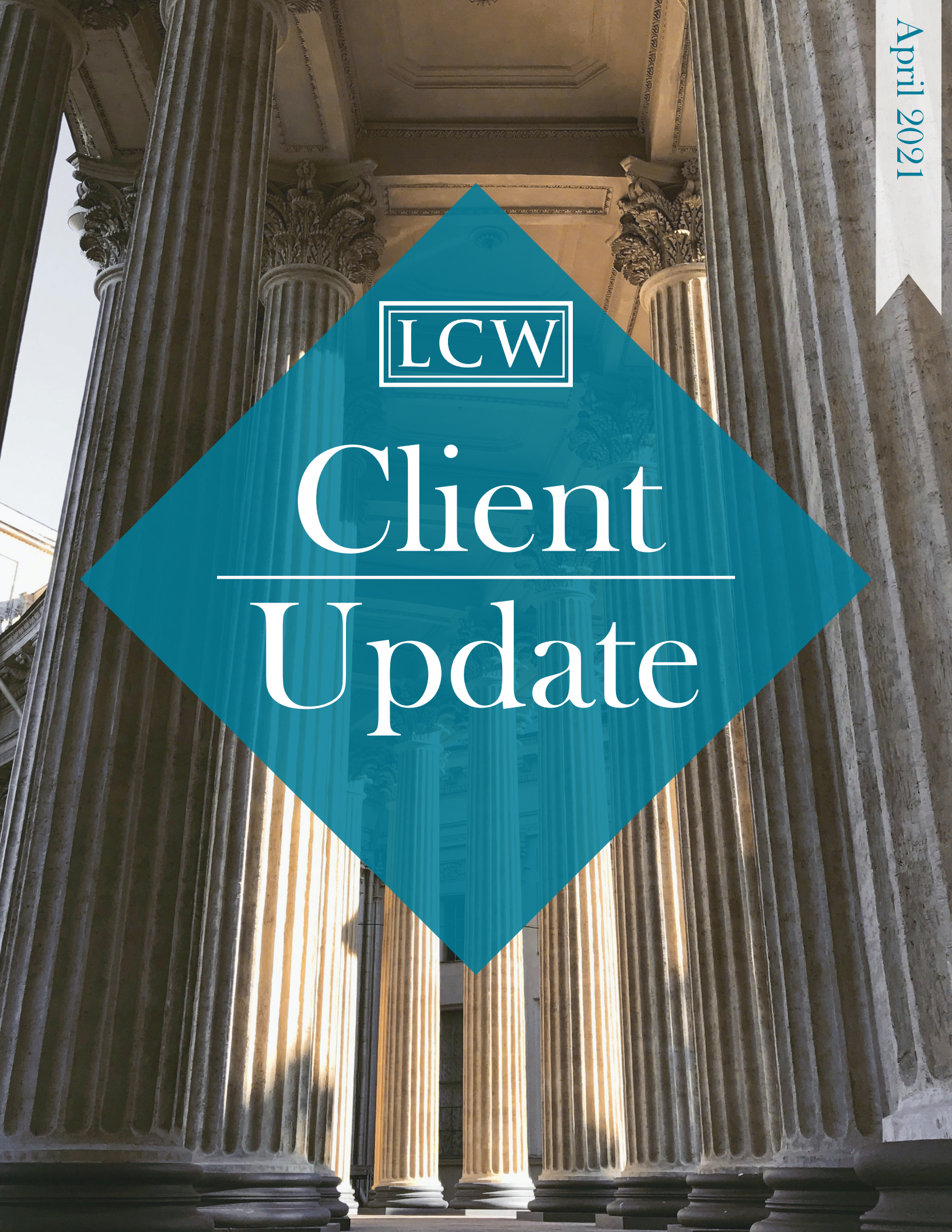


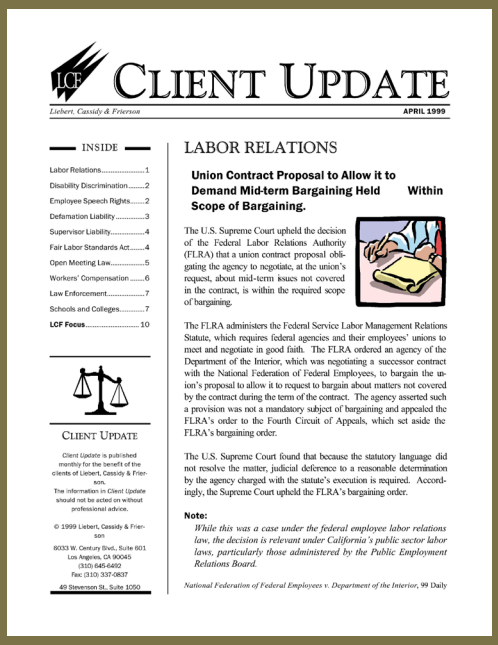
LCW

Client Update

April 2021

We're pleased to introduce our new *Client Update* format. While our layout has changed over the past 40 years, the content remains geared towards bringing you the latest in public sector labor and employment law in an easily digestible manner.

Before diving in to our new magazine, here's a look back at some of our previous covers. We hope you enjoy the new layout and features!


CLIENT UPDATE

Liebert, Cassidy & Frierson

APRIL 1999

INSIDE

Labor Relations.....1
Disability Discrimination.....2
Employee Speech Rights.....2
Defamation Liability.....3
Supervisor Liability.....4
Fair Labor Standards Act.....4
Open Meeting Law.....5
Workers' Compensation.....6
Law Enforcement.....7
Schools and Colleges.....7
LCF Focus.....10

CLIENT UPDATE

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LABOR RELATIONS

Union Contract Proposal to Allow it to Demand Mid-term Bargaining Held Within Scope of Bargaining.

The U.S. Supreme Court upheld the decision of the Federal Labor Relations Authority (FLRA) that a union contract proposal obligating the agency to negotiate, at the union's request, about mid-term issues not covered in the contract, is within the required scope of bargaining.

The FLRA administers the Federal Service Labor Management Relations Statute, which requires federal agencies and their employees' unions to meet and negotiate in good faith. The FLRA ordered an agency of the Department of the Interior, which was negotiating a successor contract with the National Federation of Federal Employees, to bargain the union's proposal to allow it to request to bargain about matters not covered by the contract during the term of the contract. The agency asserted such a provision was not a mandatory subject of bargaining and appealed the FLRA's order to the Fourth Circuit of Appeals, which set aside the FLRA's bargaining order.

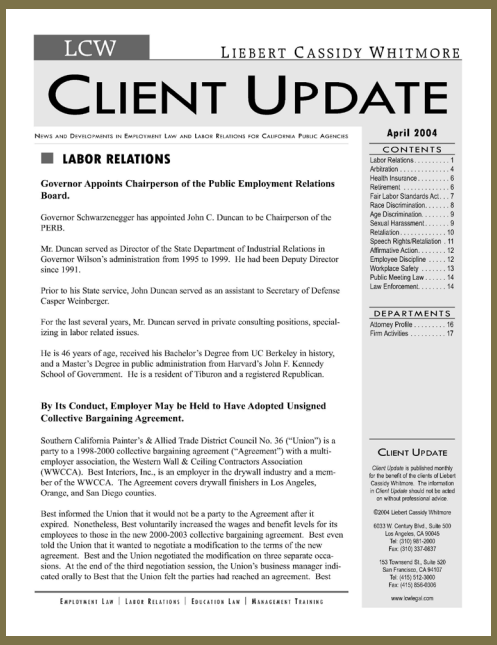
The U.S. Supreme Court found that because the statutory language did not resolve the matter, judicial deference to a reasonable determination by the agency charged with the statute's execution is required. Accordingly, the Supreme Court upheld the FLRA's bargaining order.

