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.

September 2019

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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

DISCIPLINE

College Provided Student Fair Disciplinary Process Before Expulsion.

After spending several hours drinking alcohol separately, John and Jane, students at Occidental College (Occidental), spent time together in John's dorm room dancing, kissing, and drinking vodka. Concerned about Jane's heavy drinking, Jane's friends took her back to her room. About thirty minutes later, Jane and John began exchanging text messages and John urged Jane to return to his room. Jane agreed. Before leaving her room, Jane sent a text message to John asking if he had a condom and a text message to a friend stating "The worlds [sic] moving. I'm going to have sex now." Once in John's room, John and Jane had sex.

Afterward, Jane left John's room. Jane's friends found her slurring her words, stumbling, and unable to stand upright. Jane's friends took her back to her room, checked her for signs of alcohol poisoning, and left. The next morning, Jane could not clearly recall much of the night before. When Jane asked friends what happened, they informed Jane they believed she and John might have had sex.

Jane filed a complaint against John for sexual misconduct under Occidental's Sexual Misconduct Policy (Policy), which prohibits having or attempting to have sexual contact or sexual intercourse with another individual (1) by force or threat of force; (2) without effective consent; or (3) where the other individual is incapacitated. "Incapacitation" is "a state where an individual cannot make an informed and rational decision to engage in sexual activity because s/he lacks conscious knowledge of the nature of the act … and/or is physically helpless," which may result from the use of alcohol and/or drugs. Under the Policy, evaluating incapacitation requires an assessment of whether a respondent knew, or should have known, that the complainant was incapacitated; being intoxicated or impaired by drugs or alcohol does not diminish one's responsibility to obtain consent.

After conducting an initial assessment of Jane's complaint, Occidental's Title IX team referred the matter to independent investigators for investigation. The investigators interviewed Jane and nine other witnesses, but John declined to consent to an interview. The investigators issued a written report with a summary of each witness interview, but did not reach a determination as to responsibility. After making a threshold determination that there was sufficient evidence to support a finding John violated the Policy, the hearing coordinator notified Jane and John in writing that there would be a formal hearing.

During a one-day hearing before an external adjudicator, Jane, John, the lead investigator, and five student witnesses testified. Afterward, the adjudicator found by a preponderance of the evidence that John violated the Policy by sexually

assaulting Jane and having non-consensual sexual contact with her. The adjudicator found that Jane's conduct indicated that she consented to sexual intercourse with John, but she was incapacitated when she engaged in the conduct. The adjudicator also found that John did not have actual knowledge of Jane's incapacitation because of his level of intoxication, but that "a sober person in John's position should have known Jane was incapacitated and could not consent."

The adjudicator issued a written decision, and Occidental expelled John. John appealed, but his appeal was denied. John sought relief from the Court, arguing that the hearing was unfair, the hearing coordinator and independent adjudicator were biased, and substantial evidence did not support the adjudicator's findings.

In reviewing the record, the Court found that John received a fair hearing. After examining the procedural requirements for private college sexual misconduct proceedings under California law, the Court concluded that the Policy complied with all requirements. Specifically, "both sides had notice of the charges and hearing and had access to the evidence, the hearing included live testimony and written reports of witness interviews, the critical witnesses appeared in person at the hearing so that the adjudicator could evaluate their credibility, and the respondent had an opportunity to propose questions for the adjudicator to ask the complainant." Critically important, the Court demonstrated that Occidental followed the Policy in its handling of John's disciplinary proceedings.

John's argument that the hearing coordinator was biased because she served multiple roles in the disciplinary procedure failed. The hearing coordinator's multiple roles "did not reflect any bias that negatively affected John or influenced the adjudicator's decision." While the hearing coordinator made the threshold determination that the evidence warranted a hearing, she made no findings on credibility or recommendations regarding responsibility, she did not participate in the adjudicator's decision, and she only participated in determining the appropriate sanction for John's conduct *after* the adjudicator reached a decision. Further, the hearing coordinator's only role during pre-resolution meetings and the disciplinary hearing was to make sure the Policy was followed.

John's argument that the independent adjudicator was biased against him because the adjudicator refused to ask Jane 29 of the 38 written questions John submitted also failed. California case law permits colleges to give adjudicators discretion not to ask questions that are inappropriate, irrelevant, or cumulative. The Policy gave the adjudicator this type of discretion and, in fact, the questions the adjudicator did not ask were cumulative or duplicative of evidence already in the record.

Finally, John's argument that the adjudicator's finding was not supported by substantial evidence also failed. In examining the whole record, the Court found that the adjudicator reasonably concluded, based on substantial evidence of the extent of Jane's intoxication, that Jane was unable to make "an informed and rational decision to engage in sexual activity" and that John, had he been sober, should have known she was incapacitated, despite her possible apparent consent. Accordingly, the Court upheld Occidental's sanctions against John.

Doe v. Occidental College (Cal. Ct. App., Aug. 27, 2019, No. B284707) 2019 WL 4024524, reh'g denied (Sept. 12, 2019) (unpublished).

