LIEBERT CASSIDY WHITMORE

CLIENT UPDATE

News and developments in employment law and labor relations for California Public Agencies

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INDEX

LCW NEWS

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

FIRM VICTORIES

Training Officer's Termination Upheld For Time Card Theft And Dishonesty.

LCW Partner **Laura Kalty** and Associate Attorney **English Bryant** prevailed on behalf of a district attorney's office in a training officer's termination appeal following an arbitration hearing.

The employee's new supervisor began to notice the employee, a non-exempt training officer, was frequently missing from the office, taking long lunches, and arriving late to work. The supervisor told the employee, verbally and in writing, to work the regularly scheduled hours and record time off accurately. The supervisor also required the employee, if the employee was late or taking a long lunch, to inform the supervisor and deduct any time off. Nonetheless, the employee continued to claim hours not actually worked.

During the relevant timeframe, the employee was involved in a separate incident that led to an internal investigation. The investigation expanded to review the time card issues, and the investigator obtained and reviewed the employee's entry/exit data for a period of over one year. The data showed that the time cards the employee submitted were inaccurate and almost always in the employee's favor. The investigator also determined that the employee had secretly recorded conversations with supervisors and co-workers without asking for permission, which is a violation of the Penal Code.

The district attorney's office terminated the employee, and following the employee's appeal, the matter proceeded to binding arbitration. At the hearing, the employee argued unfair treatment by supervisors and investigators, and asserted that the supervisors had always treated this employee as exempt with a flexible schedule. The employee did not dispute that the current supervisor had specifically issued directives to work the assigned schedule and report all time accurately. The employee admitted that the time card entries were inaccurate, and the department showed that the employee had falsely reported hundreds of hours of time worked. The hearing officer upheld the termination based upon the employee's time card theft and other dishonest statements, noting that dishonesty is incompatible with public service and that employees who work for law enforcement agencies are held to a higher standard.

Note:

Agencies should ensure supervisors are diligent in tracking employee hours, particularly for non-exempt employees. If a question arises, it should be addressed promptly with the employee, and documented in writing. If there is any indication of time card abuse, agencies should conduct an investigation to obtain concrete evidence of an employee's actual working hours.

Peace Officer's Termination Upheld For Failing To Complete Police Reports And Dishonesty.

LCW Partner **Jack Hughes** and Associate Attorneys **Brian Hoffman** and **Savana Manglona** successfully represented a city in a peace officer's termination appeal. After completing three internal affairs investigations, the city terminated the officer for failing to properly investigate and write mandatory reports, and for making dishonest statements during an internal affairs investigation.

In February, 2019, a victim received a call at work from her ex-boyfriend's sister, who told the victim that the ex-boyfriend was on his way to the victim's workplace to hurt her. The victim had a restraining order in place against her ex-boyfriend. The officer who responded to the victim's call told her that there was nothing he could do because the third-party threat was not "specific" enough. However, the officer did not speak with a key witness in the case – the ex-boyfriend's brother-in-law, who heard the ex-boyfriend threaten that he was going to put a bullet in the victim's head. The victim later called the department a second time, and another officer interviewed the brother-in-law, immediately secured a warrant, issued a Be-On-The-Lookout (BOLO) alert for the ex-boyfriend, and arrested the ex-boyfriend the next day.

The victim filed a complaint with the department. In response, the department initiated an internal affairs (IA) investigation into the conduct of the first officer who responded to the victim. Throughout the IA investigation, the officer claimed he spoke with the ex-boyfriend's brother-in-law but never received a specific threat. However, the brother-in-law said he did not speak with the officer that day, and none of the telephone records indicated that the officer contacted the brother-in-law. The city attempted to clear up the discrepancies and interviewed the officer a second time. The officer was adamant he spoke with the brother-in-law despite all the evidence to the contrary. The Penal Code and department policy required a report for a domestic violence call or for the violation of a restraining order.

The officer testified at the hearing that he knew that a law enforcement officer could get in serious trouble for not making a report of a domestic violence call. Additionally, all of the other peace officers interviewed during the IA investigation stated that the officer should have prepared a report. The arbitrator ultimately found that the city proved by a preponderance of the evidence that the officer was dishonest during the IA investigations and that his failure to prepare a mandatory domestic violence report was serious misconduct, warranting his termination.

The officer also demonstrated a pattern of failing to prepare required reports. In September, 2018, the officer responded to a shoplifting incident at grocery store. Department policy requires a report if the suspect is either uncooperative or on Post Release Community Supervision (PRCS). The suspect in this case was both uncooperative and on PRCS, but the officer violated policy by releasing the suspect and failing to prepare a report. The arbitrator found that the officer's failure to prepare a report interfered with the efficient and fair administration of justice because without a report, the department could not effectively work with the District Attorney's office to prosecute the suspect.

Additionally, in March, 2019, the officer responded to a call of a vehicle break-in. The victim's wallet, which contained his government issued identification card (ID), had been stolen from his truck. The victim was certain that he told the officer that his ID card was stolen and later sent the officer an e-mail stating that he was concerned about the loss of his ID card because he needed it to travel. Department policy requires an officer to take a report when there is theft of identifiable property. However, the officer did not take a report, and never followed up with the victim after the victim's e-mail. The city also established that the officer had failed to properly author reports. His reports often contained errors, omissions, or lack of sufficient detail, which made it difficult for the department to use them.

The arbitrator found that the city proved by a preponderance of the evidence that it had just case to terminate the officer. The city showed that the officer had a history of failing to prepare reports required under department policy and that the officer was dishonest when he claimed he spoke with a witness. Because the city could no longer trust the officer to honestly and effectively carry out his duties, his termination was warranted.

Note:

This case illustrates how conducting a thorough investigation is critical to a successful disciplinary action. Agencies can count on LCW to be a trusted advisor who anticipates and addresses potential legal challenges throughout peace officer investigations and discipline.

LCW Obtains Dismissal Of Three Police Officers' Claims For CalPERS Retirement Benefits.