Note:

While this was a case under the federal employee labor relations law, the decision is relevant under California's public sector labor laws, particularly those administered by the Public Employment Relations Board.

National Federation of Federal Employees v. Department of the Interior, 99 Daily

1999


LCW LIEBERT CASSIDY WHITMORE

CLIENT UPDATE

News and Developments in Employment Law and Labor Relations for California Public Agencies

April 2004

CONTENTS

Labor Relations.....1
Arbitration.....4
Health Insurance.....6
Retirement.....6
Fair Labor Standards Act.....7
Race Discrimination.....8
Age Discrimination.....9
Sexual Harassment.....9
Retaliation.....10
Speech Rights/Retaliation.....11
Affirmative Action.....12
Employee Discipline.....12
Workplace Safety.....13
Public Meeting Law.....14
Law Enforcement.....14

DEPARTMENTS

Attorney Profile.....16
Firm Activities.....17

LABOR RELATIONS

Governor Appoints Chairperson of the Public Employment Relations Board.

Governor Schwarzenegger has appointed John C. Duncan to be Chairperson of the PERB.

Mr. Duncan served as Director of the State Department of Industrial Relations in Governor Wilson's administration from 1995 to 1999. He had been Deputy Director since 1991.

Prior to his State service, John Duncan served as an assistant to Secretary of Defense Casper Weinberger.

For the last several years, Mr. Duncan served in private consulting positions, specializing in labor related issues.

He is 46 years of age, received his Bachelor's Degree from UC Berkeley in history, and a Master's Degree in public administration from Harvard's John F. Kennedy School of Government. He is a resident of Tiburon and a registered Republican.

By Its Conduct, Employer May be Held to Have Adopted Unsigned Collective Bargaining Agreement.

Southern California Painter's & Allied Trade District Council No. 36 ("Union") is a party to a 1998-2000 collective bargaining agreement ("Agreement") with a multi-employer association, the Western Wall & Ceiling Contractors Association (WWCCA). Best Interiors, Inc., is an employer in the drywall industry and a member of the WWCCA. The Agreement covers drywall finishers in Los Angeles, Orange, and San Diego counties.

Best informed the Union that it would not be a party to the Agreement after it expired. Nonetheless, Best voluntarily increased the wages and benefit levels for its employees to those in the new 2000-2003 collective bargaining agreement. Best even told the Union that it wanted to negotiate a modification to the terms of the new agreement. Best and the Union negotiated the modification on three separate occasions. At the end of the third negotiation session, the Union's business manager indicated orally to Best that the Union felt the parties had reached an agreement. Best

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LCW LIEBERT CASSIDY WHITMORE

CLIENT UPDATE

Monthly news and developments in employment law and labor relations for California Public Agencies.

JANUARY 2015

INDEX

Public Records Act.....1
Disability Discrimination.....2
Public Safety Officer Procedural Bill of Rights.....5
Discipline.....6
Labor Relations.....8
Retirement.....10
Harassment.....14
ACA Corner.....15

LCW NEWS

LCW Conference.....19
Firm Publications.....19
Firm Activities.....20

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PUBLIC RECORDS ACT

Agency Waived Privilege by Inadvertently Disclosing Documents in Response to PRA Request.

Estuardo Arden contends that the City of Los Angeles improperly collected a Telephone Users Tax (TUT). In January 2013, Ardon's attorney submitted to the City a Public Records Act (PRA) request requesting documents pertaining to the City's tax practices. The City identified approximately 33 documents and produced them to Ardon's attorney in February 2013.

In April 2013, Ardon's attorney notified the City that two of the documents the City produced pursuant to the PRA appeared to be listed in a log provided by the City that identified documents the City was not producing due to privilege, and that a third document disclosed the contents of the first two documents. The City responded that the documents were inadvertently produced and demanded that Ardon's attorney return the documents and agree not to rely on the documents in any way. Ardon's attorney refused to return the documents contending that the City waived any claim of privilege by disclosing the documents.

The City filed a motion to compel the return of the documents and to disqualify Ardon's attorney. The trial court denied the motion and the City appealed. The Court of Appeal affirmed.

Government Code section 6254, subsection (k) provides that records do not have to be disclosed under the PRA if they are the subject of a privilege created by the Evidence Code. However, Section 6254.5 provides that whenever a state or local agency discloses to a member of the public a public record that is otherwise exempt from disclosure under the PRA, the disclosure constitutes a waiver of the exemptions provided in Section 6254 or other similar provisions of law.

The City argued that statutory privileges are not waived if the protected document is "inadvertently disclosed." The Evidence Code and the Code of Civil Procedure expressly protect documents that are inadvertently disclosed during litigation. However, the Court held that disclosure under the PRA is not the same as disclosure during discovery. The PRA states that, notwithstanding any other provision of law, a privileged document disclosed pursuant to the PRA is waived. The PRA does not provide the disclosing party any right or mechanism to recover a document once it has been turned over. Further, if the Legislature wanted to create an exception for inadvertently-disclosed documents, it could have done so. For example, the Legislature created nine other exceptions, but none of the exceptions exempt inadvertent disclosure. Therefore, the Court of Appeal refused to imply an exception, and held that disclosures made inadvertently, by mistake, or as a result of excusable neglect are not exempted from the provisions of Section 6254.5, which waive any privilege that would otherwise attach to the documents.

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2015


LIEBERT CASSIDY WHITMORE

CLIENT UPDATE

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

MAY 2020

INDEX

Benefits Corner.....5
Consortium Call of the Month.....5
Did You Know?.....5
Discrimination.....2
Firm Victories.....1

LCW NEWS

Firm Activities.....7
Firm Publications.....6
Upcoming Webinar.....6

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.

40 YEARS 1980 - 2020

FIRM VICTORIES

Peace Officer's Termination Upheld Based On City Council's Independent Review Of Administrative Record.

LCW Partner Laura Drottz Kalty, Senior Counsel David Urban, and Associate Attorney Stephanie Lowe successfully represented a city in a peace officer's termination appeal beginning at the administrative appeal hearing and ending a victory at the California Court of Appeal. The Court of Appeal affirmed the termination in an unpublished decision.

The case began in June 2013, when the city's police department placed the officer on a performance improvement plan (PIP). In July 2013, the officer stated in the presence of some detectives that he did not trust his supervisors. During a PIP meeting in August 2013, the officer referred to supervisors at the department as "clowns". The department found his comments violated department policies forbidding: (i) disparaging remarks or conduct concerning supervisory authority that "subverts the good order, efficiency and discipline of the Department or which would tend to discredit any member thereof"; and (ii) disobedience or insubordination.

Based on years of progressive discipline dating back to 2008 and the officer's conduct when given a "last chance" during the course of his PIP, in December 2013, the department issued a notice of intent to terminate the officer for his policy violations, prior misconduct and performance issues. After a *Skelly* meeting, the department terminated the officer.

During his administrative appeal hearing, the officer admitted making the statements at issue. The hearing officer's written report and recommendation, however, excused the officer's statements as the result of "severe stress" from prior disciplinary actions and the PIP. Further, the hearing officer disagreed with the department that the officer was terminated based upon a multi-year pattern of misconduct and performance issues. The hearing officer concluded that no evidence existed to show the department had just cause to terminate the officer, and that another officer received a much lighter punishment for making false, misleading or malicious statements. The hearing officer recommended a two-week suspension and that the officer be reinstated in good standing.

