LCW Liebert Cassidy Whitmore

Private Education Matters

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

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LCW NEWS

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STUDENTS

ENROLLMENT CONTRACT

School Does Not Need to Refund Tuition Paid by Family Whose Child Was Expelled Mid-Year.

Carl Radinger entered into a contract with Asheville School to board and educate his son Philippe. Part of the School's curriculum was a mandatory camping trip. Philippe hated camping, and so asked his mother to get him out of the trip. She called the School and told them it was her mother's birthday that evening and that Philippe had to attend a family event. The Assistant Head of Student Affairs, Mary Wall, saw on Facebook that Philippe was out with friends the night of the camping trip. On Monday, she asked him how his weekend was and what he did the night of the camping trip. He said he was at a family dinner with his parents and grandma. When confronted with the Facebook pictures, Philippe admitted the truth.

Philippe went before the Honor Board, which determined that he violated the Honor Code provision not to lie when he gave Mary Wall false information about his weekend. They unanimously recommended that he be expelled. The next day, the Headmaster informed Radinger that Philippe was being dismissed. Radinger requested a pro-rata reimbursement of tuition, but the School declined.

Citing the enrollment contract, the School noted that it made clear that after June 30 there was no refund for any tuition, even if the student was dismissed from the School. The School also reminded Radinger that Philippe signed the Honor Code and that the enrollment agreement contained language that the School has the right to dismiss students if, in the Headmaster's best judgment, it is in the best interest of the School or the child.

Radinger sued the School, claiming first that there was no contract because the promise to educate and board his son was illusory and therefore there was no consideration. The court noted that the School agreed to reserve a space for Philippe when tuition was paid prior to the school year. The School took actions to prepare for his enrollment and boarded and educated him until he was dismissed. That was adequate consideration and therefore the contract was enforceable.

Radinger then argued the interchangeable use of "dismiss" and "expel" in the contract and handbook were ambiguous and created a factual matter that should go to a jury. The court disagreed and found instead that read together, the contract and the handbook make clear that a student's violation of the Honor Code could result in dismissal from the School. There is no meaningful difference between the terms "expel" and "dismiss" as they apply here. Next, Radinger argued the School breached the contract by not educating Philippe for the full school year. But the court noted that Philippe was dismissed in accordance with the terms of the contract. He violated the Honor Code and the handbook provided adequate notice that such a violation could lead to dismissal. Once Philippe was dismissed, the School had no further obligation to board or educate him. Therefore, there was no breach.

Finally, Radinger argued that the School was unjustly enriched by keeping the full tuition amount when Philippe was not educated for the full school year. Again, the court disagreed. Unjust enrichment is based on contract principles implied in the law. It is not necessary to look to unjust enrichment when there is a valid, legally enforceable contract covering the subject of payment. There was no issue for a jury on the topic of unjust enrichment. Summary judgment for the School was affirmed on all counts.

Radinger v. Asheville School, Inc. 2018 WL 2016459

NOTE:

The outcome of this case is what every private school would hope for when it dismisses a student mid-year and does not reimburse any tuition. It is important to note that this (non-California) court relied on the strong language in the enrollment agreement that made clear there was no reimbursement after a certain date, no matter the cause of the separation. While in some cases schools may wish to offer some sort of reimbursement in exchange for a waiver of claims, strong contract language will help bolster a school's position if it decides that no reimbursement will be made.

EMPLOYEES

TITLE VII LIMITATIONS PERIOD

Ninety Day Period to File Claim Starts After Employee Receives Right-to-Sue Letter.

Taylor Scott worked for Gino Morena Enterprises (GME) at a barbershop on the Marine Corps base at Camp Pendleton. She alleged that the manager and general manger sexually harassed and retaliated against her. Scott filed a charge with the DFEH on November 13, 2013. She received her right to sue letter November 25, 2013, which informed her that a civil action under FEHA must be filed within one year from the date of the letter. The letter also stated the charge was dual filed with the EEOC. A month later, Scott's managers issued her a warning. Scott decided to quit.

Scott followed up on the charge on October 15, 2014, when she spoke with someone at the EEOC and confirmed that her complaint was being processed. She also filed a second charge with the DFEH on November 17, 2014, alleging constructive discharge. She received her second right-to-sue letter that same day. That letter told her that to receive a federal right-to-sue letter, Scott had to file a complaint within 30 days of the receipt of a closure of case letter or 300 days of the discriminatory act, whichever is earlier.

