LIEBERT CASSIDY WHITMORE

EDUCATION MATTERS

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

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LCW NEWS

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

TITLE IX

U.S. Department Of Education Issues Guidance Stating Title IX Provides Protection Against Discrimination Based On Sexual Orientation And Gender Identity.

The U.S. Department of Education's Office for Civil Rights (OCR) issued a Notice of Interpretation on June 16, 2021, explaining that it will enforce the prohibition on discrimination based on sex under Title IX of the Education Amendments of 1972 (Title IX) to include discrimination based on sexual orientation and gender identity.

The Notice of Interpretation continues OCR's efforts to promote safe and inclusive schools for all students and is part of the Biden Administration's commitment to advance the rights of the LGBTQ+ students, which are set out in President Biden's Executive Orders on guaranteeing an educational environment free from discrimination based on sex and combating discrimination based on gender identity and sexual orientation.

Additionally, OCR issued a Dear Educator Letter on June 23, 2021, to celebrate the 49th anniversary of the passage of Title IX, highlight the law's impact on education, and provide recent developments and resources. The Letter includes a new fact sheet on sexual orientation and gender identity discrimination. It also notes that OCR is reviewing the public comments it received during the recent virtual public hearings and anticipates issuing a notice of proposed rulemaking. It is anticipated that such notice would amend the federal Title IX regulations issued in 2020 and a question-and-answer document so as to clarify schools' existing obligations under the 2020 amendments, including the areas in which schools have discretion in their procedures for responding to reports of sexual harassment.

Read the Notice of Interpretation here.

Read the Dear Educator Letter here.

NOTE:

If your school, college, or university needs assistance understanding and implementing the changing Title IX law and regulations, learn more about LCW's new Title IX compliance training program and other resources by visiting this page.

FREE SPEECH

The U.S. Supreme Court Decides Landmark Case On Off-Campus Student Free Speech.

On June 23, 2021, the United States Supreme Court issued its highly anticipated decision in *Mahanoy Area School District v. B.L.*, finding that a high school violated a cheerleader's First Amendment rights when it disciplined her for a short,

profane Snapchat post she created off-campus and on a Saturday. The case involves a public school, to which First Amendment restrictions apply when it comes to decisions to discipline students for their speech.

In *Mahanoy*, a Pennsylvania public high school student, frustrated at her lack of ability to advance in cheerleading, off campus and on a Saturday posted to Snapchat a picture of herself with the caption (spelling out the offending words): "F ____ school f_____ softball f_____ cheer f_____ everything." The image could be seen by about 250 people, including fellow students and cheerleaders. The coaches learned of the post and decided it violated team and school rules. They suspended B.L. for a year from the cheerleading team.

In November 2019, the U.S. Court of Appeals for the Third Circuit held as a matter of first impression that existing legal rules which allow schools to punish students for sufficient actual or threatened disruption of the learning environment do not apply at all to "off-campus speech." Under this rule, students thus could not be disciplined for such speech. The court described this as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." The Third Circuit found that B.L.'s post, created off campus and not during school hours, could not be the subject of discipline by the school district.

The U.S. Supreme Court's decision disagrees with the Third Circuit's bright-line rule shielding any "off-campus speech" from discipline. Instead, the majority opinion by Justice Stephen Breyer articulated a different general standard on how to handle off-campus speech. The opinion concluded that, as it turned out, the student B.L. won her case under these standards as well.

The Supreme Court began its discussion of standards by re-stating the general rule from its prior precedent on when a school can, consistent with the First Amendment, discipline a student for on-campus speech. It can do so for speech that "materially disrupts class work or involves substantial disorder or invasion of the rights of others."

The Court then explained that the ability to discipline under this standard for ***off-campus*** speech can apply in certain circumstances. The Court cited "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers." In this way, the Court preserved the ability of educators to address and discipline on such matters as bullying and harassment that occur off-campus but affects the school, and allowed for future cases to develop the law in this area.

The Court suggested that in general, speech off-campus should be more likely to enjoy First Amendment protection than on-campus speech. The Court described three typical features of off-campus speech that "diminish the strength of the unique educational characteristics that might call for special First Amendment leeway" to allow discipline. First, in relation to off-campus speech, schools will rarely stand in "loco parentis," i.e., "standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them." The Court thereby suggested discipline is more appropriate in circumstances in which the school stands "in loco parentis."

Second, regulating off-campus speech would mean responsibility to monitor students 24-hours a day, thus encroaching on their ability to express themselves. On this point, the Court emphasized as guidance for future cases: "When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention." Third, the Court stated that "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." The Court explained:

> America's pWublic schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection.

The Court proceeded to apply these standards to the student B.L.'s case, ultimately concluding that the First Amendment protected her speech.

Only about once in a decade does the U.S. Supreme Court decide a case on First Amendment rights of students. This year's *Mahanoy* case provides guidance in this area of the law, and will serve as an important tool in interpreting student free speech rights in public schools.

