LIEBERT CASSIDY WHITMORE

# EDUCATION MATTERS

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

MAY 2021

## INDEX



## 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 Announces Virtual Public Hearings On Title IX.*

The U.S. Department of Education's Office for Civil Rights (OCR) announced a virtual public hearing scheduled for June 7, 2021, to June 11, 2021, to gather information for improving enforcement of Title IX of the Education Amendments of 1972.

The hearing is part of OCR's comprehensive review of the Department's existing Title IX regulations and other actions to implement President Biden's March 8 Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity. The hearing also helps the Department fulfill the directives of President Biden's January 20 Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.

The public hearing is an opportunity for students, parents, educators, school staff, administrators and other members of the public to provide input on additional changes to the Title IX regulations and Department guidance. The Department issued revised Title IX regulations in May 2020 that became effective in August 2020. Considering the recent changes, the Department wants to ensure students who experience sexual harassment receive appropriate support, schools provide fair processes for resolving sexual harassment complaints, and students who experience discrimination based on sexual orientation and gender identity are protected under Title IX.

For more information on the public hearing or to register to participate, visit OCR's website.

***NOTE:***

*Remember, an educational entity's obligation to address sex- and gender-based harassment and discrimination stem from a variety of sources under federal and state law. If your school, college, or university needs assistance, please contact one of our five offices statewide. Learn more about LCW's new Title IX compliance training program and other resources by visiting this page.*

## FIRST AMENDMENT

### *Sixth Circuit Court Of Appeals Recognizes An Academic Exception To Restrictions On The First Amendment Rights Of Public Employees.*

Nicholas Meriwether has been a philosophy professor at Shawnee State University, a small public college in Ohio, for 25 years. Meriwether considered himself a devout Christian and, based on his religious beliefs, he believed sex is fixed and cannot be changed regardless of an individual's feelings or desires.

At the beginning of the 2016-2017 academic year, the University informed faculty that they must refer to students by their preferred pronouns. The University stated it would discipline professors if they "refused to use a pronoun that reflects a student's self-asserted gender identity."

On multiple occasions in the Spring 2018 semester, Meriwether refused to use a student's preferred pronouns in class. The student complained to the University, and subsequently, the University provided Meriwether multiple warnings regarding his non-compliance with its policies and investigated the student's complaints. The University concluded Meriwether created a hostile environment in violation of the University's nondiscrimination policies, which protect individuals from discrimination based on gender identity.

Meriwether requested an accommodation from the nondiscrimination policy based on his sincerely held religious beliefs, but the University repeatedly declined the request. The University ultimately gave Meriwether a written reprimand.

Meriwether filed a lawsuit against the University alleging it violated his rights under the Free Speech and Free Exercise Clauses of the First Amendment among other allegations. The trial court dismissed all of Meriwether's claims, and Meriwether appealed.

The Court of Appeals found this case implicated the United States Supreme Court's seminal case concerning the First Amendment rights of public employees, *Garcetti v. Ceballos.* In Garcetti, the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." However, the *Garcetti* Court declined to decide whether this holding applied "to a case involving speech related to scholarship or teaching."

The Court of Appeals held that professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship. Accordingly, this academic-freedom exception to *Garcetti* covered all classroom speech related to matters of public concern, irrespective of whether that speech is germane to the contents of the lecture.

Although the Court of Appeals acknowledged an academic-freedom exception to *Garcetti,* it also held that professors are not immune from discipline based upon their classroom speech. Instead, the Court of Appeals applied a test developed by the Supreme Court in *Pickering v. Board of Education* and *Connick v. Myers.* Under the *Pickering-Connick* analysis, a professor's classroom speech was protected if (1) the speech related to a matter of public concern, and (2) the employee's First Amendment interest outweighed the government's need for efficiency as an employer. Applying this test, the Court of Appeals held that Meriwether prevailed under both prongs. First, the Court of Appeals found that Meriwether expressed a view on a matter of public concern by refusing to comply with the University's pronoun policy, noting that "when Meriwether waded into the pronoun debate, he waded into a matter of public concern." Second, the Court of Appeals found the *Pickering* balance weighed in Meriwether's favor based upon the importance of academic freedom to our democracy and judicial reluctance to permit the government to compel the speech of individuals over their objection. In reaching this conclusion, the Court of Appeals rejected the University's argument that Title IX required a contrary result because there was no evidence to support the argument that Meriwether's decision not to refer to the student complainant using the student's preferred pronouns had the effect of denying the student equal access to the University's educational program or activity.

