increases in thirteen localities in California, including the cities of Alameda, Berkeley, Emeryville, Fremont, Los Angeles, Malibu, Milpitas, Pasadena, San Francisco, San Leandro, and Santa Monica; San Francisco County; and the unincorporated areas of Los Angeles County.

Employers located within in the geographic boundaries of one of these cities or counties must post an updated minimum wage poster on or before July 1, 2020 at each worksite. The notices must be posted in locations where employees can read them easily. These localities have notices available on their websites that employers can print and post.

The minimum wage rates are noted in the following chart. Click on the name of the city or county for additional information and the required minimum wage notice.

City or County	*Minimum Wage Rate Effective July 1, 2020*
City of Alameda	$15.00 per hour
City of Berkeley	$16.07 per hour
City of Emeryville	$16.84 per hour
City of Fremont	$15.00 per hour ($13.50 for businesses with 25 or fewer employees)
City of Los Angeles	$15.00 per hour ($14.25 for businesses with 25 or fewer employees or non-profits with approval.)
City of Los Angeles (Unincorporated Areas)	$15.00 per hour ($14.25 for businesses with 25 or fewer employees)
City of Malibu	$15.00 per hour ($14.25 for businesses with 25 or fewer employees)
City of Milpitas	$15.40 per hour
City of Pasadena	$15.00 per hour ($14.25 for businesses with 25 or fewer employees)
City and County of San Francisco	$16.07 per hour
City of San Leandro	$15.00 per hour
City of Santa Monica	$15.00 per hour ($14.25 for businesses with 25 or fewer employees)

BENEFITS CORNER

CARES Act Authorizes Employer Assistance Toward Student Loan Repayment.

Under section 127 of the Internal Revenue Code, employers with a qualifying educational assistance plan may reimburse up to $5,250 of an employee's eligible educational expenses on a nontaxable basis. In response to COVID-19, the Coronavirus Aid, Relief, and Economic Security (CARES) Act temporarily expands eligible expenses under section 127 to include employer assistance toward qualified student loan repayment. Employers may direct payment to the employee or the lender directly, and may cover principal and/or interest. However, only employer payments made during 2020 qualify.

CARES Act Loosens Section 403(b) Early Withdrawal And Loan Restrictions.

In response to COVID-19, the Coronavirus Aid, Relief, and Economic Security (CARES) Act authorizes qualified individuals to withdraw up to $100,000 from their 403(b) account in 2020, without incurring a 10% early withdrawal penalty or being subject to 20% withholding. Current and former employees qualify if they experience specified financial hardships related to COVID-19 or if they, a spouse, or dependent has a positive diagnosis. Distributions are subject to income tax, which may be spread ratably across a three-year period or avoided altogether if repaid within the same period.

Additionally, for plan loans taken between March 27 and September 23, 2020, the cap is increased to the lesser of $100,000 or the value of the employee's accrued benefit under the plan (up from the lesser of $50,000 or 50% of the employee's accrued benefit under the plan). For qualifying individuals with plan loan payments due between March 27, 2020 and December 31, 2020, the payment deadline is extended by one year, with interest continuing to accrue.

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.

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.

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. 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.

ISSUE: The Human Resources Director for an independent school called an LCW attorney and asked whether the school can require its employees to sign a waiver or release of liability for contracting COVID-19 before permitting them to come to work on campus.

RESPONSE: The LCW attorney explained that employees generally cannot release claims for injuries or illnesses that arise out of or in the course of employment. Employers have a legal duty under the federal and state Occupational Safety and Health Acts (OSHA) to provide a safe and healthy workplace for their employees and the state workers' compensation system exclusively covers employees' injuries suffered in the workplace.

Moreover, specific to COVID-19, Governor Newsom issued Executive Order N-62-20, which establishes a rebuttable workers' compensation presumption for all employees who were directed to report to their place of employment and then contracted COVID-19 during the period between March 19 and July 5, 2020, so long as the following criteria are met:

1. The employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer direction;
2. The day on which the employee performed labor or services at the employee's place of employment at the employer direction was a day between March 19 and July 5, 2020, inclusive of those days;
3. The employee's place of employment was not the employee's home or residence; and
4. The diagnosis of COVID-19 was made by a physician who holds a physician and surgeon license issued by the California Medical Board, and the diagnosis is subsequently confirmed by testing conducted within 30 days of the date of the diagnosis.

If an employee meets the above criteria, the employee may be eligible for workers' compensation benefits.

For these reasons, the School cannot require its employees to sign a waiver or release of liability for contracting COVID-19 as a condition of coming to work on campus.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

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

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