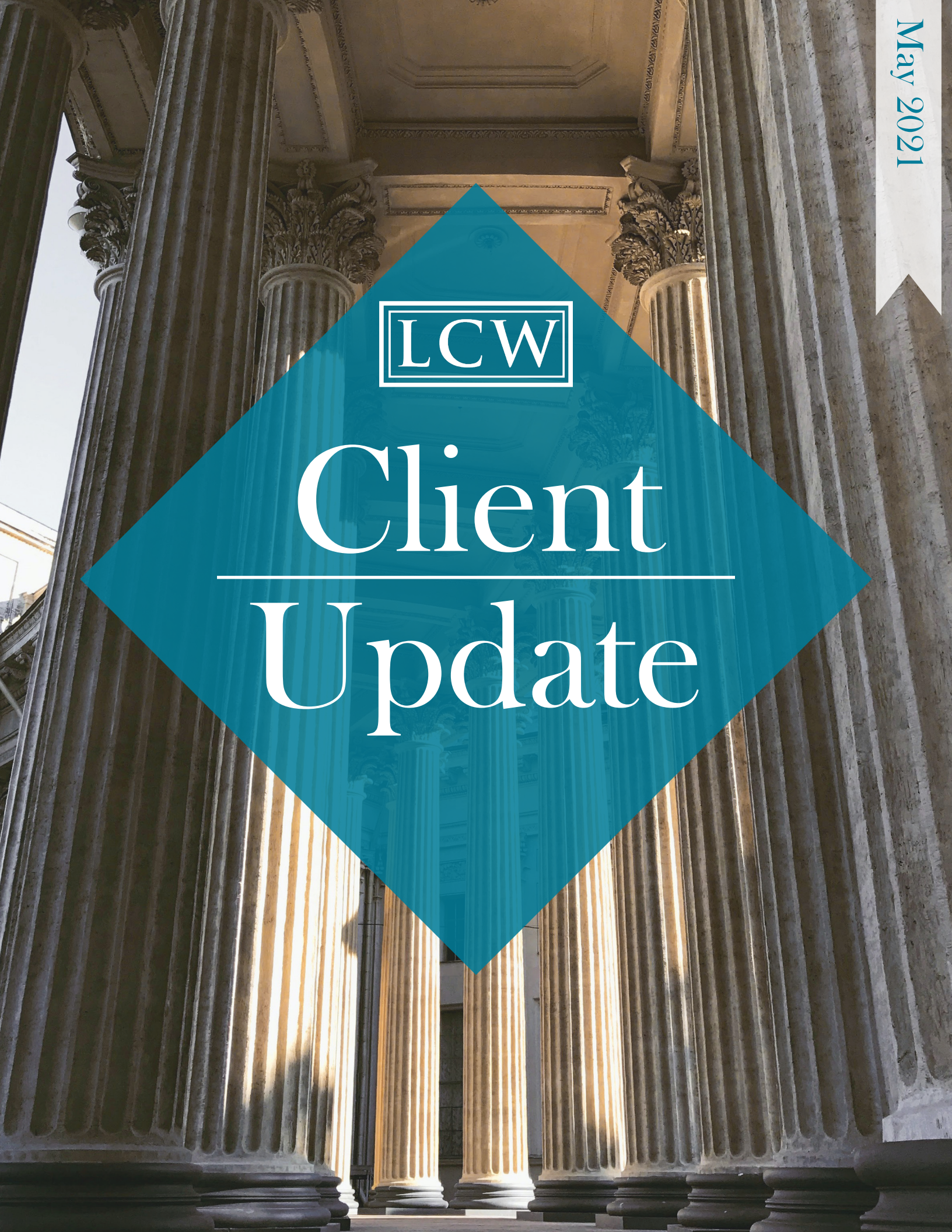

May 2021

LCW

Client Update

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FIRM VICTORY

California Supreme Court Denies Employee's Petition For Review of PERB Decision.

LCW Partner **Adrianna Guzman** and Senior Counsel David Urban secured a victory on behalf of a city when the California Supreme Court denied an employee's petition for review as to a Public Employment Relations Board (PERB) decision.

A police department employee filed an unfair practice charge against a city. The employee alleged that the city selected another applicant for a promotion because of the employee's Meyers-Milias-Brown Act (MMBA) activities. However, a PERB administrative law judge, and later PERB itself, determined that the city's decision to promote another applicant was not made to retaliate for the employee's collective bargaining-protected activities. PERB concluded the city proved that it acted because of non-discriminatory reasons in its hiring decision. After numerous appeals, the employee filed a petition for review with the California Supreme Court.

In challenging the employee's petition for review, LCW argued that the employee did not raise any issue as to "uniformity of decision", nor did the employee identify any "important question of law" for the Supreme Court to consider. Moreover, the employee's petition did not ask the Court to review whether the city had met its burden of proving an independent and adequate reason for not selecting the employee for the promotion. The Court ultimately agreed, and denied the employee's petition.

Note:

This case demonstrates how important it is for public agencies to have records that show a legitimate and non-discriminatory reason for promotions.

LCW Obtains Dismissal Of Police Officer's Whistleblower Retaliation Lawsuit.

LCW Partners **Jesse Maddox** and **Michael Youril** obtained summary judgment for a city against a former police officer's claim of whistleblower retaliation. In February 2016, the city hired the officer subject to a one-year probationary period. The officer immediately joined the police officers' association. In December 2016, the officer attended an association meeting. At that meeting, the association discussed a loan it had made to a corporal, who was then-president of the association. The officer learned the loan was for the purchase of a personal vehicle.