NOTE:

While this case is unpublished and therefore not binding on California courts, the decision is consistent with other recent California cases analyzing the fundamental fairness standard for discipline in California private postsecondary schools.

SUICIDE PREVENTION

SB 972 Requires All Schools Serving Students In Grades 7-12 And Postsecondary Institutions To Provide The Phone Number For The National Suicide Prevention Lifeline On Pupil Identification Cards.

Effective July 1, 2019, SB 972 requires public schools, charter schools, and private schools that serve students in any of grades 7 to 12, inclusive, and public and private institutions of higher learning that issue pupil identification cards to have printed on either side of the pupil identification cards the telephone for the National Suicide Prevention Lifeline, 1-800-273-8255. The law further provides that these schools, at their option, may also have printed on either side of the pupil identification cards, the Crisis Text Line

and a local suicide prevention hotline telephone number. Institutions of higher learning may also include the campus police or security telephone number. This law permits schools that have a supply of identification cards that do not comply with these requirements to continue to use their supply of noncompliant pupil identification cards until the supply is depleted.

(SB 972 amended the heading of Article 2.5 (commencing with Section 215) of Chapter 2 of Part 1 of Division 1 of Title 1 of, and adds Section 215.5 to the Education Code.)

STUDENT IMMUNIZATIONS

Governor Newsom Signs Two Bills Which Will Change The Medical Exemption Requirements For School Vaccinations.

On September 9, 2019, Governor Gavin Newsom signed two vaccination bills, SB 276 and SB 714, which will materially change the medical exemption process for student vaccinations. SB 276 was drafted as the initial bill, and SB 714 is a clean-up bill, which contains revisions to SB 276. The new legislation goes into effect on January 1, 2020, but many of the requirements will not go into effect until January 1, 2021. For a detailed explanation of SB 276 and SB 714, see the LCW Special Bulletin, which was published on September 11, 2019 and is available here.

STUDENT ATHLETES

Student Athletes And NCAA Do Not Share An Employment Relationship.

Lamar Dawson played football for the University of Southern California (USC), a member of the Division I Football Bowl Subdivision of the National Collegiate Athletic Association's PAC-12 Conference (NCAA). Dawson alleged that, as a football player, the NCAA acted as his employer within the meaning of the Fair Labor Standards Act (FLSA) and California law due to the NCAA's role in "prescribing the terms and conditions under which student-athletes perform services." Dawson filed a class action complaint against the NCAA seeking unpaid wages and overtime pay.

Under the FLSA, the test for whether an employment relationship exists requires an evaluation of the circumstances of the whole activity, referred to as "economic reality." Relevant factors in evaluating "economic reality" include (1) the expectation of compensation; (2) the power to hire and fire; (3) and evidence that an arrangement was "conceived or carried out" to evade the law.

After analyzing the economic reality of Dawson's relationship with the NCAA, the Ninth Circuit concluded that the NCAA was not Dawson's employer within the meaning of the FLSA. Significant to the Court's decision were the following factors: (1) the NCAA could not have created an expectation of compensation because Dawson did not receive his scholarship from the NCAA, but from USC; (2) Dawson failed to demonstrate that the NCAA had the power to hire or fire student athletes; and (3) versions of the relevant NCAA rules predated the enactment of the FLSA and no evidence otherwise demonstrated the NCAA rules were "conceived or carried out" to evade the law. The Court further found that the substantial revenue student athletes generate for the NCAA did not create an employment relationship. Instead, the Court concluded that the NCAA is simply a regulatory body that enforces regulations for NCAA member schools.

In analyzing Dawson's state law claims, the Ninth Circuit noted that California law generally deems student athletes not to be employees of their schools. The Ninth Circuit found instructive California court precedent holding that student athletes are not employees of their schools in the worker's compensation, tort, and discrimination contexts; the exclusion of student athletes from the Workmen's Compensation Act; and the provisions of the Student Athlete Bill of Rights. Because student athletes are not employees of their schools under California law, the Ninth Circuit held that the NCAA could not be a joint employer with the students' schools either. Therefore, Dawson could not be an employee of the NCAA under California law.

Because Dawson did not argue that his role as a football player extended him employment status at USC, the Ninth Circuit left many questions related to the employment status of student athletes at postsecondary institutions under the FLSA unanswered. For instance, the court left the question of whether USC was an employer of Dawson under the FLSA "if at all, for another day." The court also did not address whether the scholarships that student athletes receive constitute "compensation" within the meaning of the FLSA.

Dawson v. National Collegiate Athletic Association (9th Cir. 2019) 932 F.3d 905.

EMPLOYEES

WAGE AND HOUR

Unpaid Wages Are Not Civil Penalties That Employees Can Recover Under PAGA.

