LIEBERT CASSIDY WHITMORE

EDUCATION MATTERS

News and developments in education law, employment law and labor relations for School and Community College District Administration

MARCH 2021

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LCW NEWS

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

PRESIDENT BIDEN ISSUES EXECUTIVE ORDERS ON PREVENTING AND COMBATING DISCRIMINATION

President Biden Has Issued Two Executive Orders Regarding His Administration's Policy On Sex-based Discrimination.

On January 20, 2021, President Joe Biden issued Executive Order 13988 that states all persons should receive equal treatment under the law regardless of their gender identity or sexual orientation. Additionally, on March 8, 2021, President Biden issued Executive Order 14021 that states students should be guaranteed an educational environment free from discrimination based on sex.

The January 20, 2021 Executive Order states that based on the Supreme Court's ruling in *Bostock v. Clayton County* (2020) 140 S. Ct. 1731, Title VII's prohibition on discrimination "because of . . . sex" covered discrimination based on gender identity and sexual orientation, and similarly, other laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972 and its implementing regulations — also prohibited discrimination based on gender identity or sexual orientation as long as the laws did not contain "sufficient indications to the contrary."

The January 20, 2021 Executive Order states it is the policy of the Biden Administration to prevent and combat discrimination based on gender identity or sexual orientation and to fully enforce Title VII and other laws that prohibit discrimination on these bases. Accordingly, the January 20, 2021 Executive Order directs all federal agencies to review all existing orders, regulations, guidance documents, policies, programs, or other agency actions (agency actions) that may be inconsistent with this policy. If the agency identifies an inconsistency, it must revise, suspend, or rescind such agency actions or promulgate new agency actions within 100 days in order to fully implement statutes that prohibit sex discrimination according to the policy stated in the Executive Order.

The March 8, 2021 Executive Order states it is the policy of the Biden Administration to guarantee an educational environment free from discrimination based on sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination based on sexual orientation or gender identity.

The March 8, 2021 Executive Order directs newly sworn-in Secretary of Education Miguel Cardona to review agency actions, including specifically the federal Title IX regulations enacted on August 13, 2020, that are or may be inconsistent with the policy set forth above within 100 days of the March 8, 2021 Executive Order. This order also directs Secretary Cardona to consider "suspending, revising, or rescinding — or publishing for notice and comment proposed rules suspending, revising, or rescinding" agency actions that are inconsistent with the stated

policy as soon as practicable. Additionally, the March 8, 2021 Executive Order directs Secretary Cardona to consider taking additional enforcement actions to ensure educational institutions provide appropriate support for students who identify as lesbian, gay, bisexual, transgender, and queer who experienced sex discrimination.

Read the January 20, 2021 Executive Order here.

Read the March 8, 2021 Executive Order here.

NOTE:

On January 8, 2021, the U.S. Department of Education issued a memo stating Title IX's prohibition against discrimination based on sex did not confer protections based on transgender status or sexual orientation. LCW believes this memo is inconsistent with the policy identified in the January 20, 2021 Executive Order and expects the Department will revise or rescind this guidance. LCW anticipates significant changes to the Title IX regulations that became effective in 2020. However, it is still unclear how or when the Biden Administration will change these regulations. The U.S. Department of Education could issue new regulations, issue informal guidance as we saw with the 2011 Dear Colleague Letter or 2014 Question and Answer document, or even push new federal legislation. The Biden Administration is unable to withdraw the current regulations. Rather they must amend the current regulations. Amending new regulations or creating and passing new legislation takes time.

Until the Biden Administration makes any changes, LCW strongly recommends that educational entities follow the current federal Title IX regulations. It would be risky for an educational entity to refuse to adopt policies and procedures to implement the current Title IX regulations even though we suspect they will change. When Title IX obligations change whether, through regulatory amendments, guidance, or the like, LCW will work quickly to alert our clients and explain how the changes affect policies and procedures.

Remember, an educational entity's obligation to address sex- and gender-based harassment and discrimination stem from a variety of sources under federal and state law. If your school, college, or university needs assistance, please contact one of our five offices statewide. Learn more about LCW's Title IX compliance training programs and other resources by visiting this page.

TENURE

Former University Interns Must Serve A Complete Year Under A Regular Teaching Credential Before Acquiring Tenure.

Michael McGroarty entered into a contract with the Los Angeles Unified School District to serve as a "University Intern teacher of English" for the 2016–2017 school year while he was completing university coursework to obtain a single subject teaching credential. McGroarty signed another contract with the District to serve as a "University Intern Certificated Employee of Secondary, English" (some capitalization omitted) for the 2017–2018 school year. McGroarty completed his university coursework just prior to the start of the 2017-2018 school year, and he informed his principal by email around the start of the school year. In early October 2017, McGroarty learned from the California Commission on Teacher Credentialing that certain information was missing from the credential application submitted by the university on his behalf. After resolving the issue, the CTC informed McGroarty in an e-mail dated October 12, 2017, that it issued his preliminary single subject teaching credential with an issuance date of August 10, 2017.

On October 12, 2017, McGroarty informed the District he obtained his preliminary credential and wanted to sign a new contract. McGroarty's principal completed the required District paperwork in late November 2017. On December 6, 2017, McGroarty executed a new contract with the District as a "Probationary Certificated Employee of Secondary, English." McGroarty completed the 2017–2018 school year, and the District rehired him for the 2018–2019 school year.

On February 6, 2019, the District informed McGroarty that it would not reelect him for the next school year. McGroarty filed a petition for writ of mandate and injunction with the trial court ordering the District to reclassify him as a permanent employee and reinstate him, as well as damages for loss of pay and benefits, and attorney fees and costs. McGroarty argued he acquired tenure as of the first day of the 2018–2019 school year under Education Code Section 44466 and could be dismissed only for cause. Specifically, McGroarty alleged he satisfied the requirements of Section 44466 by completing his university internship program in July 2017, working the entire 2017–2018 school year, and being rehired for the 2018–2019 school year. The District argued McGroarty must complete a teaching internship program, and then serve a complete school year registered under a regular credential. Because McGroarty did not register his regular credential until December 2017, the District argued he did not satisfy the requirements and did not have tenure at the start of the 2018–2019 school year. The trial court agreed with the District. McGroarty appealed.