LCW Partner **Jennifer Rosner** and Associate Attorney **Anni Safarloo** successfully represented a city in an action brought by three police officers who disputed their retirement benefits formula based on the city's contract with the California Public Employees' Retirement System (CalPERS).

In May 2012, the city hired the three individuals to

become sworn police officers once they successfully completed the Police Academy. They would also then be eligible for safety membership in CalPERS. Until the officers completed the Police Academy, they remained non-sworn employees and were classified in CalPERS as Miscellaneous employees.

At the time of their hiring, the applicable Memorandum of Understanding (MOU) between the city and union provided the city's "current sworn" police officers with a "3% at 50" CalPERS retirement formula, meaning they would be eligible for retirement at age 50 with an annual allowance equal to 3% of their pensionable compensation for each year of service. The MOU also provided that the city would amend its contract with CalPERS to provide a "3% at 55" retirement formula for sworn employees hired after July 1, 2012. According to the officers, representatives from the city promised them during their recruitment that they would be entitled to the "3% at 50" retirement formula even though they were not sworn at the time of hire.

In July 2012, the city adopted a resolution providing that the "3% at 55" formula would apply to employees entering the safety classification with CalPERS after the effective date of the resolution. The city thereafter effectuated the language of the resolution in an ordinance and by an amendment to its contract with CalPERS, which became effective in September 2012.

In December 2012, the officers' status changed to sworn police officers after they graduated from the Police Academy. Since the officers did not become sworn personnel until after the July 1, 2012 cut-off stated in the MOU and the September 2012 CalPERS contract amendment, the City enrolled them in the "3% at 55" retirement formula.

The officers filed a lawsuit alleging breach of contract. In addition, they filed a petition for writ of mandate action requesting the court to order the city to provide the retirement benefits allegedly promised to the officers either by making a written request to CalPERS for a contract amendment to include the officers in the "3% at 50" retirement formula, or providing the officers with a supplemental retirement allowance to make up the difference between the two formulas. The Court stayed the lawsuit until the petition for writ of mandate was adjudicated.

LCW filed a demurrer on behalf of the city as to the petition for writ of mandate. The Court sustained the demurrer without leave to amend and denied the petition for writ of mandate on the grounds that the officers failed to exhaust their administrative remedies through CalPERS' administrative process. The court agreed and acknowledged that a city may enter into a contract with CalPERS, and further, that the pension formula for employees covered by that contract is determined under the Public Employees Retirement Law (PERL). The court confirmed that the CalPERS' Board of Administration (Board) is the sole judge of conditions under which persons may be admitted to and continue to receive benefits under the retirement system. The Board also has discretion to correct an error affecting any active or retired member caused by the contracting agency (the city) or CalPERS. Since the officers' petition alleged that an error in the city's amended contract with CalPERS caused them to be subject to a less desirable CalPERS retirement formula, the court held they were obligated to seek relief through CalPERS before seeking relief from the court.

Note:

A demurrer is a powerful tool that can save public agencies litigation fees by getting lawsuits dismissed before trial. LCW attorneys can help public agencies determine whether a case is appropriate for demurrer.

Labor Relations Oversight Body Grants Agency's Motion To Dismiss.

LCW Partner **Adrianna Guzman** and Associate Attorney **Emanuela Tala** obtained a victory for an agency after the agency's labor relations oversight body dismissed an unfair practice charge filed by an employee organization. In the unfair practice charge, the union argued an agency department engaged in unlawful unilateral action by changing the process by which the department considered settlement. As a result, the union alleged the agency was no longer settling pending discipline cases. The union contended that this change also interfered in its communications with, and representation of, its members.

On behalf of the agency, LCW argued the union's charge did not articulate a legal or contractual requirement that the agency consider or offer settlement of pending discipline charges. LCW also argued that the agency's new process for considering settlement was a non-negotiable management right that did not affect the wages, hours, or terms and conditions of union member's employment. The labor relations oversight body agreed, and dismissed the charge.

Note:

Employers are only required to bargain on actions that have a "significant and adverse effect on the wages, hours, or working conditions of bargaining unit employees."

FIRST AMENDMENT

Ninth Circuit Addresses How First Amendment Rights Impact An Agency's Ability To Discipline A Law Enforcement Officer For A Social Media Post.

In 2015, an individual shot a police officer with the Las Vegas Metropolitan Police Department (Department). Department officers later found and arrested that suspect. Upon seeing news of the suspect's capture, Charles Moser, a SWAT sniper with the Department, commented the following on a friend's Facebook post about the shooting: "It's a shame he [the suspect] didn't have a few holes in him[.]" Moser made the comment through his personal Facebook profile while off-duty at home.

An anonymous tip notified the Department of Moser's comment, prompting an internal investigation wherein Moser admitted his comment was inappropriate, but explained that he was expressing frustration that the suspect ambushed and shot one of the Department's officers. Moser also removed the comment from social media approximately three months after posting it. Based on the investigation's findings, Moser was transferred out of SWAT and placed back on patrol out of concern that his comment indicated he had become "a little callous to killing." Upon his dismissal from the SWAT team, Moser sued the Department, alleging violation of his free speech right under the First Amendment.

The district court granted summary judgment for the Department, holding that the government's interest in employee discipline outweighed Moser's First Amendment right under the applicable balancing test for speech by government employees. Moser appealed, and the Ninth Circuit reversed the district court's grant of summary judgment.

The Ninth Circuit first identified the framework for considering the First Amendment rights of government employees. An employee must first establish: (i) he spoke on a matter of public concern; (ii) he spoke as a private citizen rather than a public employee; and (iii) the relevant speech was a substantial or motivating factor in the adverse employment action. Once this is established, the burden then shifts to the government to show that it: (iv) had an adequate justification for treating the employee differently than other members of the general public; or (v) it would have taken the adverse employment action even absent the protected speech. If the employer cannot meet this burden, then the employee's speech is protected under the First Amendment.