Kalethia Lawson was an hourly employee of Zions Bancorporation (Zions). Zions's employee handbook contained an arbitration agreement requiring employees to resolve any legal controversy or claim arising out of their employment through binding arbitration. The employee handbook also contained a class action waiver, which prohibited combining claims from multiple employees and bringing arbitration as a class action. Lawson electronically acknowledged receipt of the employee handbook and signed a statement of compliance affirming that, by signing, she had read the employee handbook.

Lawson sued Zions for alleged Labor Code violations including failure to provide overtime and minimum wages. Lawson brought her claim under the Private Attorneys General Act of 2004 (PAGA), which permits an employee to seek civil penalties for Labor Code violations committed against the employee and other aggrieved employees by bringing a representative action against the employer on behalf of the state. Previous California Supreme Court precedent held that pre-dispute waivers, such as those in arbitration agreements, of an employee's right to bring a representative PAGA action are contrary to public policy and unenforceable as a matter of state law. Through her PAGA claim, Lawson sought unpaid wages and civil penalties against Zions under California Labor Code section 558, which authorizes recovery of unpaid wages and per-violation civil penalties from employers.

Zions moved to compel Lawson to arbitrate her claim for unpaid wages under Labor Code section 558. Zions argued that Lawson's claim under Labor Code section 558 was not a standard PAGA action because it was for victim-specific relief (i.e., unpaid wages) and, thus, it remained subject to individual arbitration.

After a thorough analysis of the legislative history of PAGA and statutory interpretation of Labor Code section 558, the Court held that Lawson could not recover unpaid wages under Labor Code section 558 in a PAGA claim. Through PAGA, the Legislature delegated enforcement of civil penalties to private citizens and authorized employees to seek any civil penalties the state can seek. In contrast, compensatory relief, such as the unpaid wages authorized by Labor Code section 558, is a separate type of recovery from the civil penalties authorized by PAGA. Accordingly, while employees may recover the civil penalties authorized by Labor Code section 558 through a PAGA claim, they cannot recover the unpaid wages authorized by section 558.

Further, the Court noted that Labor Code section 558 contains no private right of action, meaning that it does not extend a right to private persons to sue for unpaid wages. Labor Code section 558 authorizes only the Labor Commissioner to include an amount for unpaid wages in a citation. Because Lawson had no right to collect an amount for unpaid wages under Labor Code section 558, there was no valid claim the Court could compel to arbitration. Accordingly, the Court denied Zions's motion to compel arbitration of Lawson's claim and remanded the case to the trial court to consider whether to permit Lawson to amend her complaint to request unpaid wages through a different, valid cause of action.

ZB, N.A. v. Superior Court of San Diego County (Cal., Sept. 12, 2019, No. S246711) 2019 WL 4309684.

INDEPENDENT CONTRACTORS

Governor Newsom Signs AB 5 Into Law Codifying ABC Test For Determining Independent Contractor Status.

On September 18, 2019, Governor Gavin Newsom signed Assembly Bill No. 5 (AB 5) into law. AB 5 codifies the "ABC" test for determining independent contractor status that the California Supreme Court adopted in its 2018 decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. AB 5 adds section 2750.3 to the Labor Code and will become effective on January 1, 2020.

For a detailed explanation of AB 5, see the LCW Special Bulletin, which was published on September 23, 2019 and is available here.

In addition, LCW has planned a webinar to address the implications of AB 5 on private schools, please click here to learn more!

DISCRIMINATION

Employee Must Show An Adverse Employment Action Would Not Have Occurred But For A Disability.

Dr. Michael Murray sued the Mayo Clinic (Clinic) and various individuals alleging disability discrimination in violation of the federal Americans with Disabilities Act (ADA) after the Clinic terminated his employment. During trial, Dr. Murray requested that the district court instruct the jury that he would prevail if he established that his disability "was a motivating factor" in the Clinic's decision to terminate his employment. The district court denied Dr. Murray's request and instead instructed the jury that Dr. Murray needed to establish that he "was discharged because of his disability." This is known as the "but for" causation standard. The jury returned a verdict in favor of the defendants. Dr. Murray appealed.

On appeal, Dr. Murray argued that the district court was required to instruct the jury on the "motivating factor" standard rather than the "but for" standard based on the Ninth Circuit precedent stated in the case *Head v. Glacier Northwest, Inc.* (9th Cir. 2005) 413 F.3d 1053. However, a three-judge panel of Ninth Circuit disagreed.

The court noted that while the Ninth Circuit's decision in *Head* had been consistent with the plain meaning of the ADA and the interpretation of other courts, the U.S. Supreme Court had subsequently issued decisions to change the applicable causation standard. For example, the U.S. Supreme Court held that an employee must "prove that age was the 'but-for' cause of the employer's adverse action" in order to prevail on a claim under the federal Age Discrimination in Employment Act in *Gross v. FBL Financial Services Inc.* (2009) 557 U.S. 167. The U.S. Supreme Court declined to extend the "motivating factor" causation standard to Title VII retaliation claims in *University of Texas Southwestern Medical Center v. Nassar* (2013) 570 U.S. 338. Accordingly, the court noted that the U.S. Supreme Court has retreated from the "motivating factor" causation standard.