During the meeting, the association's treasurer confirmed that the loan was proper under the association's bylaws and had been repaid. In response, the officer stated that the association was not in the business of making loans, and therefore the association's money should not be used to benefit one individual. The officer was one of many who expressed an opinion during the meeting that the loan was improper or illegal. The association's members agreed that the association would speak with an attorney to determine whether to remove the loan portion of the bylaws.

In January 2017, the chief of police terminated the officer's employment for falsely reporting his time worked, and then refusing to correct his time sheet when questioned about it by a superior officer. The officer then sued the city, alleging whistleblower retaliation in violation of Labor Code Section 1102.5. The officer alleged the chief terminated him in retaliation for speaking out about potential illegal association conduct. The officer alleged that the association's treasurer influenced the chief because of the officer's comments during the association meeting.

The city moved for summary judgment on the ground that the officer could not establish essential elements of a whistleblower retaliation claim. First, the officer could not show he made a protected disclosure of information to a government, a law enforcement agency, or a person with authority over the employee. Second, the city alleged the officer could not show a nexus between any alleged protected disclosure and his termination. Lastly, the city had a legitimate, non-retaliatory reason for terminating the officer (i.e., for failing to accurately report his time worked).

The trial court granted summary judgment for the city. The officer appealed, and the Court of Appeal affirmed.

The Court of Appeal held the officer did not make a protected disclosure of information because: 1) his comments were made to the association and its members; and 2) he did not disclose new information during the meeting, but merely opined that the loan was illegal based on the facts he learned from the association. As a result, the Court affirmed summary judgment for the city. Since the Court of Appeal determined that the officer could not establish the essential elements of his whistleblower retaliation claim, it did not address the city's argument that it had a legitimate, non-retaliatory reason for terminating the officer's employment.

Note:

A summary judgment motion is a powerful tool that can save public agencies money by getting lawsuits dismissed before trial. LCW attorneys can help public agencies determine whether a case is appropriate for summary judgment.

City Defeats Police Grievance Seeking MOU Overtime For Uniform Donning And Doffing.

LCW Partners **Brian Walter** and **Geoffrey Sheldon** and Associate Attorneys **Danny Yoo** and **Emanuela Tala** defeated a "class action" grievance arbitration on behalf of a city. The stakes were high as the grievance sought overtime pay going back four years prior to the filing of the grievance in November 2006 and continuing until the grievance was resolved plus interest, civil penalties, and attorney fees.

The grievance arbitration concerned the interpretation of an overtime provision in the memorandum of understanding between the city and the police union (MOU). The MOU provision stated, "All hours or portions thereof worked in excess of [regularly scheduled] work hours … shall be overtime including hours worked by an employee when on a regular day off, hours in lieu of a holiday or vacation pay."

The union claimed that the provision obligated the city to pay MOU (as opposed to Fair Labor Standards Act (FLSA)) overtime for time peace officers spent "donning" and "doffing" their uniforms and related safety gear. The union claimed its grievance was consistent with the city's past practice and its intent during the negotiations of the terms of the MOU.

The city claimed that the MOU overtime provision did not cover donning and doffing. To support its position, the city presented evidence that the city and union considered adding a provision to the MOU in 2009 to compensate officers for donning and doffing their uniforms, but the city ultimately rejected the provision. Also, the MOU provided for a cash payment for "the cost of uniform replacement, maintenance and other professional expenses," but was silent on the issue of donning and doffing uniforms.

The union argued that there was an established past practice to pay for donning and doffing. The arbitrator disagreed, noting that the city and union had been litigating this issue for years prior to his ruling on the union's grievance. That litigation proved the absence of any mutual agreement.

The union also argued that the city's previous rejection of a MOU provision that would compensate officers for donning and doffing did not undermine the parties' intent that officers be compensated for donning and doffing. The arbitrator disagreed and found that if the city intended to include compensation for donning and doffing as part of the MOU, it would have indicated as much in the MOU's various provisions concerning overtime and payments for uniforms. The arbitrator further noted that the union's view of the city's undisclosed intent during MOU negotiations did not determine the mutual intent of the parties.

Lastly, the union argued that even if the parties had no affirmative intent to compensate officers for donning and doffing, an intent should be inferred in order to maintain compliance with the definition of "hours worked" under California law. The arbitrator held that he was precluded from addressing that argument because the union's grievance did not address the applicability of State law. The arbitrator declined to expand the grievance to consider external law.

For these reasons, the arbitrator found that the MOU's overtime provisions did not obligate the city to pay overtime for time officers spent donning and doffing their uniforms and related safety gear.

Note:

Wage and hour issues are often raised on behalf of a large category or class of employees and can subject public agencies to substantial liability. LCW attorneys regularly defend public agencies against allegations of unpaid overtime and can assist agencies to limit or eliminate liability.

NEW TO THE FIRM!

Richard Daniel Seitz is an Associate in the Los Angeles office of LCW, where he advises clients on all aspects of labor and employment law, retirement and labor relations issues. He is experienced in law and motion and appellate practice and works with the firm's public sector clients on discipline issues, retirement and labor relations matters, and compliance with state and federal COVID-19 laws and regulations.

