LIEBERT CASSIDY WHITMORE

PRIVATE EDUCATION MATTERS

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

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LCW NEWS

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

STUDENTS

ECCLESIASTICAL ABSTENTION DOCTRINE

Ecclesiastical Abstention Doctrine.

Prince of Peace Christian School is a private school for students in preschool through twelfth grade located in Texas. The School is a 501(c)(3) nonprofit organization that is accredited by secular and Lutheran school organizations, and is a recognized service organization of the Lutheran Church. The School's mission and objectives are to provide "a Christian education program that is centered upon Biblical principles," a "Christ-centered" education, and place for teachers to "live out their faith in word and deed." Most teachers and administrators are certified ministers of the Lutheran Church, and those who are not are expected to serve "as missionaries" in "making disciples" of students and their families and teach classes from a Christian point of view.

The School's Parent/Student Handbook contains language requiring students to adhere to Lutheran faith principles, and a code of conduct and other behavioral expectation policies (*e.g.*, policies against bullying, harassment, smoking, substance abuse) that all rest on Lutheran beliefs. All students and enrolled families agree to abide by the School's code of conduct and its enrollment contract allows Prince of Peace the right to "remove a student at any time for any reason, including failure of the parent(s) to adhere to the policies, philosophies, and procedures of the school."

School students B.O. and S.R. (the Students), engaged in a series of code of conduct and policy violations during their freshman and sophomore years, which resulted in meetings between the School and the Students' parents, investigations, and discipline. During this time, the parents generally maintained that the School's Assistant Principal and other employees were harassing, defaming, bullying, publically humiliating, and threatening the Students and disagreed that the Students had done anything wrong. Ultimately, the School expelled the Students, generally citing to the Students' continual code of conduct and policy violations and the parents' refusal to communicate and work cooperatively with the School.

Thereafter, the parents filed suit against the School, alleging that the School breached its contract with them by failing to appropriately address their claims that the School's Assistant Principal and other employees were harassing, defaming, bullying, publically humiliating, and threatening the Students and by failing to employ qualified faculty to address such claims. The parents also filed a negligence claim against the School, alleging failure to hire suitable employees and appropriately supervise those employees. The School countered that the parents' suit was prohibited by the ecclesiastical abstention doctrine.

The ecclesiastical abstention doctrine arises from the Free Exercise Clause of the First Amendment and applies to religious and faith-based entities, including religious schools. The ecclesiastical abstention doctrine requires that if a particular legal claim before a court requires the resolution of ecclesiastical questions, then the court must abstain from resolving those questions and instead defer to the religious entity's authority.

The court held that the facts showed that the School was a faith-based entity, considering the "extensive evidence demonstrating its reliance on Biblical principles, Biblical doctrine, and faith-based measures guiding its operation and the education it seeks to provide." The court also held that the ecclesiastical abstention doctrine precluded the court from judicially resolving the parents' claims. The court explained that resolving the parents' claims would require the court to inquiry into and interfere with the School's internal and religiously-informed policies and code of conduct, which would impermissibly intrude into the School's management of these matters.

I*n re Prince of Peace Christian School* (Tex. App., Sept. 23, 2020, No. 05-20-00680-CV) 2020 WL 5651656.

NOTE:

While this case arose out of a court in Texas, the ecclesiastical abstention doctrine has been applied by California courts, including in 2017 in Hawkins v. St. John Missionary Baptist Church of Bakersfield, California.

CRIMINAL CONDUCT

Court Upholds Conviction Of Student Who Made Social Media Post Threatening To Bring Gun To School.

A.G., a minor high school student at Simon Rodia Continuation School, posted an image of a realistic looking gun replica with the caption, "Everybody go to school tomorrow. I'm taking gum [sic]," on his Snapchat account, which was visible to about 60 of A.G.'s "friends."

One of A.G.'s Snapchat friends', D.J., who attended Linda Marquez School for Social Justice (Linda Marquez) saw the post and shared it with one of her teachers, Carol Henriquez (Henriquez), because D.J. believed that A.G. attended her school and she was concerned about a potential school shooting. In fact, A.G. had attended Linda Marquez, but transferred to Simon Rodia Continuation School earlier that year.

Henriquez, who had A.G. as a student during a previous semester and believed he still attended Linda Marquez, felt "fear, concern, and confusion when she saw the image," "was afraid the image was a threat of a school shooting," and "felt she and her students were in danger." Henriquez, therefore, contacted the police department and shared the Snapchat post. A few hours later, A.G., made a second post on his Snapchat account with the caption "Everyone, it wasn't real. I was xanned [sic] out. D.J. saw the post and shared it with Henriquez, but they both remained fearful nevertheless.