Meriwether also argued the University violated the Free Exercise Clause when it disciplined him for not following its pronoun policy. Although the University argued that compliance with nondiscrimination policies never burdens an individual's religious beliefs, the Court of Appeal held that depending on the circumstances, the application of a nondiscrimination policy could force a person to endorse views incompatible with his religious convictions. Accordingly, the Court of Appeals found that Meriwether plausibly alleged that the University's application of its pronoun policy was not neutral for at least two reasons: (1) University officials exhibited hostility to Meriwether's religious beliefs, and (2) irregularities in the University's adjudication and investigation processes permitted a plausible inference of non-neutrality. Because Meriwether made a plausible Free Exercise claim, the trial court should not have dismissed the claim.

Lastly, Meriwether claimed that the University's pronoun policy was unconstitutionally vague as applied to him. A policy is unconstitutionally vague when it either fails to inform ordinary people what conduct is prohibited or allows for arbitrary and discriminatory enforcement. However, the Court of Appeal found Meriwether was on notice that the University's policy prohibited his conduct, so he could not challenge it for vagueness. Furthermore, Meriwether also failed to argue that the policy allowed for arbitrary and discriminatory enforcement. Thus, the Court of Appeal upheld the trial court's decision dismissing this claim.

Ultimately, the Court of Appeals reversed the trial court's dismissal and instructed the trial court to conduct proceedings consistent with its opinion.

*Meriwether v. Hartop* (2021) 992 F.3d 492.

***NOTE:***

*This case is from the United States Court of Appeals for the Sixth Circuit. This case is not binding in California, but it does provide some insight into how one federal appellate court interpreted the First Amendment regarding a public university's enforcement of its anti-harassment and discrimination policy.*

## EMPLOYMENT

***The Regents Of The University Of California Are Not Subject To State Minimum Wage Laws; The Regents' Timekeeping Procedures Are Matters Of Internal Affairs Of The University That Do Not Come Within Any Of The Exceptions To The Regents' Constitutional Immunity.***

Guivini Gomez worked for the Regents of the University of California as an hourly-paid, nonexempt employee at University of California, San Diego Medical Center. The Regents utilized "a uniform company policy and practice" to pay employees. Two facets of this practice included rounding the actual time worked ("usually down") and automatically deducting a 30-minute meal period regardless of whether an employee was actually offered or took a meal period.

After leaving her employment, Gomez brought a class action lawsuit against the Regents and alleged they engaged in payment policies that resulted in nonexempt employees receiving less than minimum wage for the hours worked. Gomez alleged the Regents owed the unpaid balance of the full amount of the unpaid minimum wages owed, and she sought civil penalties under the Private Attorneys General Act (PAGA) for the Regents' violation.

The Regents objected to the complaint and argued it was exempt from statutes and regulations that govern wages and benefits of public employees. The Regents further argued Gomez's claim under PAGA was barred because: (1) it was derivative of the minimum wages claim; (2) the Labor Code only applied to employees in the private sector unless the provision specifically stated it applied to public employees; and (3) the Regents were exempt from this provision of the Labor Code.

Gomez opposed the Regents' objection and argued minimum wage laws apply to all workers employed in California. Gomez also argued that PAGA applied to the Regents, and the Regents were not exempt from civil penalties.

The trial court found in favor of the Regents on the first claim and found the Regents were exempt from PAGA, which defeated Gomez's second claim. Gomez appealed the judgment.

On appeal, Gomez argued that Wage Order No. 4-2001 (Wage Order No. 4) from the Industrial Welfare Commission applied to the Regents. Wage Order No. 4 governs wages, hours, and working conditions in professional, technical, clerical, mechanical, and similar occupations and requires employers to pay their employees at not less than a designated hourly rate "for all hours worked." The Regents argued this wage order did not apply.

The Court of Appeal noted that the California Constitution established the Regents as a "public trust," and the Legislature may regulate the Regents' conduct in only limited circumstances. Furthermore, the Court of Appeal noted that courts have consistently held the Regents are exempt from statutes regulating the wages and benefits of employees and other workers, including those pertaining to prevailing wages and overtime pay on the ground those matters are internal affairs of the university that do not come within any of the areas the Legislature may regulate.

The Regents argued that Wage Order No. 4 does not apply to them because the section on minimum wage only applied to the state and the state's political subdivisions, which, it argued, did not include the Regents. The Regents also argued that the definition of employer in Labor Code Section 1182.12, which set forth the actual minimum wage required under state law, did not explicitly refer to the Regents, but did provide: "For purposes of this subdivision, 'employer' includes the state, political subdivisions of the state, and municipalities." Accordingly, the Regents argued because they are not specifically named in the statute nor identified in Wage Order No. 4, they are not subject to the minimum wage laws identified by Gomez.

However, the Court of Appeal found Labor Code Section 1182.12 did not *definitively* address whether the Regents were a political subdivision of California for purposes of Wage Order No. 4.