Brian R. Dierzé is an Associate in the Los Angeles office of LCW where he advises clients on all aspects of labor and employment law. Brian is skilled in contract review, in-depth research into legal and legislative issues and provides guidance to LCW public sector clients.

Joel Guerra is an Associate in LCW's Sacramento office, where he advises clients on all manner of employment-related matters. He is experienced in defending harassment, discrimination, retaliation, and wrongful termination claims; appearing before administrative tribunals and state court writ departments to resolve disability retirement claims; and settling wage and hour class, collective, and representative actions.

Police Department Was Not Required To Disclose Confidential Records To The Subject Officer Prior To Further Interrogation.

In December 2017, a citizen filed a complaint against officers from the Oakland Police Department (Department), alleging that the officers violated the citizen's rights while conducting a mental health welfare check. The Department's internal affairs investigation included an interrogation of each of the accused officers. The Department's investigation cleared the officers.

Following the Department's investigation, the Oakland Community Police Review Association (OCPRA), a civilian oversight agency with independent authority to investigate claims of police misconduct, conducted its own investigation into the citizen complaint. Before the OCPRA's interrogations of the officers, counsel for the officers demanded copies of all "reports and complaints" prepared or compiled by the Department's investigators pursuant to Government Code Section 3303(g), a provision within the Public Safety Officers Procedural Bill of Rights Act (POBR). Section 3303(g) provides that a public safety officer shall have access to a tape recording of his or her interrogation "if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential."

The OCPRA agreed to provide the officers with recordings and transcribed notes from their prior interrogations during the Department's investigation, but refused to produce any other materials. After interrogating each officer, the OCPRA completed its investigation and determined that the officers knowingly violated the complainant's civil rights.

The officers and their union filed a petition for writ of mandate, alleging that the City of Oakland (City) violated their procedural rights by refusing to disclose the requested reports and complaints prior to the officers' subsequent interrogations.

The trial court noted that the Fourth District of the California Court of Appeal examined a similar issue in *Santa Ana Police Officers' Association v. City of Santa Ana* (*Santa Ana*), and held that the POBR requires agencies to disclose complaints and reports to officers after an initial interrogation and "prior to any further interrogation." Relying on *Santa Ana*, the trial court granted the petition and ordered the City to disregard the officers' interrogation testimony in any current or future disciplinary proceedings. The City appealed, and the First District of the California Court of Appeal reversed and remanded the matter to the trial court for further proceedings.

The Court of Appeal held that the plain language of Section 3303(g) only requires disclosure of tape recordings of an officer's interrogation prior to any subsequent interrogation of the officer. The statute does not specify when an officer's entitlement to the reports and complaints arises, but does grant an agency the ability to withhold these materials on confidentiality grounds under certain circumstances, including if disclosure would otherwise interfere with an ongoing investigation. Accordingly, the Court of Appeal held that stenographer's notes, reports, and complaints should be disclosed upon request, including prior to a subsequent interrogation, unless the investigating agency designates the material as confidential. The court noted that the agency can also de-designate a record previously deemed confidential when the basis for confidentiality no longer exists, such as the end of the investigation.

The Court of Appeal also concluded that mandatory disclosure of complaints and reports prior to any subsequent interrogation of an officer suspected of misconduct undermines a core objective of the POBR – maintaining the public's confidence in the effectiveness and integrity of law enforcement agencies by ensuring that internal investigations into officer misconduct are conducted promptly and fairly. The Court of Appeal disagreed with the *Santa Ana* decision, reversed, and remanded the matter to the trial court to determine whether the City had a basis for withholding the requested

reports and complaints due to their confidential nature.

Oakland Police Officers' Association v. City of Oakland, 2021 WL 1608876 (Cal. Ct. App., Apr. 26, 2021).

Note:

This decision creates a split of authority between the First and Fourth Districts of the California Court of Appeal regarding an agency's duty to disclose investigation materials before a subsequent interrogation of the subject officer. LCW attorneys can help agencies navigate conflicting case law decided under the POBR, including disclosure requirements during an ongoing personnel investigation.

A *Pitchess* Motion Is Required Before An Agency Can Disclose Its Own Peace Officer's Personnel Records.

In 1997, the County of Ventura's (County) Office of the District Attorney (VCDA) hired Tracy Towner to serve as an investigator. In 2014, Towner was promoted to investigative commander. In 2017, Towner testified in an action regarding another VCDA investigator before the County's Civil Service Commission (Commission). The Commission found his testimony credible. Thereafter, the VCDA opened an independent investigation into Towner's testimony at the Commission hearing, which determined that Towner had testified falsely at the hearing. As a result, the VCDA terminated Towner. Towner appealed his termination and requested a hearing before the Commission.

The County filed a petition for writ of mandate, requesting that the court enjoin the Commission from hearing Towner's appeal due to a conflict of interest since the Commission previously found the testimony underlying his termination credible. The exhibits to the petition the County filed in court included an excerpt of the independent investigator's report and the notices of disciplinary action relating to Towner's termination. The Commission ultimately heard Towner's appeal and ordered him reinstated with full back pay and benefits.

Towner then sued the County, in relevant part, for negligence per se and violations of the Public Safety Officers Procedural Bill of Rights Act (POBR). As to the negligence per se claim, Towner alleged the County violated Penal Code Section 832.7 by publicly disclosing his confidential personnel records without appropriate judicial review (i.e., without bringing a *Pitchess* motion). As to the POBR claim, Towner alleged the County intentionally publicly disclosed his confidential personnel records in violation of multiple provisions of the Government Code.