The city council rejected the hearing officer's recommendation and upheld the officer's termination. The city council found that a preponderance of the evidence showed that the officer's termination was warranted based on his policy violations and history of poor performance and discipline. Separately, the city council also concluded that the hearing officer had overlooked key evidence in making his recommendation. Several of the hearing officer's findings contradicted the witnesses' testimony, including the officer's admissions. The hearing officer did not cite to evidence in the administrative record to support his findings. The city council noted that the hearing officer had demonstrated bias against the city by spending time with the officer's counsel during multiple smoking breaks at the administrative appeal hearing. The city council rejected the officer's argument

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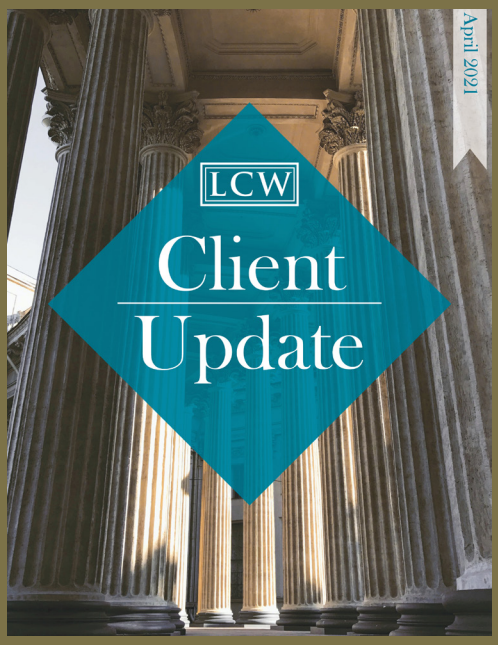

2021

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TABLE OF CONTENTS

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FIRM VICTORY

Sergeant's Demotion Upheld Due To Misconduct And Abrasive Management Style.

LCW Associate Sue Ann Renfro and Partner Jesse Maddox successfully represented a city in a peace officer's disciplinary appeal.

In 2017, a police sergeant was the subject of a grievance that a subordinate officer filed. An independent investigation sustained findings that the sergeant was discourteous, used obscene language, made disparaging remarks, and falsified a report. The chief of police then demoted the officer from the rank of sergeant to officer.

The officer appealed his demotion to the city's three-member Commission, which found there was just cause for the demotion. However, the Commission found the discipline was excessive and restored the officer to the position of corporal. The officer then filed a petition for writ of administrative mandate with the trial court to challenge the demotion to corporal. The trial court denied the writ petition, holding the weight of the evidence supported the Commission's findings.

The trial court found that sufficient evidence, including testimony from multiple department members, showed that the officer was "seriously lacking" interpersonal skills and that his abrasive management style frustrated the agency's efficiency and mission. The court found that evidence also showed that the officer regularly issued instructions and orders to subordinates in an "abrupt, rude and inappropriate manner" and at times in the presence of citizens or other officers. The court noted that the officer's intimidating tactics as a supervisor resulted in the mishandling of an investigation. The officer was repeatedly advised to improve how he communicated with other officers; he even received a counseling session for berating another officer in front of others.

Based on these facts, the trial court held that there was no abuse of discretion in demoting the officer to corporal

Note:

The trial court indicated that the department could expect more from the former sergeant because of his supervisory responsibilities. This fact, coupled with the counseling that the sergeant received, showed that his demotion to corporal was an appropriate penalty.

Fire Captain's Termination Upheld Following Off-Duty Assault.

LCW Associate Tony Carvalho successfully represented a city in a termination appeal involving a fire department captain.

In October 2018, the captain and his wife attended a birthday party at a colleague's home. In attendance were the friends and family of the hosts, as well as other fire department personnel. The captain's brother, who was another fire department employee and with whom the captain had a fraught personal relationship, also attended the party with his wife. During the party, the captain's brother made a derogatory comment about the captain's wife, which resulted in the captain striking his brother.

The city determined that the captain's actions during the party violated multiple department policies, including policies on proper conduct and good order. Following a pre-disciplinary meeting, the city terminated the captain.

The captain appealed his termination and alleged that his brother was not a credible witness in light of his brother's inconsistent statements at the party about the captain's wife, as well as other incidents unrelated to the party. The captain claimed he did not strike his brother first, and that his actions were in defense of his wife--who the captain claimed was in imminent physical danger from his brother. The captain also presented evidence to support lesser discipline, including his lengthy, discipline-free tenure with the city and testimony from other fire department personnel about his character.

The hearing officer found that even assuming the captain's brother was not a credible witness, the weight of the remaining evidence from other witnesses supported that the captain struck the first blow while his brother was turned away from him. As such, no persuasive evidence indicated that the captain had reason to believe he or his wife were at risk of imminent danger at the time of the assault. The hearing officer also found that the act occurred in front of members of the public, including young children at the party.

The hearing officer upheld the termination in light of the captain's responsibility to set a good example for his community, whether on-duty or off-duty, particularly given his supervisory rank within the fire department. The hearing officer concluded the captain's actions were the antithesis of what the public expects from fire department personnel.

Note:

Fire safety officers have a position of trust with the public. These officers, particularly at the supervisory level, are held to high standards of conduct, whether on-duty or off-duty. The off-duty misconduct in this case had a nexus to the job because the assault was on a fellow firefighter and occurred at a party attended by the public and other department firefighters.

DISCRIMINATION

District Court Was Wrong To Dismiss University Professor's U.S. Equal Pay Act Claim.

Jennifer Freyd is a Professor of Psychology at the University of Oregon (University) and a leader in the field on the psychology of trauma. At the University, Freyd is the principal investigator at the Freyd Dynamics Laboratory where she conducts empirical studies related to the effects of trauma and is responsible for running the laboratory and supervising both doctoral candidates and undergraduate students. Freyd is the editor of the *Journal of Trauma & Dissociation* and has served on the editorial board for many other journals. In addition, Freyd has served in a variety of roles at the University, and consults for other entities.

The University adjusts tenured faculty salaries using two different mechanisms. First, a merit raise is based on job performance and the contributions made in the areas of research, teaching, and service. Second, a retention raise is based on whether the faculty member is being recruited by another academic institution. To determine whether to grant a retention raise, the University considers many factors, including: the faculty member's productivity and contribution to the University; if the faculty member's departure is imminent in the absence of a raise; any previous retention increases; implications for internal equity within the unit; and the strategic goals of the University. While Freyd received initial inquiries from other universities, she never had a retention negotiation nor received a retention raise.

In 2014, as part of an unrelated public records request, Freyd unintentionally received salary information for the Psychology Department faculty. That information showed she was making between $14,000 and $42,000 less per year than four male colleagues with comparable rank and tenure. Each of those four men had received retention raises or had at least one retention negotiation. Freyd conducted her own regression analysis on the data and noticed a marked disparity in pay between the genders. Freyd and two other female psychology professors then conducted a second regression analysis, which presented similar results.

In the spring 2016, the Psychology Department conducted a mandatory annual self-study. The self-study revealed an annual average difference of $25,000 in salary between male and female professors. The study concluded this discrepancy appeared to have emerged mostly as a result of retention raises. Indeed, of the 20 retention negotiations from 2006 through 2016, only four affected female faculty and only one of the successful retention cases involved a woman.