The next morning, Detective Steve Jeong went to Simon Rodia Continuation School and spoke with A.G. about the Snapchat posts. A.G. told Detective Jeong that he made the first Snapchat post because "he likes to see [sic] reaction in people, what people might say." A.G. denied any intention to threaten anyone or carry out a school shooting and seemed apologetic. Detective Jeong confirmed that the gun was a replica.

A.G. was charged with three counts of making a criminal threat. A.G. testified that he intended for the first Snapchat post to be a joke, that "he was being immature" and did not intend for the post to be taken as a threat. The juvenile court found A.G. guilty of two of the counts, dismissed one of the counts, and ordered A.G. to serve six months' of probation. A.G. appealed.

On appeal, A.G. contended that the evidence presented against him was not sufficient to establish the crime of making a criminal threat. To establish the crime of making a criminal threat, the evidence had to establish (1) A.G. willfully threatened to commit a crime, which will result in death or great bodily injury to another person; (2) A.G. made the threat with the specific intent that the statement be taken as a threat, even if he had no intent of actually carrying it out; (3) the threat was on its face and under the circumstances so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat; (4) the threat actually caused the person threatened to be in sustained fear for his/her own safety or for his/her immediate family's safety; and (5) the threatened person's fear was reasonable under the circumstances.

A.G. alleged that the evidence did not show: "(1) he intended his Snapchat post to be understood as a threat; (2) he willfully threatened to unlawfully kill or cause great bodily injury to anyone; (3) he intended to threaten D.J. or Henriquez specifically; (4) any alleged threat was unequivocal or unambiguous to reasonably sustain fear in either D.J. or Henriquez; or (5) any threat to D.J. or Henriquez was sufficiently immediate to place either of them in fear." However, the Court disagreed with A.G.'s contentions.

First, the Court noted that A.G.'s post contained a threat to bring a gun and an image of what appeared to be a real gun, A.G. had told Detective Jeong that he wanted to see a reaction from the people who saw his Snapchat post, and A.G.'s friends on Snapchat included students who went to both his current and previous schools. The Court concluded that the record contained sufficient evidence that A.G. intended his Snapchat post to be understood as a threat and that he willfully threatened to kill or cause great bodily injury.

Second, the Court concluded that there was sufficient evidence to find that A.G. intended to communicate a threat to D.J. and Henriquez because he sent the threat through Snapchat, which given the way Snapchat works, could be disseminated to a large group of people.

Third, the Court concluded that the image of the replica gun and the caption constituted a threat that was unequivocal and specific. Fourth, the Court held that A.G.'s threat was immediate and reasonably placed D.J. and Henriquez in fear. Given "the cultural climate where school shootings sadly and tragically happen on a regular basis," it was reasonable for D.J. and Henriquez to believe A.G.'s threat was real. Therefore, the Court affirmed the findings of the juvenile court.

In re A.G. (Cal. Ct. App., Dec. 14, 2020, No. B304063) 2020 WL 7333876, *as modified* (Dec. 23, 2020).

NOTE:

Schools, universities, and colleges should have internet and social media policies in place that give them discretion to discipline students for on- and off-campus conduct that disrupts or could foreseeably disrupt the school or its students, employees, or other members of the school community. Schools should note, however, that the Education Code specifically prohibits secondary schools from making or enforcing any rule that disciplines a high school student at a secondary school solely on a basis that would otherwise be protected by the First Amendment or California Constitution. Schools must therefore take a cautious approach when disciplining high school students for unpopular or seemingly improper speech.

EMPLOYEES

REDUCTION IN FORCE

Employee Could Not Establish That Reduction In Force Was Discriminatory.

David Foroudi worked as a senior project engineer at The Aerospace Corporation (Aerospace). Foroudi's supervisors counseled him regarding deficiencies in his performance and warned him that failure to improve could result in corrective action. Under the collective bargaining agreement, Aerospace management assigned all bargaining unit employees, including Foroudi, to a value ranking based on their performance. "Bin 1" contained the highest-ranked employees and "bin 5" contained the lowest. In 2010 and 2011, Foroudi was ranked as bin 5.