On appeal, Moser and the Department only disputed the fourth factor of this test, which requires courts to balance the First Amendment rights of the employee against the government's administrative interest in avoiding disruption and maintaining workforce discipline. As part of this balancing test, the Ninth Circuit noted that courts may consider the content of a government employee's speech to determine how much weight to give the employee's free speech interests. However, the Ninth Circuit held that it could not balance Moser's First Amendment interests against the Department's administrative interests due to two factual disputes.

First, the Ninth Circuit held a factual dispute existed as to the meaning of Moser's Facebook comment. The Department alleged Moser's comment objectively advocated for unlawful violence by law enforcement, and therefore, is not at the core of First Amendment protection. In contrast, Moser contended that his comment merely expressed frustration at the dangers law enforcement officers face in the line of duty, which should receive higher First Amendment protection.

Second, the Ninth Circuit held another factual dispute existed regarding whether Moser's Facebook comment would cause disruption to the Department. The Ninth Circuit noted that the Department failed to provide enough evidence to support its prediction that the comment would cause disruption in the workplace because there was no evidence that anyone knew about the post other than the individual who anonymously notified the Department of the comment. The Court also noted that there was little chance the public would have seen the comment because Moser deleted it.

Based on these two factual disputes, the Ninth Circuit held that the district court erred in granting summary judgment to the Department and remanded the case to the district court.

Moser v. Las Vegas Metropolitan Police Department, 984 F.3d 900 (9th Cir. Jan. 12, 2021)

Note:

This case illustrates how agencies must carefully analyze potential free speech protections under the First Amendment before disciplining an employee for controversial statements on a personal social media account. LCW attorneys specialize in advising public agencies regarding the scope and application of the First Amendment to public employment.

DISCRIMINATION

District Court Improperly Entered Judgment In Favor Of Bank In Harassment Case.

Jennifer Christian began working for Umpqua Bank (Umpqua) in 2009 as a Universal Associate. In late 2013, a customer asked Christian to open a checking account for him. Afterwards, the customer began visiting the bank to drop off notes for Christian. These notes stated that Christian was the most beautiful girl he had ever seen and that he would like to go on a date with her. Christian and her colleagues began to feel concerned, and Christian told the customer that she was not going to go on a date with him. However, the behavior continued and the customer eventually sent Christian a long letter. Christian showed the letter to her manager, a corporate trainer, and other colleagues. The corporate trainer warned her to be careful.

Around the same time, Christian learned from colleagues that the same customer had visited another branch of the bank repeatedly asking how he was going to get a date with her. The corporate trainer advised Christian to call the police, and she became increasingly concerned for her safety. Nonetheless, on Valentine's Day, the customer sent Christian flowers and a card. Christian again shared the card with her manager, the corporate trainer, and other colleagues.

Subsequently, Christian told her manager that she did not want the customer to be allowed to return to the bank. According to Christian, the manager promised he would not allow the customer to return, but never advised the customer of that decision. Despite Christian's efforts, the customer continued to deliver her letters and visit the bank. On one occasion, the customer also attended a charity event where Christian was volunteering.

A few days after the charity event, the customer returned to the bank to reopen his account that another branch had closed. Rather than ask the customer to leave, Christian's manager instructed her to open the new account for him. After the customer continued coming to the bank with no apparent banking business to do, Christian reported the situation to the regional manager of another region.

Christian called in sick and refused to return to work until a no-trespassing order was implemented to bar the customer from visiting the bank. However, her manager ordered her to come to work and directed her to "hide in the break room" if the customer returned. Christian also requested in writing that the bank close the customer's account and obtain a no-trespassing order against him. In addition, Christian asked that she be transferred to a different bank location, even though the only position available was for fewer hours per week. While Umpqua eventually closed the customer's account and transferred Christian to a new location, she resigned. She said that her doctor advised that it was bad for her health to continue working there.

Christian sued the bank for gender discrimination in violation Title VII, among other claims. Title VII prohibits sex discrimination in employment. To establish sex discrimination under a hostile work environment theory, an employee must show she was subjected to sex-based harassment that was sufficiently severe or pervasive to alter the conditions of employment, and that her employer was liable for this hostile work environment. To determine whether conduct is sufficiently severe or pervasive, courts consider the totality of the circumstances, including: 1) the frequency of the conduct; 2) its severity; 3) whether it is physically threatening or humiliating; and 4) whether it unreasonably interferes with an employee's work performance.

The district court entered judgment in favor of Umpqua, finding that no reasonable juror could conclude the customer's conduct was serve or pervasive enough to create a hostile work environment. Christian appealed.

On appeal, the Ninth Circuit found that the district court erred in three respects. First, the district court erred in isolating the various harassing incidents. The harassment Christian endured involved the same type of conduct, occurred relatively frequently, and was perpetrated by the same individual. Further, Christian experienced the harassment not as isolated and sporadic incidents, but rather as an escalating pattern of behavior that caused her to feel afraid in her own workplace.

Second, the Ninth Circuit concluded the district court erred in declining to consider incidents in which Christian did not have any direct, personal interactions with the customer, such as when he sent her flowers or would sit in the bank lobby. Specifically, the court noted that Title VII does not impose any such requirement for direct, personal interactions.

Finally, the Ninth Circuit determined the district court erred in neglecting to consider evidence of interactions between the customer and third parties, such as the customer's repeated visits to the other bank branch to badger Christian's colleagues about her. Offensive comments do not all need to be made directly to an employee for a work environment to be considered hostile. Christian learned from her colleagues that the customer was persistently contacting them to obtain information about her. It did not matter she did not witness that conduct firsthand.

In addition, the court concluded that Umpqua was liable for this harassment. An employer may be held liable for sexual harassment on the part of a private individual, such as a customer, if the employer either ratifies or acquiesces in the harassment by not taking immediate or corrective actions. The court noted that while Umpqua may have decided not to allow the customer back after he sent Christian flowers, Umpqua did not implement that decision by actually informing the customer not to return or by closing his account. Additionally, Umpqua did not take any other action to end the harassment, such a creating a safety plan for Christian or discussing the situation with bank security. Moreover, while the bank eventually transferred Christian to a different location and closed the customer's account, the Court noted that Umpqua's "glacial pace" was too little, too late. It also noted that the bank placed the bulk of the burden on Christian herself.