Mahanoy Area School District v. B. L. (2021) __ U.S. __ [2021 WL 2557069].

TORTS

A Public School District Maintains Sovereign Immunity From Liability For Treble Damages Under Government Code Section 818.

Plaintiff Jane Doe attended high school in Los Angeles Unified School District. While enrolled, a District employee sexually abused Doe. Additionally, before the incident against Doe, the District allegedly engaged in a cover-up of the employee's sexual abuse of another female student.

Doe sued the District. She alleged negligent hiring, supervision, and retention of an unfit employee; breach of mandatory duty to report suspected child abuse; negligent failure to warn, train, or educate; and negligent supervision of a minor. She sought an award of economic and noneconomic damages against all defendants and an award of treble damages against the District, which would allow the trial court to triple the amount of compensatory damages the District would owe her.

The District moved to strike the request for treble damages. It argued the award of treble damages under California Code of Civil Procedure Section 340.1 would be "punitive" and, therefore, prohibited against a public entity uWnder Government Code Section 818.

Doe opposed the District's motion. She argued that the purpose of treble damages was not "merely punitive" but also serves a compensatory function. Doe asked the trial court to take judicial notice of several Assembly Floor Analyses of the enacting legislation that included statements attributed to the bill's author that seemed to support the idea that the Legislature intended treble damages to both compensate victims and serve as effective deterrent against individuals and entities who protect perpetrators of sexual assault. Accordingly, she argued the trial court could award her treble damages.

The trial court ruled in Doe's favor. Specifically, the trial court found the treble damages provision had a compensatory function, so the District was not immune from paying treble damages to Doe. The District filed a special petition, called a writ of mandate, with the Court of Appeal asking it to direct the trial court to rule in the District's favor.

Code of Civil Procedure Section 340.1 authorizes an award of "up to treble damages" in a tort action for childhood sexual assault where the assault occurred "as the result of a cover-up." However, Government Code section 818 exempts a public entity from an award of damages "imposed primarily for the sake of example and by way of punishing the defendant."

In the writ petition, Doe argued that legislative history intended treble damages to both compensate victims and serve as an effective deterrent against individuals and entities who protect perpetrators of sexual assault. However, the Court of Appeal found that the Assembly Floor Analyses that contained this author's remarks were the only reference to compensation related to treble damages in all the legislative history materials the Parties offered.

Ultimately, the Court of Appeal found that a solitary statement repeated in legislative analyses that treble damages are necessary to compensate victims of a cover-up did not unambiguously demonstrate that the Legislature added the provision regarding treble damages for that expressed purpose. The statement did not identify what injury the treble damages were needed to compensate. Accordingly, the Court of Appeal declined to embrace the Assembly Floor Analyses as an unambiguous expression of the Legislature's intent.

Furthermore, Doe did not identify any injury from a childhood sexual assault or cover-up for which normal tort damages failed to provide full compensation. On the contrary, the treble damages imposed under Code of Civil Procedure Section 340.1 were, by definition, *in addition* to a plaintiff's actual damages, and the statute necessarily awards the plaintiff, upon proof of a cover-up, damages "beyond the equivalent of harm done." Because the treble damages provision plainly was designed to punish those who cover-up childhood sexual abuse and thereby to deter future cover-ups, rather than to compensate victims, the imposition of these damages was primarily punitive under Government Code Section 818, and therefore could not be awarded against the District.

Doe also argued even if the treble damages did not serve a compensatory function, the treble damages provision was nevertheless beyond the purview of Government Code Section 818 because it advanced a non-punitive "public policy objective." She argued the provision's focus on cover-ups reflects a legislative imperative to bring past childhood sexual abuse to light, and she argued that the availability of treble damages advanced this objective by offering victims an incentive to come forward to "end the pattern of abuse." The Court of Appeal held that even if it agreed with Doe that the treble damages provision incentivized victims to file claims for childhood sexual assault, the supposed public policy objective did not remove the enhanced damages provision from Government Code Section 818's purview. The treble damages provision in the Code of Civil Procedure Section 340.1 did not have a compensatory function; its primary purpose is to punish past childhood sexual abuse cover-ups to deter future ones. While the Court of Appeal found this to be a worthy public policy objective, it was not one for which the state

waived sovereign immunity under the Tort Claims Act. Accordingly, a public entity like the District was immune from treble damages under Government Code Section 818.

The Court of Appeal granted the District's writ and directed the trial court to enter an order granting the District's motion to strike the treble damages request.

Los Angeles Unified Sch. Dist. v. Superior Ct. of Los Angeles Cty. (2021) 64 Cal.App.5th 549.

BUSINESS AND FACILITIES

If The Validity Of A Signature Is Challenged, The Party Moving To Compel Arbitration Bears The Burden Of Establishing That The Signatures Are Authentic.