In late 2011, Aerospace learned that its funding would be significantly impacted by Department of Defense budget cuts. In response, Aerospace began implementing a company-wide reduction in force (RIF). The pool of eligible employees was divided into those ranked in bins 4 and 5 in 2011; new employees who were unranked; and employees on displaced status. Management then ranked RIF-eligible employees based on several criteria, including bin ranking, performance issues, and skills and expertise. Foroudi's managers ultimately selected him for the RIF because he was in the lowest ranking bin, he did not have a strong background in algorithmic applications for GPS navigation, and he had received prior performance counseling. Aerospace notified Foroudi he would be laid off in March 2012. In Foroudi's division, one laid off employee was in his 80's, two were in their 70's, 17 were in their 60's, 46 were in their 50's, 24 were in their 40's, and six were in their 30's. Foroudi's duties were given to an employee who was 14 years younger than Foroudi and who was considered an expert in GPS technology.

In January 2013, Foroudi filed a charge with the California Department of Fair Employment and Housing (DFEH) alleging discrimination, harassment, and retaliation because of his age, association with a member of a protected class, family care or medical leave, national origin, and religion. He also filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). More than one year later, Foroudi filed an amended DFEH charge alleging that he was laid off because of his protected statuses.

In August 2014, Foroudi and four other former Aerospace employees filed a civil complaint against Aerospace, alleging among other claims, age discrimination in violation of the Fair Employment and Housing Act (FEHA). The complaint also alleged that Aerospace used the RIF as pretext to hide its motivation to terminate Foroudi because of his age, and that the RIF had a disparate impact on employees over the age of 50. In January 2015, the employees filed an amended complaint to add a cause of action under the Federal Age Discrimination in Employment Act and class action allegations.

After a federal court dismissed the employees' disparate impact and class allegations because they were not included in the DFEH charge, the matter was remanded

to California superior court. Foroudi subsequently contacted the DFEH and EEOC to amend his charges to include class and disparate impact allegations, but the superior court did not let Foroudi file an amended civil complaint.

Aerospace then moved to dismiss Foroudi's case. Aerospace claimed that he could not establish a *prima facie* case of age discrimination, nor provide substantial evidence that Aerospace's reasons for the RIF were a pretext for age discrimination. Foroudi argued that discriminatory intent was evident because: 1) he was more experienced and qualified than the younger employee who took over his work; 2) his statistics showed the RIF had a disparate impact on older workers; 3) Aerospace did not rehire him after he was laid off; and 4) his managers gave "shifting" reasons for selecting him for the RIF. The superior court found in favor of Aerospace. Foroudi appealed.

The California Court of Appeal affirmed the superior court's ruling. First, the court upheld the decision to deny Foroudi the opportunity to amend his complaint. The court noted that the EEOC did issue Foroudi a new right-to-sue letter after the federal court remanded the case. But, the exhaustion of EEOC remedies did not satisfy the requirements for Foroudi's state law FEHA claims. While Foroudi attempted to add the class claims to the DFEH charge, he did so more than three years after the DFEH had permanently closed his case and nearly two years after he filed his civil complaint. Foroudi could not argue his charge including the class and disparate impact claims "related back" to his prior DFEH charge because he was asserting new theories that could not be supported by his prior DFEH charge. Accordingly, Foroudi could not show he exhausted his administrative remedies as to his class and disparate impact claims.

Next, the court agreed to enter judgment in favor of Aerospace. The court reasoned that even assuming Foroudi could establish a *prima facie* case, Aerospace had legitimate, nondiscriminatory reasons for Foroudi's termination that Foroudi could not show were pretextual. Aerospace's evidence showed it instituted the company-wide RIF after learning it faced potentially severe cuts to its funding and selected Foroudi using standardized criteria.

The court found that Foroudi could only proceed by offering "substantial evidence" that Aerospace's reasons for terminating Foroudi were untrue or pretextual and that Foroudi had not met this burden. For example, the court noted that he was not replaced by a younger employee. Rather, Aerospace eliminated Foroudi's position and created a new position that combined Foroudi's former duties with the duties of an existing employee. Further, the court noted that for Foroudi's statistical evidence to create an inference of intentional discrimination, it had to "demonstrate a significant disparity" and "eliminate nondiscriminatory reasons for the apparent disparity." The statistical evidence Foroudi offered did not account for the age-neutral factors that were considered in connection with the RIF, such as an employee's experience, performance, and the anticipated future need for the employee's skill.

For these reasons, the Court of Appeal affirmed the superior court's ruling and awarded Aerospace its costs on appeal.