On November 20, 2014, Scott filed a complaint in superior court, asserting only FEHA claims. GME removed the matter to federal court. On June 3, 2015, Scott finally received the right-to-sue notice from the EEOC from her first charge. That notice said Scott must file a lawsuit under Title VII within 90 days of receipt of the notice. Scott filed a first amended complaint that included only federal claims under Title VII. GME moved to dismiss, arguing the claims were time-barred. The court granted the motion for summary judgment and Scott appealed.

Scott filed her first complaint, based on the DFEH charge, just within one year of the date of the right-to-sue letter. The issue at hand in this case was whether the federal claims under Title VII had to be filed within 90 days of receiving the federal right-to-sue letter, or within 180 days of filing the EEOC charge. GME argued it was the latter and that her claims were time-barred. By interpreting the statutory language, the court held that the key event was the giving of the right-to-sue letter, not simply the eligibility of right-to-sue notice. Even though a plaintiff may sue when the EEOC has not acted on a charge for 180 days, but the plaintiff only must do so within 90 days after receiving the right-to-sue letter. Therefore, Scott's claims on the first charge were timely.

Scott's amended complaint contained charges for both harassment and retaliation. The retaliation claim was based, in part, on conduct that occurred after the date of her first charge. That charge was filed more than 300 days after she quit her job on December 22, 2013, and so it was untimely. Scott argued otherwise, claiming that under the continuing violations doctrine, the claim was still actionable. The court held that she could only base Title VII claims on actions that occurred after she filed her first DFEH charge to the extent she can show such acts are part of a single hostile work environment claim. Ultimately, the court ruled that summary judgment was only appropriate for the claims that are based on discreet discriminatory or retaliatory acts occurring after Scott filed her first DFEH charge. Also, the 90 day period for an aggrieved employee to file a civil action under Title VII begins when the person is actually given notice of the right-to-sue from the EEOC, not when the person become eligible to receive such notice.

Scott v. Gino Morena Enterprises, LLC (2018)—F.3d--, 2018 WL 1977123.

SEXUAL HARASSMENT

Hostile Work Environment Created Where Incidents Spread Over Two Years and Repeated Requests to Stop Were Ignored.

UCSF has a research and teaching hospital associated with its campus. The hospital maintains a written policy against sexual harassment and against gender harassment that is not specifically sexual. A clinical nurse at the hospital, identified in the case as S.M., worked there since 1992, helping care for critically ill infants. Arthur Johnson was a lab technician whose job duties included calibrating machinery used by the patients.

S.M. was polite to Johnson, but they were not friends and only maintained a professional relationship. S.M. began to notice that Johnson would linger near her station and interject himself in conversations she was having. She felt that he was staring at her in a way that made her uncomfortable and was noticeable to her colleagues. At some point in 2009, S.M. received a gift card with a note from Johnson in her office mailbox. She threw it out and did not acknowledge it. Over the holidays he gave her another gift and again she threw it out, thinking he would get the hint that she was not interested in him. He asked her out on dates twice and she finally told him she had a boyfriend and did not have romantic feelings for Johnson.

Despite Johnson's continuing to stare at her and be near her even when he was not working in her area, S.M. tried to ignore it and did not report anything to her supervisor. Johnson then began using his responsibilities with scheduling to put himself in places where he was working close to her with such regularity that it could not have been random. Paul Gardner, a friend of S.M.'s, wrote an email to Johnson telling him to stop his behavior and warning him that he was opening himself up to a charge of harassment. Gardner blind copied Johnson's supervisor on the email. Johnson then emailed S.M. directly, apologizing to her and saying he did not realize he was making her uncomfortable. S.M. did not reply and continued to try to avoid Johnson. Johnson sent a note on July 3, 2010, apologizing again and saying he felt sick inside that he made her feel uncomfortable.

Johnson learned that another nurse had moved into the same apartment complex as S.M. Johnson then said he wanted to live there too. S.M. heard about this and became extremely upset after learning that Johnson put in a bid on a unit in her building. S.M. confronted Johnson at work and screamed at him to leave her alone. He said okay and walked away. Due to the stress of the situation, S.M. developed shingles and had trouble sleeping. She had friends walk her to her car at night and she avoided public places. She took a medical leave late in 2010 and did not return until March 2011. Upon her return, S.M. learned that Johnson was in escrow on a unit in her apartment complex. She started hyperventilating and shaking uncontrollably. She filed a complaint of harassment on May 11, 2011.