The central issue for the Court of Appeal to consider was under what circumstances an employee who served as a university intern acquired tenure. Generally, a certificated probationary employee of a school district is classified as permanent (i.e., acquires tenure) if, after having been employed for two complete successive school years in a position requiring certification qualifications, the district reelects them for the following year. (Education Code Section 44929.1.)

Education Code Section 44466 governs how and whether time employed as a university intern counts in reaching the consecutive two-year requirement under Section 44929.21. In short, this statute states university interns may count the last year of their internship towards the two-year tenure requirement under Section 44929.21. In other words, an employee meets the two-year tenure requirement by working the last year of the internship followed by one complete post-internship year.

Here, the Parties disputed whether the 2017–2018 school year constituted McGroarty's post-internship year under Section 44466. Resolving that dispute requires determining what circumstances delineate the end of the internship and the beginning of the post-internship year for purposes of Section 44466.

The trial court interpreted Section 44466 to require McGroarty to serve a complete school year under a regular, non-intern credential. Under this interpretation, the post-internship year under Section 44466 does not begin until McGroarty ceased to serve under an intern credential and began service under a regular credential. In the trial court's view, this required McGroarty to register his new credential with the District and enter into a new contract under that credential, which the trial court found he did not do until December 6, 2017, halfway through the 2017–2018 school year. McGroarty argued that reading Section 44466 to require registration of, or recontracting under a regular credential to trigger the start of the post-internship year imposed an additional condition outside the plain language of the statute.

The Court of Appeal held that although McGroarty's interpretation of Section 44466 was, grammatically speaking, a plausible construction of the language, it rejected this interpretation because it would lead to unreasonable and unfair consequences the Legislature could not have intended. In short, McGroarty's interpretation of Section 44466 created a regime in which his proposed line between intern and non-intern—i.e., the completion of university coursework—was potentially invisible to the school district until sometime during or after the school year, thus depriving the district of adequate opportunity to evaluate the employee for tenure. The Court of Appeal rejected this interpretation.

Instead, the Court of Appeal found the more reasonable interpretation of Section 44466 was that a former intern "is employed ... in a position requiring certification qualifications" following completion of an internship program only when "the school district that employed the person as an intern during the immediately preceding school year" reemployed the former intern under a regular credential. Under this reading, the phrase "is employed" included the school district's affirmative act of hiring the former intern into a post-internship position, as opposed to McGroarty's reading in which the intern simply continues employment under the existing internship contract. This interpretation sets a bright line between intern and non-intern status, a line of which both the employee and the school district are aware. It also gives the school district control over whether to continue the intern's employment following completion of the internship. The Court of Appeal found this interpretation consistent with other provisions of the Education Code and previous court decisions concerning the tenure requirements for university interns.

Accordingly, the Court of Appeal upheld the trial court's ruling that McGroarty did not acquire tenure at the commencement of the 2018–2019 school year. McGroarty did not enter into a contract under his regular credential until December 2017, and thus did not serve a complete post-internship school year under that credential.

McGroarty v. Los Angeles Unified Sch. Dist. (2021) 61 Cal. App 5th 258.

BUSINESS AND FACILITIES

A Local Agency Formation Commission (LAFCO) Cannot Condition Its Performance On Applicant Agreeing To Reimburse Litigation Expenses.

Central Coast Development Company (Developer) owned a 154-acre parcel of property within the City of Pismo Beach (City). The Developer wanted to construct 252 single-family residences and 60 senior housing units on the parcel. The City approved the Developer's application for a development permit and the City and Developer applied to the San Luis Obispo Local Agency Formation Commission (LAFCO) to annex the property. The LAFCO application signed by the City and the Developer contained an indemnity agreement for "damages, costs, expenses, attorneys' fees, and expert witness fees…arising out of or in connection with the application."

LAFCO denied the application and the City and Developer brought an action to challenge that decision. LAFCO prevailed and presented a bill to the City and

Developer for more than $400,000 in attorney fees and costs. However, the City and Developer refused to pay. In response, LAFCO filed suit asserting breach of contract. LAFCO argued that the indemnification provision was "given in consideration for not requiring anticipated attorney fees to be paid as part of the application fee at the beginning of the process." The City and Developer disagreed. The court ruled that LAFCO had no authority to impose such fees for post-administrative proceedings. LAFCO appealed the trial court's ruling.

Ultimately, the Court of Appeal held that the statutory authority for local agency formation commissions only permits the imposition of fee increases associated with application processing, and application processing does not include indemnification for post-application processing. The Court further held that the "agreement" to indemnify was not an actual agreement since there was no consideration, which constitutes either a benefit to the promisor or a detriment to the promise. In this case, LAFCO had a statutory duty to accept all completed applications and did not give any consideration in exchange for the indemnity agreement. Therefore, LAFCO's indemnity requirement in its application was invalid.

San Luis Obispo Local Agency Formation Commission v. City of Pismo Beach, et al. (2021) 61 Cal.App.5th 595.

NOTE:

This is an interesting and important decision. To the extent that districts, and other public agencies, are required to accept for filing and review, and approve or disprove, various types of applications, they cannot unilaterally include indemnification clauses with attorneys' fees requirements without specific statutory authority to do so.

FIRM VICTORY

Retired Fire Captain Dismissed His Lawsuit For Retroactive Pay Increase After LCW Convinced The Court That His Case Had No Legal Merit.

LCW Partner **Morin Jacob** and Associate Attorney **Anthony Risucci** prevailed on behalf of a city in a lawsuit brought by a retired fire captain. The lawsuit was dismissed at the outset of the case because of LCW's successful demurrer.

The captain was on an approved disability leave prior to his retirement. While he was on leave, the city and the firefighters' union were negotiating a new Memorandum of Understanding (MOU). The captain retired in June 2018. Approximately six months later, the city council approved the MOU. The MOU gave a retroactive pay increase of 2.5% for all firefighters employed on or after December 17, 2017.