The court noted that while a three-judge panel generally cannot overrule a prior Ninth Circuit decision, it may overrule prior authority when an intervening U.S. Supreme Court case undermines the existing precedent. The court concluded that because the U.S. Supreme Court's decisions in *Gross* and *Nassar* were clearly irreconcilable with the Ninth Circuit's decision in *Head*, *Head* was overruled. Thus, the court found that an employee bringing a discrimination claim under the ADA must show that the adverse employment action would not have occurred but for the disability.

Murray v. Mayo Clinic (2019) 2019 WL 3939627.

NOTE:

This case confirms that California courts should apply the "but for" causation standard when considering ADA discrimination cases. This standard is more generous towards employers than the "motivating factor" causation standard.

Employee Could Not Establish Disability Discrimination Without A Causal Relationship Between His Impairment And Termination.

Jose Valtierra began working for Medtronic, Inc. in 2004 as a facility maintenance technician. Between his hiring until his termination in 2014, Valtierra was severely overweight. In late 2013, Valtierra received time off for joint pain associated with his weight. Valtierra returned to work in December 2013 without medical restrictions; however, he was still morbidly obese.

In May 2014, Valtierra's supervisor noticed Valtierra seemed to be having difficulty walking. Concerned about Valtierra's ability to perform his job, the supervisor checked the computer system the company used to track assignments. Although Valtierra had left for vacation a day prior, the computer system indicated that he had completed numerous assignments that should have taken a more significant amount of time to complete. When Valtierra's supervisor confronted him about these discrepancies, Valtierra admitted he had not performed all of the work, but intended to complete the assignments when he returned from vacation. Medtronic then terminated Valtierra for falsifying records.

Subsequently, Valtierra sued Medtronic alleging that he had a disability within the meaning of the

Americans with Disabilities Act (ADA) and that his termination was unlawful discrimination. The trial court dismissed Valtierra's case, finding that obesity, no matter how great, could not constitute a disability under ADA regulations unless the obesity is caused by an underlying condition. The trial court concluded that Valtierra was not able to demonstrate that his obesity was caused by such a condition.

On appeal, the Ninth Circuit affirmed the trial court's decision to dismiss the case. However, the Ninth Circuit did not decide whether Valtierra's obesity was a disability under the ADA. Instead, the court found that even assuming that Valtierra was disabled, he could not establish ADA disability discrimination because he could not prove a causal relationship between his obesity and his termination. The court reasoned that because Valtierra admitted he marked assignments as completed when he had not done the work, and because he had been severely overweight throughout his employment, there was no basis to conclude that the company terminated him for any reason other than falsifying records.

Valtierra v. Medtronic Inc. (9th Cir. 2019) 934 F.3d 1089.

NOTE:

Employers should also be aware that obesity may be a disability within the meaning of the California Fair Employment and Housing Act (FEHA) if there is a physiological cause or if the employer perceives of or regards the condition as a disability. Accordingly, schools should be sure to evaluate all disability discrimination complaints and requests for reasonable accommodations carefully.

ARBITRATION

Post-Complaint Arbitration Agreement Held Enforceable.

Victor M. Quiroz Franco received an arbitration agreement from his employer, Greystone Ridge Condominium (Greystone), requiring Franco to agree to submit to final and binding arbitration any and all claims relating to any aspect of his employment with Greystone pre-hire through post-termination. Ten days later, Franco filed a complaint against Greystone for employment-related claims, including violations of the Fair Employment and Housing Act, the Labor Code, and Business and Professions Code. Two days after that, Franco signed the arbitration agreement and returned it to Greystone.

Greystone filed a motion to compel arbitration because Franco had agreed to submit any and all claims arising from his employment to final and binding arbitration in the arbitration agreement. Franco opposed the motion, arguing that the claims in his complaint were not subject to the arbitration agreement because he filed the complaint before signing the arbitration agreement. Franco further argued that the lawsuit could not be subject to arbitration because the arbitration agreement failed to state expressly that it covered pre-existing lawsuits.

The Court noted that arbitration is a matter of contract and the fundamental policy underlying both the California Arbitration Act (CAA) and the Federal Arbitration Act (FAA) "is to ensure that arbitration agreements will be enforced *in accordance with their terms*." Therefore, the Court analyzed the plain language of the arbitration agreement and determined that it covered the employment claims in Franco's complaint.

The parties' arbitration agreement was "clear, explicit, and unequivocal." It covered *any and all* claims relating to any aspect of Franco's employment with Greystone pre-hire through post-termination. The arbitration agreement did not contain any qualifying language limiting its applicability to claims that had yet to accrue. In fact, the arbitration agreement's reference to claims relating to "pre-hire" matters clearly indicated that the agreement intended to cover all claims, regardless of when they accrued, unless otherwise expressly excluded by the arbitration agreement.

