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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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LCW NEWS

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

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STUDENTS

NEGLIGENCE

Massachusetts Supreme Court Finds University Owes A Duty To Protect A Drunk Student From Harm Where The University Is On Notice Of Foreseeable Harm.

In fall 2013, Morgan Helfman (Helfman) and A.G. were freshmen at Northeastern University (Northeastern) and lived in the same dormitory. The dormitories at Northeastern are supervised by resident assistants (RAs), who are students hired to serve as role models to the student residents, perform rounds of their assigned dormitory, intervene and report students violating Northeastern's code of student conduct, and regulate access to the dormitory.

In October 2013, Helfman and A.G. drank alcohol in Helfman's dorm room and then went to a Halloween party hosted by an RA, Sarah Smith (Smith), from a different dormitory. At the party, Helfman and A.G. drank more alcohol, which they brought to the party themselves, and played drinking games with Smith and another RA, Paul Jones (Jones). Neither Smith nor Jones, who were both underage, supplied alcohol to Helfman, A.G., or any other guest, but did observe Helfman and A.G. drinking alcohol.

After the party, Helfman and A.G. walked back to their dormitory together. During the walk, Helfman sent a text message to her roommate that said "Okay [sic] I'm coming home [sic] I'm really sick" and Helfman stumbled and fell. When Helfman and A.G. checked into their dormitory with the RA on duty, Helfman leaned on the counter for support and then walked unsteadily from the RA's desk to the elevator. Once in A.G.'s room, A.G. initiated sex and although Helfman "was very uncomfortable with what was going on, she didn't want to hurt his feelings by saying anything to him or telling him to stop." Helfman also "wasn't scared," did not feel as if she could not have left if she wanted to, and was unsure whether A.G. believed she had consented to sex.

The next morning, Helfman told her roommate about the incident with A.G. and her roommate, with Helfman's permission, told an RA about the incident. The next day, the Northeastern police escorted Helfman and her mother to a local hospital, where Helfman was examined and an evidence collection kit was completed. Northeastern police completed an investigation, but decided not to file any criminal charges against A.G. or report the incident to Boston police. Based on the Northeastern police investigation, the Office of Student Conduct and Conflict Resolution (OSCCR) charged A.G. with "sexual assault with penetration." A student conduct board (SCB) hearing was held and the SCB ultimately held that A.G. had not committed the alleged offense. Helfman's appeal of the decision did not change the SCB's finding.

Helfman filed a claim against Northeastern alleging that Northeastern negligently failed to prevent the sexual assault, contributed to its occurrence, and failed to respond adequately to the incident. The trial court granted summary judgment in favor of Northeastern, finding that Helfman failed to establish essential elements of her case.

On appeal, the court noted that it has "long [] recognized that universities have a duty to protect students from the foreseeable criminal acts of third parties" and "[s]uch a duty exists even when those criminal acts are made possible by the intoxication of the student victim." The court further recognized that a college or university may owe a duty to protect its students from the foreseeable harms associated with alcohol-related emergencies because "dangerous drinking-related activities are a foreseeable hazard on college and university campuses." The court noted that the responsibility of colleges to protect students from alcohol-related emergencies is triggered when a college or university has "actual knowledge" that a student on campus "is in imminent danger of serious physical harm due to alcohol intoxication" and when a student is "so intoxicated that the student is incapable of seeking help for him- or herself." The court concluded that Northeastern had no duty to protect Helfman in this matter because Northeastern "had at best minimal knowledge of the conditions that gave rise to the particular harm, rendering this assault unforeseeable." The court explained that the RAs at the party and the RA who checked Helfman and A.G. in at the dormitory could not have reasonably known that Helfman was at risk of being sexually assaulted. Therefore, the court ruled against Helfman's claims and affirmed the trial court's ruling.

Helfman v. Northeastern University (2020) 485 Mass. 308.

Note:

A recent California Supreme Court case, Regents of University of California v. Superior Court *(2018) 4 Cal.5th 607, suggests the same result may be reached by courts in California. In* Regents of University of California v. Superior Court*, the California Supreme Court held that universities have a special relationship with their students and a duty to protect them from foreseeable violence.*

DISCRIMINATION

New York University Settles With U.S. Department Of Education Over Complaint Of Antisemitism.

On September 25, 2020, the U.S. Department of Education, Office for Civil Rights (OCR) reached a settlement with New York University (University) over a complaint filed by a student that the University discriminated against students of Jewish descent, on the basis of their national origin, by failing to respond appropriately to incidents that created a hostile environment for Jewish students at the University. The complaint involved multiple incidents where students experienced harassment based on their Jewish ancestry from 2017 to 2019. These incidents include, an injury to a student during an event hosted by the University student group, Realize Israel, and a tweet from a student that he wanted "all Zionists to die," which resulted in the closure of the University' Bronfman Center for Jewish Student Life for 48 hours, among other incidents.

OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulations, which collectively prohibit discrimination on the basis of race, color, or national origin in programs and activities receiving financial assistance from the U.S. Department of Education (ED). Under Title VI, a recipient college or university subjects an individual to discrimination based on national origin if the college or university "effectively caused, encouraged, accepted, tolerated, or failed to correct a hostile environment of which it has notice." A hostile environment is one that includes "harassing conduct (e.g., physical, verbal, or graphic conduct) that is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities, or privileges provided by the recipient [college or university]."