Maureen Bannister was an office worker at a skilled nursing facility for approximately three decades when Marinidence Opco, LLC (Marinidence) purchased the facility. A year later, Marinidence terminated Bannister. She proceeded to file suit against Marinidence alleging discrimination, retaliation, defamation, and other claims. In response, Marinidence moved to compel arbitration, alleging that, at the time it took over the facility, Bannister electronically signed an arbitration agreement when completing the paperwork for new Marinidence employees.

Marinidence presented evidence that to access the online onboarding portal, an individual had to enter their first and last name, social security number, as well as their "Client ID" and pin code. Once logged in, the individual employee had to complete a W-4 tax withholding form and provide emergency contact information prior to accessing the arbitration agreement. Marinidence claimed that, based on these requirements, Bannister was the only person who could have electronically signed the arbitration agreement.

Bannister submitted contradictory evidence that, when Marinidence purchased the facility, it had a short deadline by which to complete the purchase transaction to take over the facility. As a result, Marinidence rushed to hire 180 staff members employed by the prior nursing facility owners before the deadline. Bannister claimed there were no employee-specific user names or passwords required to access the onboarding portal; Marinidence never provided her with copies of any documents; she never saw an arbitration agreement; and the entire process took less than 10 minutes. Bannister also presented evidence that the human resources manager completed the onboarding process for other employees without their participation.

The trial court denied the motion to compel and concluded that Marinidence failed to meet its burden in establishing the authentication of an electronic signature under Civil Code Section 1633.9, which is part of the California Uniform Electronic Transactions Act. Civil Code Section 1633.9 requires that the party claiming an electronic signature is valid must make "a showing of the efficacy of any security procedure applied to determine the person to which the…electronic signature was attributable." The Court of Appeal affirmed the trial court's decision and stressed that it would not "second guess" the trial court's factual determinations. Because Marinidence failed to rebut evidence that the human resources manager completed the onboarding process for other employees, as well as evidence that persons other than the employee could complete the form, the Court of Appeal was not in position to disrupt the trial court's factual determinations.

Bannister v. Marinidence Opco, LLC, et al. (2021) 64 Cal. App.5th 541.

NOTE:

When requiring employees to electronically sign an arbitration agreement, employers should ensure that the execution of the agreement is possible only by the employee in question. Employers should review their electronic signing processes to ensure that they meet the requirements of the California Uniform Electronic Transactions Act, which can be accomplished by various methods including the use of unique log in ID and passwords created by the employee.

LEGAL TRENDS

LCW Provides Assistance to Educational Entities Responding to California Public Records Act Request Regarding Police Officer Personnel Records.

LCW is aware that many community college districts and other public agencies across the state have recently received requests under the California Public Records Act (CPRA) for unredacted copies of agreements between the educational entity and current or former employees assigned to the entity's police department regarding threatened discipline or discipline. Specifically, the requests demand access to settlement agreements, last chance agreements, separation agreements, clean record agreements, resignation agreements, and related agreements between the district and such employees.

The CPRA contains specific legal requirements, including timelines to respond among others, with respect to the obligations to respond to such requests. Furthermore, the CPRA requires that an entity perform

a reasonable search for potentially responsive records. Depending on the content of responsive documents, the entity may find that all or some of its content are exempt from disclosure. Ultimately, the law requires the entity to provide responsive, non-exempt documents, if any exist.

Accordingly, determining whether an entity must provide documents in response to a CPRA request is an individualized analysis that depends on the specific request and the contents of the responsive document. If your school, college, or district needs assistance with responding to this or other CPRA requests, please contact one of our five offices statewide.

FIRM VICTORY

LCW Obtains Dismissal Of POA's Breach Of Contract Claim Related To Salary Surveys.

LCW Partner Jennifer Rosner and Associate Viddell Lee Heard obtained a defense judgment for a city against a police officer's association's claims for: 1) breach of the memorandum of understanding (MOU); and 2) declaratory relief.

The MOU, dated 2015 to 2020, provided for annual salary increases for association members based on a salary survey. The MOU also stated that the salary surveys would be conducted in accordance with the provisions of the City Charter and "consistent with the interpretation and methodology [the city] currently utilized by the City."

The city's municipal code specified the following methodology for salary surveys: if an item of compensation from a comparator city's memorandum of understanding appeared on a surveyed-city's salary plan (consisting of ranges and steps), then the compensation was included in the survey. Any other item of compensation, such as fringe benefits or education pay, was not included in the survey. In addition, a 2004 City Attorney Opinion letter stated that Peace Officer Standards and Training (POST) certificate pay should only be included in the salary survey if it was part of a surveyed-city's salary plan.

In 2015 and 2016, an association member who prepared the materials for the parties' annual salary survey included POST certificate pay from a few comparator cities even though that pay was not in a salary plan. For both years, the city's human resources director approved the salary surveys without realizing this mistake. In 2017, the human resources director learned of these errors and ensured the mistake was not repeated in the salary survey for that year or for future salary surveys.