The County moved to strike Towner's POBR and negligence per se claims under California's anti-SLAPP statute, which allows for the early dismissal of a case that thwarts constitutionally-protected speech. A court examines an anti-SLAPP motion in two parts: 1) whether a defendant has shown the challenged cause of action arises from protected activity; and 2) whether the plaintiff has demonstrated a probability of prevailing on the claim.

The trial court granted the County's motion to strike, finding the County's writ petition and exhibits fell within the scope of the anti-SLAPP statute as a written statement submitted in a judicial proceeding. The trial court also found that Towner failed to show a probability of success on the merits because: 1) the County's conduct was protected by the litigation privilege; and 2) neither the POBR nor Penal Code Section 832.7 provided a private right of action based on disclosure of confidential personnel records. Towner appealed, and the California Court of Appeal reversed.

On appeal, Towner argued that the anti-SLAPP statute did not apply because the County's disclosure of his confidential personnel records was illegal as a matter of law. The Court of Appeal agreed, noting that Penal Code Section 832.7 states that confidential peace officer records may only be disclosed following to a *Pitchess* motion. The Court of Appeal also noted that Government Code Section 1222 makes a public officer's "willful omission to perform any duty enjoined by law" a misdemeanor. The Court of Appeal held that the County willfully failed to treat Towner's personnel documents as confidential by intentionally filing them as exhibits in the writ proceeding. Since the County's actions violated both Penal Code Section 832.7 and Government Code Section 1222, Towner adequately showed that the County's conduct was illegal as a matter of law and therefore was not protected activity under the anti-SLAPP statute.

Based on the foregoing, the Court of Appeal reversed and remanded the matter to the trial court with directions to enter an order denying the County's motion.

Towner v. County of Ventura, et al., 2021 WL 1660616 (Cal. Ct. App. Apr. 28, 2021).

Note:

Prior to this decision, there was a lack of clarity on whether an agency must file a Pitchess *motion to use and disclose its own peace officer personnel records in litigation or administrative hearings. This decision clarifies that an agency not only must do so, but that disclosing confidential peace officer personnel records without a* Pitchess *motion could be a crime if willfully done. LCW attorneys can assist agencies with protecting the confidentiality of peace officer records in accordance with this decision.*

Upcoming Webinar

Hiring CalPERS Retirees: Do's and Don'ts

June 9, 2021 | 10:00 - 11:00am
Register online here!

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.

Employee Could Pursue FEHA Case Despite Misnaming Employer In DFEH Complaint.

In May 2018, Alicia Clark filed a complaint with the Department of Fair Employment and Housing (DFEH) against her former employer, Arthroscopic & Laser Surgery Center of San Diego (ALSC), and her former supervisor. In the caption of her DFEH complaint, Clark listed ALSC as "Oasis Surgery Center LLC" and "Oasis Surgery Center, LP."

In her complaint, Clark stated the company and her former supervisor had taken numerous "adverse actions" against her and that she had been harassed, and discriminated and retaliated against in the workplace. Clark's complaint also: identified other individuals who had discriminated against her; referred to several other managers and supervisors for whom she worked; named numerous witnesses with information related to her claims; and stated her job tile and period of employment. Upon Clark's request, the DFEH issued an immediate right-to-sue notice.

Subsequently, Clark initiated a civil lawsuit against "Oasis Surgery Center LLC;" "Oasis Surgery Center, LP;" and her former supervisor. Clark alleged numerous claims under the Fair Employment and Housing Act (FEHA), including race, sex, and sexual orientation discrimination, harassment, and retaliation. Clark attached a copy of her DFEH complaint and the DFEH's right-to-sue-notice to her civil complaint. Clark later amended her initial civil complaint twice to name ALSC and an additional individual defendant.

ALSC then moved to dismiss the lawsuit on the grounds that Clark did not exhaust her administrative remedies, as required under the FEHA, because her DFEH complaint did not refer to ALSC by its legal name. The trial court agreed and entered judgment in ALSC's favor. Shortly thereafter, Clark challenged the trial court's decision by filing a petition for writ of mandate requesting that the Court of Appeal vacate the trial court's order.

The Court of Appeal concluded that the trial court was wrong. While employees must exhaust their administrative remedies, the DFEH regulations require it to "liberally construe" all complaints to effectuate the remedial purpose of the FEHA.

The court first indicated that there was no administrative DFEH process to exhaust because Clark requested and received an immediate right-to-sue notice. However, even assuming that Clark could be found to have failed to exhaust her administrative remedies, the court reasoned that she still met her burden. The court noted that Clark named "Oasis Surgery Center LLC" and "Oasis Surgery Center, LP" as respondents in her DFEH complaint – names that are very similar to ALSC's actual legal name – "Oasis Surgery Center." Further, her DFEH complaint named her managers, supervisors, coworkers, job title, and period of employment at ALSC. Thus, any administrative investigation into Clark's DFEH complaint would have certainly identified ALSC as the employer.

Because any administrative investigation into Clark's DFEH complaint would have revealed ALSC as the employer at issue, the court found her complaint served the purpose of the FEHA administrative exhaustion doctrine, i.e., to give the DFEH an opportunity to investigate and conciliate the claim. This conclusion was also consistent with state and federal decisions that hold that employees can exhaust their administrative remedies even without referring to their employers' legal names. Accordingly, the court noted that a misdescription of an employer's legal name on a DFEH complaint is not a "get-out-jail-free card" for the employer under the anti-discrimination laws.