The retired captain claimed in his lawsuit that he was entitled to the retroactive pay increase for the time he was on disability prior to retiring in 2018. He also claimed that the retroactive compensation would have increased his final compensation for purposes of determining his CalPERS pension benefits, as his pension was based upon a percentage of his three highest years of compensation.

The captain's lawsuit had a single claim for declaratory relief. The captain sought an order from the court that would require the city to report his final compensation to CalPERS in a manner that reflected the retroactive 2.5% pay increase. The city demurred on three grounds: (1) failure to exhaust administrative remedies available through the CalPERS Board of Administration; (2) failure to follow pre-litigation procedures under the Government Claims Act; and (3) the claim was unsuitable for declaratory relief, as it sought to correct past conduct and was more properly asserted as a breach of contract cause of action.

The court sustained the demurrer based on the first and third arguments. The Court did not address the Government Claims Act because the other two arguments were dispositive.

In its ruling, the court reasoned that the CalPERS Board of Administration has the power to both correct errors and omissions of contracting agencies, and the ultimate authority to calculate a beneficiary's "final compensation." As a result, the retired captain was first required to exhaust his CalPERS administrative remedies by appealing the city's decision to deny him the MOU retroactive pay increase to the CalPERS Board of Administration. The court also declined to exercise its power to provide equitable relief because the purpose of declaratory relief is to prevent future wrongs. The city's decision to exclude the captain from a pay increase in 2018 was a past wrong, albeit with future implications, and was a fully accrued cause of action for a breach of contract claim.

After the court's decision, the retired captain elected to dismiss the complaint with prejudice. This result allowed the city to avoid the time and expense of pre-trial discovery.

NOTE:

By convincing the court at the outset of this case that the claim had no legal merit, LCW was able to quickly end this litigation. Agencies can count on LCW attorneys to apply their deep knowledge of employment law and litigation procedure to minimize the costs of litigation.

DISCIPLINE

Correctional Officer's Termination Upheld Due To Domestic Violence Conviction.

In October 2015, Anthony Hernandez, a Correctional Sergeant with the California Department of Correction and Rehabilitation (Department), choked his girlfriend of five months. Hernandez and his girlfriend told police that Hernandez lived with her approximately four or five days per week. Thereafter, Hernandez pled nolo contendere to a misdemeanor violation of Penal Code Section 273.5, which criminalizes the infliction of bodily injury on a spouse or cohabitant, or on another intimate partner in an "engagement or dating relationship."

The Department then terminated Hernandez. The Department stated that the conviction rendered him unable to possess a firearm. A federal law generally bans a person convicted of a misdemeanor crime of domestic violence from possessing any gun or ammunition. The Department noted that as a correctional officer, Hernandez must be able to carry a firearm at work.

Hernandez appealed to the State Personnel Board (Board). While the appeal was pending, the California Department of Justice and the Bureau of Alcohol, Tobacco and Firearms both notified Hernandez that federal law prohibited him from possessing a firearm. An administrative law judge also concluded that Hernandez was prohibited from possessing a firearm and held that his termination was proper. The Board adopted the judge's proposed decision, and Hernandez filed a petition for writ of administrative mandate with the trial court. The trial court denied the writ petition and Hernandez appealed.

The California Court of Appeal affirmed the trial court's decision. The Court of Appeal noted that a court should not disturb the penalty imposed on Hernandez in a mandamus proceeding unless the Department prejudicially abused its discretion.

Since the Department terminated Hernandez based on his inability to possess a firearm under federal law, the Court of Appeal examined federal law addressing domestic violence. Specifically, the Court of Appeal examined Title 18, Section 921(a), of the U.S. Code, which defines a crime of domestic violence as one involving the use or threatened use of a deadly weapon by (i) a current or former spouse, (ii) a person who is cohabitating with or has cohabitated with the victim as a spouse, or (iii) a person "similarly situated to a spouse" of the victim. After analyzing multiple cases confirming that a "live-in" boyfriend or girlfriend qualifies as someone "similarly situated" to a spouse under Section 921(a), the Court of Appeal held that Hernandez was a person "similarly situated to a spouse." Further, although Hernandez and his girlfriend only lived together for four or five days per week, the Court held this was sufficient.

Based on these facts, the Court of Appeal held that there was no abuse of discretion because the Department's decision to terminate Hernandez was correct as a matter of law.

Hernandez v. State Personnel Board (2021) 60 Cal.App.5th 873.

NOTE:

Violence involving employees in and out of the workplace often requires quick and decisive employer action. LCW attorneys can assist agencies in evaluating the proper steps to take when these circumstances arise.

DISCRIMINATION

Terminated Employee Could Not Establish Claims Under The CFRA Or FEHA.

In March 2012, Barracuda Networks, Inc. (Barracuda) hired George Choochagi as a Technical Support Manager. In May 2013, Choochagi reported to HR that his former supervisor had made inappropriate sexual comments to him and suggested that he was not "man enough" for his position. Choochagi's former supervisor also told him he was not part of the "boys club."

In January 2014, Choochagi sought medical treatment for severe migraine headaches and eye irritation. Choochagi notified the Director of Sales Engineering and one of his supervisors that he needed to take time off from work. Barracuda gave Choochagi the time off he initially requested. But when Choochagi approached his supervisors about taking additional time off, they seemed "irritated" and attempted to force Choochagi to quit. One month later, a supervisor told Choochagi he "must decide whether he wants to be fired or gracefully quit." Choochagi refused to resign and maintained that he had performed well. Barracuda terminated his employment.

Choochagi initiated a lawsuit against Barracuda alleging, among other things: 1) disability and gender discrimination, retaliation, and failure to prevent discrimination and retaliation under the Fair Employment and Housing Act (FEHA); and 2) interference and retaliation under the California Family Rights Act (CFRA).