OCR investigated the student complaint, but before it finished the investigation and reaching findings, the University elected to voluntarily settle the complaint. As part of the settlement, the University must revise its Non-Discrimination and Anti-Harassment Policy to include a statement that the University prohibits anti-Semitism; take action to address and ameliorate anti-Semitism that involves student clubs; issue a statement that the University does not tolerate acts of anti-Semitism; and conduct outreach to inform students, faculty, and staff of the University's commitment to take all necessary actions to address and ameliorate discrimination and harassment based on shared ancestry or ethnic characteristics, including anti-Semitism. The University must also take steps, including disciplinary action where appropriate, to address complaints and

respond to incidents of anti-Semitism. The University must submit periodic reports to OCR to demonstrate compliance with the terms of the settlement.

U.S. Justice Department Settles With School District Over Equal Access For Students With Service Animals.

The U.S. Department of Justice (DOJ) reached an agreement with the Gates Chili Central School District (School) in Rochester, New York, to settle the DOJ's lawsuit alleging disability discrimination in violation of Title II of the Americans with Disabilities Act (ADA). The DOJ alleged that the School violated the ADA by refusing to permit a student with a disability to use her service animal unless she was accompanied by a separate, adult handler provided by her mother, despite the student's demonstrated ability to control and handle her service dog with minimal assistance and the service dog's extensive training to serve and respond to the student and follow school routines. The School denied the allegations and denied that it violated the ADA.

ADA regulations require school districts to modify their policies, practices, or procedures to permit the use of a service animal by an individual with a disability. Nevertheless, a service animal must be under the control of its handler and must "have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the dog's safe, effective performance of work or tasks, in which case the service dog must be otherwise under the handler's control (e.g., voice control, signals, or other effective means)." The DOJ alleged that the student demonstrated sufficient control of her service animal.

Under the settlement agreement, the School is required to comply faithfully with ADA regulation 28 C.F.R. Section 35.136, which governs service animals, and to provide reasonable modifications to facilitate the use of service animals by students with disabilities. The School is also required to distribute its Service Animal Policy to all staff and administrators and to report to the DOJ all requests for service animal use it receives and its handling of such requests over a 12-month period. Finally, the School must pay the student's mother $42,000.

NOTE:

While this settlement agreement involved a public school, generally, private schools also must accommodate a student's request to use a service dog at school. Service dogs utilized by students must be under the control of the handler at all times and in most instances, the handler will be the student with a disability or a third party who accompanies the student with a disability.

COLLEGE ADMISSIONS

Common App Strikes Disciplinary History Questions From Standard Application Process.

The Common Application (Common App) is a non-profit membership organization that represents approximately 900 public and private colleges and universities in 21 countries, including the United States. The Common App allows students to apply to multiple colleges and universities through one streamlined admissions process. Through the Common App, students applying for college submit basic background information like name, address, parental employment and education, and extracurricular activities, and submit the types of documents that colleges and universities typically require like essays, recommendation letters, and transcripts.

The Common App has also asked students to provide information about their history of discipline in high school. Since 2006, students have had to answer the following question:

"Have you ever been found responsible for a disciplinary violation at any educational institution you have attended from the 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct, that resulted in a disciplinary action? These actions could include, but are not limited to: probation, suspension, removal, dismissal, or expulsion from the institution."

Beginning with the 2021-2022 application season, however, the Common App will no longer ask questions about high school discipline as part of the application process. In a recent press release, the Common App announced that its decision to remove discipline-related questions arose from federal data and academic research demonstrating that school discipline disproportionately impacts students of color, and particularly students of color with disabilities. The Common App cited a study by the Center for Civil Rights Remedies that the suspension rate for Black students is approximately 3.5 times higher than for white students.

The Common App also shared data from 2019 about submission rates among students who begin completing the admissions process though the Common App. The data indicated that among the students who did not report any disciplinary history, 12 percent did not submit their college applications, whereas, among the students who reported disciplinary history, 22 percent did not submit their college applications. That amounted to more than 7,000 students not submitting their college applications after disclosing school disciplinary history, likely out of concern that colleges would not accept them due to the discipline.

The Common App explained that the removal of disciplinary history questions is intended to "make a positive impact on millions of students." Nevertheless, it is important to note that despite the removal of these questions from the Common App, colleges and universities may still request disciplinary history from applicants in their supplementary admissions applications.

EMPLOYEES

EQUAL PAY

Princeton University And U.S. Department Of Labor Reach Settlement Over Faculty Pay Gap.

On September 30, 2020, Princeton University (Princeton) and the Department of Labor Office of Federal Contract Compliance Programs (OFCCP) entered into an early resolution conciliation agreement (Agreement) to resolve allegations that Princeton was not in compliance with Executive Order 11246, as amended, and its implementing regulations. Executive Order was signed by President Lyndon B. Johnson in 1965 and prohibits federal contractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin.