Accordingly, the Ninth Circuit determined that the district court improperly entered judgment for Umpqua on Christian's Title VII gender discrimination claim.

Christian v. Umpqua Bank, 984 F.3d 801 (9th Cir. Dec. 31, 2020).

Note:

In hostile work environment cases, courts will consider the totality of circumstances and not view potentially harassing events in isolation. An employee does not need to personally witness harassment. Simply learning of harassing conduct from colleagues may be sufficient. Employers should promptly brainstorm solutions to effectively prevent further harassment, and take swift action to implement all reasonable solutions to protect employees.

PROTECTED LEAVE

Employer May Count All Weeks To Determine FMLA Leave Entitlement For Employees Working "One Week On, One Week Off" Schedules.

The Alaska Marine Highway System (AMHS) employs "traditional" employees who work a regular 40-hour week with five days on followed by two days off, and "rotational" employees who work a regular schedule of seven days on followed by seven days off. Both types of employees generally work the same number of hours over the course of a year, and both are generally paid the same amount.

The Secretary of Labor alleged that AMHS was improperly calculating Family and Medical Leave Act of (FMLA) leave for certain rotational employees, specifically rotational employees who took continuous FMLA leave. The FMLA grants eligible employees "a total of 12 workweeks of leave during any 12-month period" to attend to qualifying family and medical needs. FMLA leave may be either continuous (i.e., leave taken in one block of time) or intermittent (i.e., leave taken in increments). Continuous leave is the default form of FMLA leave.

Under the Secretary of Labor's view, rotational employees taking continuous leave should return to work 24 weeks later, because a rotational employee's off weeks cannot be counted as "workweeks of leave." However, AMHS contended that a rotational employee working a "one week on, one week off" schedule who takes 12 workweeks of continuous leave must return to work 12 weeks later because both the "on" and "off" weeks count against the employee's FMLA leave entitlement. The district court agreed with the Secretary of Labor, and entered judgment against AMHS. AMHS appealed.

On appeal, the Ninth Circuit noted that this case turned on what the term "workweek" meant. While Congress did not define "workweek" when it enacted the FMLA, it used the same term in the Fair Labor Standards Act (FLSA). Under the FLSA, employers are prohibited from employing any covered employee "for a workweek longer than forty hours unless such employee receives compensation for his employment . . . at a rate not less than one and one-half times the regular rate at which he is employed." Additionally, FMLA's regulations construed the term "workweek" to mean a fixed period of seven days. Further, the Court reasoned that the FMLA's purpose and legislative history bolster the conclusion that Congress rejected the Secretary of Labor's narrow interpretation of the term "workweek." Therefore, the Ninth Circuit concluded that Congress intended "workweek" to refer to a week-long period, designated in advance by the employer, during which the employer is in operation.

While the Secretary of Labor argued his interpretation of the FMLA was entitled to deference, the court disagreed. Accordingly, when an employee working a "one week on, one week off" schedule takes continuous leave, an employer may count both the on and off weeks against the employee's FMLA leave entitlement. AMHS's method of calculating leave did not violate the statute.

Scalia v. Dep't of Transportation & Pub. Facilities, 2021 WL 139738 (9th Cir. Jan. 15, 2021).

Note:

Public agencies should ensure employees working alternate schedules are receiving the appropriate FMLA leave entitlement. LCW attorneys can assist agencies in evaluating FMLA compliance.

WAGE AND HOUR

Fifth Circuit Rejects Two-Step Certification Process For FLSA Collective Actions.

The Fair Labor Standards Act (FLSA) permits "similarly situated" employees to bring a collective action against their employer for federal wage and hour violations. However, the FLSA does not define what "similarly situated" means. Congress later amended the FLSA's collective action procedure, through the 1947 Portal-to-Portal Act, to require similarly situated employees to opt-in via a written consent. Neither Congress nor the U.S. Supreme Court, however, have provided further guidance for the proper procedure for certifying collective actions.

District courts across the nation have arrived at a loose consensus as to the process for certifying the appropriateness of FLSA collective actions. Courts have adopted a nearly universal two-step approach. In the first step, known as "conditional certification," the employee must make a modest factual showing that they and the potential opt-in employees were victims of a common policy or plan that violated the law. If conditional certification is granted at the first step, the court proceeds to the second step. In the second step, following discovery, the court will decide whether the case can proceed on a collective basis by determining whether the employees who have joined the lawsuit are in fact "similarly situated." If the employees are not similarly situated, the action may be decertified.

KLLM Transport Services (KLLM) transports refrigerated goods throughout the county, using either company-owned trucks operated by its employee-drivers, or trucks provided by other drivers classified as independent contractors. A number of workers at KLLM who drove trucks under independent contractor agreements with the company initiated a collective action lawsuit alleging that KLLM misclassified them, and all other "similarly situated drivers," as independent contractors rather than employees. The workers alleged KLLM violated the FLSA's minimum wage requirement they were entitled to as employees.

After the parties conducted a significant amount of discovery, the workers moved for conditional certification. Applying its own variation of the two-step approach, the district court ultimately granted the workers' request for conditional certification, thereby certifying a collective action of potentially thousands of KLLM truck drivers. KLLM immediately filed a petition for appeal by permission, which the Fifth Circuit granted.

On appeal, the Fifth Circuit rejected the two-step certification rubric. The court relied on the only two principles it found to be binding on district courts: 1) the FLSA's text that declares (but does not define) that only those "similarly situated" may proceed as a collective action; and 2) the Supreme Court's admonition that a district court may "facilitat[e] notice to potential" employees for case-management purposes. The court noted that while the two-stage approach may be "common practice," nothing in the FLSA, nor in Supreme Court precedent interpreting it, requires or even authorizes any "certification" process.