The association sued, alleging that the city breached the MOU by failing to include POST certificate pay for all comparator cities during the 2017 salary survey. The association argued that 1) the City Charter does not limit salary and should be interpreted to include all forms of compensation including POST pay; and 2) the parties modified that methodology when they included the otherwise excluded POST certificate pay in the 2015 and 2016 salary surveys. During the bench trial, however, the association presented the member who prepared the salary survey materials in 2015 and 2016. She testified that, while she did not participate in negotiations for the MOU, she understood that the MOU required the parties to use the same methodology that the parties had always been using for conducting salary surveys. Thus, she admitted that she had deviated from the parties' past practice by including POST certificate pay in the salary survey for the years 2015 and 2016 when it was not part of the comparator agency's salary plan.

After the association presented its case at trial, the city moved for judgment on the grounds that the association failed to present evidence supporting a breach of the MOU. The court agreed, finding that there was no evidence to support that the language in the City Charter section required the city to incorporate POST pay into the salary survey or that this was the intent of the parties during negotiations for the MOU. The Court also found that the association had not presented sufficient evidence to support that the parties intended to modify the existing methodology, particularly since the deviation that occurred in 2015 and 2016 was rectified during the 2017 salary survey after the human resources director learned of the error.

The Court also held that the association's request for declaratory relief was moot because the MOU had expired in 2020. Thus, there was no need for the Court to take any action.

NOTE:

A party may move for judgment at trial after the opposing party with the burden of proof has completed presenting its evidence. The party can make this motion even before it puts on its case. Therefore, the motion for judgment is a powerful tool that can reduce costs by getting a lawsuit dismissed before the completion of trial.

COVID-19

Wife Could Not Sue Spouse's Employer For Her COVID-19 Infection.

Robert Kuciemba worked for Victory Woodworks, Inc. (Victory). In the fall of 2020, Kuciemba asymptomatically transmitted COVID-19 to his wife, Corby Kuciemba. Mrs. Kuciemba then sued Victory, to hold Victory liable for her COVID-19 infection. Mrs. Kuciemba alleged she contracted COVID-19 both through direct contact with her husband and through indirect contact with his clothing. She also alleged that Victory had a duty to keep her from this harm.

The district court dismissed the lawsuit. First, the court concluded that California workers' compensation exclusivity barred Mrs. Kuciemba's claim that she contracted COVID-19 through direct contact with Mr. Kuciemba. Next, the court determined Mrs. Kuciemba's "indirect contact" theory was not a plausible claim. Finally, the court reasoned that even if Mrs. Kuciemba's claims could survive, Victory's duty was to provide a safe workplace to its employees, and that duty did not extend to nonemployees who, like Mrs. Kuciemba, contracted viral infections away from Victory's work premises.

Kuciema v. Victory Woodworks, Inc. (2021, 3:20-cv-09355-MMC) [nonpub. opn.]

NOTE:

While this is not a published Northern District of California decision, this case offers guidance for a rapidly emerging area of law. LCW anticipates that agencies may see COVID-19-related litigation in 2021 and beyond.

LABOR RELATIONS

Company Must Bargain Impacts Of Requirement That Employees Fill Out New I-9 Forms.

In 2010, Frontier Communications Corporation (Frontier) took over Verizon's West Virginia operations. In 2013, Frontier discovered that it did not have I-9 forms for many, if not all, of the former Verizon employees who stayed on with Frontier. Because neither Frontier nor Verizon could locate the forms, Frontier sought to obtain new I-9 forms from all affected employees.

The Communications Workers of America, AFL-CIO, District 2-13 (the Union) asked to bargain over the process the employees would follow to complete the forms. Frontier maintained that it was not obligated to bargain, but it agreed to discuss the issue with the Union. Following a meeting with Frontier, the Union ultimately encouraged its members to complete new I-9 forms.

In late 2018, Frontier conduct an audit and discovered "extensive" noncompliance with I-9 form requirements, including forms that were not supported by documentation. Frontier determined that it needed to obtain new I-9 forms from approximately 95% of all employees hired after November 6, 1986 and before March 31, 2018. Frontier then notified employees by email about the need to submit new I-9 forms.

The Union objected that this was similar, if not identical, to what occurred in 2013 and requested that Frontier provide a list of the employees who had incomplete or incorrectly completed I-9 forms. It also demanded bargaining on the issue. However, Frontier declined to provide the list, arguing that the Union had no right to the information. Frontier also indicated that since federal immigration statutes required Frontier to have valid I-9s on file for employees, it was not required or permitted to bargain over its "straightforward" decision to comply with these laws. Frontier eventually provided a 17-page list of the affected employees, but the Union continued to demand bargaining. The Union also asked Frontier to provide additional information, including the specific deficiency for each I-9 form and where the I-9 forms at issue were stored. Frontier did not provide this information.