The matter was referred to UCSF's Labor and Employee Relations representative and Johnson was placed on an investigative leave. Johnson denied some of the accusations but then admitted he sent her cards and asked her out. He denied leering at her or assigning himself to work near her. He denied moving to her building because of his feelings for her. S.M.'s co-workers told the investigator about S.M.'s ongoing distress and that they witnessed the behavior. The June 9, 2011, investigation report concluded that Johnson had engaged in unwelcome behavior that created a hostile work environment. Johnson, a public sector employee, received a Notice of Intent to Terminate and requested a hearing to fight the termination. He presented evidence that he was suffering from depression and under the care of a psychiatrist. He admitted to having a one-sided infatuation with S.M. He stated, "I was guilty of what is known as workplace harassment, also known as creating a hostile work environment." The termination was upheld.

Johnson appealed the decision and another hearing was held August 5, 2013. At this hearing, after over 150 sessions with his psychiatrist, Johnson presented testimony that he was simply naïve regarding romantic relationships and that he had not truly sexually harassed S.M. The termination was upheld and Johnson filed a writ of mandate in the superior court. The court denied the petition and Johnson appealed. Johnson argued he should not have been subject to discipline because his conduct was neither severe nor pervasive enough to meet the legal definition of sexual harassment. He compared his behavior to that of a junior high crush.

The court explained the factors that are considered when determining if a hostile work environment has been created. They include the nature of the unwelcome acts, the frequency of the encounters, the total length of time over which the encounters occurred, and the context of the conduct. The standard to be used is one of what a reasonable person would find offensive. The court emphasized that sexual harassment does not need to involve actual sexual acts or images or language. Given the overall scope of Johnson's behavior, the court decided that his unwanted attention was sufficiently severe or pervasive enough to create a hostile work environment.

The court also found UCSF's decision to terminate was not an abuse of discretion. Johnson was not entitled to progressive discipline in this matter. Although the policy allows for progressive discipline, it also makes clear that an employee who has been found to have engaged in sexual harassment may be terminated as a result. The investigation was appropriately thorough and Johnson did not prove otherwise. The judgment was affirmed.

Johnson v. Regents of the University of California 2018 WL 1919038.

GOVERNANCE/RETALIATION

All Claims Dismissed Between Executive Director and Board Who Split Over Litigation Disagreement.

Daniel Morgan Graduate School of National Security (DMGS) is a private, non-profit educational institution in Washington, D.C. offering post-graduate programs in intelligence and national security issues. Linda Millis began working at DMGS in 2016 and was its Executive Director. On August 26, 2016, Millis reported information to the Board Chair about co-founder Mark Levin engaging in inappropriate sexual conduct with students in his private residence. Levin was suspended and an investigation was commenced by an attorney-investigator.

The investigator concluded her investigation and produced an Executive Summary with her findings and recommendations but no names, and also a confidential Appendix that included names of witnesses. The Board received the Executive Summary only. Levin was terminated in October 2016. On November 1, 2016, the Board met with counsel to have a confidential discussion regarding the report and its recommendations. The Board decided to take a hands-off approach by not disclosing any confidential information in the report and neither encouraging nor discouraging any possible victims from pursuing legal action. Millis disagreed with this course of action.

A former employee contacted the local police department and complained of sexual abuse by Levin. Millis attended his police interview to be supportive but claims she did not give him any documents or information. The former employee provided police with a copy of the Executive Summary, but it is not clear how he got it. DMGS Vice President Alan Kelly also ended up providing the Summary to the police detective who he spoke to regarding the former employee's allegations.

In March 2017, a group of former employees made known that they were intending to sue DMGS regarding Levin's conduct. Millis disagreed with the Board's response to the litigation and resigned as Executive Director. She wrote a resignation letter, which stated that the Board was vilifying and blaming the victims. DMGS alleged that Millis provided a copy of her resignation letter to the initial former employee complainant, as it was attached as an exhibit to the lawsuit. The Washington Post wrote articles about the lawsuit, but Millis maintained that she never gave the resignation letter to anyone for publication purposes.