Barracuda moved to dismiss the case on the grounds that Choochagi was a poorly performing employee. Barracuda argued that while Choochagi would follow explicit instructions, he could not proactively solve problems or come up with creative solutions. Barracuda also presented evidence that Choochagi's supervisors and team had immediately felt misgivings about his leadership. For example, Choochagi's performance evaluation indicated he "demonstrated poor leadership skills" and had not improved in key areas of concern.

As to medical leave, Barracuda argued that Choochagi never specifically requested it. Barracuda said that Choochagi did inform his supervisors he was experiencing headaches and needed to follow up with his doctors. According to Barracuda, Choochagi only mentioned taking time off in one email and ultimately took the leave as requested.

Finally, Barracuda argued that it properly investigated Choochagi's complaint about his supervisor. Even though the supervisor denied saying anything inappropriate, Barracuda reminded the supervisor of its policies and instructed him not to have any type of sexually explicit communication in the workplace.

The trial court entered judgment for Barracuda on all but two of Choochagi's claims. The case proceeded to trial on the remaining claims, including Choochagi's disability discrimination claim. The jury found Barracuda had no liability. After the trial court denied Choochagi's request for a new trial, Choochagi appealed.

As relevant here, the California Court of Appeal considered the merits of Choochagi's claims regarding CFRA interference, CFRA retaliation, FEHA retaliation, and FEHA failure to prevent discrimination and retaliation. With respect to Choochagi's CFRA claims, the Court of Appeal determined that the trial court properly found for Barracuda. To establish CFRA interference, an employee must prove: 1) he is entitled to CFRA leave rights; and 2) the employer interfered with those rights. Similarly, to establish a cause of action for CFRA retaliation, the employee must prove: 1) the employer was a covered employer; 2) he was eligible for CFRA leave; 3) he exercised his right to take qualifying leave; and 4) he suffered an adverse employment action because he exercised the right to take CFRA leave.

The court noted that Choochagi could not establish either of these claims because he failed to present evidence that he asked for and was denied leave. While Choochagi mentioned his headaches and sent a single email requesting time off, these facts would not have alerted Barracuda to the CFRA criteria that an employee was requesting leave to take care of his own serious health condition that made him unable to perform his job functions. Further, because the court found Choochagi did not request leave, there could be no adverse employment action taken because of a request for leave. Accordingly, the court found the trial court properly entered judgment for Barracuda on these claims.

The Court of Appeal also concluded the trial court properly decided Choochagi's FEHA retaliation and failure to prevent claims. First, Choochagi could not establish FEHA retaliation because the individuals responsible for terminating his employment were not aware of the HR complaint Choochagi had made against his former supervisor. Thus, Choochagi could not establish the requisite causal link between his protected activity and termination. Second, Choochagi could not establish a claim for failure to prevent discrimination and retaliation since Barracuda submitted evidence it had anti-discrimination policies and procedures in place and that its HR department directed an immediate investigation into Choochagi's complaint.

The Court of Appeal concluded Choochagi's evidentiary objections were without merit.

Choochagi v. Barracuda Networks, Inc. (2020) 60 Cal. App.5th 444.

NOTE:

This case demonstrates the importance of: 1) having an up-to-date anti-discrimination policy; and 2) conducting immediate investigations into complaints of discrimination, harassment, or retaliation. The employer's quick response to the employee's complaint reduced its liability.

Teacher With Electromagnetic Hypersensitivity Can Pursue Only Her Reasonable Accommodation Claim.

Laurie Brown has been a teacher employed by the Los Angeles Unified School District (LAUSD) since 1989. In 2015, LAUSD installed an updated Wi-Fi system at the school where Brown taught that would accommodate the iPads, Chromebooks, and tablets LAUSD intended to provide its students. During public comment before LAUSD installed the new system, an environmental scientist and expert on electromagnetic frequency stated she could not support the installer's conclusions about the safety of the new Wi-Fi system. LAUSD's medical personnel also indicated they were uncertain about any long-term effects the Wi-Fi system may have on students and staff, but LAUSD promised to continue actively monitoring any developments.

Soon after LAUSD installed the new system, Brown had chronic pain, headaches, nausea, itching, ear issues, and heart palpitations. Brown thought the new Wi-Fi caused her symptoms. Brown reported her symptoms,

and her school granted her leave from work "due to these symptoms, on an intermittent basis, for several days thereafter." After Brown returned to work the following week, she immediately fell ill again. Brown's doctor subsequently diagnosed her with electromagnetic hypersensitivity, which is also referred to as "microwave sickness."

Brown then requested accommodations. LAUSD held its first interactive process meeting with Brown on July 15, 2015. Following the meeting, LAUSD agreed to disconnect the Wi-Fi access points in Brown's assigned classroom and in an adjacent classroom. LAUSD also agreed to use a hardwired computer lab with Wi-Fi turned off. However, Brown alleged that LAUSD's accommodations were not reasonable and did not work. For example, while LAUSD disconnected the routers in Brown's classroom and one adjoining classroom, other classrooms nearby continued to have their routers active. Another one of Brown's physicians subsequently placed her on a medical leave of absence for three months.

While on leave, Brown filed a second request for accommodation. Brown requested that LAUSD further reduce her exposure using paints and other forms of shielding materials to block Wi-Fi and radio frequencies in her classroom. After another interactive process meeting, LAUSD denied Brown's second request for accommodation, relying on testing the installer performed that indicated the system was safe. Brown appealed the denial, and LAUSD agreed to provide a "neutral expert EMF inspection for further microwave measurements." However, the parties could not reach an agreement about the expert to use. During this time, a third physician extended Brown's medical leave through June 2016.

Brown expressed frustration that LAUSD was retracting an accommodation it had promised and claimed she could not return to work without being overcome with crippling pain. She also alleged she was forced to go out on a disability leave, which exhausted her approximately 800 hours of accrued paid leaves. Brown then sued LAUSD, alleging it discriminated against her based on her electromagnetic hypersensitivity, failed to accommodate her condition, and retaliated against her in violation of the Fair Employment and Housing Act (FEHA). The trial court dismissed Brown's lawsuit finding she failed to plead sufficient facts to support each of her claims, and Brown appealed.