In September 2019, Frontier advised the Union that starting September 27, 2019, it planned to send out letters to a group of employees who had not yet completed a new I-9 form. In the sample letter it sent the Union, Frontier noted that if an employee failed to comply with the I-9 form verification process, Frontier may treat the employee as voluntarily terminated for failure to satisfy a federal employment requirement. By October 2019, five employees had not yet completed the I-9 form. Frontier again notified the Union of its intent to send a "final notification" to these employees. During this time, the Union continually requested to bargain.

The Union subsequently filed an unfair labor practice charge. The National Labor Relations Board's (NLRB's) General Counsel issued a complaint alleging that Frontier violated the National Labor Relations Act (NLRA) by refusing to provide the Union requested information and refusing to bargain over the effects of requiring employees to complete new I-9 forms. An Administrative Law Judge (ALJ) heard the case in August 2020.

The ALJ concluded that Frontier violated the NLRA when it refused to provide the Union with an opportunity to bargain over the effects of its decision to require employees to submit new I-9 forms. The ALJ

reasoned that while Frontier's argument that it did not have to bargain over the decision to require new forms had merit, the Union still had a valid interest in effects bargaining to explore options for reducing or avoiding the impact on employees. The ALJ also concluded that Frontier violated the NLRA by failing to provide the Union with information it requested about the specific deficiencies in each I-9 form and where the faulty forms were stored. Because Frontier had a duty to bargain with the Union over the effects of its requirement that employees submit new I-9 forms, the information the Union sought was presumptively relevant to the Union's role as the exclusive collective-bargaining representative. Frontier appealed.

On appeal, the NLBR affirmed the ALJ's decision. The NLRB ordered Frontier to bargain with the Union and provide the information it had requested about the specific deficiencies in each I-9 form. The NLRB also directed Frontier to display notices at all of its facilities that it had violated this labor law.

Frontier Communications Corp. & Communications' Workers of Am., AFL-CIO, Dist. 2-13 (2021) 370 NLRB No. 131.

NOTE:

While NLRB precedent is not binding on PERB, NLRB decisions often provide persuasive guidance in construing California's public sector labor relations statutes, including the Educational Employment Relations Act (EERA). This case provides guidance on two issues that are very relevant to EERA compliance: 1) the duty to provide a recognized employee organization information relevant to bargaining; and 2) the duty to bargain the impacts of a non-negotiable decision.

WAGE AND HOUR

Class Certification Denied Because Individualized Testimony On Meal Breaks Was Needed.

California law requires that private employers, such as See's Candy Shops, Inc. in this case, provide two 30-minute meal periods for employees who work shifts longer than 10 hours. Employees are also entitled to one more hour of pay if they miss a meal period. See's Candy's policies complied with this requirement.

Debbie Salazar brought a class action against See's Candy on behalf of a "meal break class," consisting of See's Candy employees who failed to receive second meal breaks when they worked shifts longer than 10 hours. Salazar alleged that despite the official policy on meal breaks, See's Candy's consistently failed to provide the required breaks in practice. To support her claim, Salazar identified a preprinted form used to schedule employee shifts that did not include a space for a second meal break.

Salazar moved to certify a class of employees. A party moving for class certification must show: (i) an ascertainable and sufficiently numerous class; (ii) a well-defined community of interest among class members; and (iii) substantial benefits from certification that make a class action superior to any alternatives. To show a well-defined community of interest, a party must show, that common questions of fact or law "predominate" over individual issues in the action.

See's Candy opposed the certification motion. See's Candy argued that common issues did not "predominate" because testimony from individual employees would be required regarding their experiences with See's Candy's meal break practices. See's Candy submitted declarations from 55 employees -- both managers and shop employees – who confirmed: (i) their knowledge of See's Candy's meal break policy; and (ii) that employees do take a second meal break when they work shifts longer than 10 hours. See's Candy also submitted expert evidence showing that 43% of employees who worked shifts longer than 10 hours received a second meal break.

Based on this evidence, the trial court denied class certification in relevant part because Salazar failed to show that she could prove through common evidence that See's Candy had a consistent practice to deny second meal breaks. The trial court agreed with See's Candy that individual testimony would be necessary to show that See's Candy consistently applied an unlawful practice, which would result in a trial that would "devolve into a series of mini-trials" on meal break practices. Salazar appealed, and the California Court of Appeal affirmed.

The Court of Appeal held individualized evidence would be necessary, given that some employees did receive second meal breaks as required by law. The Court of Appeal noted that the evidence supported that a significant number of employees declined second meal breaks. As a result, individual testimony would be necessary to distinguish those situations from occasions when managers failed to provide a second meal break. Since individualized testimony would negate the purpose of a class action, the trial court properly denied class certification.

Salazar v. See's Candy Shops, Incorporated (2021) 64 Cal. App.5th 85.