For these reasons, the court vacated the trial court's order entering judgment in ALSC's favor.

Clark v. Superior Ct. of San Diego Cty., 62 Cal. App. 5th 289 (2021).

Note:

Courts tend to excuse employees who make mistakes on administrative complaints provided that the mistake does not prevent the DFEH from investigating and conciliating.

LABOR RELATIONS

PERB Finds County Guilty Of Bad Faith Effects Bargaining Because Of Misrepresentations And Exploding Offer.

In November 2017, the Criminal Justice Attorneys Association of Ventura County (Association) filed an unfair practice charge alleging the County of Ventura unilaterally characterized accrued leave as taxable income. A few weeks later, the Association filed a second unfair practice charge accusing the County of bad faith bargaining during the meet and confer over changes to represented employees' paid leave plan. The parties consolidated both charges for the administrative hearing.

Following the hearing, an administrative law judge (ALJ) issued a proposed decision. The proposed decision found that the County violated its duty to bargain in good faith by unilaterally implementing its decision to withhold taxes on "constructive receipt income" without completing negotiations over the negotiable effects of that decision. In addition, the ALJ found that the County bargained in bad faith during its negotiations to amend the annual leave redemption plan. Specifically, the ALJ found that the County misrepresented its tax withholding plan and made an exploding offer without justification. The ALJ dismissed the Association's remaining allegations. The County filed exceptions to the proposed decision.

Under the parties' Memorandum of Understanding (MOU), each employee accrued annual leave on a biweekly basis at a rate based on length of service. Employees could use annual leave hours for paid time off or redeem them for cash. Before August 2016, the County neither reported accrued annual leave hours as taxable income, nor withheld taxes based on such hours until employees either used them as paid time off or redeemed them.

However, in the summer of 2016, County Counsel met with the County's elected Auditor-Controller to express concerns about the tax implications of the redemption option in the County's annual leave plans. The Auditor-Controller subsequently conducted an investigation and sent a letter to all County unions indicating that the redemption option in the plan risked exposing both employees and the County "to unintentional tax consequences under a tax principle known as the 'constructive receipt doctrine.'" The Auditor-Controller noted that the County's MOUs could be amended to avoid this issue, but in the absence of an agreement, he was legally obligated to comply with federal tax laws and would begin reporting the annual leave plan benefits as taxable income in tax year 2017.

Representatives from the County's HR Department then sought to meet with each of the County's 10 unions, including the Association. While meeting with the Association, the County reiterated its position from the Auditor-Controller's letter: absent changes to the redemption plan, the County intended to start treating accrued leave eligible for redemption as constructively-received income. The County suggested reopening negotiations on the applicable MOU provision and presented three ideas for modifying the leave plan. However, the Association expressed concerns, and the meeting ended without any agreement. Thereafter, the County submitted its first written proposal including the three options discussed at the prior meeting.

After reviewing the County's proposal, counsel for the Association sent a letter to the County asserting that its leave plans did not trigger the constructive receipt doctrine because

they already included substantial limitations on employees' ability to redeem leave hours. The County again requested to meet over changing the leave plan. The parties exchanged other proposals; however, they did not reach an agreement on the constructive receipt issue.

In January 2017, the parties began negotiations for a successor MOU. While they negotiated the redemption language in their annual leave plan on multiple occasions and issued numerous proposals, they were again unable to reach an agreement. When the Association asked questions to learn more about the County's constructive receipt tax implementation plan, the County's lead negotiator responded that except for a few minor exceptions, the County would only be reporting accrued leave hours as taxable constructive receipt income and that, for the most part, there would be no tax withholding.

On April 4, 2017, the County issued a proposal that expired on April 7, 2017. While there was some confusion as to which elements of the County's proposal would expire, the Association did not accept the proposal and the County withdrew it. The parties subsequently reached a tentative agreement for a three-year successor MOU, but the tentative agreement contained no provisions designed to address the constructive receipt issue. The Association ratified the tentative agreement in May 2017.

In September 2017, the Chief Deputy Auditor-Controller sent a letter to all employees whose unions had not agreed to modify their leave redemption plans. That letter said that the County would treat the value of accrued leave as constructively received income. The Auditor-Controller's Office later confirmed that it would be both reporting constructively received income and withholding taxes on that income from employees' paychecks.

The Association complained that the County had provided information during negotiations that contradicted the information received from the Auditor-Controller's Office. The Association then hired a law firm to explore litigation options regarding the constructive receipt dispute. The law firm requested that the County immediately suspend its planned withholding and maintain the status quo pending good faith discussions. However, the County implemented its plan and began withholding taxes on constructively received income beginning with employees November 24, 2017 paychecks. As a result, some employee's paychecks netted out to near zero. While the Association presented alternative proposals for the County consider, the County rejected them. The County continued to report accrued annual leave hours as a constructively received income and to withhold taxes on that income in the 2018 tax year.

The Public Employment Relations Board (PERB) first considered whether the County had negotiated in bad faith during its negotiations with the Association over amending the parties' leave redemption plan. The County argued that both items that the ALJ had found were in bad faith – its representations at the bargaining table and its exploding offer – were outside the statute of limitations period. PERB disagreed.