Foroudi v. Aerospace Corp. (2020) 57 Cal.App.5th 992.

NOTE:

Given the impacts of the COVID-19 pandemic, many employers have reduced their workforces. State and federal laws prohibit discrimination in the RIF process. Schools, universities, and colleges should ensure they are evaluating employees according to standardized criteria that are not age-related to avoid claims that they are discriminating against employees 40 and above.

DISCRIMINATION

Employee Provided Sufficient Evidence To Support Hostile Work Environment Claim Based On Employer's Failure To Correct Third Party's Harassment.

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 as 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 Ban (9th Cir. Dec. 31, 2020) 984 F.3d 801.

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 and seriously consider solutions to effectively prevent further harassment, and take swift action to implement all reasonable solutions to protect employees.

LABOR RELATIONS

NLRB Issues Updated 2021 Bench Book For NLRB Judges And Trial Practitioners.

In January 2021, the Division of Judges of the National Labor Relations Board (NLRB) issued an updated Bench Book, which replaces the January 2020 version. The Bench Book is intended to serve as a reference guide for NLRB administrative law judges during unfair labor practice hearings.

The new Bench Book also serve as a useful tool and reference guide for attorneys practicing before the NLRB Board and for employers as it contains citations to and information about numerous precedential Board decisions and orders, including those issued over the last year. Some of the updates to the new Bench Book include information on the authority of administrative law judges to order remote hearings by videoconference during the COVID-19 public health emergency.

NOTE:

Liebert Cassidy Whitmore attorneys have expertise and experience representing private schools, colleges, and universities in labor relations matters.

REQUIRED NOTICES OF STATUTORY RIGHTS

U.S. Department Of Labor Issues Guidance On Electronic Posting Of Required Notices Of Employees' Statutory Rights.

On December 23, 2020, the U.S. Department of Labor's Wage and Hour Division (WHD) issued a Field Assistance Bulletin (Bulletin) providing guidance to field staff regarding the electronic posting of required notices to employees of their statutory rights given that many employees are currently working remotely due to the COVID-19 public health emergency. The WHD contains specific information as to when and under what circumstances an employer may use electronic means, such as email, postings on an internet, or intranet website, and posting on a shared network drive or file system, to provide employees with required notice of their statutory rights under the following statutes and their regulations:

1. The Fair Labor Standards Act (FLSA);

2. The Family and Medical Leave Act (FMLA);

3. Section 14(c) of the FLSA (Section 14(c));

4. The Employee Polygraph Protection Act (EPPA); and

5. The Service Contract Act (SCA).

The WHD noted that, generally, providing notice to employees through electronic means is in addition to the legal requirement to post a hard copy of the notice in appropriate places in the workplace.

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 International, 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. (Cal. Jan. 14, 2021) 2021 WL 127201.

NOTE:

Liebert Cassidy Whitmore reported about the Dynamex *decision in the May 2018 Private Education Matters newsletter.*

EEO PAY DATA

EEOC Reopens Collection Of EEO-1 And DFEH Issues California Pay Data Reporting Portal User Guide.

All private sector employers with 100 or more employees are required to file an Equal Employment Opportunity Standard Form 100, also known as an EEO-1, with the U.S. Equal Employment Opportunity Commission (EEOC) annually. After delaying the collection of the 2019 EEO-1 Component 1 in light of the COVID-19 public health emergency, the EEOC recently announced that collections will resume in 2021.

For eligible private sector employers, collection of 2019 and 2020 EEO-1 Component 1 reports will open in April 2021. The EEOC has not yet announced the precise opening dates and new submission deadlines, but stated that those dates will be announced on the EEOC's home page at www.eeoc.gov and on the EEOC's EEO data collection webpage at https://EEOCdata.org. The EEOC also stated that it would send a notification letter to eligible filers.

Further, the Department of Fair Employment and Housing (DFEH) recently issued a California Pay Data Reporting Portal User Guide (User Guide) to assist California employers to comply with SB 973, the state's new law requiring employers with 100 or more employees, and subject to federal EEO-1 reporting, to report certain pay data information to the DFEH by March 31, 2021. The User Guide contains specific information for employers on the basic structure and required content of the report, how to navigate the pay data reporting portal, and how to submit the pay data report. The User Guide also contains templates and samples. Employers should review and reference the User Guide as they prepare and plan to submit their pay data reports by the March 31, 2021 deadline to confirm that they are complying fully with the new law.