Instead, the court concluded that a district court should identify, at the outset of the case, which facts and legal considerations will be material to determining whether a group of employees is "similarly situated." Then, the district court should authorize preliminary discovery accordingly. The Fifth Circuit noted that a district court should make this determination "as early as possible" and not after a lenient, step-one "conditional certification."

Swales v. KLLM Transp. Servs., L.L.C., 2021 WL 98229 (5th Cir. Jan. 12, 2021).

Note:

As a Fifth Circuit decision, this case is not binding on California courts. However, the Ninth Circuit has also rejected the two-step approach because it "improperly sanctions the decertification of collective actions the district court finds procedurally challenging."

Federal Agency Preempts California Wage Order Requiring Meal And Rest Breaks For Commercial Motor Vehicle Drivers.

The Federal Motor Carrier Safety Administration (FMCSA) is tasked with issuing regulations on commercial motor vehicle safety. The FMCSA also has authority to determine that state laws on commercial motor vehicle safety are preempted following a multi-step process.

Under federal law, a property-carrying commercial motor vehicle driver "may not drive without first taking 10 consecutive hours off duty," and "may not drive after the end of the 14-consecutive hour period without first taking 10 consecutive hours off duty." Within that 14-hour period, a driver may only drive 11 hours. Federal regulations also impose weekly driving limits.

In 2011, the FMCSA revised the federal hours-of-service regulations and adopted rules on breaks for truck drivers. Subject to certain exceptions, a property-carrying commercial motor vehicle driver working more than eight hours must take a least one 30-minute break during the first eight hours. This break requirement

supplemented longstanding federal regulations prohibiting a driver from operating a commercial motor vehicle if the driver was too fatigued or unable to safely drive.

Under California Wage Order 9-2001, however, "all persons employed in the transportation industry" who work more than five hours a day are entitled to a "meal period of not less than 30 minutes." An employee is entitled to a second meal period of not less than 30 minutes when working more than 10 hours in a day. Employees and employers can mutually agree to waive these meal breaks under certain circumstances. The wage order gives transportation employees 10-minute rest breaks for every four hours worked. An employer who fails to provide a meal or rest break must pay the employee one additional hour of pay at the employee's regular rate of pay for each workday that the meal or rest break period is not provided.

In 2008, a group of motor carriers filed a petition to the FMCSA seeking to preempt California's meal and rest break requirement as applied to commercial motor vehicle drivers subject to the FMSCA's hours-of-service regulations. However, the FMCSA ruled that it lacked the authority to preempt California law because the meal and rest break rules applied beyond the trucking industry and were thus not "on commercial motor vehicle safety."

In 2018, two industry groups asked the FMCSA to revisit its 2008 decision. Following public comment, the FMCSA declared California meal and rest break rules preempted as applied to operators of property-carrying motor vehicles subject to the federal hours-of-service regulations. California's Labor Commissioner, labor organizations, and affected individuals challenged the decision.

In reviewing the FMCSA's determination, the Ninth Circuit considered whether the FMCSA's preemption decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court noted that Congress expressly gave the FMCSA authority to preempt state laws "on commercial vehicle safety" if the agency decides certain criteria are met. The court concluded that the FMCSA reasonably determined that a California state law "on commercial motor vehicle safety" was already addressed by FMCSA's regulations. Finally, the court found that the fact California law regulates meal and rest breaks in a variety of industries does not compel the conclusion that the FMCSA's meal and rest break rules are not also "on commercial motor vehicle safety." Thus, the court determined that California's meal and rest break rules were within the FMSCA's preemption authority.

Further, the Ninth Circuit found that the FMCSA's determination that California's meal and rest break rules were more stringent than federal regulations was reasonable and supported. The court noted that California law requires more breaks, more often, and with less flexibility as to timing. It also noted that the FMCSA reasonably determined that the California state law: 1) had no safety benefit; 2) was incompatible with the regulation prescribed by the agency; and 3) would cause an unreasonable burden on interstate commerce. Any one of these three enumerated grounds would have been enough to justify a preemption determination pursuant to the authority Congress granted the FMCSA.

For these reasons, the Ninth Circuit determined the FMCSA's decision was entitled to deference, and the Labor Commissioner's challenge lacked merit.

Int'l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin., 2021 WL 139728 (9th Cir. Jan. 15, 2021).

INDEPENDENT CONTRACTORS

California Supreme Court Concludes Dynamex *Decision Applies Retroactively.*

The California Supreme Court decided *Dynamex Operations West, Inc. v. Superior Court* in 2018. *Dynamex* determined how the term "suffer or permit to work," as used in the California wage orders, should be interpreted for purposes of distinguishing between employees who are covered by the wage orders and independent contractors who are not.

The *Dynamex* decision also adopted the so-called "ABC test." Under the ABC test, a worker is an independent contractor to whom a wage order does not apply only if the employer establishes that the worker:

A) Is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

B) Performs work that is outside the usual course of the hiring entity's business; and

C) Is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

In *Vazquez v. Jan-Pro Franchising Inernational, Inc.*, the Ninth Circuit requested the California Supreme Court to determine whether the *Dynamex* decision applies retroactively. The California Supreme Court noted that its decision in *Dynamex* did not overrule any prior California Supreme Court cases, nor disapprove of any prior California Court of Appeal decisions. These facts supported the retroactive application of *Dynamex*.

Jan-Pro argued that a narrow exception to the general retroactivity rules applied because it reasonably believed that the question of whether a worker should be considered an employee or an independent contractor would be determined by application of the multi-factor test established in *S.G. Borello and Sons, Inc. v. Department of Industrial Relations*.