DMGS sued Millis, claiming breach of contract, breach of fiduciary duty of loyalty, and defamation per se. Millis counterclaimed, alleging constructive discharge, unlawful retaliation, abuse of process, and intentional infliction of emotional distress. Both sides moved for summary judgment on their claims. The court held that Millis was entitled to summary judgment on all her claims. There was no evidence anywhere in the record that Millis published a false and defamatory statement to a third party. There is no evidence she gave her resignation letter to the Washington Post. Even though the former employees filed the letter as an exhibit to the lawsuit, under D.C. law there is a privilege protecting statements made in the course of a judicial proceeding.

DMGS also was not able to produce any evidence showing that Millis breached any duty of loyalty by providing information to the Post or to the litigants. The school waived its privilege with respect to the Executive Summary when Vice President Kelly provided it to the police. Furthermore, the evidence did not show any compensable harm suffered by DMGS as a result of Millis's actions specifically. While the school may have suffered reputational harm due to the incident and lawsuit, neither of those were the result of Millis's actions.

DMGS also tried to argue Millis breached a contract because she violated the organization's Bylaws. The court pointed out, however, that Millis was only contractually bound by her employment agreement, not by Bylaws.

With respect to Millis's claims against DMGS, the court also found each of these claims failed as a matter of law. Millis could not claim constructive discharge because she quite clearly had resigned, as noted in her resignation letter. She stated she was resigning because of how DMGS was treating other people (the alleged victims) and not how the school was treating her. Also, she disagreed morally with the Board's approach to the litigation. She also could not prove retaliation, as she

was not subject to a materially adverse employment action. Though she claimed that her pay raise was not as high as what was promised to her and she had some supervisees removed from her work load, such grievances do not rise to the level of materially adverse employment actions.

Finally, the court explained that the Board's behavior did not rise to the level of extreme outrageous conduct needed to show intentional infliction of emotional distress. Millis also did not demonstrate she suffered emotional distress, stating she was in good mental health. The court found both parties were entitled to summary judgment.

Daniel Morgan Graduate School of National Security v. Linda Millis, 2018 WL 1915928.

NOTE:

This case involved a very dramatic public split between the Executive Director and the Board, heightened by public scrutiny. It can be difficult when officers of the Board fundamentally disagree about the appropriate course of action for a school to take under difficult circumstances. Here, while there ended up being a lot of anger and frustration, there were no actual legal claims to pursue.

ARBITRATION AGREEMENTS

Arbitration Agreements Found Unconscionable Where Employees Not Given Information About How Agreement Affected Ongoing Litigation.

Anthony Nguyen was an employee at Inter-Coast International Training, Inc. He filed a class action against Inter-Coast on May 13, 2011, alleging wage and hour issues. He sought to establish a class of non-exempt employees. At the time the suit was filed, no employees had signed arbitration agreements. In March 2012, Inter-Coast revised its employee handbook and added an arbitration provision. The provision was near the end of the handbook and had the heading "Employee Acknowledgement and Agreement." It then had unrelated paragraphs not about arbitration and, finally, in the same small font, the arbitration provision.

In March 2012, 62 putative class members signed the arbitration agreement, but not Nguyen. Two months later, Inter-Coast filed a motion to compel arbitration. The court denied that motion. Later versions of the handbook also contained similar arbitration provisions, and over the next three years, an additional 106 putative class members signed the agreement.

Nguyen moved for class certification in December 2014 and the trial court granted the motion in September 2015. Inter-Coast then filed a motion to compel arbitration. By then, 168 of the 323 class members had signed arbitration agreements. Inter-Coast argued it was only seeking to compel arbitration for those who had signed the agreement. Nguyen opposed the motion, arguing the arbitration provisions were both procedurally and substantively unconscionable.

The plaintiffs argued that the agreement was buried in the handbook in the same small font with no header or separation to call attention to the fact that it is an arbitration agreement. There were no rules attached. Furthermore, Inter-Coast required putative class members to sign the agreement without telling them about the ongoing case or that signing might affect their rights with respect to that case. The trial court agreed with the plaintiffs and Inter-Coast appealed.

The Court of Appeal here agreed with the trial court, emphasizing the way the agreement was hidden in the employee manual and how employees were instructed to sign at the meeting at which they received the handbook. The court also pointed out that the agreement itself stated that Inter-Coast uses a system of binding arbitration to resolve "all disputes which may arise out of the employment context." This language does not allow an employee to understand that the agreement would cover the pre-existing wage and hour claims. Inter-Coast did not inform employees at any time that signing would affect their rights regarding the ongoing litigation. The trial court's decision was affirmed and the motion to compel arbitration was denied.