OFCCP alleged that Princeton discriminated against 106 female full-time professors by paying them lower salaries than those paid to similarly situated male professors from 2012-2014. OFCCP also alleged that Princeton committed several technical violations, including failure to collect and maintain certain personnel and employment records and failure to evaluate compensation to identify potential gender-based pay disparities. Princeton denied the allegations and denied that it violated any laws or regulations related to the allegations. Princeton did not admit any misconduct or unlawful activity as part of the Agreement.

The Agreement requires Princeton to dedicate almost one million dollars to compensate the 106 female full-time professors impacted by the pay inequity and to efforts to remedy gender-based pay inequity at the school. The Agreement further requires Princeton to take several steps, including, but not limited to, conducting a salary equity review of all full-time professors, making prospective salary adjustments, conducting pay equity training for its Department Chairs, submitting regular salary data reports to the OFCCP, and implementing and enforcing record retention protocols. Princeton is also generally required to continue efforts to promote diversity, pay equity, and inclusion.

NOTE:

The settlement agreement is an important reminder that schools should periodically conduct salary equity reviews to ensure that similarly-situated male and female employees are equally compensated.

ARBITRATION AGREEMENT

Arbitration Agreement In Employee Handbook Held Enforceable Despite Employee's Failure To Read Handbook; Court Directs Unconscionable Provisions Severed.

Hula Media Services, LLC. hired Michael Conyer in January 2017 and provided Conyer a copy of the employee handbook. Conyer signed a receipt and acknowledgement of Hula Media's employee handbook, which read:

"This is to acknowledge that I have received a copy of the Employee Handbook. This Handbook sets forth the terms and conditions of my employment as well as the rights, duties, responsibilities and obligations of my employment with the Company. I understand and agree that it is my responsibility to read and familiarize myself with all of the provisions of the Handbook. I further understand and agree that I am bound by the provisions of the Handbook. [¶] I understand the Company has the right to amend, modify, rescind, delete, supplement or add to the provisions of this Handbook, as it deems appropriate from time to time in its sole and absolute discretion."

In August and October 2017, Conyer submitted written complaints alleging sexual harassment and retaliation by Hula Media's chief executive officer. In November 2017, Hula Media added an arbitration agreement to its employee handbook and distributed the revised version of the employee handbook to its employees. Conyer and the other employees of Hula Media each signed new receipt and acknowledgement forms with the above language. In January 2018, Hula Media terminated Conyer's employment.

In August 2018, Conyer sued Hula Media and its chief executive officer alleging six causes of action under the Fair Employment and Housing Act (FEHA), including sexual harassment, and failure to reimburse business expenses. Citing the arbitration agreement in the employee handbook, Hula Media filed a motion to compel arbitration of Conyer's claims. Conyer opposed the motion and argued that he had not received a copy of the revised employee handbook and even if he had received a copy, he would never have known that Hula Media put an arbitration clause in it because Hula Media did not notify him of whether and how the employee handbook had been changed.

The trial court denied Hula Media's motion to compel arbitration. The trial court explained that the receipt and acknowledgment form Conyer signed did not indicate that an arbitration agreement was added to the employee handbook or that the handbook was revised or added to at all. The trial court further concluded that it was reasonable for Conyer to assume the distribution of the employee handbook in November 2017 was nothing more than routine without any particular reason for Conyer to read it again,. The trial court noted it would be "fundamentally unfair to presume that [Conyer] was aware of the arbitration clause."

On appeal, Hula Media argued that Conyer "demonstrated his assent to the arbitration clause by signing the acknowledgment of receipt of the employee handbook, and his failure to read the handbook before signing the acknowledgment did not render the arbitration clause unenforceable." Whereas, Conyer argued he did not consent to the arbitration clause because Hula Media did not inform him that an arbitration clause had been added to the employee handbook.

The appeals court determined the evidence showed that Conyer received the employee handbook in November 2017, had the opportunity to read the handbook, and signed the receipt and acknowledgement form. Further, the court concluded that the language of the receipt and acknowledgement form clearly constituted a contract and Hula Media had no obligation to point to Conyer that an arbitration clause had been added to the employee handbook. The court noted that "[i]t has long been the rule in California that a party is bound by a contract even if he did not read the contract before signing it," and that rule applies to all contracts, including arbitration agreements.

Conyer further argued that the provisions of the employee handbook, including the arbitration agreement, were procedurally unconscionable, which is a contract defense that turns on "the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." Conyer also argued that the arbitration agreement was substantively unconscionable, which is a contract defense that turns on the "fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided."

The appeals court concluded that there was some degree of procedural unconscionability in the employee handbook because it contained provisions that were nonnegotiable conditions of Conyer's employment (i.e., Conyer could not negotiate the handbook's provisions and had no meaningful choice about its terms.) The appeals court also concluded that the arbitration agreement contained elements that were substantively unconscionable because it contained a clause requiring each party to pay a pro rata share of the arbitrator's fees and costs and specified that the arbitrator would award attorney's fees to the prevailing party, which both contradict express limitations set forth in the FEHA.

Nevertheless, the appeals court determined that the arbitration agreement could be fully mutual and enforceable if the arbitrator's fees and costs and the attorney's fees provisions were severed from the arbitration agreement. Accordingly, the appeals court directed the trial court to sever these provisions from the arbitration agreement and grant Hula Media's motion to compel Conyer's claims to arbitration.