PERB regulations prohibit PERB from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. PERB noted that the Association only knew in September 2017 that the County had made misrepresentations at the bargaining table, a time which was within six months of the Association's November 2017 unfair practice charge. Further, while the Association knew about the County's exploding offer in April 2017, more than six months before the November 2017 charge, PERB considers conduct that occurs outside the statute of limitations period if there is also challenged conduct within the limitations periods. Thus, the Association's unfair practice charges were timely.

Moreover, PERB concluded that the County's exploding offer indicated bad faith. While an exploding offer is not a per se violation, a bargaining party shows bad faith under the totality of conduct test if it does not adequately justify a threatened change in position that is inherent in an exploding offer. Here, the County made an offer with an expiration date only three days later. While PERB credited the County's argument that the tax liability was a reasonable basis for not leaving its offer on the table throughout 2017, the County could not provide a clear reason for its exceedingly short, three-day deadline. Thus, PERB concluded that the County's inability to justify the tight timeline was intended at least in part to pressure the Association into reaching agreement on a successor MOU, which is not legally sufficient to justify an exploding offer.

Next, PERB found that the Association did not waive its right to bargain the effects of the County's

decision to withhold taxes on constructively-received income. The duty to bargain in good faith extends to the implementation and effects of a decision that has a foreseeable effect on matters within the scope of representation. While the County argued that the Association waived its right to bargain following the September 2017 letter, PERB determined that the County did not provide the Association with clear notice of its decision to implement tax withholding based upon constructively received income until November 2017. Before November 2017, the County did not provide the Association with critical details that would have put the Association on notice of the County's intended change. In any event, even if PERB regarded the County's September 2017 letter as adequate notice, the Association repeatedly indicated its interest in bargaining over the impacts of the County's decision. For these reasons, the Association did not waive its right to effects bargaining.

Finally, PERB concluded that the County did not negotiate in good faith prior to implementing its tax withholding decision. As a result, PERB ordered the County to reimburse employees for any accountancy and/or professional fees incurred in relation to the County's implementation of its constructive receipt tax withholding decision.

County of Ventura, PERB Dec. No 2758-M (2021).

Note:

Because PERB had no reason to determine whether the County was right or wrong in its interpretation of the constructive receipt doctrine, and because some employees were able to obtain at least partial refunds of excess withholdings from the IRS and the CA Franchise Tax Board, PERB did not order the County to make employees whole for their additional tax liability or for other harms caused when employees sought to reduce their taxes by redeeming accrued leave.

WAGE & HOUR

California Supreme Court Broadly Defines "Public Works" In Prevailing Wage Law.

David Kaanaana and others were former employees of Barrett Business Services, Inc. (Barrett). Barrett contracted with the Los Angeles County Sanitation District (District) to provide belt sorters to operate the District's facilities. Belt sorters were responsible for removing non-recyclable materials from the conveyor belt, clearing obstructions, and sorting recyclables.

Kaanaana and other employees sued, claiming, among other things, that Barrett failed to pay them the "prevailing wage" they were owed under California law. They asserted that their recycling duties constituted "public work" under the California Labor Code, which states:

"[e]xcept for public works projects of . . . ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works." (§ 1771.)

This section of the California Labor Code applies to some categories of work performed under contract with public agencies, but not to work that a public agency performs using its own work force. After much litigation, the California Court of Appeal agreed with the employees and found that this recycling work was "public work" subject to prevailing wage law. Barrett appealed.

On appeal, the California Supreme Court also concluded that the employees were entitled to prevailing wages. In reviewing the language and legislative history of the Labor Code, the Court determined that the definition of "public work" had broadened over time to cover work beyond that associated with construction projects. The Court also reasoned that the goal of the prevailing wage law is to ensure that local contractors have a fair opportunity to work on public building projects that may otherwise be awarded to contractors hiring cheaper out-of-market labor. Accordingly, even though recycling duties are not specifically enumerated in the Labor Code, the Court concluded that the belt sorters' labor qualified as "public work."

Kaanaana v. Barrett Bus. Servs., Inc. 11 Cal.5th 158 (2021).

Note:

This case confirms the judiciary's trend to broadly define "public work." Public agencies who contract for work must be sure to determine whether the contract comes within California's prevailing wage laws.

BROWN ACT

Association's Brown Act Claims Dismissed Due To Unreasonable Litigation Delay.

Prior to 2018, the Julian Volunteer Fire Company Association (Volunteer Association) provided fire prevention and emergency services through a local fire district, the Julian-Cuyamaca Fire Protection District (District), to the Julian and Cuyamaca rural communities. In April 2018, the District's board of supervisors approved a resolution to dissolve the District and to be replaced by the County of San Diego (County) fire authority.

Two weeks later, the Volunteer Association sued the District, alleging the District's approval of the resolution violated the Brown Act. The Volunteer Association alleged that the District's board members secretly communicated through email and private meetings to discuss the dissolution prior to the formal negotiations. The Volunteer Association sought a writ of mandate ordering the District to vacate the resolution. The trial court scheduled a hearing in November 2018 to rule on the merits of the Brown Act claims. However, the Volunteer Association took the hearing off calendar in October 2018.

While the Volunteer Association's lawsuit was pending, the County and the San Diego Local Agency Formation Commission (LAFCO) conducted a mandatory review of the dissolution request, which included holding public hearings and a special election for residents affected by the request. In March 2019, the County announced the special election had resulted in a majority vote favoring the District's dissolution.