On appeal, the Court of Appeal concluded that Brown could not establish her claims for disability discrimination or retaliation. For both discrimination and retaliation claims under the FEHA, an employee must show that the employee took an adverse employment action because of the employee's membership in a protected classification or protected activity. However, the court concluded Brown could not make this showing. For Brown's disability discrimination claim, the court noted she could not establish an "adverse employment action" because she merely alleged that LAUSD would not reasonably accommodate her disability. The court reasoned Brown was improperly conflating an "adverse employment action" with a failure to accommodate claim. Further, the court found that Brown did not show any facts from which to infer any discriminatory intent. This is because Brown did not have any facts to suggest that LAUSD: 1) clung to any belief that the campus was safe; or 2) refused to accommodate her because it was biased against her as a person with a disability.

However, the Court of Appeal concluded that Brown adequately alleged facts sufficient to support a claim for failure to provide reasonable accommodation. Brown alleged that LAUSD did agree on a reasonable accommodation (to hire an independent consultant to determine where on-campus exposure to the electromagnetic frequencies was most minimal) and then changed its mind, deciding the campus was "safe." Since these allegations were sufficient to support a claim for failure to accommodate, the court reversed the trial court's decision regarding this claim only.

Brown v. Los Angeles Unified Sch. Dist. (2021) 60 Cal. App.5th 1092.

NOTE:

A critical part of the FEHA reasonable accommodation and interactive process is that the employer must keep the process moving. Every potential reasonable accommodation identified in the interactive process must be run to ground and determined to be reasonable and implementable, or not. The analysis supporting that determination must be documented.

HOME RULE

MOU Provision Authorized Charter County To Recover Overpayments From Employees.

The Association for Los Angeles Deputy Sheriffs (ALADS) is the union representing sworn non-management peace officers employed by the Los Angeles County (County) Sheriff's Department (Department). The memorandum of understanding (MOU) between ALADS and the County includes provisions that address "Paycheck Errors," including overpayments and underpayments.

The MOU provision on overpayments states that "employees will be notified prior to the recovery of overpayments." Further, "recovery of more than 15% of net pay will be subject to a repayment schedule established by the appointing authority under guidelines issued by the Auditor-Controller. Such recovery shall not exceed 15% per month of disposable earnings (as defined by State law), except, however, that a mutually agreed-upon acceleration provision may permit faster recovery."

In April 2012, during a conversion to a new payroll system, the County failed to apply an agreed-upon cap to certain bonus payments. The error resulted in salary overpayments to 107 deputies.

In May 2017, the County sent letters to these deputies, informing them of the overpayment, and giving them two repayment options: remit the payment in full, or repay the amount through payroll deductions at a specified rate. In April 2018, the County sent the deputies letters stating it would deduct the overpayments as described in the prior letters.

In May 2018, the County began the paycheck deductions. Thereafter, ALADS filed grievances on behalf of the affected employees, challenging the deductions from their paychecks to recover the overpayment amounts.

While the parties addressed the grievances through the County's administrative procedures, ALADS also went to court. ALADS sought a writ of mandate and declaration that an overpayment provision of the MOU between ALADS and the County was unenforceable because it violated wage garnishment law and the Labor Code. Specifically, ALADS alleged the deductions violated Labor Code Section 221, which makes it unlawful "for any employer to collect or receive from an employee any part of wages" paid to the employee. ALADS alleged that the wage garnishment law provided the exclusive procedure for withholding an employee's earnings.
The County demurred to the writ of mandate on multiple grounds, including that ALADS failed to exhaust administrative remedies, and that neither Labor Code Section 221 nor wage garnishment law applied to the County. The trial court granted the demurrer solely on the ground that ALADS failed to exhaust administrative remedies. ALADS appealed, and the Court of Appeal affirmed the trial court's ruling, but on the grounds that Labor Code Section 221 and the wage garnishment laws do not prevent a charter county from agreeing to MOU provisions regarding the recovery of overpayments.

The union argued it was not required to exhaust administrative remedies because the available administrative remedy would be futile since it would require all 107 deputies to bring individual grievances addressing the same issue: namely, the County's ability to recover overpayments under the MOU. The Court of Appeal agreed, holding that the administrative remedy was inadequate because it would not provide "classwide" relief for the 107 deputies.

However, the County argued that ALADS could not state a valid claim because of the home rule doctrine, which gives charter counties like the County the exclusive right to regulate matters relating to its employees' compensation. The Court of Appeal agreed and held the recovery of overpayments pursuant to a MOU was within the authority of a charter county as part of its exclusive right to regulate compensation. For similar reasons, the Court of Appeal noted that wage garnishment law did not prohibit the County from recouping overpayments.

Association for Los Angeles Deputy Sheriffs v. County of Los Angeles (2021) 60 Cal.App.5th 327 (2021).

NOTE:

A growing body of case law holds that the California Labor Code is not applicable to public entities unless a particular Labor Code Section states it applies to public entities. This case applied the home rule doctrine to authorize a charter county to adopt a MOU provision to deduct overpayment amounts, notwithstanding the Labor Code or wage garnishment laws.

RETIREMENT

Retiree Forfeited Part Of Pension Because Of Criminal Conduct.

In December 2012, Jon Wilmot, an employee with the Contra Costa County Fire Protection District, submitted his application for retirement to the County's retirement authority, the Contra Costa County Employees' Retirement Association (CCERA), established in accordance with the County Employees Retirement Law of 1937 (CERL). On January 1, 2013, the California Public Employees' Pension Reform Act of 2013 (PEPRA) took effect, which included a provision mandating the forfeiture of pension benefits/payments if a public employee is convicted of "any felony under state or federal law for conduct arising out of or in the performance of his or her official duties."

In February 2013, Wilmot was indicted for stealing County property. In April 2013, CCERA approved Wilmot's retirement application, fixing his actual retirement on the day he submitted his application in December 2012. Also in April 2013, Wilmot began receiving monthly pension checks. In December 2015,

Wilmot pled guilty to embezzling County property over a 13-year period ending in December 2012. Thereafter, the CCERA reduced Wilmot's monthly check in accordance with PEPRA's forfeiture provision.