NOTE:

Additional information about SB 973 is available in the Liebert Cassidy Whitmore article, SB 973 – Authorizes The DFEH To Investigate And Prosecute Complaints Alleging Discriminatory Wage Rate Practices And Requires Employers With 100 Or More Employees To Submit An Annual Pay Data Report To The DFEH.

BUSINESS & FACILITIES

Important Terms For COVID-19 Testing Vendor Agreements.

Since the onset of COVID-19 shelter-in-place and related public health orders in jurisdictions throughout California, schools and colleges have grappled with how to protect students, staff, and other school community members, from coming into contact with the virus on their campuses. In some California jurisdictions, schools that resume in-person instruction must require student and staff COVID-19 testing in the event these individuals develop COVID-19 symptoms, or if one of their household members or a close contact tests positive. Schools may similarly be required to screen students and staff daily for COVID-19 symptoms, and to encourage staff to undergo routine testing unrelated to known exposure.

In relation to these requirements and recommendations for safe re-opening, schools are contracting with COVID-19 testing vendors that range from local

nonprofit entities to national health services corporations. The potential legal issues associated with school-sponsored testing, and the contracts these vendors offer to school clients are equally broad in range. For this reason, it is important that schools: (1) ensure they have written agreements with COVID-19 testing vendors; and (2) that such agreements address the following concerns.

1. Medical Privacy Requirements Under Federal And State Law

Most healthcare vendors know about their obligations relating to "protected health information" under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the electronic transition of health information under the Health Information Technology for Economic and Clinical Health Act (HITECH). These Acts embody Federal law applicable to jurisdictions throughout the United States. However, these same vendors may not have considered their obligations under California's Confidentiality of Medical Information Act (CMIA). CMIA is similar to HIPAA in that it requires protocols to protect medical information, as that term is used under CMIA. Importantly however, CMIA has more stringent medical release requirements than HIPAA, and it is therefore essential that a vendor contracting to create or collect CMIA covered medical information on behalf of a California school understand that they are additionally required to comply with any obligations under this law. As the entity providing testing, we recommend that schools prepare and collect CMIA-compliant waivers from their community members directly for COVID-19 testing purposes. Relatedly, the school and its vendor should discuss how and when waivers will be issued and formalize any agreement on this issue in their vendor contracts.

2. Parties Subject To Testing

Some vendors focus on employee testing, and know how to comply with various privacy and employment implications related to the same. Some vendors focus on academic settings. Even then, the vendor may have created a contract that works in the public school setting, but with terms that are inapplicable to private schools. Assuming a school is contracting with a vendor to provide testing to its employees and its students, the school will need to ensure that both of these populations are sufficiently contemplated by the vendor agreement. Different issues arise depending on the population being tested. For example, if the tested person is a student, a parent or legal guardian consent may be required and should be addressed by the vendor contract. Most employees, on the other hand, will be able to consent to testing on their own behalf. As further discussed below, testing costs may also depend on who is being tested, and whether an individual staff member or student's health care insurance provider will be billed for the test.

3. Testing Costs And Payment Liability

In some instances, schools may agree to cover the costs of testing; and may be required to cover the cost of testing it mandates for its employees. At the same time, depending on an employee's required duties, their insurer may be required to cover the cost. In short, there are many variables pertaining to testing costs, and any agreement with a vendor to conduct COVID-19 testing on campus should detail who will cover costs, and in what order. For example, if insurers will be billed first, the agreement should state the same, and also identify who is billed should insurance deny the claim.

4. Type Of Testing Implemented

By now, you have probably learned that not all COVID-19 tests are the same. An individual can obtain, and a vendor may provide molecular, antigen, and/or antibody testing. Molecular testing may be "pooled" or individualized. Some tests are faster, some less expensive, and may have varying reliability. For all of these reasons, it is important that a COVID-19 vendor agreement identify the type of testing that will be provided to school community members under the contract. Schools screening vendor options should also be sure to ask questions about the dependability, timing, and costs associated with the type of testing provided. Schools should address all of these variables in the resulting vendor agreement.

5. Responsibility For Test Collection, Transport, And Reporting

Logistically, a school entering into a contract with COVID-19 testing vendor should work with the vendor to identify which party – the school or the vendor – will provide staffing to administer tests if the tests are not self-collected. The parties will similarly need to identify who will be responsible for properly storing test samples until they can be transported to any off-site lab site (if necessary), and who will be responsible for the transport. In relation to these duties, someone will need to be responsible for appropriate record-keeping in relation to collected samples, and, as noted above, ensuring compliance with HIPAA and CMIA protocols relating to those collections. To the extent a school expects its vendor to manage these issues, it should ensure this is explicitly covered by the vendor agreement.