Several months later, the Department Head conducted his own regression analysis and sent his results to the Dean and Associate Dean of the College of Arts and Sciences. The Department Head recommended the University address its "most glaring" inequity case –Freyd. But, the Dean and Associate Dean concluded Freyd's compensation "was not unfairly, discriminatorily, or improperly set." Accordingly, she was denied a raise.

Freyd sued the University, the Dean. and Assistant Dean alleging, among other claims, violations of the U.S. Equal Pay Act, Title VII of the Civil Rights Act, and Title IX. The district court found in favor of the University because Freyd could not show that she and her comparators performed substantially equal or comparable work. The district court also concluded that Freyd didn't have sufficient evidence of disparate impact or discriminatory intent, and that the University did show its salary practices were job related and a business necessity. Freyd appealed.

The U.S. Equal Pay Act prohibits wage discrimination based on sex. The Act requires a female employee to show that a male employee is paid different wages for equal work in jobs that are "substantially equal."

On appeal, the Ninth Circuit concluded the district court was wrong to rule in the University's favor on Freyd's Equal Pay Act claim. Specifically, the court concluded that a reasonable jury could find that Freyd and her comparators perform a "common core of tasks"

and do substantially equal work. For example, Freyd and three of the comparators are all full professors in the Psychology Department who conduct research, teach classes, advise students, serve actively on University committees, and participate in relevant associations and organizations. While their duties may not have been identical, the court reasoned that their responsibilities were not so unique that they could not be compared for purposes of the Equal Pay Act.

The Ninth Circuit also found that the district court erred in dismissing Freyd's Title VII disparate impact claim. To establish disparate impact under Title VII, an employee must show that a seemingly neutral employment practice has a significantly discriminatory impact on a protected group. The employee also must establish that the challenged practice is: not job related; or is inconsistent with business necessity. Here, the court noted that Freyd challenged the practice of awarding retention raises without also increasing the salaries of other professors of comparable merit and seniority. Further, because of numerous factors related to gender, female faculty may be less willing to move and thus less likely to entertain an overture from another institution. It also noted that Freyd had significant evidence that the University's practices caused a significant discriminatory impact on female faculty. Freyd's evidence included the statistical analysis of an economist who concluded female professors earned $15,000 less than male professors, as well as the University's own self-study data. Finally, the court noted that Freyd may be able to establish the University's retention raise practice was not a business necessity because she offered an alternative practice that may be equally effective in accomplishing the University's goal of retaining talented faculty.

However, the Ninth Circuit determined that the district court was right to rule in the University's favor with respect to Freyd's Title VII and Title IX disparate treatment claims. Regarding Freyd's TVII disparate treatment claim, the court noted that because equity raises and retention raises are not comparable, it could not say that Freyd's comparators were treated "more favorably" than she was. Similarly, Freyd's Title IX disparate treatment claim failed because Freyd presented no evidence of intentional discrimination.

The Ninth Circuit remanded the case back to the district court for further proceedings on Freyd's Equal Pay Act and disparate treatment claims.

Freyd v. Univ. of Oregon, 2021 WL 958217 (9th Cir. Mar. 15, 2021).

Note:

This case involved the US Equal Pay Act, which prohibits wage discrimination only on the basis of sex. California's Equal Pay Act (Labor Code sections 432.3 and 1197.5) prohibits wage discrimination on the basis of sex, race, and ethnicity. California's law provides employees greater protection than the US Equal Pay law because it prevents an employer from relying on an employee's salary history to justify a wage disparity. Conducting an equal pay audit can ensure that all employees are paid similarly for substantially equal or similar work.

CALIFORNIA PUBLIC RECORDS ACT

Disclosing Peace Officer Records Related to Dishonesty Was Protected Activity Under Anti-SLAPP Statute.

In 2018, the City of Rio Vista (City) terminated police officer John Collondrez after an investigation found he was dishonest and committed misconduct, including making false reports. Collondrez appealed his termination. Prior to his appeal hearing, the parties' reached a settlement. The City agreed to pay $35,000 to Collondrez and he agreed to resign from his employment, effective December 2017. The settlement agreement stated that the City would maintain all disciplinary notices and investigation materials related to Collondrez's employment in his personnel file and that those records would only be released as required by law or court order. The agreement also stated the City would notify Collondrez of any request to release his personnel records.

In January 2019, the City received a number of media requests under the California Public Records Act (CPRA) for records related to Collondrez's disciplinary action. The City produced responsive records from Collondrez's personnel file and gave him prior notice of some, but not all of the disclosures. The media then reported information from the disclosed records, and Collondrez's subsequent employer (Uber) terminated his employment in February 2019 in light of his prior misconduct.

Collondrez then sued the City and Police Chief Dan Dailey for breach of contract, invasion of privacy, interference with prospective economic advantage, and intentional infliction of emotional distress. The City moved to strike the complaint under California's anti-SLAPP statute, on the grounds that it was required to disclose Collondrez's records pursuant to Penal Code section 832.7 and the CPRA.

A court examines an anti-SLAPP motion, which allows for the early dismissal of a case that thwarts constitutionally-protected speech, in two parts: (i) whether a defendant has shown the challenged cause of action arises from protected activity; and (ii) whether the plaintiff has demonstrated a probability of prevailing on the claim. Under this framework, the trial court granted the City's motion to strike in part, finding that Collondrez had shown a probability of prevailing on his causes of action for breach of contract and invasion of privacy, but not on his other two causes of action. Both parties appealed, and the California Court of Appeal affirmed in part and reversed in part.

As to the first element of the anti-SLAPP framework, Collondrez argued on appeal that his causes of action did not arise from protected activity because the essence of his complaint was not the release of his personnel information, but rather the City's failure to give him pre-release notice of disclosure in accordance with the settlement agreement. The Court of Appeal disagreed, holding that the complaint arose from the protected speech, namely, the City's release of Collondrez's personnel information to media outlets.

As to the second element, the Court of Appeal held Collondrez failed to show a probability of prevailing on the merits of any cause of action against the City because the City was compelled to produce his personnel

information regarding any "sustained findings" of officer dishonesty pursuant to Penal Code section 832.7 and the CPRA. Notably, the Court of Appeal disagreed with Collondrez's argument that the settlement agreement meant that there was no "sustained finding" of officer dishonesty against him, and that therefore, the City was not compelled to disclose his records. The Court of Appeal found that a "sustained finding" is established when an officer has had the opportunity to appeal, and not solely when an appeal is actually completed. Collondrez was provided the opportunity to appeal his termination, and therefore his records concerned a "sustained finding" of dishonesty and were properly disclosed as required by the CPRA requests.

Since Collondrez's entire complaint against the City was based on a claim of wrongful disclosure of his records, the Court of Appeal held the City's anti-SLAPP motion should have been granted in full and decided in favor of the City.

Collondrez v. City of Rio Vista, 2021 WL 973420 (Cal. At. App., Mar. 16, 2021).

Note:

Anti-SLAPP motions are a powerful tool for early dismissal of lawsuits involving issues of protected speech. This case affirms that the disclosure of peace officer records pursuant to a CPRA request is protected speech that can be protected under the anti-SLAPP statute. This case is important because the Court of Appeal held that a "sustained finding" of dishonesty that triggers a CPRA disclosure is established when an officer has had the opportunity to appeal, and not solely when an appeal is actually completed. As a result, a settlement agreement that is completed after the officer has an opportunity to appeal discipline does not prevent the discovery of certain peace officer records.

Certain Peace Officer Records Created Before 2019 Must Be Disclosed In Response To CPRA Requests.