Following the election, the Volunteer Association filed an emergency motion asking the court to immediately enter judgment in favor of its Brown Act claims, without notifying LAFCO or the County of this request. The court entered judgment for Volunteer Association and issued a writ ordering the District to revoke its original dissolution resolution. The District then relied on this judgment to preclude LAFCO from certifying the special election results.

The County and LAFCO then intervened in the Volunteer Association's lawsuit and successfully moved to vacate the judgment and the writ. The County and LAFCO moved for judgment on the pleadings against the Volunteer Association. They argued that the lawsuit was untimely and that the Brown Act claims were barred by the laches doctrine, which applies if a plaintiff unreasonably delays in prosecuting its claims to the prejudice of the defendant. The trial court granted the motion solely on the grounds that the lawsuit was untimely and entered judgment against the Volunteer Association. The Volunteer Association appealed, and the California Court of Appeal affirmed on different grounds.

The Court of Appeal found that the Volunteer Association improperly waited to reschedule the hearing on its Brown Act claims until after the special election results were announced. In doing so, the Court of Appeal held that Volunteer Association unreasonably delayed since the alleged Brown Act violations occurred months before the special election. The Court noted the Volunteer Association presented no justification for the delay, such as the need to conduct discovery. The Court also found that the delay prejudiced LAFCO, the City and the general public, given the substantial costs and burdens of the completed special election. Based on this ruling, the Court affirmed the judgment against the Volunteer Association.

Julian Volunteer Fire Company Association v. Julian-Cuyamaca Fire Protection District, 62 Cal.App.5th 583 (2021).

Note:

While litigation is often a lengthy process, this decision shows that some delays are improper if they prejudice the party being sued.

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 April 15, 2021, the Department of Treasury released information concerning the pre-award requirements in order for certain local governmental entities to receive payments from Coronavirus Local Fiscal Recovery (CLFR) Fund for "covered costs" related to COVID-19 and for other limited purposes. LCW's Special Bulletin regarding qualification for CLFR Fund payments is available **here**.
- The Fair Labor Standards Act (FLSA) does not require an employer to pay employees premium pay for work performed on a holiday or on weekends. (29 U.S.C. §§ 201, et seq.) However, a public agency's memorandum of understanding with an employee organization may give employees premium pay for work on holidays or weekends.
- AB 992 prohibits a member of a legislative body from responding directly to any communication made, posted, or shared by another member of that body regarding any matter within the agency's jurisdiction. (Government Code § 54952.2(b)(3).)

LCW In The News

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

Partner **Brian P. Walter** was quoted in the April 6 issue of *WorldatWork's Workspan Daily* section in a piece highlighting potential increases in lawsuits involving employees who spend "off the clock" time taking part in health screening and/or other tasks designed to help ensure a safe workplace.

In a recent KFI News segment with reporter Corbin Carson, Partner **Mark Meyerhoff** discussed whether police officers have First Amendment rights that allow them to make comments on social media. While police officers do indeed have personal free speech rights, Mark shared that there is a significant difference between personal free speech and speech of public concern. He indicated that statements about the public should not cause a level of disruption that impacts the officer's department (i.e. offensive comments or those that advocate violence), and that new laws call for more diversity/bias training and expanded background checks to avoid hiring officers that engage in behavior that may negatively impact their departments.

Managing Partner **Scott Tiedemann** recently discussed details of the high-profile Kelly Thomas case with KFI News reporter Corbin Carson. As attorney for the City of Fullerton, which prevailed, Scott said it has taken nine years of lawsuits and appeals to uphold terminations of police officers involved in the use of force against Thomas. *"It's really hard in the moment when there are protests—hundreds … thousands of people protesting saying 'The officers need to be fired,'"* said Scott. *"If you cave into that pressure and you don't do things right on the front end, you can find yourself years later having your decisions overturned."* Scott explained that procedural mistakes can cost millions in back pay and rob the public of the justice they are demanding in this type of case, and he shared that the last two police officers involved in this case recently abandoned their lawsuits in which they unsuccessfully tried to be reinstated to their positions in law enforcement.

Partner **Mark Meyerhoff** recently took part in a KNX 1070 Newsradio segment with reporter Craig Fiegener in which Mark discussed a new law that will require public safety applicants for employment in California to be screened for implicit or explicit biases. This law will go into effect in January 2022 and puts pressure on public safety departments to determine how best to conduct such screening. Mark also discussed the issue of public safety departments limiting the private speech of police personnel that is so prevalent amidst high-profile social and political issues.

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 customized training?

Our customized training programs can help improve workplace performance and reduce exposure to liability and costly litigation.

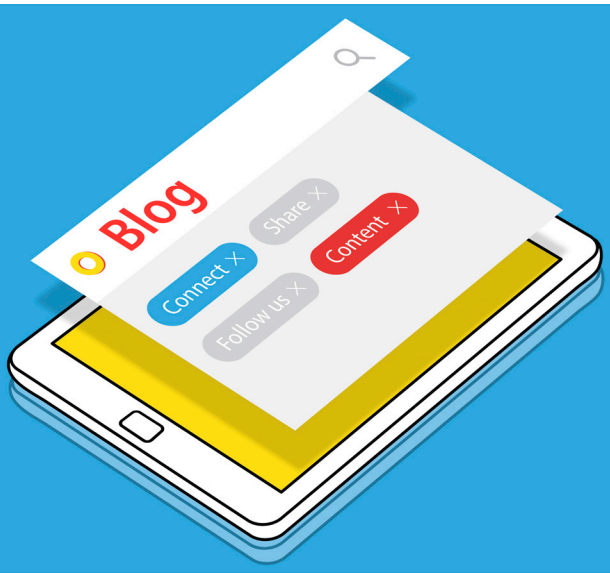
With forty years of conducting employment law and labor relations training, Liebert Cassidy Whitmore regularly customizes our Management Training Programs to meet the specific needs of our clients. Whether a half-day workshop for top-level managers and supervisors or a series of full-day workshops for all employees, our expert trainers can create effective workshops on employment law and labor relations topics. We also provide training on a variety of topics in the areas of business, construction and facilities to community college districts, school districts, and private schools.