6. The Provision Of Training, If Any

If school staff will be responsible for managing any COVID-19 test collection, storage, or transport, the contract with its vendor should specify who will provide necessary training on testing protocols. This training

will also need to cover HIPAA and CMIA compliance obligations. Conversely, if the vendor is managing test collection, storage, and transport, its contract with the school specify that the vendor is responsible to ensuring that its staff or contractors have the requisite training to provide the contracted services.

7. Insurance And Indemnification

As with other vendor agreements, a school contracting for COVID-19 testing services should ensure that the vendor has adequate general and professional liability insurance, workers compensation insurance, as well as employer's liability insurance. Depending on the services provided, the school should also insist that it be named as additional insured under the general liability policy and require the vendor to provide it with proof of coverage. Schools should include language stating that the vendor's liability should not be limited to the coverage provided in the contract.

Schools should also ensure that their vendors indemnify them against any claims or harm resulting from the vendor's conduct, and the conduct of its contractors.

8. Other Privacy Concerns

In some instances, COVID-19 testing providers offer additional services, such as contact tracing. If contract tracing depends on software that school employees or other school community members download on a mobile device, schools must be mindful of additional privacy concerns and potential harm that can arise from software hacks and mishaps.

As with any contract, and in addition to the above recommendations, schools that contract with vendors to provide COVID-19 testing should ensure that the contract contains provisions sufficiently addressing the term of the agreement, how the agreement may be terminated, options for extending the agreement, if any, and what process applies in the event of a breach in the agreement. We further recommend general provisions relating to notice, severability, assignment, and contract modifications to address potentially changing needs at the pandemic spread fluctuates.

BENEFITS CORNER

INCOME TAX DEDUCTIONS

IRS Issues Guidance On Educators Deducting Out-Of-Pocket Expenses For COVID-19 Protective Items.

On February 4, 2021, the Internal Revenue Service (IRS) issued Revenue Procedure (Rev. Proc.) 2021-15. Rev. Proc. 2021-15 entitles "eligible educators" to deduct from their 2020 gross income, certain expenses incurred in order to prevent or limit the spread of the virus that causes COVID-19 in their classrooms.

Eligibility

In order to qualify for the deduction the individual must be an "eligible educator," which means that the individual is a "kindergarten through grade 12 teacher, instructor, counselor, principal, or aide in a school" who works at least 900 hours during a school year.

Covered Expenses

"Eligible educators" may permissibly deduct from their gross income unreimbursed expenses incurred after March 12, 2020 for certain "COVID-19 Protective Items."

The IRS guidance expressly provides that "eligible educators" may deduct expenses related to the prevention of the spread of COVID-19 in the classroom. The IRS provides that following list of expenses that would qualify for deduction:

- Face masks;
- Disinfectant for use against COVID-19;
- Hand soap;
- Hand sanitizer;
- Disposable gloves;
- Tape, paint, or chalk to guide social distancing;
- Physical barriers (for example, clear plexiglass);
- Air purifiers; and
- Other items recommended by the Centers for Disease Control and Prevention (CDC) to be used for the prevention of the spread of COVID-19

In order for an expense to qualify for deduction the expense must satisfy each of the following three conditions: (1) It was not reimbursed (i.e., was an out-of-pocket expense); (2) It was incurred after March 12, 2020; and (3) It was for the purchase of an item that was or will be used for the prevention of the spread of COVID-19 in the classroom.

Limitations on Deductions

In addition to the limitations on the type of expenses that qualify for coverage under the Revenue Procedure, and thus for deduction from "eligible educators'" gross income, the IRS limits the total deduction for covered expenses to $250 for each "eligible educator." Therefore, two "eligible educators" who file jointly may permissibly deduct up to $500.

NOTE:

While employers are under no legal obligation to inform their employees of this benefit, you and your school may elect to inform your school's employees of this tax benefit, so that "eligible educators" may maximize their deductions as part of their upcoming 2020 tax filings.

HEALTH & FSA BENEFITS

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.

MEDICAL EXPENSE REIMBURSEMENT

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.

LCW BEST PRACTICES TIMELINE

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

JANUARY/FEBRUARY

□ Review and revise/ update annual employment contracts.