Wilmot petitioned for a writ of traditional mandate and declaratory relief. He argued that the CCERA's application of the PEPRA's felony forfeiture provision was improper because the statute does not apply retroactively to persons who retired prior to PEPRA's effective date. The trial court disagreed, holding that the CCERA properly applied the forfeiture provision to Wilmot's pension.

Wilmot appealed, and the Court of Appeal affirmed the trial court's decision.

First, Wilmot argued when PEPRA took effect in January 2013, he was no longer a "public employee" because he worked his final day and submitted his retirement paperwork in December 2012. The Court of Appeal disagreed, stating that an employee's retirement application is pending until approved by a retirement board under the CERL. When PEPRA took effect, Wilmot's application was submitted, but CCERA did not approve his application until April 2013. Thus, he was subject to PEPRA's forfeiture provision.

Second, Wilmot argued he was improperly being "divested" of his vested pension benefits. Again, the Court of Appeal disagreed. Relying on the Court of Appeal's pervious decision in *Marin Association of Public Employees v. Marin County Employees' Retirement Association*, the Court of Appeal confirmed that anticipated pension benefits are subject to reasonable modifications and changes before the pension becomes payable and that an employee does not have a right to any fixed or definite benefits until that time.

Third, Wilmot argued that application of the forfeiture provision "impaired the obligation" of his employment contract with the Contra Costa County, which is prohibited by the California Constitution's contract clause. The Court of Appeal disagreed. The Court acknowledged that to be constitutional under the contract clause, modification of public pension plans must relate to the operation of the plan and intend to improve its function or adjust to changing conditions. Relying on the Supreme Court's decision in *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* and the Court of Appeal's decision in *Hipsher v. Los Angeles County Employees Retirement Association,* the Court of Appeal noted that one of the primary objectives in providing pensions to public employees is to induce competent persons to remain in public employment and render faithful service. Therefore, withholding that inducement if an employee's performance is not faithful (such as Wilmont who pled guilty to embezzling County property for 13 years) is a logical and proper response to improve the function of a public pension plan.

Fourth, Wilmot argued applying the PEPRA's forfeiture provision was an unconstitutional ex post facto law -- meaning a law that only makes an act illegal or that increases the penalties for an infraction after the act has been committed. The Court of Appeal disagreed, holding the forfeiture provision is a civil remedial measure, not a criminal penalty, and does not improperly increase the penalty for Wilmot's misconduct. Rather, the forfeiture provision merely takes back from Wilmot what he never rightfully earned in the first place due to his failure to faithfully perform in public service.

Accordingly, the Court of Appeal determined that the CCERA properly applied the PEPRA's forfeiture provision to Wilmot because of his admitted criminal conduct during his employment.

Wilmot v. Contra Costa County Employees' Retirement Association (2021) 60 Cal.App.5th 631.

NOTE:

This decision relies upon a case that LCW attorneys won involving a complex retirement issue. LCW Partner Steven Berliner and Associate Attorney Joung Yim successfully represented a defendant agency in Hipsher v. Los Angeles County Employees Retirement Association.

WAGE AND HOUR

Company Improperly Excluded Per Diem Benefits From The FLSA Regular Rate Of Pay.

AMN Services (AMN) is a healthcare staffing company that places hourly workers on short-term assignments throughout the United States. AMN pays clinicians an hourly wage in addition to a per diem amount that is, in part, based on federal reimbursement rates. According to AMN, the per diem paid to traveling clinicians is to reimburse them for the cost of meals, incidentals, and housing while they work away from home. Traveling clinicians do not need to document their expenses to receive a per diem. They only need to certify that their home is farther than 50 miles from their assigned facility. AMN treats these per diem payments as nontaxable income and excludes them from the regular rate of pay. If clinicians work the weekly shifts required by their employment contracts, they are paid the maximum weekly per diem benefit. If a clinician works fewer hours or shifts than required, AMN prorates the per diem amount. Until the end of 2014, per diem payments were prorated based on hours missed. Starting in 2015,

AMN switched to a shift-based prorating system. Under that system, if a clinician contracted to work three shifts per week misses a shift, the per diem allowance is adjusted by one-third. If a clinician works for part, but not all, of the required hours in a shift, AMN will round to the nearest shift. In addition, clinicians can offset missed or incomplete shifts with hours they have "banked" on days or weeks when they worked more than the minimum required hours. AMN also makes certain exceptions to its prorating practices, such as if the hospital cancels the shift.

While most of AMN's employees are assigned to work at facilities more than 50 miles away from their homes, AMN also employs "local clinicians" who work at facilities within 50 miles from their homes. Local clinicians also receive per diem benefits. However, for these local clinicians, the per diem benefit is included as part of their wages for both tax purposes and calculation of their regular rate of pay.

Verna Clarke and Laura Wittmann worked as traveling clinicians for AMN. In 2016, Clarke and Wittmann filed a lawsuit against AMN on behalf of themselves and all other similarly situated individuals. They alleged claims for unpaid overtime under state law and the Fair Labor Standards Act (FLSA). For Clarke and Wittman's FLSA claim, the district court certified a nationwide class. The district court then entered judgment in AMN's favor on the FLSA and state unpaid wages causes of action.

The FLSA generally prohibits an employer from requiring an employee to work longer than 40 hours in a workweek unless the employer pays for the excess hours at a rate of at least one and one-half times the employee's "regular rate of pay." The FLSA regular rate of pay includes "all remuneration for employment paid to, or on behalf of, the employee." But, the FLSA also allows employers to exclude certain payments from the regular rate of pay. For example, "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursement by the employer" can be excluded from the regular rate of pay.

On appeal, the workers asserted that their per diem payments operated as wages, and thus, should have been included in the calculation of their regular rate of pay. AMN argued that the per diem wages were not wages, but instead, reasonable reimbursement for work-related expenses incurred while traveling on assignment.