Accordingly, the Court found that the motion to compel arbitration should be granted.

Quiroz Franco v. Greystone Ridge Condominium (Cal. Ct. App., Aug. 14, 2019, No. G056559) 2019 WL 4024731.

ADMINISTRATION / GOVERNANCE

PUBLIC ACCOMMODATIONS AND WEBSITES

Title III Covers Websites With Nexus To Physical Place Of Public Accommodation.

Midvale Corporation (Midvale), the owner of The Whisper Lounge restaurant, operates a website where members of the public can, among other things, read the restaurant's menu and make reservations 24 hours a day. Cheryl Thurston is blind and uses screen reader software (screen reader), which "vocalizes invisible code (alternative text) embedded beneath graphics on the website and describes the content of the webpage," to access the internet.

On five to six occasions, Thurston visited the website for The Whisper Lounge and attempted to access the website's features, including reading the menu and making a reservation, but encountered considerable obstacles. The website's graphics were generally unreadable for screen readers and attempting to access pdf versions of certain information resulted in error messages. Thurston sued Midvale Corporation, alleging its inaccessible website violated the Unruh Civil Rights Act (Unruh), which requires "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever" and makes a violation of the Americans with Disabilities Act (ADA) a violation of Unruh as well.

Title III of the ADA (Title III) prohibits discrimination on the "basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Discrimination includes "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." Regulations require a public accommodation to "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities," which includes "effective methods of making visually delivered materials available to individuals who are blind or have low vision."

In analyzing Thurston's claim under Title III, the Court stated that The Whisper Lounge's physical location was indisputably a place of public accommodation because it was an establishment that served food and drink to the public. The analysis of whether a place of public accommodation also included a website associated with the physical place required the Court to conduct a more thorough exploration of the ADA and applicable precedent in this and other jurisdictions.

Midvale urged the Court to find that Title III only applies to physical places of accommodation and not to websites or other off-site methods available to access the goods or services of a physical place. However, the Court declined to interpret Title III so narrowly. Instead, the Court explained that the ADA should be construed broadly to effect its purpose of eliminating discrimination against individuals with disabilities. On this note, the Court noted that the definition of a place of public accommodation should be construed broadly to encompass more than a physical place. Accordingly, the Court found that discrimination occurring off-site, such as through websites, violates Title III if it prevents disabled individuals from enjoying services offered from a physical place of public accommodation.

The Court also noted that while websites and web-based services did not exist when the ADA passed in 1990, Congress intended that the ADA "keep pace with the rapidly changing technology of the times." Because a significant amount of business is now conducted online, exempting businesses that sell services through the Internet from the ADA would frustrate the purposes of the ADA and Congress's intent "that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."

Thurston asked the Court to hold that Title III also applies to standalone websites that are unconnected to a physical place of public accommodation, but the Court declined to consider that issue. Instead, the Court held that Title III covers a website if there is a nexus between the website and a physical place of public accommodation. The nexus requirement is broad and is fulfilled simply where a website connects customers to the goods and services of a physical place of public accommodation.

Midvale also argued that the presence of a phone number and email address for The Whisper Lounge on the website were auxiliary aids and services that provided Thurston with effective communication as required by the ADA. The Court disagreed, finding that the telephone and email options did not provide timely, effective communication and did not protect the independence or privacy of the visually impaired.

Ultimately, the Court held Title III applied to The Whisper Lounge website. There was a sufficient nexus between the website and the restaurant because the website connected customers to the services of the restaurant.

Thurston v. Midvale Corporation (Cal. Ct. App., Sept. 3, 2019, No. B291631) 2019 WL 4166620.

NOTE:

Generally, private schools and private postsecondary institutions that are not religious entities or are not operated by religious entities are places of public accommodation within the meaning of Title III. While only binding on the Second Appellate District, which covers San Luis Obispo, Santa Barbara, Ventura, and Los Angeles counties, this case reiterates the Ninth Circuit's holding in Robles v. Domino's Pizza, LLC *(9th Cir. 2019) 913 F.3d 898, which covers the state of California. It provides an important reminder of the duty to furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.*

FEDERAL EDUCATION BENEFITS

U.S. Office Of Non-Public Education Issues Updated Nonpublic School Non-Regulatory Guidance.

On September 19, 2019, the U.S. Office of Non-Public Education (ONPE), which serves as the U.S. Department of Education's liaison to nonpublic schools, issued updated non-regulatory guidance for the private elementary and secondary school community. The guidance, titled *Frequently Asked Questions – General Issues Related to Nonpublic Schools*, contains information about some federal education benefits available to private school students, teachers, and families and grants available through the Department of Education for private elementary and secondary schools.

The guidance also provides answers to many frequently asked questions about equitable services provisions under the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA), and Part B of the Individuals with Disabilities Education Act (IDEA). The ONPE *Frequently Asked Questions – General Issues Related to Nonpublic Schools* is available here.

For more information about ONPE, see the ONPE website, which is available here.