Nguyen v. Inter-Coast International Training, Inc. 2018 WL 1887347

RACIAL DISCRIMINATION

Racially Derogatory Image Texted Between Employees Can Give Rise to Hostile Environment Claim.

Benjamin Smith worked first as a law clerk and then as an associate at the Cronin Law Firm. In December 2016, the firm entered into an agreement with Smith regarding bonuses he would receive as a result of cases the firm settled. Around June 2017, the firm settled a case that resulted in a $920,000 recovery, which, under the agreement, meant Smith was owed roughly $10,000 as a bonus. He was not paid the bonus. After another settlement, the firm again declined to pay Smith his promised bonus.

Around the same time as the settlements, attorney Joseph Cronin text messaged his former office manager, stating that he was concerned about the terms of the bonus agreement and wanted to change the terms. Around August 2017, Smith discovered other text messages Cronin sent that contained derogatory jokes about Smith's Asian race. In one message, another firm employee circulated an image with a figure dressed as a Samurai with the caption: "Me Doggie Gotta Poopie So Me So Late." Cronin wrote back, saying "Haha. Classic!" Cronin also verbally repeated how funny he thought the image was.

Smith alleges that he was constructively discharged and forced to resign due to the hostile, racist conduct. He requested his bonuses, but Cronin replied they were discretionary and he was not going to get paid. Smith filed a claim under Section 1981 for race discrimination. (Note, under Section 1981 an employee can only sue for intentional discrimination on the basis of race. This law does not require the employee to file an EEOC charge before bringing suit and has a longer statute of limitations.) He also brought claims regarding the state anti-discrimination law and the non-payment of the bonuses.

To state a claim under Section 1981 on an indirect evidence theory of race discrimination, Smith must show that he is a member of a protected class, he was aggrieved by an adverse employment action, and the adverse action gives rise to an inference of discrimination. The law firm argued there was no evidence the photo had anything to do with his race. The court strongly disagreed and stated the "photo and message invoke every conceivable physical, cultural, and linguistic stereotype about Asians…Plaintiff's physical appearance, cultural heritage, and linguistic accent were all unmistakably attacked due to his race." The court therefore found that due to the constructive discharge allegation, the Section 1981 claim cannot be dismissed at this stage.

The court acknowledged that not everything that makes an employee unhappy is an adverse employment action. The situation must be so intolerable to a reasonable employee that they are forced to leave if the employee wants to claim constructive discharge. Here Smith has alleged the fostering of a work environment with overt racism. The picture, caption, and subsequent praising of the picture were extremely offensive and therefore he had shown an adverse employment action. Similarly, Smith did properly plead a hostile work environment claim. Under New Jersey law, a single incident can be enough to establish a hostile environment if it is severe enough.

Finally, the court held that Smith sufficiently plead the fraud charge pertaining to the unpaid bonuses. The firm had an agreement on bonuses and then did not hold up its end of the bargain. Whether Smith will prevail on that claim is a question for the jury, but he demonstrated enough to survive the motion to dismiss.

Benjamin E. Smith v. Cronin Law Firm LLC, 2018 WL 1790831.

NOTE:

This case shows how employee communications via text and other electronic communications can lead to charges of hostile work environment. Although the image was not sent to Smith directly, he became aware of it, and was so distraught by the content that he felt he could no longer work in that environment. While Cronin and others found the image funny and not discriminatory, their perception is irrelevant. The target of the image understood it to be highly offensive and suffered as a result. Schools should make sure that as part of employees' regular anti-harassment training, employees understand that even making what one person might consider a joke involving race, nationality, religion or other protected classification can have dire consequences for other employees and the school as a whole.

INDEPENDENT CONTRACTORS

CA Supreme Court Adopts New Standard to Determine if Someone is an Employee or Independent Contractor Which Presumes Employee Status.

Dynamex is a nationwide same-day courier service that offers on-demand pick-up and drop-off services. In 2004, Dynamex converted its employee drivers into independent contractors. The drivers must provide their own vehicles and pay for all transportation-related expenses. Drivers may work for other delivery companies and may hire others to make deliveries for them. A Dynamex driver brought suit against the company, alleging the classification of drivers as independent contractors was wrong, and asserting the drivers are employees and thus are subject to state wage and hour laws and Wage Orders. There was disagreement about whether the class as proposed should be certified. Part of that disagreement related to the proper legal standard that is applicable to the determination of whether a worker is an employee or an independent contractor.