The Supreme Court disagreed. The Court reasoned that California wage orders have included the "suffer or permit to work" standard as one basis for defining who should be treated as an employee for purposes of the wage order for more than a century. Additionally, the Court noted that at least since the 1930s, the "suffer or permit to work" standard has been understood as embodying "the broadest definition" of employment. Further, the Court pointed out that the multi-factor *Borello* test Jan-Pro attempted to rely on was not a wage order case. Moreover, that decision did not analyze who is an employee for purposes of a wage order. Finally, the Court noted that the factors articulated in the *Dynamex* case drew on the factors articulated in *Borello*. Thus, they were not beyond the bounds of what employers could reasonably have expected.

For these reasons, the Court determined employers were clearly on notice well before the *Dynamex* decision that, for purposes of the obligations imposed by a California wage order, a worker's status as an employee or independent contractor might depend on the suffer or permit to work prong of an applicable wage order. Accordingly, the Court confirmed that the *Dynamex* decision applies retroactively

Vazquez v. Jan-Pro Franchising Int'l, Inc., 2021 WL 127201 (Cal. Jan. 14, 2021).

Note:

LCW's discussion of the Dynamex *decision is available here: https://www.lcwlegal.com/news/california-supreme-court-adopts-abc-test-for-independent-contractor-status. LCW will continue to monitor developments in this area.*

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.

- California Department of Justice Live Scan fingerprint background checks now include background check information from the FBI. (Penal Code Sections 11105 and 11105.3.)
- California's Family Rights Act Leave now gives leave for eligible employees to care for an adult child, grandparent, grandchild, or sibling with a serious health condition. These categories of family members are in addition to those for whom leave could be taken prior to the 2021 amendment: parent, spouse, minor child or child incapable of self-care, and registered domestic partner. (Government Code Section 12945.2.)
- Effective Sept. 1, 2020, employers may file a petition requesting a court to issue a gun violence restraining order enjoining the subject from "having in their custody or control, owning purchasing, possessing or receiving a firearm or ammunition for a period of time between one to five years." (Penal Code Section 18170(a)(1)(B).)

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 contacted LCW and explained that the agency wants miscellaneous employees to work overtime to address severe weather conditions. The manager asked whether the Fair Labor Standards Act (FLSA) limits how many hours an employee can work in a row.

Answer: The FLSA does not regulate the number of hours an employee can work consecutively. Instead, the FLSA regulates how much compensation must be paid for those hours of work. While the FLSA does not regulate the number of hours an employee works, agencies may have their own policies for consecutive work hours in the applicable memorandum of understanding or personnel rules.

BENEFITS CORNER

Appropriations Act Provides Health And Dependent FSA Relief.

The Consolidated Appropriations Act of 2021 (CAA) was signed into law on December 27, 2020. It contains provisions providing employers with options that can potentially impact the administration of employer-sponsored group health plans and health and dependent care flexible spending account (FSA) benefits. These provisions are meant to relax health plan rules in light of the on-going COVID-19 pandemic. This is not surprising, considering many employees' actual 2020 health and dependent care expenses may have been less than they anticipated when they elected FSA coverage for the 2020 plan year because, for example, they deferred routine health checkups or because their dependent care provider was closed.

The CAA permits FSA plan sponsors to make voluntary temporary changes to the plan allowing FSA plan participants to utilize FSA contributions made in 2020 and 2021, which include:

- Permitting all FSA balances to be rolled over from the 2020 plan year to the 2021 plan year, and from the 2021 plan year to the 2022 plan year. This rule also applies to dependent care FSAs, which would otherwise not permit such roll-over.
- Extending the FSA grace periods for using contributions for 2021 or 2022 plan years to 12 months (increased from 2.5 months) following the end of the plan year.
- For plan years ending in 2021, allowing participants to prospectively modify their FSA election contributions for any reason without experiencing a change in status.
- Permitting employees who stopped participating in a health FSA during 2020 or 2021 to continue to receive reimbursements from unused amounts through the end of the plan year, including any grace period.
- Allowing participants who elected dependent care FSA coverage for the 2020 plan year, for which open enrollment ended before January 31, 2020, and whose dependent children turned age 13 during the 2020 plan year, to continue to use the FSA balance for the child's qualified dependent care expenses through the end of the 2020 plan year. Further, participants may also use remaining balances in the participant's FSA at the end of the 2020 plan year for the child's expenses in 2021, until the child reaches age 14.

To implement these changes, employers will need to amend their existing Section 125 cafeteria plans. These amendments would need to be made by the end of the calendar year following the end of the plan year in which the amendment became effective. (*For example, December 31, 2021 would be the deadline for changes effective in 2020.*) Employers, however, have the discretion to decide which (if any) of these permissible changes they wish to make to the plan.

IRS Regulations Outline Affordability Safe Harbors For ICHRAs.

The IRS recently issued final regulations, which, among other things, address Individual Coverage Health Reimbursement Arrangements (ICHRA). These arrangements became available at the beginning of 2020, and allow employers to provide defined non-taxed reimbursements to employees for qualified medical expenses incurred in securing individual health care coverage (including Medicare), including monthly premiums and out-of-pocket costs such as co-payments and deductibles. In summary, the final regulations provide several specific safe harbors for ICHRAs from the ACA penalties for applicable large employers (ALEs) for failing to provide "affordable coverage."

For example, under the final regulations, an employer can determine whether an offer of an ICHRA to a full-time employee is "affordable" under the ACA by using the lowest cost silver plan for self-only coverage offered through a Health Insurance Marketplace (or "exchange") where the employee's primary site of employment is located, rather than the employee's residence. However, remote employees' residences are considered their "primary site of employment" if they do not work on the ALE's premises or have an assigned office space at a jobsite other than the employer's premises to which they may reasonably be expected to report on a daily basis.

As self-insured medical plans, ICHRAs are subject to the Internal Revenue Code's non-discrimination rules, which prohibit discrimination in favor of highly compensated individuals when it comes to plan eligibility or benefits. Accordingly, employers generally may not vary ICHRA contribution amounts to participants. The

final regulations, however, include nondiscrimination safe harbors. The maximum reimbursement the employer offers under an ICHRA can differ within a class of employees or between classes if the arrangement provides: 1) the same maximum dollar amount to all employees who are members of a particular class of employees; and/or 2) the maximum dollar amount made available to an employee for any plan year increases as the age of the employee increases. The final regulations do caution, however, that ICHRAs must also be nondiscriminatory in their operation. They may fail to meet this requirement if, for example, a disproportionate number of highly compensated individuals qualify for and utilize the maximum ICHRA amount based on age.