BUSINESS AND FACILITIES

NON-COMPETE CLAUSES

Fourth District Okays Non-Compete Clauses In Agreements Between Entities.

A recent California appellate court decision holds that entities may have non-compete clauses in their agreements as long as those terms do not have an unnecessarily preclusive effect on trade and are outside the employment context.

Under California law, specifically Business and Professions Code (the Code), section 16600 (Section 16600), employment contracts cannot restrict a person's ability to engage in their lawful profession, trade, or business, even where a proposed restriction is narrowly drafted. Only a restriction that falls into the statutory exceptions established by Code sections 16601, 16602, or 16602.5 is exempt from that rule. The effect of Section 16600 on restrictive terms in agreements between two business entities has been unclear. However, a recent decision by the California Court of Appeal for the Fourth District may provide some guidance to private schools considering the inclusion of a non-compete or similar restrictive clause in contracts with other entities.

The decision mentioned above was published on August 29, 2019 in *Quidel Corporation v. Superior Court of San Diego County* (*Quidel*). In *Quidel*, the Fourth District Appellate Court held that an agreement between entities, outside of the employment context, could contain a non-compete clause if the clause (1) does not negatively impact the public interest; (2) is designed to protect the parties in their dealings; and (3) does not attempt to establish a monopoly. A non-compete clause would have a negative impact on the

public interest if the clause tends to restrain trade more than promote it.

The matter in *Quidel* involved two biomedical companies that entered into an agreement regarding a lab analyzer and an immunoassay, a procedure for detecting or measuring specific proteins. The plaintiff-seller developed a test for a certain protein, B-type natriuretic peptide (BNP), from proprietary materials provided by defendant to plaintiff-seller. Plaintiff-seller agreed to sell this test exclusively to defendant and defendant agreed to purchase its BNP test only from plaintiff-seller. Plaintiff-seller also agreed not to research or to develop any test for BNP or a related protein for two years after the agreement's expiration. The agreement did not prohibit the plaintiff-seller from researching or developing tests for other proteins.

Plaintiff-seller successfully challenged the agreement's non-compete provisions, claiming they violated Section 16600. However, on appeal, the higher court held that the strict interpretations of Section 16600 that invalidate non-compete provisions were limited to the employment context.

In analyzing the claims before the Court, the *Quidel* Court analyzed, discussed, and endorsed other cases allowing a restraint of this type in agreements between entities where employment mobility was unaffected and where a monopoly was not established. For example, the *Quidel* Court considered *Centeno v. Roseville Community Hospital* (1979) 107 Cal. App.3d 62, where a restrictive agreement between a hospital and medical group granting access only to that group to run the hospital's radiology department was valid under Section 16600, even when the hospital refused a former partner of the radiology group access to the facilities. In discussing *Centeno*, the *Quidel* Court held that contracts with restraints, like "closed staff" limitations, would need to be examined "in the view of the ends sought to be accomplished," and noted that those decisions indicated "the antitrust laws prohibit only those contracts which unreasonably restrain competition." The *Centeno* Court held the balancing test should not only consider the "affected physician" and hospital, but should balance the interests of all the parties. Therefore, a balancing test regarding restrictive terms between two entities should consider the interests and consequences to the entities and affected individuals.

Private schools may be able to enter restrictive agreements with other entities in certain circumstances based on the holdings in *Quidel* and its adoption of *Centeno*. For example, private schools are often asked to agree to restrictive terms for specialized services by a company. In considering these types of agreements, private schools can analyze the proposed terms in light of the balancing test, which requires that the restrictive terms (1) do not negatively impact the public interest; (2) are designed to protect the parties in their dealings; and (3) do not establish a monopoly. In some situations, a private school may be able to agree to obtain services only from a specific company and agree not to obtain these services from any other person or entity. However, a term preventing employment by a specialized service company's employee in any capacity at the school may be unnecessarily restrictive.

Notably, the *Quidel* decision is an appellate court, not California Supreme Court, decision. Therefore, it is binding only in the Fourth District, which covers Imperial, San Diego, Inyo, Riverside, San Bernardino, and Orange counties. However, the decision may be persuasive and instructive to courts in other districts. Depending on the nature of the services contract, there could also be other laws that affect non-compete provisions. If your school is considering a restrictive staffing, sales, marketing, or specialty services agreement, the *Quidel* factors will play a part in the overall analysis.

Quidel Corporation v. Superior Court of San Diego County (Cal. Ct. App., Aug. 29, 2019, No. D075217) 2019 WL 4071848.

MECHANIC'S LIENS

Subcontractor Cannot Enforce Mechanic's Lien Recorded Before It Ceases Work On A Project.

Henry and Deborah Luzuriaga hired a general contractor to construct a veterinary hospital. The general contractor hired Precision Framing Systems, Inc. (Precision) as a subcontractor to perform framing and truss work on the project. Precision's contract with the general contractor required Precision to provide materials, trusses, and labor "necessary to complete the … project." Precision hired Inland Empire Truss, Inc. (Inland) as its subcontractor to design and fabricate the trusses. Precision and Inland performed their work, but the project architect found that the trusses were defective and the city issued a

correction notice related to the trusses. Precision had Inland repair the trusses, but the city issued a second correction notice relating to the trusses.