The Supreme Court of California underwent a lengthy analysis of the issue. The court first engaged in a detailed history of the case law analyzing this issue. The seminal case on this matter is *S.G. Borello & Sons,*

Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341. In *Borello*, the court concluded that it is permissible to consider all of the various factors set forth in earlier cases, as well as the Labor Code, and other state cases which used a six-factor test. The court also found that Borello relied on a statutory purpose standard that considers the control of the details and other potentially relevant factors to best effectuate the legislative intent and objective of the statute at issue.

The court then analyzed *Martinez v. Combs* (2010) 49 Cal.4th 35, which held that "to employ" in state Wage Orders had three alternative definitions: (1) to exercise control over the wages, hours or working conditions, or (2) to suffer or permit to work, or (3) to engage, thereby creating a common law employment relationship.

In this current wage and hour case, the issue for the court was whether the class of employees in question may be certified on the wage order definitions of "employ" and "employer" as construed in *Martinez* or, instead, whether the test for distinguishing between employees and contractors in Borello was the only standard that applies.

After a lengthy analysis of the historical purposes of these various tests, the court described the "ABC" test used in several other jurisdictions. Under this test, all workers are presumptively employees and may be classified as independent contractors only if they meet all three of the following conditions: (a) the worker is free from the control or direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) the worker performs work that is outside the usual course of the hiring entity's business; and (c) the worker is engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The court held that the ABC test is appropriate because it places the burden on the employer to establish the worker is an independent contractor and not an employee by demonstrating that each of the three conditions is met. Under the first part, the business need not control the precise manner or details of the work in order to be found to have maintained control similar to the control the business has over employees. But the entity must show the worker is free of such control. Under the second part, workers whose services are provided within the usual course of the business of the entity are to be considered employees. The court gave the example of a clothing store hiring a plumber to fix the toilet. That would certainly be an independent contractor arrangement. However, if a clothing manufacturer hired work-at-home seamstresses to make dresses from patterns and cloth supplied by the company and which the company then sold, that would be an example of workers engaging in the entity's usual business and therefore those workers could reasonably be viewed as employees. Finally, under the third part, the hiring entity must prove the worker is customarily engaged in an independently established trade, occupation, or business.

The business entity must establish each part of the test. The court noted it may be easier for plaintiffs to show parts two or three are not met, and therefore they can then avoid the slightly more difficult analysis under part one. The hiring entity's failure to prove any of the three parts will be sufficient in itself to prove the worker is an employee and not a contractor.

As for the specifics of the situation with the Dynamex drivers, the court used the ABC test to show that the trial court did not err in certifying the class of workers at issue. The drivers in question performed services only for Dynamex and the class excluded drivers who performed services for other delivery companies or had employees of their own. Dynamex's motion to decertify the class was denied.

Dynamex Operations West Inc. v. The Superior Court of Los Angeles County, (2018) –P.3d--, 2018 WL 1999120.

NOTE:

This is an extremely important case because it changes the way schools must analyze whether a hired worker is appropriately classified as an independent contractor. While previous tests looked to a variety of factors, including control and economic benefit, the courts now require a school to demonstrate the individual in question meets all three parts of the ABC test. Schools should undergo an assessment of all workers currently classified as independent contractors and determine whether they still can be classified as such under this new test. Schools need to recognize that the legal presumptions continue to make it much more difficult to classify workers as independent contractors. Workers at schools who provide typical school services such as teaching likely do not qualify as independent contractors under the law.

LABOR/NLRB

Employer Engaged in Misconduct When COO Implied Employees May Lose Benefits Before Union Representation Vote.

On February 28, 2015, just a few days before an election to decide whether to unionize, the Franklin Preparatory

Academy's COO, Marty Griffith, sent an email to pro-union employee Julie Pfeifer. Griffith referenced several popular employee benefits like pay increases, personal development days, and training flexibility. He then stated that if the school were unionized, he suspected the Board would take a very hard line on pay and benefits. He reminded Pfeifer that ultimately he works for the Board, so he will have to follow their lead.

Prior to the election, Pfeifer shared the email with three other employees in the unit that was being petitioned for in the election. The election was held March 5, 2015, and the results were 5 for and 4 against unionization. One ballot was void and three more were challenged. The Board noted that it applies an objective standard to determine whether conduct is objectionable and interferes with employee free choice. The considerations include the number of incidents of misconduct, the severity of the incidents and if they were likely to cause fear, the proximity to the election, the closeness of the final vote and the degree to which the misconduct can be attributed to the employer.