Conyer v. Hula Media Services, LLC (2020) 53 Cal.App.5th 1189, *review filed* (Oct. 5, 2020).

NOTE:

A peripheral matter in this case is that employers may make midyear revisions and modifications to employee handbooks if the employee handbook itself reserves that right for the employer. In doing so, however, employers should provide employees with a copy of or access to the revised or modified handbook and have employees sign a new receipt and acknowledgement form.

CRIMINAL BACKGROUND

Employer Who Did Not Investigate DOJ Background Check Discrepancy Violated Labor Code Section 432.7.

Tracey Molina applied for a position with Premier Automotive Imports of CA, LLC (Premier) in 2014. Molina did not disclose a 2010 conviction for misdemeanor grand theft on her job application because the conviction was dismissed in 2013. In not disclosing the dismissed conviction, Molina was exercising her rights under Labor Code Section 432.7, which prohibits an employer from asking a job applicant to disclose any conviction that has been judicially dismissed and bars an employer from using any record of a dismissed conviction as a factor in the termination of employment.

Molina passed Premier's criminal background check and Premier hired her. After working for Premier for four weeks, a subsequent background check conducted by the Department of Motor Vehicles (DMV) needed for Molina's position mistakenly reported to Premier that Molina had an active criminal conviction. During her four weeks on the job, Molina appeared qualified and there had been no complaints about Molina's work performance. Without investigating or inquiring further, Premier terminated Molina for "falsification of job application" despite Molina's explanation to

her superiors that her conviction had been dismissed by court order. Three weeks later, the DMV issued a corrected notice, but Premier did not rehire Molina.

Molina filed a retaliation complaint with the Labor Commissioner (Commissioner) for her termination. The Commissioner determined that Premier unlawfully discharged Molina and ordered Premier to reinstate her to her former or a similar position, reimburse her for lost wages plus interest, and pay a civil penalty. Premier appealed to the Director of the Department of Industrial Relations, lost the appeal, and then refused to comply with the Commissioner's orders.

The Commissioner then filed an enforcement action against Premier for violation of Labor Code Sections 432.7 and 98.6, alleging that Premier unlawfully retaliated against Molina for exercising her right to omit disclosure of the dismissed conviction on her job application, and relied on a dismissed conviction as a factor in terminating her employment. The trial court, however, dismissed the Commissioner's enforcement action, finding that the Commissioner failed to produce sufficient evidence to support its claim. The Commissioner appealed.

On appeal, the appeals court analyzed whether the Commissioner provided sufficient evidence to support its claim.

First, to establish a violation of Labor Code Section 432.7, the Commissioner was required to show that Premier utilized a record concerning a conviction that had been judicially dismissed as a factor in terminating Molina's employment. The appeals court determined that the Commissioner presented sufficient evidence to make this showing, namely that Premier knew about Molina's dismissed conviction and misused that information to terminate her in violation of Labor Code Section 432.7. In reaching that conclusion, the appeals court noted that Molina passed her first criminal background check, which should have suggested to Premier that the DMV check was incorrect or incomplete. However, Premier took no steps to contact the DMV, speak with Molina, or investigate the discrepancy between the two background checks. Instead, Premier decided to terminate Molina, and then followed through on the termination despite learning from Molina that the conviction on her record had been dismissed. Premier should have evaluated the situation to determine whether it was proceeding in a lawful manner and should have considered Molina's disclosure that her conviction was dismissed before proceeding with the termination. Moreover, three weeks later, after the DMV confirmed it had made a mistake, Premier did not rehire Molina.

Second, to establish a prima facie violation of Labor Code Section 98.6, the Commissioner was required to demonstrate that Molina engaged in protected activity, that Premier subjected her to an adverse employment action, and that Molina's protected activity substantially motivated Premier's adverse employment action. The appeals court determined that the Labor Commissioner produced sufficient evidence to meet this burden. First, it was undisputed that Molina engaged in protected activity when she exercised her right under Labor Code Section 432.7 by not disclosing her dismissed conviction on her job application. It was also undisputed that Premier subjected Molina to an adverse employment action when it terminated her employment. The key issue was whether the Commissioner produced sufficient evidence that Molina's protected activity substantially motivated Premier's adverse employment action. The appeals court held the Commissioner had produced such sufficient evidence. Premier received conflicting criminal background checks and rushed to fire Molina without investigating further or contacting Molina or the DMV. Molina told Premier when they informed her of her termination that the conviction had been dismissed. Further, when the DMV corrected its mistake three weeks later, Premier took no steps to rehire Molina. Accordingly, the appeals court found these factors supported a reasonable inference that Molina's failure to disclose the dismissed conviction was a substantial motivating factor in Premier's decision to terminate Molina's employment.

The appeals court reversed the decision of the trial court and remanded the case back to the trial court for a new trial.

Garcia-Brower v. Premier Automotive Imports of CA, LLC (Cal. Ct. App., Oct. 15, 2020, No. A156985) 2020 WL 6074454.