The Luzuriagas were not satisfied with Precision's work and they told Precision it would need to sue them to receive payment. On January 2, 2014, Precision recorded a mechanic's lien claim for $53,268.16. The Luzuriagas claimed Precision's mechanic's lien was premature, as corrective work was still needed on the trusses. In mid-February 2014, Precision had Inland perform the necessary repairs to the trusses. Precision then filed a complaint against the Luzuriagas to foreclose its mechanic's lien.

The trial court granted summary judgment in the Luzuriagas' favor finding that Precision filed its mechanic's lien prematurely before it completed its work. Precision appealed and the Court of Appeal agreed that a mechanic's lien claim filed prematurely is void and cannot be enforced.

Civil Code section 8404 states that a mechanic's lien claimant, other than a direct contractor, cannot enforce a lien unless the claimant records that lien (1) after it ceases to provide work; and (2) before the earlier of (i) 90 days after completion of the work or (ii) 30 days after the owner records a notice of completion.

Precision argued that its mechanic's lien was timely because they recorded the lien after its work was complete. However, the Court of Appeal disagreed, finding that Precision's contract required it to also supply trusses "necessary to complete the project." Precision's subcontractor, Inland, had not yet fully repaired the trusses when Precision recorded its lien. As long as the correction notices related to the trusses were still outstanding, the project could not be complete and Precision's work was not finished. Precision's mechanic's lien claim was recorded before its scope of work was complete and it ceased to provide work, and was therefore premature and void.

Although Precision argued that it did not know the correction notices for Inland's work on the trusses were outstanding when it recorded its mechanic's lien, the Court of Appeal found Precision's subjective knowledge or belief as to whether its work was complete was irrelevant. The Court of Appeal also pointed out that Precision could have recorded its mechanic's lien again after the repairs were performed.

Precision Framing Systems Inc. v. Luzuriaga (Cal. Ct. App., Aug. 29, 2019, No. E069158) 2019 WL 4072008.

NOTE:

Project owners should note when a subcontractor records a mechanic's lien. If the subcontractor's contract requires the subcontractor to complete the project or its scope of work, and the subcontractor records that lien before it or its second-tier subcontractors are finished with all repair work, the project owner may have an argument that the mechanic's lien claim is void.

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.

SEPTEMBER

- ☐ The due date to submit EEO-1 Component 2 pay data for 2017 and 2018 is September 30, 2019, and the report must be filed with the U.S. Equal Employment Opportunity Commission through the web-based portal available at https://eeoccomp2.norc.org, which opened on July 15, 2019. Effective July 15, 2019, the EEOC helpdesk is open and answering Component 2 pay data questions at EEOCcompdata@norc.org or (877) 324-6214. Further instructions on how to file are posted on the EEOC website at: http://www.eeoc.gov/employers/eeo1survey/howtofile.cfm
    - It is the opinion of the General Counsel of the EEO Commission that Section 702, Title VII of the Civil Rights Act of 1964, as amended, does not authorize a complete exemption of religious organizations from the coverage of the Act or of the reporting requirements of the Commission. The exemption for religious organizations applies to discrimination on the basis of religion. Therefore, since the EEO Standard Form 100 does not provide for information as to the religion of employees, religious organizations must report all information required by this form.

OCTOBER 1ST THROUGH 15TH

- ☐ File Verification of Private School Instruction (Education Code § 33190.)

- Every person, firm, association, partnership, or corporation offering or conducting private school instruction on the elementary or high school level shall between the first and 15th day of October of each year, file with the Superintendent of Public Instruction an affidavit or statement, under penalty of perjury, by the owner or other head setting forth the following information for the current year:
  a. All names, whether real or fictitious, of the person, firm, association, partnership, or corporation under which it has done and is doing business.
  b. The address, including city and street, of every place of doing business of the person, firm, association, partnership, or corporation within the State of California.
  c. The address, including city and street, of the location of the records of the person, firm, association, partnership, or corporation, and the name and address, including city and street, of the custodian of such records.
  d. The names and addresses, including city and street, of the directors, if any, and principal officers of the person, firm, association, partnership, or corporation.
  e. The school enrollment, by grades, number of teachers, coeducational or enrollment limited to boys or girls and boarding facilities.
  f. That the following records are maintained at the address stated, and are true and accurate:
     1. The attendance of the pupils in a register that indicates clearly every absence from school for a half day or more during each day that school is maintained during the year (Education Code § 48222.)
     2. The courses of study offered by the institution.
     3. The names and addresses, including city and street, of its faculty, together with a record of the educational qualifications of each.
  g. Criminal record summary information of applicants that has been obtained pursuant to Education Code Section 44237.