Here these factors led the Board to determine the school had engaged in misconduct. The email from Griffith, who was one of the highest-ranking administrators at the school, came within days of the election and was spread among the employees by Pfeifer. And the content of the email was designed to make employees fear the consequences of voting for unionization. The election results were so close that one ballot might have changed the outcome. The Board ordered that one of the remaining challenged ballots be counted.

Franklinton Preparatory Academy, (09-RC-144924; 366 NLRB No. 67) Columbus, OH, April 20, 2018.

BUSINESS AND FACILITIES

Checklists for Schools with Summer Camp Programs

NOTE: The following is general advice only. Please consult us if you have specific questions on these issues.

With the school year winding down, many schools are in the process of getting ready to open or run summer camp programs at their facilities. Here are checklists of issues to consider when running these summer camp programs.

For Summer Camps Operated by a Camp Operator

- Clear Communication to parents of school students that the school does not operate the summer camp;
- School's contract with the Camp Operator includes the following essential provisions:
  - Clear Description of Premises
  - Description of lease by school of any equipment or furniture
  - Indemnification Provision
  - Termination for convenience
  - Criminal background checks and tuberculosis risk assessments by Camp Operator of camp staff
  - Camp Operator compliance with all applicable local, state, and federal laws
  - Payment terms
  - Use restrictions & rules
  - Insurance by Camp Operator naming School as additional insured. Third Party policies to be primary; School's insurance non-contributory. Third Party policies to provide endorsement waiving rights of subrogation against the School.
  - Provisions addressing camp's use of School's name/logo
  - Marketing/Advertising of camp
  - Provision that Camp employees are not jointly employed by the School. Joint employment is determined when:
    - The School directly or indirectly exercises control over wages, hours, or working conditions of the camp's staff. This includes setting rates and negotiating summer camp staff's rates of pay, authority to hire and fire, and supervising camp staff.
- Provision ensuring that Camp Operator does not hire independent contractors.

For Summer Camps Operated by the School

- Use Waivers and Releases for activities posing a heightened risk of injury, including hiking, horseback riding, swimming, and off campus field trips (e.g. trips to the beach);
- Ensure staff is properly trained in the camp activities and that there are records documenting the training especially if staff are employed in different positions during the school year.
- Obtain essential forms such as emergency contacts, authorization for medical treatment in emergencies, and authorization to administer medications;
- Independent Contractors – ensure classification as independent contractor is appropriate. Factors that must be met are:
  - the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

- the worker performs work that is outside the usual course of the hiring entity's business; and
- the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

- Determine whether California and Federal laws relating to organized camps may apply;
- Camp Employees
  - Passed criminal background checks
  - Completed tuberculosis risk assessments before they begin work;
- Work permits (for minors);
- Volunteers & Interns – ensure worker is appropriately categorized. A few key rules:
  - Employees may not volunteer for services similar to those they are paid to perform during the school year.
  - Volunteers may only receive nominal compensation
  - Volunteers should sign volunteer agreements clearly stating they have no expectation to be compensated for services
- Evaluate Wage & Hour compliance for camp staff (i.e. If the camp is overnight, determine whether camp staff need to be paid for on call time when they are sleeping; and
- Mandated Reporter Training to camp staff.

ACA CORNER

ACA Back to Basics: The Employer Mandate

This article is the first installment in LCW's ACA Back to Basics series. The series will allow employers to brush up on the Patient Protection and Affordable Care Act's (also known as "the ACA") Employer Shared Responsibility Provisions.

The Employer Mandate – What is it?

The ACA's Employer Shared Responsibility Provisions, commonly known as the "Employer Mandate," require certain employers to offer qualifying medical coverage to substantially all of their ACA full-time employees and their dependents or, alternatively, to make an employer shared responsibility payment to the IRS. The Employer Mandate applies only to Applicable Large Employers ("ALEs"), i.e. employers that had an average of at least 50 full-time employees – including full-time-equivalents – during the preceding calendar year.

Applicable Large Employer ("ALE")

An employer is an ALE for the current calendar year if it has at least 50 full-time employee, including full-time equivalent employees, on average, during the prior year.