NOTE:

Public agencies are not subject to California wage and hour laws except the State's minimum wage laws and regulations. Public agencies are covered by the Fair Labor Standards Act (FLSA). Unlike California "class actions" in which all similarly situated employees are automatically included in the case, employees in FLSA "collective actions" must opt into the lawsuit. LCW attorneys have successfully represented many public agencies in complex FLSA collective action cases.

Hospital Avoided Costly Litigation After Court-Ordered Arbitration Of Nurse's Claims.

Isabelle Franklin worked as a nurse with United Staffing Solutions, Inc. (USSI), a staffing agency. While working for USSI, Franklin signed an arbitration agreement agreeing to arbitrate "all disputes … related to" her employment.

In late 2017, USSI assigned Franklin to work at Community Regional Medical Center's hospital (the Hospital) in Fresno, California. Franklin then signed an assignment contract with USSI regarding her wages and overtime rate, the length of her shifts, and USSI's reimbursement policies. The assignment contract also required arbitration for any controversy arising between USSI and Franklin involving the terms of the agreement. The Hospital was not a party to either of the contracts between Franklin and USSI, and it did not have its own contract with Franklin. Instead, the Hospital contracted with a managed service provider, Comforce Technical Services Inc. (RightSourcing) to source nursing staff. RightSourcing, in turn, contracted with USSI to provide contingent nursing staff like Franklin to the Hospital.

Under this arrangement, the Hospital retained supervision over the contingent nursing staff's work. RightSourcing billed the Hospital and remitted payment to USSI for time worked by contingent nursing staff. USSI set the wages of the nursing staff and paid them accordingly. The contract between RightSourcing and USSI required the nursing staff to use the Hospital's timekeeping system, but it allowed USSI to review the records for any discrepancies.

Following her assignment, Franklin brought a class and collective action against the Hospital alleging violations of the Fair Labor Standards Act (FLSA), the California Labor Code, and the California Business and Professions Code. Franklin's FLSA claim alleged the Hospital required her to work during meal breaks and off the clock, but did not pay her for that work. The district court dismissed Franklin's lawsuit, finding that even though the Hospital did not sign Franklin's contracts with USSI, she was required to arbitrate with the Hospital. Franklin appealed.

Generally, those who have not agreed to arbitrate agreement cannot be compelled to do so. However, under California law, a non-signatory can compel arbitration when a signatory "attempts to avoid arbitration by suing non-signatory defendants for claims that are based on the same facts and are inherently inseparable from arbitrable claims against signatory defendants."

On appeal, the U.S. Court of Appeals for the Ninth Circuit relied on California cases to determine that Franklin's claims against the Hospital were "intimately founded in and intertwined with" her employment contract with USSI. The thrust of Franklin's claims was that she was owed wages and overtime for unrecorded time she worked, and her employment with USSI was central to those claims. For example, USSI was responsible for seeking meal period waivers and compensating Franklin for missed meal breaks. USSI was also responsible for reviewing the timekeeping records, raising any discrepancies with the Hospital, and compensating her for her services. Thus, as a matter of equity, Franklin could not avoid arbitration simply because she sued only the Hospital and not USSI. Franklin was required to arbitrate her claims against the Hospital, and the district court properly dismissed the action.

Franklin v. Cmty. Reg'l Med. Ctr. (2021) 998 F.3d 867.

NOTE:

This defense strategy applied California law to allow the Hospital to avoid an expensive trial on the merits on the wage and hour claims. Note that as to California Fair Employment and Housing Act (FEHA) claims, however, employers cannot require any applicant or employee to submit any FEHA discrimination claims to mandatory arbitration, as a condition of employment, continued employment, or the receipt of any employment-related benefit.

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.

- An entity that is not an individual's employer may still be liable under the Fair Employment and Housing Act (FEHA) for "aiding and abetting" an employer's FEHA violation. In order to establish that another entity "aided and abetted" an employer's FEHA violation, an employee needs to establish: 1) the entity subjected the individual to

conduct in violation of the FEHA; 2) the entity knew the employer's conduct also violated the FEHA; and 3) the entity gave the employer "substantial assistance or encouragement" to violate the FEHA. (*Smith v. BP Lubricants USA Inc.* (2021) 64 Cal. App.5th 138.)

- The California Court of Appeal recently ruled that Governor Gavin Newsom did not abuse his power when he issued an executive order requiring all voters to be provided vote-by-mail ballots for the 2020 general election in light of the COVID-19 pandemic. (*Newsom v. Superior Ct. of Sutter Cty.* (2021) 63 Cal.App.5th 1099.)