The final regulations reference other safe harbors, including the generally applicable affordability safe harbors (W-2, rate of pay, and federal poverty line), which may be used instead of household income to determine an ICHRA's affordability. Employers and plan administrators will want to carefully review the IRS' final regulations, including any subsequently issued guidance and rules for ensuring compliance with the applicable safe harbors.

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New to the Firm

Michael Jarvis is a Labor Relations Consultant in LCW's Los Angeles office. His background includes working in management roles, and he has more than a decade of labor negotiation experience working with clients on mutually beneficial outcomes while building positive and productive relationships.

He can be reached at 916.747.6219 or mjarvis@lcwlegal.com.

Arti L. Bhimani is Senior Counsel in LCW's Los Angeles office. She is a leading litigator on behalf of nonprofit institutions, having served as Deputy General Counsel and head of litigation for a leading global healthcare nonprofit.

She can be reached at 310.981.2318 or abhimani@lcwlegal.com.

Sylvia J. Quach is an Associate in LCW's Los Angeles office where she advises clients in all aspects of labor and employment law and defends clients in litigation.

She can be reached at 310.981.2000 or squach@lcwlegal.com.

Firm Publications

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

Partner **Peter Brown** and Associate **Alexander Volberding** recently penned a *Bloomberg Law* piece "Labor Law, Union Implications for Employer-Mandated Covid Vaccines," which was published Jan. 21. The piece discusses how employers will likely have to bargain with labor organizations that represent their employees prior to requiring certain employees be vaccinated.

Partner **Peter Brown** and Associate **Alexander Volberding** were both recently quoted in "Can employers mandate the COVID-19 vaccine?" which was published in the *Orange County Register, Daily Breeze, Inland Valley Daily Bulletin, Press-Telegram, Los Angeles Daily News, Pasadena Star-News, Redlands Daily Facts, The Press-Enterprise, The San Bernardino Sun, San Gabriel Valley Tribune, Whittier Daily News, East Bay Times, California Healthline Daily Edition* and *Mercury News*. The piece explores whether an employer can legally mandate the vaccine under the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964.

Partner **Peter Brown** and Associate **Alexander Volberding** were recently highlighted during a FOX News segment on employer-mandated vaccinations.

Partner **Peter Brown** was recently interviewed by KNX 1070 on the topic of employer-mandated vaccinations.

Management Training Workshops

Firm Activities

Consortium Training

Feb. 4 **"Navigating the Crossroads of Discipline and Disability Accommodation"**
Imperial Valley ERC | Webinar | Jennifer Rosner

Feb. 4 **"File That! Best Practices for Employee Document and Record Management"**
Gateway Public ERC | Webinar | James E. Oldendorph

Feb. 4 **"File That! Best Practices for Employee Document and Record Management"**
San Gabriel Valley ERC | Webinar | James E. Oldendorph

Feb. 10 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
Central Coast ERC | Webinar | Jack Hughes

Feb. 10 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
Napa/Solano/Yolo ERC | Webinar | Jack Hughes

Feb. 10 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
Ventura/Santa Barbara ERC | Webinar | Jack Hughes

Feb. 10 **"Prevention and Control of Absenteeism and Abuse of Leave"**
North State ERC | Webinar | Brian J. Hoffman

Feb. 11 **"Maximizing Supervisory Skills for the First Line Supervisor - Part 1"**LA County HR Consortium | Webinar | Kristi Recchia

Feb. 11 **"Human Resources Academy I"**
San Diego ERC | Webinar | Kristi Recchia

Feb. 11 **"The Art of Writing the Performance Evaluation"**
East Inland Empire ERC | Webinar | I. Emanuela Tala

Feb. 11 **"The Art of Writing the Performance Evaluation"**
San Joaquin Valley ERC | Webinar | I. Emanuela Tala

Feb. 17 **"Administering Overlapping Laws Covering Discrimination, Leaves and Retirement Part 1"**
Gold Country ERC | Webinar | Richard Bolanos & Richard Goldman

Feb. 17 **"The Art of Writing the Performance Evaluation"**
Central Valley ERC | Webinar | Stephanie J. Lowe

Feb. 17 **"The Art of Writing the Performance Evaluation"**
Sonoma/Marin ERC | Webinar | Stephanie J. Lowe

Feb. 24 **"Public Sector Employment Law and Legislative Update"**
NorCal ERC | Webinar | Richard S. Whitmore

Feb. 25 **"Ethics In Public Service"**
Humboldt County ERC | Webinar | Shelline Bennett

Feb. 25 **"Ethics In Public Service"**
Mendocino County ERC | Webinar | Shelline Bennett

Feb. 25 **"The Future is Now - Embracing Generational Diversity & Succession Planning"**
North San Diego County ERC | Webinar | Christopher S. Frederick

Feb. 25 **"Managing the Marginal Employee"**
San Mateo County ERC | Webinar | Erin Kunze

Feb. 25 **"Supervisor's Guide to Public Sector Employment Law"**
Coachella Valley ERC | Webinar | Ronnie Arenas

Feb. 25 **"Supervisor's Guide to Public Sector Employment Law"**
West Inland Empire | Webinar | Ronnie Arenas

Mar. 4 **"Difficult Conversations"**
Bay Area ERC | Webinar | Heather R. Coffman

Mar. 4 **"New Developments in FLSA Litigation: What Fire Command Staff Need to Know"**
San Diego Fire Districts | Webinar | Lisa S. Charbonneau

Mar. 4 **"Public Service: Understanding the Roles and Responsibilities of Public Employees"**
Gateway Public ERC | Webinar | Ronnie Arenas