NOTE:

Employers should take steps to investigate discrepancies in the results of a background checks. (The employee repeatedly told her supervisors her conviction had been dismissed; and the employee was not interviewed prior to her termination or given an opportunity to prove to her superiors that she was telling the truth.)

ADMINISTRATION & GOVERNANCE

TITLE IX

New York State Voluntarily Dismisses Lawsuit Regarding Title IX Regulations.

The State of New York agreed on November 3, 2020, to dismiss its lawsuit against the U.S. Department of Education regarding the new federal Title IX regulations. The lawsuit, filed in June 2020 by New York State officials and the Board of Education for the City School District of the City of New York, challenged the new federal regulations that govern how educational entities must adjudicate sexual harassment allegations under Title IX of the Education Amendments of 1972.

Although the parties voluntarily dismissed the lawsuit, they agreed the State or educational entities in the state could still argue the regulations were invalid if New York schools are sued for sexual assault or harassment-related claims.

In October, a federal trial judge in Washington, D.C., also dismissed a different lawsuit filed by the American Civil Liberties Union on behalf of advocacy organizations for survivors of sexual assault.

Therefore, two lawsuits remain that challenge the legality of the new Title IX regulations. One lawsuit filed by the National Women's Law Center and other legal advocacy groups completed a trial on November 12, 2020, in a federal trial court in Massachusetts. The parties in another lawsuit involving sixteen states and the District of Columbia, including California, continue to litigate the matter, and the court set some deadlines in March 2021.

NOTE:

An educational institution's obligation to address sex- and gender-based harassment and discrimination stem from a variety of sources under federal and state law. Even if a school or college does not accept federal or state funding, the new regulations may raise issues of best practice. Educational institutions should therefore review their policies and procedures in light of the new Title IX regulations and carefully consider what practices they wish to adopt.

CLERY ACT

U.S. Department Of Education Rescinds And Replaces 2016 Handbook For Campus Safety And Security Reporting.

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act contained specific campus safety- and security-related requirements for institutions of higher education. In an announcement made October 9, 2020, the U.S. Department of Education stated the 2016 Handbook for Campus Safety and Security Reporting and previous versions of the Handbook created additional requirements and expanded the scope of the statute and regulations. In an effort to eliminate guidance that extended beyond the statutory and regulatory requirements and reduce regulatory confusion, the Department rescinded the 2016 Handbook. However, this action does not change any statutory or regulatory requirements related to Clery Act reporting.

The Department will create a new appendix in the Federal Student Aid Handbook. Among the significant changes is guidance regarding Clery geography, Clery crimes, and Campus Security Authorities.

This rescission will inform the Department's views moving forward, but the rescission will not retroactively apply to previous Department determinations regarding Clery Act violations, fines, enforcement actions, or any other related actions by the Department. Additionally, none of the changes in the new appendix affect the July 10, 2020, temporary extension (to December 31, 2020) that the Department provided regarding Clery reporting due to COVID-19.

Read the Department's announcement here and new Appendix to the FSA Handbook here.

BUSINESS & FACILITIES

CONTRACTS

When A Company Modifies A Contract, It Must Provide Notice To All Parties And Allow The Parties To Consent To The New Term.

In 2014, Rachel Stover purchased Experian's credit score subscription service. The terms of the service required Stover to arbitrate all claims arising out of the subscription service and contained a change-of-terms provision stating that, each time Stover accessed

Experian's website, she consented to "the then current terms" (*i.e.*, new or different terms added or revised after 2014). Stover cancelled her Experian subscription one month after purchase and later claimed that Experian fraudulently marketed this credit score as information that lenders review when determining consumers' creditworthiness.

Stover accessed the Experian website again in 2018, one day before she filed her complaint. At that time, the arbitration provision had changed to exclude certain disputes from arbitration. Stover argued that her dispute was not subject to arbitration pursuant to the 2018 terms. Experian disagreed and argued that a mere visit to the website after the parties terminated their business relationship was insufficient to activate a change in the original terms because Stover had no opportunity to review the new terms and conditions before visiting the website. Experian moved in the trial court to compel arbitration of Stover's claims. The trial court granted Experian's motion but held that the 2018 terms applied because of the plain language of the 2014 terms. Stover appealed.

The Ninth Circuit Court of Appeal affirmed the trial court ruling, but held that Experian's 2014 terms applied because Stover did not receive notice of the 2018 version of the terms and conditions. The Court of Appeal held that ruling otherwise would undermine the contract principle requiring mutual assent. The Court of Appeal reasoned that in order to bind parties to new terms pursuant to a change-of-terms provision, the parties must have express notice and an opportunity to review those changes. Thus, the 2018 changed terms did not apply because Stover did not have notice of them and Experian could compel arbitration of her claims under the 2014 arbitration provision.

Stover v. Experian Holdings, Inc. (2020) 978 F.3d 1082.

NOTE:

If a company modifies contract terms and conditions, even with an express change-of-terms clause, it must provide notice to all parties in a manner that allows the parties to expressly consent to the new or changed terms. LCW can help schools and colleges navigate the terms of any contract and evaluate appropriate and effective notification strategies.

BENEFITS CORNER

COBRA

Recent Developments Should Trigger Employer's Review of COBRA Notice Procedures.