The Ninth Circuit Court of Appeals reasoned that in determining a payment's function, the tie between payments and time worked is relevant but not determinative in assessing whether a payment can be excluded from the regular rate of pay. The Court noted that other relevant factors include: 1) whether the payments are made regardless of whether any costs are actually incurred; 2) whether the employer requires any attestation that the employee incurred costs; 3) the amount of the per diem payment relative to the regular rate of pay; and 4) whether the payments are tethered specifically to days or periods spend away from home.

Applying these factors, the Ninth Circuit decided that AMN's per diem benefit for traveling clinicians functioned as compensation for work, rather than reimbursement for expenses incurred. First, under AMN's policies, the maximum per diem benefit compensates employees for seven days of expenses, even though most only work three, 12-hour shifts. AMN was therefore paying clinicians a per diem for days they are not working for AMN. Second, AMN's pro rata deductions from its per diem payments are unconnected to whether the employee remains away from home incurring expenses for AMN's benefit. Third, because clinicians can offset missed or incomplete shifts with "banked" hours, there is no plausible connection between working extra hours one week, and incurring greater expenses the next. Finally, AMN pays local clinicians the same per diem it would if the clinicians were traveling. Thus, the Ninth Circuit concluded the per diem benefits function as compensation for hours worked, and AMN violated the FLSA by excluding the benefits from traveling clinicians' regular rate of pay.

Clarke v. AMN Servs. (2021) 987 F.3d 848.

NOTE:

This case addresses the same provision of the FLSA the Court addressed in the Flores v. City of San Gabriel decision. In the Flores decision, the Ninth Circuit concluded that cash-in-lieu-of-benefits payments must generally be included in the regular rate of pay for the purposes of calculating overtime payments.

DID YOU KNOW....?

Whether you are looking to impress your colleagues or just want to learn more about the law, LCW has your back! Use and share these fun legal facts about various topics in labor and employment law.

- Effective January 1, 2021, AB 685 requires employers to comply with certain reporting requirements and provide notices related to potential COVID-19 exposures in the workplace within one business day of being informed of the potential exposure. (Lab. Code, §§ 6325 & 6409.6).

- AB 846 requires the creation of new POST standards and screening evaluations for peace

officers by January 1, 2022 regarding implicit and explicit protected-status bias. (Gov. Code, § 1031.3.)

- An educational entity has 10 days to determine if a public records request seeks disclosable records, and must promptly notify the requestor of the determination and the supporting reasons. (Gov. Code., § 6253(c).)

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's employment relations consortiums may speak directly to an LCW attorney free of charge regarding questions that are not related to ongoing legal matters that LCW is handling for the agency, or that do not require in-depth research, document review, or written opinions. Consortium call questions run the gamut of topics, from leaves of absence to employment applications, disciplinary concerns to disability accommodations, labor relations issues and more. This feature describes an interesting consortium call and how the question was answered. We will protect the confidentiality of client communications with LCW attorneys by changing or omitting details.

Question: A human resources manager asked LCW whether a district is required to reimburse employees for expenses incurred while working from home. The human resources manager indicated that the district is requiring all employees to work from home for the foreseeable future.

Answer: The attorney advised the manager that under Labor Code Section 2802, subdivision (a), "an employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful." While the attorney noted that the analysis of the applicability of Labor Code Section 2802 is very fact specific depending on the policies the district has in place, in general, if the employee is teleworking on a voluntary basis, expenses incurred by the employee as a result would likely not be covered Labor Code Section 2802. However, Labor Code Section 2802 would likely apply if the employer directs the employee to telework for public health purposes. The attorney also explained that determination of reimbursement amounts depends on many factors. Generally, an employee who is entitled to reimbursement under Labor Code Section 2802 is entitled to a "reasonable percentage" of the expenses they incurred, which may be subject to meet and confer.

BENEFITS CORNER

IRS Provides Cafeteria Plan Relief Related To COVID-19.

On February 18, 2021, the Internal Revenue Service (IRS) issued **Notice 2021-15** (Notice), providing additional flexibility to employers who offer health flexible spending arrangements (Health FSAs) or dependent care assistance programs (DCAPs aka Dependent Care FSAs).

A Health FSA and DCAP offered under a Section 125 cafeteria plan (Section 125) allow employees to set aside pre-tax wages to reimburse qualified medical or dependent care expenses, respectively. As a result of the COVID-19 public health emergency, many employees have unused amounts in these arrangements left over at the end of the plan year. Typically, funds remaining at the end of the plan year are forfeited under the "use it or lose it" rules applicable to Health FSAs and DCAPs.

However, the Notice allows employers to amend existing Section 125 plans to provide additional flexibility during the 2020 and 2021 plan years for employees to make use of these funds.

Specifically, the Notice addresses the following issues: (1) the temporary special rules relating to Health FSAs and DCAPs; (2) mid-year election changes related to employer-sponsored health coverage; and (3) plan amendments necessary to provide for the specific forms of relief described herein.

The Notice also references the expansion of reimbursements for over-the-counter drugs (OTCs) without prescriptions and menstrual care products.

Temporary Special Rules Related to Health FSAs and DCAPs

Employers have discretionary authority to amend their Section 125 plan document in order to provide certain relief to employees, which may include the following:

1. Either extend the applicable grace period (grace period relief) or expand the carryover amount (carryover relief) in order to allow employees

to carryover some or all unused FSA and DCAP amounts from a plan year ending in 2020 or 2021 to the immediate next plan year ;

2. Allow employees who cease participation in a plan during plan year to spend down unused FSAs and DCAPs benefits after ceasing their participation ;

3. Expand DCAP coverage to dependents who are 13 years of age, rather than 12 years of age (DCAP age relief), and to establish a special carryover rule for unexpended funds related to such dependent care to the following plan year ; and

4. Allow employees to make certain mid-year election changes for FSAs and DCAPs for plan years ending in 2021, including revoking elections, increasing or decreasing salary reduction contributions, and making new elections, regardless of whether the basis for such election change satisfies the generally applicable IRS election change requirements (FSA election relief) and allow employees to use amounts contributed to a FSA or DCAP after a revised election for qualified expenses incurred prior to the election change.