Mar. 4 **"Public Service: Understanding the Roles and Responsibilities of Public Employees"**
San Joaquin Valley ERC | Webinar | Ronnie Arenas

Mar. 4 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
Imperial Valley ERC | Webinar | Jack Hughes

Mar. 4 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
Central Valley ERC | Webinar | Jack Hughes

Mar. 4	**"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"** South Bay ERC | Webinar | Jack Hughes
Mar. 10	**"Human Resources Academy I"** Coachella Valley ERC | Webinar | Kristi Recchia
Mar. 10	**"Human Resources Academy I"** San Gabriel Valley ERC | Webinar | Kristi Recchia
Mar. 10	**"Difficult Conversations"** Ventura/Santa Barbara ERC | Webinar | Stacey H. Sullivan
Mar. 11	**"Maximizing Supervisory Skills for the First Line Supervisor - Part 2"** LA County HR Consortium | Webinar | Kristi Recchia
Mar. 11	**"Technology and Employee Privacy"** San Diego ERC | Webinar | Heather R. Coffman
Mar. 11	**"Technology and Employee Privacy"** San Mateo County ERC | Webinar | Heather R. Coffman
Mar. 17	**"Administering Overlapping Laws Covering Discrimination, Leaves and Retirement Part 2"** Gold Country ERC | Webinar | Richard Bolanos & Richard Goldman
Mar. 18	**"Prevention and Control of Absenteeism and Abuse of Leave"** Central Coast ERC | Webinar | T. Oliver Yee
Mar. 18	**"Prevention and Control of Absenteeism and Abuse of Leave"** East Inland Empire ERC | Webinar | T. Oliver Yee
Mar. 18	**"A Guide to Implementing Public Employee Discipline"** Napa/Solano/Yolo ERC | Webinar | Stephanie J. Lowe
Mar. 18	**"A Guide to Implementing Public Employee Discipline"** West Inland Empire ERC | Webinar | Stephanie J. Lowe
Mar. 24	**"Navigating the Crossroads of Discipline and Disability Accommodation"** North State ERC | Webinar | Jennifer Rosner
Mar. 24	**"Navigating the Crossroads of Discipline and Disability Accommodation"** Ventura/Santa Barbara ERC | Webinar | Jennifer Rosner
Mar. 24	**"Maximizing Performance Through Evaluation, Documentation and Corrective Action"** Orange County ERC | Webinar | Christopher S. Frederick
Mar. 25	**"Terminating the Employment Relationship"** North San Diego County ERC | Webinar | Kevin J. Chicas
Mar. 25	**"Managing COVID-19 Issues: Now and What's Next"** Mendocino County ERC | Webinar | Alexander Volberding
Mar. 25	**"Managing COVID-19 Issues: Now and What's Next"** Sonoma/Marin ERC | Webinar | Alexander Volberding

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.

Feb. 8 **"Ethics in Public Service"**
City of Bellflower | Webinar | Stephanie J. Lowe

Feb. 9 **"Maximizing Supervisory Skills for the First Line Supervisor"**
Mammoth Community Water District | Webinar | I. Emanuela Tala

Feb. 10 **"Evaluations"**
City of Hawthorne | Webinar | Kristi Recchia

Feb. 17, 24 **"Evaluations"**
City of Hawthorne | Kristi Recchia

Feb. 23 **"Key Legal Principles for Public Safety Managers - POST Management Course"**
Peace Officer Standards and Training - POST | San Diego | Stefanie K. Vaudreuil

Feb. 25 **"Accommodations During the Pandemic"**
California Sanitation Risk Management Authority (CSRMA) | Webinar | Alexander Volberding

Feb. 25 **"Labor Relations"**
East Bay Regional Park District | Webinar | Richard Bolanos

Mar. 3 **"Diversity and Inclusion"**
County of San Luis Obispo | Webinar | Shelline Bennett

Mar. 4 **"Labor Law Update for 2021"**
CSRMA | Webinar | I. Emanuela Tala

Mar. 8 **"Legal Issues Update"**
Orange County Probation Department | Webinar | Christopher S. Frederick

Mar. 11 **"Labor Relations"**
East Bay Regional Park District | Webinar | Richard Bolanos

Mar. 17, 18 **"The Art of Writing the Performance Evaluation"**
Mendocino County | Webinar | Jack Hughes

Mar. 24 **"Liability Issues with Remote Workers"**
CSRMA | Webinar | Alexander Volberding

Speaking Engagements

Feb. 9 **"Annual Employment Law Update: Recent Cases and Trends"**
California Special District Association (CSDA) Webinar | Webinar | Che I. Johnson

Feb. 17 **"Cost Restructuring Amid Challenging Economic Times"**
California Society of Municipal Finance Officers (CSMFO) Annual Speaking | Webinar | Jack Hughes

Feb. 18, 19 **"LCW Annual Conference"**
LCW Conference 2021 | Virtual

Feb. 25 **"Legislative Update: Part 1"**
Southern California Public Labor Relations Council (SCPLRC) Webinar | Webinar | J. Scott Tiedemann

Mar. 25 **"Legislative Update: Part 2"**
(SCPLRC) Webinar | Webinar | J. Scott Tiedemann

Seminars / Webinars

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

Feb. 25 **"PERB Academy"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Adrianna E. Guzman

Mar. 4 **"PERB Academy"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Adrianna E. Guzman

Mar. 10 **"FLSA Academy Day 1 - Part 1"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Peter J. Brown

Mar. 11 **"FLSA Academy Day 1 - Part 2"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Peter J. Brown

Mar. 17 **"FLSA Academy Day 2 - Part 1"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Peter J. Brown

Mar. 18 **"FLSA Academy Day 2 - Part 2"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Peter J. Brown

Mar. 24, 31 **"Trends & Topics at the Table"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Peter J. Brown

Client Update is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in ***Client Update*** should not be acted on without professional advice. To contact us, please call 310.981.2000, 415.512.3000, 559.256.7800, 916.584.7000 or 619.481.5900 or e-mail info@lcwlegal.com.