- The California Court of Appeal reviewed a municipal ordinance that provided laid off employees with a right to be rehired if the employee had been employed for six months or more with an employer in that municipality. The court held that the ordinance did not apply to an employee who was involuntarily separated from employment after working for less than six months. While the employee had a prior, approximately 10-month stint with that employer, he voluntarily resigned due to scheduling difficulties. The court noted that the purpose of the municipal ordinance was to protect employees who were involuntarily laid off due to economic circumstances—not to protect employees who quit for personal reasons. (*Bruni v. Edward Thomas Hospitality Corp.* (2021) 64 Cal.App.5th 247.)

BENEFITS CORNER

ARPA And CAA Provide Employers With Temporary Flexibility In Structuring Dependent Care FSAs.

Recently, President Joe Biden signed into law the American Rescue Plan Act of 2021 (ARPA) which impacts employers' dependent care flexible spending account (FSA) plans. ARPA allows employers to increase the limit of dependent care expenses that a participating employee may exclude from his or her gross income under a dependent care FSA to $10,500 (increased from $5,000) for single taxpayers and married taxpayers filing taxes jointly, and to $5,250 (increased from $2,500) for married individuals filing separately. These increases are effective only for calendar year 2021.

ARPA also allows employers to retroactively amend a stand-alone dependent care FSA, or one contained in an IRS Code Section 125 cafeteria plan, so long as the employer (1) adopts an amendment to its plan no later than the last day of the plan year in which the amendment is effective (this means December 31, 2021 for calendar year plans); and (2) operates the plan consistent with the amended terms during the period beginning on the effective date of the amendment and ending on the date the amendment is adopted. Notably, ARPA does not require employers to increase the exclusion limits under their plans but merely permits them to do so.

Congress also recently enacted the Consolidated Appropriations Act of 2021 (CAA) which provides, in part, additional temporary dependent care FSA flexibility.

CAA has implications for employers seeking to increase their 2021 dependent care FSA exclusion limits. Specifically, CAA allows employers to permit dependent care FSA participants to roll over unused funds from their FSA account from 2020 to 2021, and from 2021 to 2022. Under CAA, employers can also permit employees to make mid-year changes to their dependent care FSA salary reduction contribution amounts without experiencing a qualifying election change event, such as a marital status change, or the birth or adoption of a child. These CAA provisions are both optional for employers.

Employers should be aware that if they intend to increase their dependent care FSA exclusion limits for 2021, and they do not also allow employees to make mid-year election changes without a qualifying reason, only employees who experience a qualifying event could take advantage of the increased limits.

Additionally, if employers opt to implement CAA's permissive unlimited carryover of unused amounts from 2021 to 2022, and also adopt ARPA's increased exclusion limits, employees could end up with very large account balances in 2022. As a result, employers should consider the implications of both laws before deciding to take advantage of the temporary flexibility provided by one or both.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's employment relations consortiums may speak directly to an LCW attorney free of charge regarding questions that are not related to ongoing legal matters that LCW is handling for the agency, or that do not require in-depth research, document review, or written opinions. Consortium call questions run the gamut of topics, from leaves of absence to employment applications, disciplinary concerns to disability accommodations, labor relations

issues and more. This feature describes an interesting consortium call and how the question was answered. We will protect the confidentiality of client communications with LCW attorneys by changing or omitting details.

Question: A Human Resources manager contacted LCW to inquire about whether the district was required to provide accommodations under the Americans with Disabilities Act (ADA) to an employee with a family member with a disability. The manager explained that the district had been providing a temporary schedule accommodation to an employee who was caring for her mother. The employee's mother had Alzheimer's.

Answer: Under the ADA, employers are generally not obligated to provide reasonable accommodations to an employee for their family member's disability; instead, accommodations are only for the *employee's* own disability. The employee may, however, be eligible for family leave to care for the family member.

Also, under the California Fair Employment and Housing Act (FEHA), an employer cannot discriminate against an employee because of the employee's association with a disabled family member. For example, in *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal. App. 5th 1028, the California Court of Appeal addressed whether an employee had a viable associational disability discrimination case if the employer knew that the employee was caring for a family member with a serious, physical, medical condition. In this case, the employee was provided with a schedule accommodation to care for his son. The son needed daily dialysis treatments. The employee was allowed to work an altered schedule for three years. When the employee refused an assigned shift that conflicted with his son's medical needs, his supervisor told him "he had quit by choosing not to take the assigned shift." The *Castro-Ramirez* court held that these facts were sufficient to defeat a motion for summary judgment, and that a "jury could reasonably find from the evidence that [the employee's] association with his disabled son was a substantial motivating factor in [the supervisor's] decision to terminate him, and, furthermore, that [the supervisor's] stated reason for termination was a pretext."

Firm Publications

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

In the 2nd Quarter 2021 issue of *Workspan,* LCW Associate and Affordable Care Act (ACA) expert **Stephanie Lowe** shared her thoughts on how the Supreme Court might rule on a case regarding the ACA's individual mandate. The article explores whether the individual mandate can be severed from the ACA as well as whether the mandate and the ACA as a whole are constitutional.