Employers should review their COBRA notices, election forms, and procedures due to recent regulatory and litigation developments. COBRA is a federal law that provides for the continuation of group health plan benefits to "covered employees" (i.e., employees who elect group health plan coverage) and "qualified beneficiaries" (i.e., the spouses and dependents of covered employees) under certain circumstances when the health coverage would otherwise be lost. Typically, this can happen due to a "qualifying event", such as a reduction in hours or termination of employment, which then allows employees to elect to continue coverage under their employer's group health plan for a specified number of months at their own expense. The current economic climate has also unfortunately required many employers to implement cost-saving and workforce reduction measures, thus further highlighting the need to revisit COBRA compliance.

A plan administrator must provide qualified employees (and covered dependents) with mainly two types of COBRA notices: general and election notices. General notices are provided to employees who are newly covered under their employer's health plan, which explains their COBRA rights due to a qualifying event. An election notice is provided to an employee experiencing a qualifying event, which explains important and required information, such as continued coverage rights, the length and cost of continued coverage and an election form. The U.S. Department of Labor (DOL) has actively guided employers, plan administrators and employees regarding COBRA compliance, including issuing regulations identifying the necessary information in these notices and publishing model notices.

On May 4, 2020, the DOL issued a new rule, which pauses certain COBRA deadlines due to COVID-19 during a period designated as the "Outbreak Period" (from March 1, 2020 until 60 days after the end of the Coronavirus National Emergency or such other date announced in future guidance). Notably, the clock stops on the following key COBRA deadlines (among others) and then restarts after the Outbreak Period ends: the subsequent 60-day period for a qualified beneficiary to elect COBRA continuation coverage; the 45-day deadline for making an initial COBRA premium payment following the initial election; and the 30-day deadline for making subsequent monthly COBRA premium payments, which follows the first day of the coverage period for which payment is being made. For further discussion on the DOL's new rule, see our June 2020 *Client Update*. Also note, the DOL

recently revised its model COBRA notices, but they have not been updated to account for the extended deadlines noted above.

Recently, there has been a notable rise in class action litigation against employers based on alleged non-compliance in the content and issuance of COBRA notices. These class actions generally allege that the companies' COBRA election notices: failed to include the minimum content that the DOL regulations specified; were not written in a readable manner; failed to explain COBRA coverage enrollment and related deadlines; deviated significantly from the DOL's model notices; and included additional unnecessary information intended to deter persons from obtaining COBRA continuation coverage. Defendants are raising a variety of applicable defenses to these class actions, but the significant costs of litigation alone often drive the parties towards settlement.

Given these significant recent developments, employers should take the time to review the administration of their plans and the issuance of required notices, and consult with their benefits counsel and third-party administrators. For example, employers can compare their COBRA election notices line-by-line to both the DOL Regulations and model notices. Employers should understand what differences exist and why.

Employers should also take the time to review their administrator service agreements to ensure adequate indemnification against COBRA compliance deficiencies.

It is unclear whether employers need to specifically revise COBRA notices to reflect the extended deadlines noted in the DOL's new rule, especially considering the DOL has not yet revised its own model notices. Nevertheless, to mitigate against the risk of non-compliance and costly litigation, employers should exercise due diligence to independently determine whether any revisions are necessary. Also, employers should familiarize themselves again with the applicable rules for terminating COBRA continuation coverage, such as when qualified beneficiaries obtain coverage under other group health plans or become entitled to Medicare benefits. Note, the DOL's temporary rule extends the due date for making COBRA premium payments through the Outbreak Period, which effectively limits employers' ability to terminate such coverage for failure to timely pay premiums.

AFFORDABLE CARE ACT

Calendar Year 2020 ACA Reporting And Penalties For Applicable Large Employers.

As we enter the last quarter of this unprecedented year, applicable large employers (ALEs) are starting to prepare for annual ACA reporting. Generally, an ALE is an employer that had, on average, 50 or more full-time employees (including full-time equivalents) during the preceding calendar year, according to ACA's specific calculation rules.

Recently on July 13, 2020, the IRS released drafts of the 2020 Form 1094-C and Form 1095-C. ALEs will provide a completed Form 1095-C to each full time employee and file the final versions of these forms in early 2021 to report ACA compliance during the 2020 calendar year. Please note the following deadlines:

- January 29, 2021 - Provide IRS Form 1095-C that you plan to file with IRS to each full-time employees (as that term is defined under the ACA) (Statement);
- February 26, 2021 - Last Day to Mail Form 1094-C and Forms 1095-C to the IRS;
- March 31, 2021 –Last Day to E-file Form 1094-C and Forms 1095-C to the IRS.

Note: ALEs filing 250 or more returns must file electronically.

Employers who fail to provide Statements to full-time employees or fail to file correct Forms are subject to the following penalties:

- Failure to provide Statement to Employee – $270 for each failure (maximum annual penalty of $3,275,500); and
- Failure to file correct Form - $270 for each failure (maximum annual penalty of $3,275,500).