Question

A Human Resources Manager contacted LCW and explained that a former employee wished to rescind her letter of resignation. The manager noted that the agency had already sent a letter accepting the resignation and was in the process of recruiting for the vacancy. The agency's Personnel Manual did not address recession of resignation letters. The manager asked if the agency was required to allow this individual to rescind her resignation.

Answer

In the absence of any personnel rule, MOU or other local rule to the contrary, an employer is not required to allow an employee to rescind her resignation if the employer has already accepted and acted in reliance on the resignation. In a similar situation, the California Supreme Court held in *Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 205-206, that in the absence of a valid enactment, policy or rule providing otherwise, a state civil service employee was entitled to withdraw a resignation if the employee did so: 1) before the effective date of the resignation; 2) before the resignation had been accepted; and 3) before the appointing power acted in reliance on the resignation. Under the facts of this consortium call, because the resignation effective date had occurred, and the agency had already accepted the employee's resignation and had begun recruiting, the agency was not required to allow the employee to rescind her resignation.



ON THE BLOG

My Other Computer is Your Computer: Preventing Employee Cybercrimes and Maximizing the Protections of California's Anti-Hacking Statute

By: Kelly Tuffo

California's Computer Data Access and Fraud Act (CDAFA) (also referred to as the "Anti-Hacking Statute") prohibits access to computers, computer systems, and networks without permission in order to do harm or engage in unauthorized use. (See California Penal Code § 502). Violation of the CDAFA may range from a misdemeanor to a felony offense, and the Act also provides for a civil remedy in the form of compensatory damages, injunctive relief, and other equitable relief. The intent of the CDAFA is to protect individuals, businesses, and governmental agencies from tampering, interference, damage, and unauthorized access to lawfully created computer data and computer systems.

The Act specifically prohibits the disruption of government computer services and public safety computer systems without permission.

Prosecution for violation of Penal Code section 502 is not limited to outsiders of an organization. Employees who misuse their access to employer computer systems may be held criminally liable for taking, copying, or making use of any data from a computer, computer system, or computer network. According to the U.S. Court of Appeals for the Ninth Circuit, the term "access" as defined in the state statute includes logging into a database with a valid password and subsequently taking, copying, or using the information in the database improperly.

Many employers are ill prepared to defend against insider hacking jobs. Information Technology (IT) employees and others with unfettered access to computer systems, data, and employee email accounts may be tempted to eavesdrop and appropriate data beyond what is required in their scope of employment.

Public agencies must protect their electronic information just as private companies must. Indeed, while numerous local government records are public documents, improper access and/or misuse of public data, such as employee emails, without a business purpose, can create significant disruption within an agency. Also, many local government documents are exempt from public disclosure, including documents pertaining to pending litigation, private personal information, and library circulation records, to name a few. Local government agencies have an obligation to protect such exempt documents from disclosure.

While improper access can be difficult to detect and control, employers can take several important steps to deter unmitigated employee access.

1. Adopt personnel policies prohibiting employees from gaining access without permission in order to alter, damage, delete, destroy, or otherwise improperly use any data, computer, computer system, or computer network. Such policies should also prohibit making copies of data without permission, and gaining access in order to disrupt services.Community colleges should also note that they are required by Penal Code Section 502(e)(3) to include computer-related crimes as a specific violation of college or university student conduct policies.

2. Establish in job descriptions and terms of service that access to employer computers, systems, networks, and data are only permitted for legitimate business purposes that fall within the employee's scope of employment, and that the employer does not consent to access for non-business purposes or for purposes that fall outside of an employee's scope of employment.

3. Require employees to acknowledge and agree in writing that access is restricted to designated business purposes, and that they are not permitted to access or misuse employer computers, systems, networks, and data for any other reason. Employees should also be required to acknowledge that unauthorized access or access/use for a non-business purpose may result in discipline up to and including termination, and may result in prosecution under the law. Such acknowledgements should be renewed on a regular basis. User agreements are particularly important for IT employees.

4. For IT employees, establish a "service" or "trouble" ticket system to define when access to certain systems is appropriate, and when such access is no longer necessary once each ticket is resolved.

5. In order to discourage misappropriation of agency data, prohibit employees from bringing their own computer equipment, including computers, laptops, hard drives, USB drives and other personal devices, into the workplace.

6. Finally, in the event that employers need to investigate an employee's alleged improper access or misuse, advise and regularly remind employees in writing that they have no expectation of privacy regarding their activity on employer-owned devices and systems.

Data theft and computer system disruption can have serious effects on an organization. These steps can help ensure that employees are aware of the rules and expectations related to computer and data access, and will help protect employer data from misuse.

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