Mid-Year Elections to Change to Employer-Sponsored Health, Dental and/or Vision Coverage

An employer also has discretionary authority to allow employees to make mid-year election changes to their coverage under employer-sponsored health, dental and vision plans (Health coverage election relief).

If the employer amends its Section 125 plan to allow for such mid-year elections, employees may change their coverage, according to the plan, as follows: (1) to elect coverage under an employer-sponsored plan if the employee was not previously covered; (2) to revoke an existing election and elect a different employer-sponsored plan; or (3) to revoke existing employer-sponsored coverage entirely, so long as the employee revoking such coverage attests in writing that they are enrolled in or will immediately enroll in another health plan not sponsored by the employer. Relatedly, the Notice provides sample attestation language that employers may use and rely upon when an employee is revoking their employer-sponsored coverage entirely.

Employers who offer this flexibility may want to consider limiting the number of election changes an employee may make or limiting the circumstances under which an employee may make an election change, such as to only allow a change if it would improve the employee's coverage.

Section 125 Plan Amendments

In order to take advantage of the flexibility offered by the IRS Notice, an employer must adopt an amendment to its Section 125 Plan. In order for such plan amendments to provide relief retroactively, the employer must adopt the amendment no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective and the employer must operate such plan in accordance with the amendment at all times beginning on the effective date of such amendments.

This generally means that any Section 125 Plan amendment should be adopted by December 31, 2021 in order for the flexibility to apply retroactively to 2020 and 2021. Employers with a non-calendar plan year may have additional time.

Expansion of Reimbursable Expenses

Lastly, FSAs and Health Reimbursement Accounts (HRAs) can now reimburse participants for menstrual care products and over-the-counter drugs (OTCs) as qualified medical care expenses if incurred after December 31, 2019.

Employers should ensure that the definition of qualified medical care expenses in their 125 Plan includes this expanded definition.

Firm Publications

To view these articles and the most recent attorney-authored articles, please visit: **www.lcwlegal.com/news.**

Partner Peter Brown was quoted in the February 8, 2021 *Daily Journa*l article "Third attempt to let legislative staff unionize has more support," which highlighted the stakes of AB 314 and its potential effects on unionized workforces.

Partner Elizabeth Tom Arce and Associate Kaylee Feick penned "COVID-19, Social Justice and Their Impact on Litigation for Years to Come" for the January-February 2021 issue of *California Special Districts*, Volume 16, Issue I. The article spotlights the impact the COVID-19 pandemic and social justice movement will have on litigation in 2021 and beyond; the piece further cautions special districts to brace for increased legal claims.

Senior Counsel David Urban's op-ed column "The next landmark case on student free speech" was published in the March 9 issue of the *Daily Journal*. The piece illuminates a U.S. Supreme Court case that questions whether the First Amendment prohibits public school officials from regulating off-campus speech.

Senior Counsel Arti Bhimani was mentioned in the *Daily Journal's* March 1 "Joining The Firm" section.

Law.com recently mentioned the promotion of litigator Jenny-Anne Flores to the role of LCW litigation manager in the Los Angeles office.

Liebert Cassidy Whitmore was recently ranked #57 in the *Los Angeles Business Journal's* Annual List of Law Firms.

LCW

LABOR RELATIONS CERTIFICATION PROGRAM

The LCW Labor Relations Certification Program is designed for labor relations and human resources professionals who work in public sector agencies. It is designed for both those new to the field as well as experienced practitioners seeking to hone their skills.

Participants may take one or all of the classes, in any order. Take all of the classes to earn your certificate and receive 6 hours of HRCI credit per course!

Join our other upcoming HRCI Certified - Labor Relations Certification Program Workshops:
1. April 22 & 29, 2021 - Bargaining Over Benefits
2. May 12 & 19, 2021 - Communication Counts!
3. June 17 & 24, 2021 - The Rules of Engagement: Issues, Impacts & Impasse

The use of this official seal confirms that this Activity has met HR Certification Institute's® (HRCI®) criteria for recertification credit pre-approval.

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Learn more about this program by visiting https://www.lcwlegal.com/lrcp.

Firm Activities

Consortium Training

Apr. 2 **"An Employment Relations Primer for Community College District Administrators and Supervisors"**
Central CA CCD ERC | Webinar | Eileen O'Hare-Anderson

Apr. 16 **"Name that Section: Frequently Used Education Code and Title 5 Sections for Community College Districts"**
Bay Area CCD ERC | Webinar | Eileen O'Hare-Anderson

Apr. 22 **"Unfair Practice Charges and PERB"**
Southern California CCD ERC | Webinar | Adrianna Guzman

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.

Apr. 16 **"Confidentiality"**
Rancho Santiago Community College District | Webinar | Melanie L. Chaney

Apr. 23 **"Closing Session"**
Hartnell Community College District | Webinar | Laura Schulkind & Heather R. Coffman

Apr. 27 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
San Jose-Evergreen Community College District | Webinar | Laura Schulkind

Apr. 29 **"Title IX"**
Mt. San Antonio Community College District | Webinar | Pilar Morin and Jenny Denny

Apr. 30 **"Title IX"**
Southern 30 | Webinar | Pilar Morin and Jenny Denny

Speaking Engagements

Apr. 7 **"Hot Topics and Emerging issues with CalPERS and CalSTRS"**
CASBO 2021 Annual Conference | Webinar | Michael Youril & Alysha Stein-Manes

Seminars/Webinars

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

Apr. 1 **"Train the Trainer: Harassment Prevention - Part 2"**
Liebert Cassidy Whitmore | Webinar | Christopher S. Frederick

Apr. 22 **"Labor Relations Academy: Bargaining Over Benefits Day 1"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Steven M. Berliner

Apr. 29 **"Labor Relations Academy: Bargaining Over Benefits Day 2"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Steven M. Berliner

Apr. 30 **"Train the Trainer Refresher: Harassment Prevention"**
Liebert Cassidy Whitmore | Webinar | Christopher S. Frederick

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