On January 1, 2019, Senate Bill 1421 (SB 1421) went into effect, which amended Penal Code section 832.7 to allow disclosure of peace officer records related to officer-involved shootings, serious use of force and sustained findings of sexual assault or serious dishonesty under the California Public Records Act (CPRA). Previously, these records could only be accessed through a *Pitchess* motion using the judicial process laid out in Evidence Code sections 1044 and 1045.

Following the passage of SB 1421, the Ventura County Deputy Sheriffs' Association (Association) sued the County of Ventura (County) and the Sheriff of Ventura County for a court order confirming that Section 832.7 only required disclosure of peace officer records for conduct occurring after January 1, 2019.

While the case was pending in the trial court, the California Court of Appeal's First District issued an opinion in *Walnut Creek Police Officers' Association v. City of Walnut Creek (Walnut Creek)*, which held that SB 1421 required the disclosure of peace officer records created prior to January 1, 2019. Despite the *Walnut Creek* decision, the trial court found for the Association and issued a permanent injunction preventing the County from disclosing peace officer records that were created prior to 2019 in response to CPRA requests.

The County's Public Defender intervened and appealed to the Court of Appeal's Second District, alleging the trial court was bound by the *Walnut Creek* decision. On appeal, the Association argued SB 1421 cannot retroactively divest peace officers of their right to confidentiality in records. The Court of Appeal disagreed with the Association and reversed the trial court's judgment.

Relying on the *Walnut Creek* decision, the Court of Appeal found that Section 832.7 adequately safeguards an officer's right to privacy by only requiring disclosure of records under limited circumstances, including instances of egregious misconduct. The Court of Appeal also found that the Legislature intended SB 1421 to apply to pre-2019 records in accordance with its stated goal of increasing transparency regarding incidents of peace officer misconduct.

For these reasons, the Court of Appeal held that the trial court erred in failing to follow *Walnut Creek*, and held SB 1421 applies retroactively to require the disclosure of responsive records created prior to 2019.

Ventura County Deputy Sheriffs' Association v. County of Ventura, 61 Cal.App.5th 585 (2021).

Note:

This case again affirms that SB 1421 applies retroactively to peace officer records created prior to January 1, 2019. LCW attorneys can help agencies comply in full with their CPRA obligations.

FIRST AMENDMENT

School District Did Not Violate Constitution Or Title VII In Football Coach Prayer Case.

Bremerton School District (BSD) employed Joseph Kennedy as a football coach at Bremerton High School (BHS) from 2008 to 2015. Kennedy is a practicing Christian, and his religious beliefs required him to give thanks through prayer at the end of each game by kneeling at the 50-yard line. Because Kennedy's religious beliefs occurred on the field where the game was played immediately after the game, spectators including students, parents, and community members would observe Kennedy's religious conduct. While Kennedy initially prayed alone, a group of BHS players soon asked if they could join him. Over time, the group grew to include the majority of the team. Kennedy's religious practice also evolved and he began giving short speeches at midfield after games with participants kneeled around him.

BSD first learned that Kennedy was praying on the field in September 2015, when an opposing team's coach told BHS' principal that Kennedy had asked his team to join him in prayer on the field. After learning of the incident, the Athletic Director spoke with Kennedy and expressed disapproval in the religious practice. In response, Kennedy posted on Facebook "I think I just might have been fired for praying." Subsequently, BSD was flooded with thousands of emails, letters, and telephone calls from around the Country regarding Kennedy's prayer.

BSD's discovery of Kennedy's 50-yard line prayers prompted an inquiry into whether Kennedy was complying with its Religious-Related Activities and Practices policy. That policy provided that school staff should not encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or other devotional activity. BSD's investigation revealed that the coaching staff received little training regarding BSD's policy, so the superintendent sent Kennedy a letter advising him that he could continue to give inspirational talks, but they must remain entirely secular in nature. The letter also noted that student religious activity needed to be entirely student-initiated; Kennedy's actions could not be perceived as an endorsement of that activity; and that while Kennedy was free to engage in religious activity, it could not interfere with his job responsibilities and must be physically separate from any student activity. While Kennedy temporarily prayed after everyone else had left the stadium, he alleged he soon returned to his practice of praying immediately after games. However, BSD received no further reports of Kennedy praying on the field, and BSD officials believed he was complying with its directive.

On October 14, 2015, Kennedy wrote a letter to BSD through his lawyer announcing he would resume praying on the 50-yard line immediately after the conclusion of the October 16, 2015 football game. Kennedy's intention to pray on the field was widely publicized through Kennedy and his representatives, and BSD arranged to secure the field from public access. Following the game, Kennedy prayed as he had indicated he would do, with a large gathering of coaches and players around him. Members of the public also jumped the fence to join him, resulting in a stampede. On October 23, 2015, BSD sent Kennedy a letter explaining that his conduct at the October 16th game violated BSD's policy. While BSD offered Kennedy a private location to pray after games or suggested that he pray after the stadium had emptied, Kennedy responded the only acceptable outcome would be for BSD to permit Kennedy to pray on the 50-yard line immediately after games. Kennedy continued his behavior in violation of BSD's directives. BSD placed him on paid administrative leave on October 26, 2015. During this time, BSD employees felt repercussions due to the attention Kennedy gave the issue, and many were concerned for their safety. Kennedy did not apply for a coaching position for the following season, but he initiated a lawsuit against BSD asserting his First Amendment and Title VII rights were violated.

After significant litigation and numerous appeals, the district court eventually entered judgment in BSD's favor finding that the risk of constitutional liability associated with

Kennedy's religious conduct was the sole reason BSD suspended him. The district court also concluded that BSD's actions were justified due to the risk of an Establishment Clause violation if BSD allowed Kennedy to continue with his religious conduct. Kennedy appealed.

On appeal, the Ninth Circuit first considered Kennedy's free speech claim. The Court noted two factors were at issue: 1) whether Kennedy spoke as a private citizen or public employee; and 2) whether BSD had adequate justification for treating Kennedy differently from other members of the general public. If Kennedy spoke as a public employee during his religious activity, his speech would not be constitutionally protected. Similarly, if BSD had adequate justification for treating Kennedy differently from other members of the public, Kennedy's claim would also fail.

As to the first issue, the court noted that when public employees make statements during their official duties, the employees are not speaking as citizens for First Amendment purposes. Thus, the Constitution does not insulate their communications from employer discipline. The Ninth Circuit concluded that Kennedy spoke as a public employee when he was praying on the 50-yard line. Kennedy only had access to the field because of his employment, and he practiced his religion during a time when he was generally tasked with communicating with students. Kennedy also insisted that his speech occur while players stood next to him, fans watched from the stands, and he stood at the center of the football field. Moreover, Kennedy repeatedly acknowledged, and behaved as if, he was a mentor to students specifically at the conclusion of the game.

As to the second issue, the court reasoned that even assuming Kennedy spoke as a private citizen, BSD could still prevail because its justification for treating Kennedy differently from other members of the general public was adequate. Under the Establishment Clause, "Congress shall make no law respecting an establishment of religion." The court noted that it needed to consider the context of Kennedy's actions. Specifically, Kennedy engaged in a media blitz and his religious practice evolved to include a majority of the team. In addition, Kennedy prayed on the 50-yard line after the October 16th game despite that BSD made clear that the field as not open to the public. Thus, the court concluded that had BSD rescinded its directive and allowed Kennedy free rein to pray on the 50-yard line, the public would have perceived that the prayer had BSD's stamp of approval.