ALE Calculation: Add the total number of **full-time employees** for each month of the prior calendar year to the total number of **full-time equivalent employees** for each calendar month of the prior calendar year and divide that total number by 12.

For purposes of this calculation: An employee is a **full-time employee** if he/she has on average at least 30 hours of service per week during the calendar month, or at least 130 hours of service during the calendar month. An employer determines the number of **full-time equivalent employees** for a month in two steps:

1. Combine the number of hours of service of all non-full-time employees for the month but do not include more than 120 hours of service per employee, and
2. Divide the total by 120.

The Employer Mandate Penalties

An employer that meets the requirements of an ALE must offer minimum essential coverage to substantially all of its ACA full-time employees and their dependents, and such coverage must provide minimum value and be affordable as to the ACA full-time employee, otherwise, the IRS may assess one of two employer shared responsibility payments (aka "Penalty A" and "Penalty B"). These penalties are triggered if an ACA full-time employee purchases coverage through Covered California and obtains a premium tax credit.

Penalty A: The IRS may assess Penalty A where an ALE fails to offer minimum essential coverage to at least 95 percent of its full-time employees (and their dependents). The IRS will calculate Penalty A as follows: $2,320 annually ($193.33 per month) multiplied by the total number of full-time employees less 30. For example, Penalty A for an ALE with 40 employees could result in up to $23,200 of liability in 2018 (40 less 30 is 10, multiplied by $2,320).

Penalty B: The IRS may assess Penalty B where an ALE offers minimum essential coverage to at least 95 percent of its full-time employees and their dependents, but the coverage offered to a full-time employee is either not "affordable" or does not provide "minimum value." Penalty B is $3,480 annually ($290 per month) multiplied by the number of full-time employees who actually purchase coverage through Covered California and receive a premium tax credit.
Both Penalties are indexed. The numbers above are for 2018.

Key Compliance Points

• The IRS will look at the lowest cost plan offered each month.

• Employers must report this data through ACA Reporting. (e.g. Forms 1094C/1095C).

• To avoid Penalty A, an employer must offer minimum essential coverage to at least 95 percent of its ACA full-time employees and their dependents.

• To avoid Penalty B, an employer must offer coverage that is affordable and provides minimum value.

All employers that qualify as an ALE should determine whether they offer "affordable" coverage to their ACA "full-time employees," as those terms are defined by the ACA.

Later installments in our ACA Back to Basics series will provide additional details on how to identify ACA full-time employees and determining whether an employer is offering affordable coverage.

LCW BEST PRACTICES TIMELINE

Each month, LCW will present a monthly timeline of best practices for private and independent schools. The timeline runs from the fall semester through the end of summer break. LCW encourages schools to use the timeline as a guideline throughout the school year.

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 Section 33192, if they provide the following services:
    - School and classroom janitorial.
    - Schoolsite administrative.
    - Schoolsite grounds and landscape maintenance.
    - Pupil transportation.
    - Schoolsite 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.
- Plan potential construction projects for the following summer (to be performed in approximately one year.)

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

ISSUE: A Dean of Students called to report that after an incident in which a student had sent inappropriate pictures to a group chat and was disciplined, a parent suggested to the school that it require every group chat that students set up for class purposes be monitored by a school administrator. The Dean wanted to know if that was something the school should or needed to do, since this group chat was not an official school communication channel and was created organically by students to assist with studying and homework questions.

RESPONSE: The attorney told the Dean that the school cannot possibly monitor every group chat that students set up on their own using their personal cell phones. They are allowed to engage in conversations about school on their own time. The important thing was that school policies made clear that such use may be subject to policies such as bullying, harassment, or social media if it impacted school life. In this case, the school was able to discipline the student who sent the images because the policies permitted such discipline. The attorney agreed that any official school group communications, such as class Facebook pages and group texts from club leaders or coaches, should include an adult employee to monitor, but the school cannot force students to include school administrators in their own personal communications.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

June 7 — **"Ministerial Exception"**
ACSI | Webinar | Michael Blacher

Private Education Matters is available via e-mail. If you would like to be added to the e-mail distribution list, please visit www.lcwlegal.com/news.

Please note: by adding your name to the e-mail distribution list, you will no longer receive a hard copy of ***Private Education Matters***.

If you have any questions, call Sherron Pearson at 310.981.2753.

LCW Liebert Cassidy Whitmore
6033 West Century Blvd., 5th Floor | Los Angeles, CA 90045
www.lcwlegal.com | @lcwlegal

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