ALEs should plan ahead to ensure these deadlines are met to avoid penalties. ALEs working with a vendor on the filings should double check the Forms to ensure that the vendor is completing them correctly, as the IRS will still penalize the ALE (not the vendor) for incorrect forms and failure to timely file.

2020 Penalty Amounts For The ACA's Employer Shared Responsibility Requirements.

The IRS also recently published the 2020 tax year annual ACA penalty amounts, which increase every year. These penalties are referred to as Employer Shared Responsibility Payments, and are described as follows:

4980H(a) Penalty: For failure to offer minimum essential coverage to at least 95 percent of full-time employees in any given calendar month:

- **$214.17 per month** ($2,570 annualized) multiplied by the total number of full-time employees less 30. In 2021, this penalty increases to $2,700 annualized.

4980H(b) Penalty: For failure to offer affordable minimum essential coverage that provides minimum value:

- **$321.67 per month** ($3,860 annualized) for each full-time employee who enrolls in coverage and receives a subsidy from Covered California. In 2021, this penalty increases to $4,060 annualized.

ALEs subject to potential penalties will receive an IRS Letter 226J to inform them of their potential liability for an employer shared-responsibility payment.

ALEs who are subject to the Employer Shared Responsibility Requirements should review their policies and health benefit arrangements to confirm they do not have exposure to ACA penalties. In our August 2020 *Client Update*, we generally discussed the three main IRS safe harbors, which an employer may use to consider whether it offers affordable coverage. However, it's important to note that offering flexible benefit arrangements and cash in lieu may impact the general affordability calculations. If you have questions about your particular arrangement, please reach out to an LCW attorney.

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.

NOVEMBER THROUGH JANUARY

□ Issue Performance Evaluations

- We recommend that performance evaluations be conducted on at least an annual basis, and that they be completed before the decision to renew the teacher for the following school year is made. Schools that do not conduct regular performance reviews have difficulty and often incur legal liability terminating problem or marginal employees - especially when there is a lack of notice regarding problems or deficiencies.
  - Consider using Performance Improvement Plans but remember it is important to do the necessary follow up and follow through on any support the School has agreed to provide in the Performance Improvement Plan.

□ Compensation Committee Review of Compensation before issuing employee contracts

- The Board is obligated to ensure fair and reasonable compensation of the Head of School and others. The Board should appoint a compensation committee that will be tasked with providing for independent review and approval of compensation. The committee must be composed of individuals without a conflict of interest.

□ Review employee health and other benefit packages, and determine whether any changes in benefit plans are needed.

□ If lease ends at the end of the school year, review lease terms in order to negotiate new terms or have adequate time to locate new space for upcoming school year.

□ Review tuition rates and fees relative to economic and demographic data for the School's target market to determine whether to change the rates.

□ Review student financial aid policies.

□ Review and revise enrollment/tuition agreements.

□ File all tax forms in a timely manner:

- Forms 990, 990EZ
  - Form 990:
    - Tax-exempt organizations must file a Form 990 if the annual gross receipts are more than $200,000, or the total assets are more than $500,000.

- Form 990-EZ
  - Tax-exempt organizations whose annual gross receipts are less than $200,000, and total assets are less than $500,000 can file either form 990 or 990-EZ.

- A School below college level affiliated with a church or operated by a religious order is exempt from filing Form 990 series forms. (See IRS Regulations Section 1.6033-2(g)(1)(vii)).

- The 990 series forms are due every year by the 15th day of the 5th month after the close of your tax year. For example, if your tax year ended on December 31, the e-Postcard is due May 15 of the following year. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is the next business day.

- The School should make its IRS form 990 available in the business office for inspection.

• Other required Tax Forms common to business who have employees include Forms 940, 941, 1099, W-2, 5500

□ Annual review of finances (if fiscal year ended January 1st)

• The School's financial results should be reviewed annually by person(s) independent of the School's financial processes (including initiating and recording transactions and physical custody of School assets). For schools not required to have an audit, this can be accomplished by a trustee with the requisite financial skills to conduct such a review.

• The School should have within its financial statements a letter from the School's independent accountants outlining the audit work performed and a summary of results.

• Schools should consider following the California Nonprofit Integrity Act when conducting audits, which include formation of an audit committee:

  - Although the Act expressly exempts educational institutions from the requirement of having an audit committee, inclusion of such a committee reflects a "best practice" that is consistent with the legal trend toward such compliance. The audit committee is responsible for recommending the retention and termination of an independent auditor and may negotiate the independent auditor's compensation. If an organization chooses to utilize an audit committee, the committee, which must be appointed by the Board, should not include any members of the staff, including the president or chief executive officer and the treasurer or chief financial officer. If the corporation has a finance committee, it must be separate from the audit committee. Members of the finance committee may serve on the audit committee; however, the chairperson of the audit committee may not be a member of the finance committee and members of the finance committee shall constitute less than one-half of the membership of the audit committee. It is recommended that these restrictions on makeup of the Audit Committee be expressly written into the Bylaws.

JANUARY/FEBRUARY

□ Review and revise/update annual employment contracts.

□ Conduct audits of current and vacant positions to determine whether positions are correctly designated as exempt/non-exempt under federal and state laws.

FEBRUARY- EARLY MARCH

□ Issue enrollment/tuition agreements for the following school year.