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

FEBRUARY- EARLY MARCH

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

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

□ Tax documents must be filed if school conducts raffles:

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

□ Begin planning for spring fundraising event, if planning has not already begun.

MARCH- END OF APRIL

□ The Board should approve the budget for next school year.

□ Issue contracts to existing staff for the next school year.

□ Issue letters to current staff who the school is not inviting to come back the following year.

□ Assess vacancies in relation to enrollment.

□ Post job announcements and conduct recruiting.

- Resumes should be screened carefully to confirm that applicant has necessary core skills and criminal, background and credit checks should be done, along with multiple reference checks.

□ Summer Program:

- Consider whether summer program will be offered by the school and if so, identify the nature of the program and anticipated staffing and other requirements. Advise staff of summer program and opportunity to apply to work in the summer, and that hiring decisions will be made after final enrollment numbers are determined in the end of May.

- Distribute information on summer program to parents and set end date for registration by end of April.

- Enter into Facilities Use Agreement for summer program, if not operating summer program.

□ Transportation Agreements:

- Assess transportation needs for summer/ next year.

- Update/ renew relevant contracts.

MAY

□ Complete hiring of new employees for next school year.

□ Complete hiring for any summer programs.

□ If service agreements expire at the end of the school year, review service agreements to determine whether to change service providers (e.g., janitorial services, if applicable).

- Employees of a contracted entity are required to be fingerprinted pursuant to Education Code section 33192, if they provide the following services:
  - School and classroom janitorial.
  - School site administrative.
  - School site grounds and landscape maintenance.
  - Pupil transportation.
  - School site food-related.

- A private school contracting with an entity for construction, reconstruction, rehabilitation, or repair of a school facilities where the employees of the entity will have contact, other than limited contact, with pupils, must ensure one of the following:
  - That there is a physical barrier at the worksite to limit contact with pupils.
  - That there is continual supervision and monitoring of all employees of that entity, which may include either:
    - Surveillance of employees of the entity by School personnel; or
    - Supervision by an employee of the entity who the Department of Justice has ascertained has not been convicted of a violent or serious felony, which may be done by fingerprinting pursuant to Education Code section 33192. (See Education Code section 33193).

If conducting end of school year fundraising:

□ Raffles:

- Qualified tax-exempt organizations, including nonprofit educational organizations, may conduct raffles under Penal Code section 320.5.
- In order to comply with Penal Code section 320.5, raffles must meet all of the following requirements:
  - Each ticket must be sold with a detachable coupon or stub, and both the ticket and its associated coupon must be marked with a unique and matching identifier.
  - Winners of the prizes must be determined by draw from among the coupons or stubs. The draw must be conducted in California under the supervision of a natural person who is 18 years of age or older.
  - At least 90 percent of the gross receipts generated from the sale of raffle tickets for any given draw must be used by to benefit the school or provide support for beneficial or charitable purposes.

□ Auctions:

- The school must charge sales or use tax on merchandise or goods donated by a donor who paid sales or use tax at time of purchase.
  - Donations of gift cards, gift certificates, services, or cash donations are not subject to sales tax since there is not an exchange of merchandise or goods.
  - Items withdrawn from a seller's inventory and donated directly to nonprofit schools located in California are not subject to use tax.
    - E.g., if a business donates items that it sells directly to the school for the auction, the school does not have to charge sales or use taxes. However, if a parent goes out and purchases items to donate to an auction (unless those items are gift certificates, gift cards, or services), the school will need to charge sales or use taxes on those items.

CONSORTIUM CALLS OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves

of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature Consortium Calls of the Month in our newsletter, describing one or more interesting calls and how the issues were resolved. All identifiable details will be changed or omitted.

CONSORTIUM CALL NO. ONE

ISSUE: An administrator of an independent school explained to an LCW attorney that the school currently has employees working remotely as an accommodation because they are at increased risk of severe illness if they contract COVID-19. The administrator asked if these employees will be able to return to working onsite after they receive the COVID-19 vaccination.

RESPONSE: The LCW attorney explained that after these employees receive both the first and second doses of the COVID-19 vaccination, the administrator should meet with the employees to discuss having them return to work in person and the timing for doing so. The LCW attorney noted that it takes several weeks after the second dose for the vaccine to create full immunity. Also, there may be circumstances where accommodations should still be made, such as if the employee lives with a household member who is at increased risk of severe illness should he/she/they contract COVID-19 and that family member has not yet been vaccinated. Further, for employees who do not receive the vaccine because they have received an exemption due to a disability or sincerely held religious practice or belief, there is still a need to discuss accommodations to the extent those employees are at increased risk of severe illness should they contract COVID-19.