LCW Partner **Shelline Bennett** penned the piece "Bringing back decorum and civility in the public sector," which was published in the June 1, 2021 edition of *Western City Magazine*. The article provides much-needed tips that elected officials and senior city management can implement to help preserve civility and set high standards for employees, elected officials, and the cities with which they work.

LCW Associate **Ronnie Arenas** appeared on Telemundo June 16, 2021 to discuss Cal/OSHA and the pending decision regarding masks in the workplace.

LCW Senior Counsel **David Urban** was quoted in the June 24 *Law360* article "Justices Won't Mute Athletes' Social Media Megaphone," which explores the U.S. Supreme Court's recent decision that a public school overstepped by punishing a cheerleader for a "vulgar" social media post. The Court's decision also found students could still face discipline for off-campus speech, a narrow decision that legal experts say reinforces the First Amendment rights of college athletes during a time of amplified online activism. David explained there was great anticipation that this case would talk about college speech in general and specifically athlete speech, and he said the result of the case might bolster the First Amendment rights of college athletes, who presumably have a greater degree of free speech protection.

The article "Recent Decision Leads to Split of Authority on Peace Officer Investigation Rights" penned by LCW Managing Partner **Scott Tiedemann** and Associate **Alex Wong** was reprinted in the *California JPIA* May 2021 newsletter. The piece highlights the April 26, 2021, decision of the District Court of Appeal in Oakland Police Officers Association v. City of Oakland.

LCW Partner **Peter Brown** and Associate **Alex Volberding** penned "Employer Comms Key To New Calif. COVID Rules Compliance" for the June 29 issue of *Law360*, which highlights the collaboration needed between employers and employees to increase the workforce vaccination rate and avoid negative operational impacts and costs associated with work-related COVID-19 exposure.

New to the Firm

Millicent Usoro is an Associate in the Los Angeles office of LCW where she advises clients on labor and employment law matters and represents education clients on matters such as contracting, Title IX policy, discrimination, student privacy and investigations.

She can be reached at 310.981.2753 or musoro@lcwlegal.com.

LCW Webinar

MOU Overtime: Are You Paying Above the Legal Requirements?

REGISTER TODAY!

THURSDAY, AUGUST 26, 2021 | 10:00 AM

This webinar will address the differences between the overtime requirements of the Fair Labor Standards Act that you must follow and the different ways that employers provide overtime benefits to employees that exceed the law, known as either MOU or Contract overtime. In addressing these differences, the instructor will describe the different ways MOU overtime is provided, how it is paid and can be paid, strategies for labor negotiations and ways to use MOU overtime to offset any FLSA overtime liability. The cost of MOU overtime will also be discussed and how the dollars used for it could be directed to compensation typically studied in compensation surveys. Register for this webinar now!

PRESENTED BY: Peter Brown

LCW LABOR RELATIONS CERTIFICATION PROGRAM

Congratulations to Rodolfo Aguayo, County of Imperial's Director of Human Resources & Risk Management, for completing LCW's Labor Relations Certification Program!

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

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

Join our other upcoming HRCI Certified - Labor Relations Certification Program Workshops:
1. July 21 & 28, 2021 - Nuts & Bolts of Negotiations
2. August 18 & 25, 2021 - The Public Employment Relations Board (PERB) Academy
3. September 19 & 16, 2021 - Nuts & Bolts of Negotiations

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

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Trianing

July 7 **"The Future is Now - Embracing Generational Diversity & Succession Planning"**
Monterey Bay ERC | Webinar | Christopher S. Frederick

July 7 **"The Future is Now - Embracing Generational Diversity & Succession Planning"**
NorCal ERC | Webinar | Christopher S. Frederick

July 21 **"A Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves, and Accommodations"**
Orange County ERC | Webinar | Laura Drottz Kalty

Customized Training

For more information, please visit http://www.lcwlegal.com/events-and-training.

July 21 **"Hiring the Best While Developing Diversity in the Workforce: Legal Requirements and Best Practices for Screening Committees"**
Contra Costa Community College District | Webinar | Amy Brandt

July 23 **"Elimination of Bias in Hiring and Employment"**
Cabrillo College | Webinar | Laura Schulkind & Amy Brandt

Speaking Engagements

July 22 **"Title IX"**
ACHRO Human Resources Leadership Academy | Virtual | Jenny Denny & Pilar Morin

July 29 **"CHRO Emerging Leaders: Title IX"**
ACHRO | Virtual | Pilar Morin & Jenny Denny

Seminars/Webinars

For more information, please visit http://www.lcwlegal.com/events-and-training.

July 20 **"Title IX Training Part 3: Title IX Hearings and Determinations"**
Liebert Cassidy Whitmore | Webinar | Jenny Denny

July 21 **"Nuts & Bolts of Negotiations: Part 1"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Shelline Bennett

July 28 **"Nuts & Bolts of Negotiations: Part 2"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Shelline Bennett

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