Next, the Ninth Circuit addressed Kennedy's free exercise claim. While Kennedy argued that BSD's directive telling him his speeches needed to be secular in nature violated his rights under the Free Exercise Clause, the court disagreed. The court reasoned that BSD's directive and accompanying BSD policy were narrowly tailored to BSD's interest in avoiding a violation of the Establishment Clause. For example, BSD tried repeatedly to work with Kennedy to develop an accommodation that would avoid violating the Establishment Clause, but Kennedy declined to cooperate in that process and insisted that the only acceptable outcome would be praying immediately after the game on the 50-yard line in view of students and spectators.

Finally, the court analyzed Kennedy's claims pursuant to Title VII. Title VII provides "an unlawful employment practice is established when the complaining party demonstrates that . . . religion . . . was a motivating factor for any employment practice." The Ninth Circuit, however, concluded that Kennedy could not establish his failure to rehire, disparate treatment, failure to accommodate, and retaliation claims. Regarding his failure to rehire claim, Kennedy could not show he was adequately performing his job as is required under the law. Instead, Kennedy refused to follow BSD policy and conducted numerous media appearances that led to spectators rushing the field after the October 16th game in disregard of BSD's responsibility to student safety.

Kennedy's disparate treatment claim failed because he could not show BSD treated him differently than similar situated employees. This was because Kennedy's conduct was clearly dissimilar to that of other assistant coaches. With respect to his failure to accommodate claim, BSD met its burden in establishing that accommodating Kennedy's religious practices on the 50- yard line would cause an undue hardship. Lastly, with respect to his retaliation claim, BSD had a legitimate reason for placing Kennedy on administrative leave because he made it clear he would continue to pray on the 50-year line immediately following games.
For these reasons, the Ninth Circuit concluded the district court properly entered judgment in BSD's favor on Kennedy's claims.

Kennedy v. Bremerton Sch. Dist., 2021 WL 1032847 (9th Cir. Mar. 18, 2021.

Note:

LCW previously reported on an earlier decision in this case in the October 2017 Client Update.

LABOR RELATIONS

PERB Concluded City Did Not Establish Good Cause For Its Untimely Answer.

Alfonso Garcia filed an unfair practice charge against the City and County of San Francisco alleging the City interfered with his protected rights and retaliated against him for his union activities by placing him on paid administrative leave and reassigning him to a new worksite.

On December 6, 2019, the Public Employment Relations Board's (PERB's) Office of the General Counsel (OGC) issued a formal complaint to the City. PERB regulations required the City to file an answer within 20 calendar days from the date the complaint was served. That same day, the OGC also issued two complaints to the City in companion cases and dismissed eight other charges Garcia and another employee had filed against it. While the City filed answers to the complaints in the companion cases, it did not file an answer to Garcia's charge.

On April 30, 2020, the City filed a motion to dismiss all three related cases, contending the complaint allegations had already been resolved through binding arbitration under with the collective bargaining agreement between the City and the union. On May 8, 2020, the City filed an answer to Garcia's complaint. Garcia filed an opposition to the motion to dismiss, arguing the City's answer and motion were untimely.

Subsequently, the Administrative Law Judge (ALJ) asked the City's counsel to provide good cause as to why the City's late answer should be excused. In response, the City's counsel submitted a declaration indicating she filed a late answer because she had not realized the City did not respond to the charge. She also noted that: the complaint was nearly identical to the complaints in the companion cases; the charging parties initially filed 12 PERB charges within a short period of time; and one of her colleagues had handled filing the answers because she was preparing for consecutive jury trials. Accordingly, the City argued that the failure to timely file an answer was an oversight and there was no prejudice to Garcia.

Nevertheless, the ALJ issued a proposed decision concluding the City failed to establish good cause to excuse the late filing. Thus, the ALJ deemed the allegations in the complaint and underlying unfair practice charge to be true, and issued a proposed remedial order. The City timely filed exceptions to the proposed decision.

In resolving the exceptions, PERB first affirmed the ALJ's conclusion that the City failed to establish good cause. In general, good cause to excuse a late filing exists if the delay is short and based on circumstances that were either unanticipated or beyond the party's control. Further, regardless of the particular reason, the party must provide a "reasonable and credible" explanation or show it at least made a conscientious effort to comply with the filing deadline. PERB reasoned the City's counsel could have filed the answer on time "had she exercised reasonable diligence in reviewing the case documents received from PERB" and that a heavy caseload provides no excuse for failing to do so. Thus, PERB determined the City could not establish good cause.

Next, PERB concluded that the ALJ did not improperly add any allegation to the complaint that the City reassigned Garcia to a new facility because he exercised Meyers-Milias-Brown Act (MMBA) rights. PERB noted that while the complaint did not expressly allege the City reassigned Garcia because of his protected

activity, it nonetheless contended the City took adverse employment action against him by reassigning him to a different facility. Further, in its motion to dismiss, the City acknowledged that Garcia alleged the City retaliated against him for his protected activities by placing him on administrative leave and reassigning him. For these reasons, PERB concluded the City understood the complaint to encompass the retaliatory reassignment allegation and the ALJ did not err in addressing it.

Finally, PERB concluded that the ALJ's remedial order was proper. In the ALJ's proposed order, the ALJ ordered that the City make Garcia whole for any losses he incurred as a result of the misconduct; reinstate Garcia to his prior position or to a substantially similar position; post copies of the Notice to all work locations where notices are customarily posted; and cease and desist from imposing reprisals, discriminating against, or interfering with the exercise of protected MMBA rights.

While the City argued this proposed order was overbroad, PERB disagreed. PERB reasoned that the notice requirement is educational for the represented employees and that the purpose of a cease and desist order is to prohibit future unlawful conduct. Further, PERB reasoned that Garcia should have the opportunity to establish any financial losses in compliance proceedings, and that the City's authority to reassign its employees to particular worksites did not prevent PERB from ordering the City to offer Garcia reinstatement to his former, or a substantially similar, position.

City and County of San Francisco, PERB Dec. No. 2757-M (2021).

Note:

This decision shows that PERB strictly enforces filing deadlines, and the good cause requirements for excusing failure to meet filing deadlines.

Responding to COVID-19

COVID-19 has changed how we live and work. LCW has created numerous resources to assist your organization during the pandemic, including templates, special bulletins, and webinars-on-demand. Visit **our dedicated webpage** to stay up-to-date on the most recent COVID-related news.

Liebert Cassidy Whitmore presents

Wage & Hour Issues In The Workplace

A video series from our
Wage & Hour Practice Group

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.

- On March 29, 2021, Senate Bill (SB) 95 went into effect, codifying new obligations on public agency employers to provide COVID-19 Supplemental Paid Sick Leave. The new law applies to employees who are unable to work or telework because of anyone of several qualifying reasons. SB 95 provides a new employee entitlement to such leave retroactivity to January 1, 2021 and effective through September 30, 2021. *See* LCW's Special Bulletin **here**.

- On March 11, 2021, President Biden signed House Resolution (HR) 1319, the American Rescue Plan Act. The Act provides aid to local governments through the $130-billion Coronavirus Local Fiscal Recovery Fund and extends CARES Act unemployment provisions. *See* LCW's Special Bulletins on this topic **here**.

- Cal/OSHA regulations require a 10-day quarantine period following a known COVID-19 exposure. (*See* 8 C.C.R. 3205(c)(10)(B).) Therefore, LCW recommends that employers continue to adhere to the Cal/OSHA regulatory requirements and require that employees with close contact exposures observe the full 14-day quarantine period.

Events & Training

For more information on some of our upcoming events and trainings, click on the icons below:

Consortium

Seminars

Webinars

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.