□ Review field trip forms and agreements for any spring/summer field trips.

□ Tax documents must be filed if School conducts raffles:
• Schools must require winners of prizes to complete a Form W-9 for all prizes $600 and above. The School must also complete Form W-2G and provide it to the recipient at the event. The School should provide the recipient of the prize copies B, C, and 2 of Form W-2G; the School retains the rest of the copies. The School must then submit Copy A of Form W2-G and Form 1096 to the IRS by February 28th of the year after the raffle prize is awarded.

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: The Head of School of an independent school called an LCW attorney and explained that the School chose to enforce the Travel Advisory issued on November 13, 2020, by the California Department of Public Health (CDPH) with its students and staff. One student intends to travel out of state over the weekend to attend a non-school related competition. The student's father has said that the educational nature of the trip qualifies it as travel for "study," which makes it essential travel under the Travel Advisory. The student's father told the Head of School that he does not believe his child needs to quarantine. The Head of School asked whether the student's trip constituted essential or non-essential travel.

RESPONSE: The LCW attorney explained that it is unlikely that this constitutes essential travel. According to a statement by Governor Newsom, the CDPH Travel Advisory was issued in response to the increased cases of COVID-19 in the state, which are adding "pressure on our hospital systems and threatening the lives of seniors, essential workers and vulnerable Californians." Governor Newsom noted that "Travel increases the risk of spreading COVID-19, and we must all collectively increase our efforts at this time to keep the virus at bay and save lives." While the CDPH Travel Advisory makes an exemption for "essential travel," which includes: work and study, critical infrastructure support, economic services and supply chains, health, immediate medical care, and safety and security," given the important public policy reasons behind the Travel Advisory, we believe this essential travel exemption should be construed very narrowly. As such, the exemption for "study" is likely intended just to cover travel for a regular educational program. Expanding those exemptions to cover travel related to a non-school related competition would be inconsistent with the language of the Travel Advisory itself and the important public policy reasons behind it. Therefore, since the School has chosen to enforce the Travel Advisory through its own travel-related quarantine policy, we recommend requiring this student to participate in distance learning through the 14th day after the student returns from the out of state competition.

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LCW LIEBERT CASSIDY WHITMORE

On-Demand Mandated Reporting Training for Private and Independent Schools!

Employees whose duties require contact with and/or supervision of children are considered "mandated reporters." LCW's Mandated Reporting for Private and Independent Schools workshop provides mandated reporters with the training that is suggested and encouraged by the California Penal Code to help them understand their obligations. It is essential that mandated reporters understand their legal duties not only to help ensure the safety and welfare of children, but because the duty to report is imposed on individual employees, not their schools.

On-Demand Training Course:
LCW has created an engaging, interactive, and informative on-demand training course. Training is one-hour and participants will receive an acknowledgement of completion at the end of the course, which can be forwarded to a school administrator.

Compatible with LMS Systems:
Does your school already use a Learning Management System for other training? Simply add LCW's Mandated Reporting training to the required training list and let your staff complete it when and where they want.

Train your whole school at a discounted price:
We are pleased to offer discounted pricing for schools that purchase multiple training sessions. In addition to pricing discounts, schools that purchase multiple training sessions will receive robust tracking analytics, dedicated account support, and branding opportunities.

Questions?
We are here to help! Contact us at on-demand@lcwlegal.com with questions on discounted school-wide pricing.

Register Today!

New to the Firm

Megan Nevin is an Associate in Liebert Cassidy Whitmore's Sacramento office, where she represents public sector employers in all aspects of labor and employment law. Megan is an experienced litigator with a proven track record of success in motion practice and trials.

She can be reached at 916.584.7013 or mnevin@lcwlegal.com.

Michael Gerst is an experienced litigator in Liebert Cassidy Whitmore's Los Angeles office. His has successfully argued several state and federal appellate matters, including before the United States Courts of Appeals for the Ninth, Fifth, Sixth and Third Circuits.

He can be reached at 310.981.2750 or mgerst@lcwlegal.com.

Management Training Workshops

Firm Activities

Consortium Training

Jan. 19 **"Managing the Marginal Employee"**
Builders of Jewish Education Consortium | Webinar | Elizabeth Tom Arce

Jan. 26 **"Student Policies Every California Private School Handbooks Should Contain and Why"**
Golden State Independent School Consortium | Webinar | Grace Chan

Customized Training

Our customized training programs can help improve workplace performance and reduce exposure to liability and costly litigation. For more information, please visit www.lcwlegal.com/events-and-training.

Jan. 4 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment and Mandated Reporting"**
Laguna Blanca School | Webinar | Julie Strom

Speaking Engagements

Jan. 31 **"Annual Legal Update for California Independent Schools"**
California Association of Independent Schools (CAIS) Trustee School Head Conference | Webinar | Michael Blacher & Donna Williamson

Seminar/Webinars

For more information and to register, please visit www.lcwlegal.com/events-and-training/webinars-seminars.

Dec. 15 **"Five Things California Private Schools Need to Know about: COVID-19 and Reasonable Accommodations"**
Liebert Cassidy Whitmore | Webinar | Jennifer Rosner

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