CONSORTIUM CALL NO. TWO

ISSUE: An administrative employee responsible for handling human resources matters for an independent school sent an email to an LCW attorney and explained that the school would like to collect proof of receipt of the COVID-19 vaccination from employees. The school employee asked whether employers are legally permitted to collect this information, and, if so, where the school should store the information.

RESPONSE: The LCW attorney explained that it is generally legally permissible for an employer to collect proof of a COVID-19 vaccination from an employee. However, the school must obtain a valid authorization to receive the information that is consistent with the requirements of the California Confidentiality of Medical Information Act (CMIA), which is signed by the employee. A valid authorization under the CMIA has the following elements:

1. Identifies the person authorized to release the information;

2. Identifies the person authorized to receive the information;

3. Identifies any limitations on the types of information to be disclosed and the purposes for which the information can be used;

4. States a specific date after which the health care provider is no longer authorized to disclose the information;

5. Is typed in 14 point font or handwritten by the person signing it;

6. Is separate from any other language contained on the same page and executed by a signature that serves no other purpose; and

7. Advises the signing party of the right to receive a copy of the authorization.

The LCW attorney further explained that the Equal Employment Opportunity Commission (EEOC) has provided guidance that "[s]imply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry." However, the EEOC cautions that follow-up questions related to the COVID-19 vaccination, such as asking why an individual did not receive a vaccination, may elicit information about a disability. Therefore, any follow-up questions would need to meet the Americans with Disabilities Act (ADA) "job-related and consistent with business necessity" standard. The EEOC further advises employers to advise employees to provide only the proof of receipt of the COVID-19 vaccination and not to provide or volunteer any medical information.

The LCW attorney further explained that the school should treat COVID-19 vaccination records as medical records and store them in a manner consistent with the ADA's requirements for storage of medical records *(i.e.*, in the employee's medical file, and not in the employee's personnel file.).

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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 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.

LCW LIEBERT CASSIDY WHITMORE

Train the Trainer Program

Become a Certified Harassment Prevention Trainer for your Organization!

LCW Train the Trainer sessions will provide you with the necessary training tools to conduct the mandatory AB 1825, SB 1343, AB 2053, and AB 1661 training at your organization.

California Law requires employers to provide harassment prevention training to all employees. Every two years, supervisors must participate in a 2-hour course, and non-supervisors must participate in a 1-hour course.

QUICK FACTS:

- Trainers will become certified to train both supervisors and non-supervisors at/for their organization.
- Attendees receive updated training materials for 2 years.
- Pricing: $2,000 per person. ($1,800 for Consortium members).

Upcoming Dates:

Via Zoom over a two day period

March 31, 2021 and April 1, 2021

9:00 AM - 12:00 PM

INTERESTED?

To learn more about our program, please visit our website below or contact Anna Sanzone-Ortiz 310.981.2051 or asanzone-ortiz@lcwlegal.com .

www.lcwlegal.com/train-the-trainer

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Mar. 9 **"Employee Policies Every California Private School Handbooks Should Contain and Why"**
CAIS Consortium | Webinar | Linda K. Adler

Mar. 16 **"How To Conduct Student Misconduct Investigations: What School Administrators Need To Know"**
ACSI Consortium | Webinar | Brett A. Overby

Apr. 7 **"Emerging Legal Issues"**
Builders of Jewish Education Consortium | Webinar | Michael Blacher

Apr. 13 **"Crisis Management: How to Approach Chaos in an Organized and Thoughtful Manner"**
ACSI Consortium | Webinar | Grace Chan

Apr. 20 **"Planning and Preparing for School Travel Amid COVID-19"**
Golden State Independent School Consortium | Webinar | Julie L. Strom

Apr. 27 **"Emerging Legal Issues"**
CAIS Consortium | Webinar | Michael Blacher

Speaking Engagements

Apr. 27 **"Legal Update"**
California Independent Schools Business Officers Association (Cal-ISBOA) Annual Conference | Webinar | Michael Blacher

Seminars/Webinars

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

Mar. 31 **"Train the Trainer: Harassment Prevention - Part 1"**
Liebert Cassidy Whitmore | Webinar | Christopher S. Frederick

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

Apr. 6 **"Five Things California Private Schools Need to Know about: Layoffs and Furloughs"**
Liebert Cassidy Whitmore | Webinar | Donna Williamson

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

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