The 411: What Is An ERC?

An Employment Relations Consortium (ERC) is a number of local agencies (cities, counties and special districts), or school and community college districts, in a geographic area joining together for the purpose of securing quality employment relations training, consultation and informational services on a very economical basis. Currently, there are close to 800 cities, counties, special districts, school districts, community college districts, universities, private and independents schools, and other agencies involved with Liebert Cassidy Whitmore's 36 consortiums.

For more information, click here.

Question

A Human Resources manager contacted LCW to ask whether an employee, who used a sick day because he had symptoms related to his COVID-19 vaccine, could use COVID-19 Supplemental Paid Sick leave to cover the day he had already taken in February 2021.

Answer

LCW advised the manager that under Senate Bill (SB) 95, one of the qualifying reasons for the new COVID-19 Supplemental Paid Sick Leave (SPSL) is that the employee was having symptoms related to a COVID-19 vaccine that prevented the employee from being able to work or telework. LCW advised that while the new paid leave obligations under SB 95 are retroactive to January 1, 2021, for individuals who took paid leave for a qualifying reason prior to the March 29 effective date of the new law, there is no statutory obligation for the employer to change that employee's pay status to SPSL. Employers may, by mutual agreement with the employee, change the pay status for paid leave previously provided, but there is no express requirement under the law to do so. If the employer does not change the paid leave status, the employee will be entitled to their full SPSL allotment under SB 95.

What kinds of services are provided in an ERC?

1. **Training workshops with reference material for all attendees**
   Workshops are conducted virtually, at, or near, one of the member agencies. Attendees receive comprehensive reference material.

2. **Monthly newsletters**
   ERC members are added to our distribution list to receive LCW's monthly newsletter directly by email.

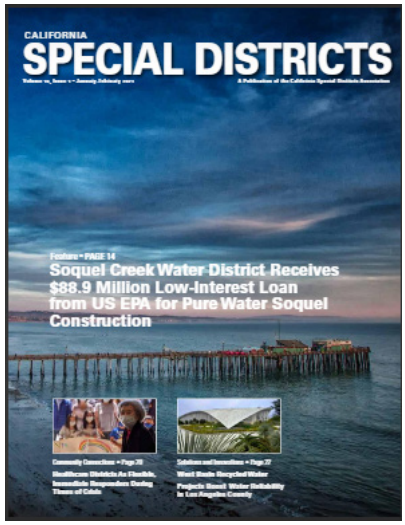
3. **Complimentary telephone consultation**
   ERC members are entitled to complimentary telephone consultation with attorneys in matters relating to employment and labor law questions.

SPOTLIGHT ARTICLE

COVID-19, Social Justice and Their Impact on Litigation for Years to Come

By: Elizabeth Tom Arce & Kaylee Feick

From an unprecedented global pandemic to civil unrest and increasing political polarization, the events of 2020 launched employers into uncharted territory as they faced a host of unique employment-related issues. As employers across California continue to navigate these issues, one thing remains certain: the impacts of COVID-19 and the social justice movement will likely result in a wave of litigation in 2021 and beyond. Consequently, special districts cannot afford to ignore these realities and must brace for an increase in legal claims.



Originally published in CSDA's January-February 2021 issue.

COVID-19

The pandemic and resulting stay-at-home orders forced employers to find answers for employment-related questions in which there was little to no guidance. Despite acting with best intentions, special districts had to make tough choices that were not always welcomed by employees.

Disability discrimination claims are likely to arise from situations where an employer refuses to reasonably accommodate employees who may be at greater risk of severe illness if they contract COVID-19, or who live in households with someone who is high-risk. The failure to accommodate can range from denying telework requests to refusing to reassign an employee to a work location with less risk of exposure. Employees may also assert related claims for failure to engage in the interactive process.

In a Massachusetts case, a court issued a preliminary injunction allowing an employee to telework as a reasonable accommodation in lieu of termination. After the employee successfully teleworked for four months, the employer denied the request to continue teleworking. The employer issued a blanket statement requiring all managers to report to work and gave them PPE such as N95 masks. The court ruled that the employee's moderate asthma constituted a disability, and, therefore, the employer should have engaged in the interactive process. Peeples v. Clinical Support Options, Inc., No. 3:20-CV-30144-KAR (D. Mass. Sept. 16, 2020).

Employers can also expect an uptick in leave-related claims. The Families First Coronavirus Response Act ("FFCRA") provided employees with additional leave benefits. Litigation for FFCRA violations is expected to follow along with claims for unlawful denial of leave under the Family and Medical Leave Act, the California Family Rights Act, and other leave laws.

The California Occupational Safety and Health Act, requires employers to provide employees with a healthy and safe workplace. Special districts should anticipate litigation from employees who feel districts failed to implement sufficient measures to protect them from COVID-19. Relatedly, districts should be prepared to defend against employees who claim they have been retaliated against for complaining about workplace safety issues, or from exercising their COVID-related rights.

Social Justice and Promoting Diversity, Equity and Inclusion

The year 2020 will also be remembered for some of the largest public protests in American history and a particularly contentious election year. Influenced by these events, public employees participated in demonstrations, expressed their views on clothing, and spoke out against perceived inequities in and outside the workplace. As a result, employees' speech on social media and at work became a hot topic for employers. The way employers handled these issues is expected to result in an increase of speech-related claims.

Employees claiming retaliation for speaking out can sue under the First Amendment. Public employees have a right to free speech and cannot be retaliated against for expressing their views if they spoke on a matter of "public concern," spoke in a way that was not pursuant to their "official duties," and suffered an "adverse employment action" as a result. Further, under Labor Code sections 1101 and 1102, employers cannot prevent employees from participating in politics or threaten employees to adopt certain political views.

There are a number of other legal theories employees can use to assert their speech rights. For example, speech related to race or other protected classifications can trigger the protections of anti-discrimination laws like the Fair Employment and Housing Act. In addition, California protects employees who engage in lawful off-duty conduct. Consequently, special districts may not be able to discipline employees for participating in peaceful demonstrations on their own time. Finally, employees complaining about their employer's alleged illegal conduct may be protected by statutory whistleblower laws.

The charged political environment may also have implications beyond employee speech-related issues. For instance, employers are expected to see a shift in the types of discrimination and harassment claims employees file as claims based on race and gender increase. Further, amidst efforts to improve diversity and inclusion in the workplace, employers may be confronted with "reverse" discrimination claims by employees who feel employers are favoring employees who are not in the majority group in employment decisions. Pay equity claims may also increase.

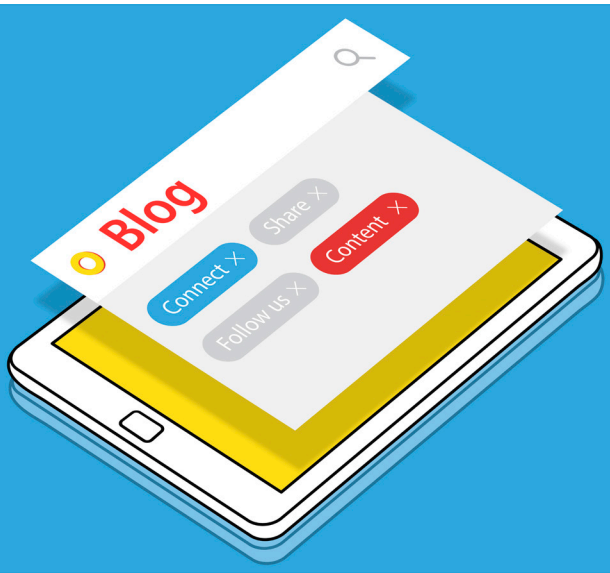
Looking Ahead

While 2020 affected the workplace in ways employers could have never anticipated, special districts can take steps to mitigate the risk of litigation from decisions arising from COVID-19 and the social justice movement.