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 employees - especially when there is a lack of notice regarding problems.
    - Consider using Performance Improvement Plans but remember it is important to do the necessary follow up.
- ☐ 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.

CONSORTIUM CALL OF THE MONTH

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

ISSUE: An administrator from an independent day school called an LCW attorney about an accommodation for an incoming student with a disability. Due to the student's disability, she has a service dog, which provides her the assistance she requires during the school day. The administrator asked whether there were any potential issues with permitting, or not permitting, the service dog to accompany the student on campus during the school day.

RESPONSE: The LCW attorney explained that Title III of the Americans with Disabilities Act (Title III of the ADA) generally requires places of public

accommodation to permit the use of a service dog by an individual with a disability. Private schools that are not religious entities or are not operated by religious entities constitute places of public accommodation under Title III of the ADA. Therefore, private schools must generally comply with Title III of the ADA. Refusing to accommodate the use of a service dog by a student with a disability may constitute discrimination under Title III of the ADA and may create liability for a possible discrimination claim.

The LCW attorney advised the administrator to engage in the interactive process with the student's family to determine the arrangements for having the service dog on campus. Under the ADA, service dogs must be under the control of the handler at all times. The handler may be the student with a disability or a third party who accompanies the student with a disability. Schools may need to provide some assistance to enable the student to handle his or her service dog.

The LCW attorney also advised that, while the potential risk of having a trained service dog on campus is probably quite low, the administrator should inform the school's insurer that there would be a service dog on campus. Further, while the school may not require a special identification card for the dog, require training documentation for the dog, or ask that the dog demonstrate its ability to perform the work or task, schools should ensure that the service dog has current vaccinations and is licensed in accordance with any applicable local animal or public health requirements.

For more information about service dogs on campus, the religious exemption from Title III of the ADA, or for specific questions regarding these or related issues, please consult with an attorney.

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NEW TO THE FIRM

Anni Safarloo is an Associate in Liebert Cassidy Whitmore's Los Angeles office where she provides representation and counsel to clients in matters pertaining to labor and employment law, business and facilities, and general litigation. Anni has experience representing clients in all phases of litigation, especially related to construction delay, extra work and stop notice claims; commercial matters; and code enforcement. She has secured judgments in favor of clients in various code enforcement matters and handles post-judgment remedies. Anni also represents clients in real estate related litigation. She advises clients in various general counseling, pre-litigation and litigation matters. She can be reached at 310.981.2313 or asafrloo@lcwlegal.com.

Nathan T. Jackson is an associate in Liebert Cassidy Whitmore's Sacramento office where he provides representation and counsel to clients in matters pertaining to labor and employment law. Nathan defends clients against individual and representative claims for discrimination, retaliation, harassment, wrongful termination, breach of contract, and violations of wage and hour laws, including class actions and claims brought under the Private Attorney General Act (PAGA). He also counsels clients regarding sensitive personnel matters. He can be reached at 916.584.7022 or njackson@lcwlegal.com

Richard Shreiba is an Associate in Liebert Cassidy Whitmore's Fresno office where he provides advice and representation to clients on labor, employment, and business & facilities matters. Richard litigates in both state and federal court and has experience from pre-litigation through trial. He can be reached at 559.256.7800 or rshreiba@lcwlegal.com.

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, contact **Sara Gardner** at sgardner@lcwlegal.com.

Firm Activities

Consortium Training

Oct. 15 **"Independent Contractors"**
Golden State Independent Schools Consortium | Webinar | Stephanie J. Lowe

Oct. 22 **"Employee Evaluations and Separations"**
CAIS | Webinar | Grace Chan

Oct. 24 **"Hot Topics in Wage & Hour"**
ACSI Consortium | Webinar | Lisa S. Charbonneau

Nov. 5 **"Pregnancy, Maternity and Parental Leaves"**
CAIS | Webinar | Julie L. Strom

Nov. 12 **"Leaves, Leaves and More Leaves"**
Golden State Independent Schools Consortium | Webinar | Stacy Velloff

Nov. 13 **"Managing Student and Employee Internet/Social Media Use"**
Builders of Jewish Education Consortium | Webinar | Brett A. Overby & Stephanie J. Lowe

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/training.

Nov. 1 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment and Mandated Reporting"**
Curtis School | Los Angeles | Michael Blacher

Speaking Engagements

Oct. 11 **"Independent Contractors"**
California Association of School Business Officers (CASBO) San Diego Imperial Workshop | Escondido | Frances Rogers

Seminars/Webinar

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

Oct. 16 **"AB 5 Webinar for Independent Schools"**
Liebert Cassidy Whitmore | Webinar | Stacy Velloff

Oct. 23 **"101 on Gift Agreements & Self-Dealing Transactions for Nonprofit Schools"**
Liebert Cassidy Whitmore | Webinar | Casey Williams

Nov. 20 **"2020 Legislative Update for Private Education"**
Liebert Cassidy Whitmore | Webinar | Stacy L.Velloff

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