Since the statute of limitations for some claims can be up to three years, districts should maintain all supporting documentation for decisions they have already made. Further, if there is an opportunity to change course on a decision to mitigate risk, districts should consult with their attorneys.
Because the pandemic and political discord are likely to continue deep into 2021, special districts should also review and, if necessary, update their policies and procedures.

Regarding COVID-19, this means examining how the interactive process and reasonable accommodations are handled. Districts should also be familiar with each type of leave employees may be eligible for, and adopt sound return-to-work measures to create a safe working environment. Regarding workplace equity, this means reviewing policies related to hiring and promotion and anti-harassment, discrimination and retaliation, and conducting an equal pay audit. Finally, districts should exercise care when making decisions involving employees who exercised rights related to COVID or advocated for social justice.

You can find the original article at csda.net if you login and are a member.



ON THE BLOG

What To Do When Employees Decline COVID-19 Vaccinations?

By: Alison Kalinski

One year after the public health emergency caused by COVID-19 began, hope is on the horizon as vaccine production and distribution increases and eligibility criteria for vaccinations expands. With many employees teleworking during the pandemic, employers are starting to consider post-pandemic working arrangements, including the return of employees to the workplace. As employers think about this critical issue, there are a number of questions employers must consider: How do employers respond to employees that are eligible for vaccination, but decline to be vaccinated? Can unvaccinated employees return to the workplace, and, if so, under what conditions? Should teleworking employees who refuse vaccination be permitted to continue teleworking? While there are no simple answers to these questions, this blog explores the issues implicated by these questions and provides guidance for employers considering these subjects.

Eligible Employees Who Decline Vaccinations

There are three statutory bases under which an individual may be legally entitled to refuse vaccination: (1) a disability/medical condition; (2) sincere religious belief; and (3) on the basis that the vaccine is being distributed under the Emergency Use Authorization. The first two bases arise from the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), and the California Fair Employment and Housing Act (FEHA). The third basis arises from the Food, Drug & Cosmetic Act (FD&C Act), and the protections afforded thereunder.

Under the ADA, Title VII, and FEHA, employers may require all employees to be vaccinated, but with important limitations. For example, employers must provide reasonable accommodations to employees who because of a disability/medical reason cannot be safely vaccinated, or if vaccination conflicts with a sincerely held religious belief. When an employee presents documentation establishing a disability or describes a sincerely held religious belief, the employer should engage in the interactive process to determine how the employee can be reasonably accommodated to minimize the employee's risk of exposure –and spread – of COVID-19 in the workplace. Accommodations to consider are remote work, additional personal protective equipment, moving the employee's workspace to be more isolated, and unpaid leave.

The third basis upon which an individual may refuse vaccination is based on the vaccines being distributed under an Emergency Use Authorization (EUA) under to the FD&C Act. Under the EUA, individuals must be informed they have the right to refuse vaccination and the consequences of refusal, which is typically presented in an accompanying fact sheet. It is unclear what is meant by "consequences," but it is likely referring to health consequences, not termination from employment. While there is no law indicating an employer is legally required to accommodate employees who refuse vaccination based on EUA, it would be risky for the employer to terminate or take adverse action against employees who exercise their rights under the FC&C Act to decline vaccination. At least one lawsuit has been filed by a public first responder employee in New Mexico seeking an injunction to prevent his termination on the basis that the county's mandatory COVID-19 vaccination policy violates his rights under the FD&C Act. (Legaretta v. Macias, No. 21-CV-179 MV/GBW, 2021 WL 833390, at *1 (D.N.M. Mar. 4, 2021).) Guidance from the EEOC explains employers' obligations to reasonably accommodate employees who cannot be vaccinated because of a disability or religious belief, but is silent on refusals based on the EUA. But is it safe for those employees to return to the workplace? Does the employer need to accommodate them, including allowing telework? These are difficult questions, with many considerations and no easy answers.

The Return to Work of Unvaccinated Employees

The ADA permits employers to exclude from the workplace employees who pose a direct threat to the health and safety of other employees or members of the public. This standard presents two threshold questions: (1) does a non-vaccinated employee pose a direct threat to the health and safety of the workplace sufficient to exclude them from returning to work; and (2) if so, what, if any measures could an employer adopt in order to reduce the threat to allow the employee to return to work?

On one hand, the employer may be able to claim that employees who have not been vaccinated present a health and safety risk to other employees and/or members of the public, if the unvaccinated employees will come into contact them. The employer can use this as a basis to require the unvaccinated employees to telework or take leave. On the other hand, if that employer had unvaccinated employees in the workplace during the pandemic (such as before the vaccines were available) while following COVID-19 safety protocols, it may be hard to explain why now it was suddenly unsafe for unvaccinated employees to be in the workplace.

In addition, as more individuals become vaccinated, the risks from having unvaccinated employees in the workplace should diminish. For example, if only one employee is unvaccinated, and everyone else is vaccinated, the risk from one unvaccinated employee to the vaccinated employees should be relatively low. Employers, however, need also to consider morale. Even if employees have been vaccinated, they may feel nervous working in the same workspace as a non-vaccinated employee, especially if they have children or others in their household who have not been vaccinated, or have been vaccinated but are high risk for developing serious illness from COVID-19. It is unclear if unvaccinated employees would pose a direct threat to justify separating them from employment, and doing so could risk discrimination and retaliation claims. In addition, the direct threat assessment should be individualized to each unvaccinated employee; for example, a first responder that comes into contact with numerous members of the public and other first responders would likely pose a higher threat than an employee who works at a desk all day in their own office.

In order to minimize the risks to unvaccinated employees – and to others from having unvaccinated employees in the workplace — the employer should consider providing the same COVID-19 safety measures and reasonable workplace accommodations it has had in place, to reduce the threat level. The employer should discuss concerns related to COVID-19, and see if there are ways to allow the employee to work while minimizing risk to the employee and other employees/members of the public from the spread of COVID-19. These include providing additional personal protective equipment, moving the employee's workspace to be more isolated, partitions between work areas, and even schedule changes to reduce the amount of employees in the work area at once or entering and exiting together. The employer is not required to adopt accommodations imposing an undue burden; the focus is accommodations allowing the employee to perform job duties safely for them and others.

Allowing Unvaccinated Employees Who Refuse Vaccinations to Continue Teleworking

Employees who decline to be vaccinated because of the Emergency Use Authorization or personal views about the vaccination who had been teleworking during the pandemic may request to continue teleworking. On one hand, employees do not have a right to their most desired accommodation, and there may be other accommodations that allow the employee to return to the workplace while ensuring everyone's safety. If the employee is at high-risk for serious illness from COVID-19, there may not be any accommodations that allow that employee to return to the workplace. Employers will also need to consider how successful teleworking was during the pandemic; for example, if the employee was successfully performing their job duties and meeting their job expectations, it may be hard to justify refusing continued telework.

While things are now looking more hopeful, the reality is that COVID-19 will still be here for a while, and the COVID legal landscape concerning vaccinations, accommodations, and best practices is evolving. While there may not be clear answers to all questions relating to vaccinations and the workplace, the considerations described above should help employers assess risk and develop policies and practices best suited for their workplace.

Click here to visit our blog!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