Ultimately, the Court of Appeal held, consistent with another case, that the University of California is not a political subdivision, which made the Regents a public corporation that administers that trust. Therefore, neither the Regents or the University of California could

be considered a "political subdivision" to which Wage Order No. 4 applied to set the minimum wage at the University of California.

Furthermore, the Court of Appeal found that Gomez did not allege the Regents set her hourly pay below the minimum wage. Instead, she challenged certain time-keeping procedures the Regents employed. In light of California courts' consistent deference to the Regents regarding the setting of wages and benefits for employees, the Court of Appeal concluded the trial court did not err in finding in favor of the Regents on the first cause of action. The Regents' time-keeping procedures are matters of internal affairs of the university that do not come within any of the exceptions to the Regents' constitutional immunity.

Finally, because Gomez's claim under PAGA was derivative of her first cause of action, and the Court did not find that the Regents violated any labor laws in the first cause of action, Gomez's PAGA action also failed.

*Gomez v. Regents of Univ. of California* (2021) 63 Cal. App.5th 386.

## BUSINESS AND FACILITIES

### *When A Contract Designates A Third Person To Certify Performance Under A Contract, That Third Person's Decision Is Conclusive In the Absence Of Fraud Or Mistake.*

Three neighboring property owners in San Juan Capistrano incurred varying damages due to a mudslide. Coral Farms, L.P.; Paul and Susan Mikos; and Thomas and Sonya Mahony own the three neighboring properties. In the first lawsuit, the property owners sued and countersued each other for negligence and other claims related to water drainage. In October of 2013, the parties eventually settled and the owners agreed to each perform mitigation and repair work on their own property. The agreement was memorialized in a settlement agreement (Settlement Agreement) which provided that "[u]pon completion of the work, each party shall obtain a written report by the design engineer or geologist that the work performed is in substantial compliance with the Parties' plan…and will provide a copy to all other Parties within 30 days of completion." In 2014, each of the three property owners obtained engineer reports from different engineering companies that their mitigation/repair work was "in substantial compliance" with the approved plan.

In October 2017, Coral Farms and the Mikoses (collectively "Coral Farms") filed suit against the Mahonys for breach of the Settlement Agreement claiming that the mitigation/repair work performed by the Mahonys was "dramatically and substantively different" than what was required under the Settlement Agreement. At trial, the Mahonys' civil engineer testified that the completed repairs on the Mahonys' property were "in substantial compliance" with the agreed upon mitigation/repair plans. The trial court found no breach of the Settlement Agreement because, as drafted, the Settlement Agreement allowed each party's engineer to decide whether that party had substantially complied with its own plan. Further, the Settlement Agreement required each party to deliver its' engineer's certificate to the other parties, which the Mahonys did. The trial court found in favor of the Mahonys and Coral Farms appealed.

The Fourth Appellate District agreed with the trial court's interpretation of the Settlement Agreement stating, "courts are not in the business of rewriting ill-advised contract provisions. Plaintiffs are stuck with the contract they signed." Pursuant to the plain language of the contract, Coral Farms expressly agreed to accept the written report that the Mahonys had performed the required repairs in substantial compliance with the agreed upon plan. Thus, absent a finding of bad faith, fraud, or gross negligence, Coral Farms could not dispute the engineer's certificate presented by the Mahonys.

*Coral Farms, L.P., et al. v. Mahony* (2021) 63 Cal.App.5th 719.

> *NOTE:*
> *This case affirm that when there is a valid written contract, courts generally enforce its terms, regardless of their advisability. It is not enough to argue that the contract operates harshly or inequitably. If parties intend different results than as written in the contract, then they should negotiate or draft different terms.*

### *Arbitrator Cannot Decide Whether Plaintiff Is An Employee Or Independent Contractor Under PAGA.*

Damaria Rosales (Rosales) was an Uber driver under a written agreement with Uber Technologies (Uber) stating she was an independent contractor. The agreement compelled all disputes to be resolved by arbitration under the Federal Arbitration Act (FAA) and delegated to the arbitrator decisions on the enforceability or validity of the arbitration provision. The arbitration agreement was part of Uber's then-standard technology services agreement, which Rosales executed on-line when she became a driver for Uber in March 2016.

In April 2018, Rosales filed suit against Uber for unpaid wages under the Private Attorneys General Act (PAGA). PAGA allows aggrieved employees to sue their employer for labor code violations and pursue civil penalties on

the state's behalf. Thus, every PAGA claim is a dispute between an employer and the state. Relief under PAGA is designed primarily to benefit the general public, not the party bringing the action. In January 2020, Uber sought an order compelling Rosales to arbitrate the issue of her independent contractor status under the arbitration agreement. Uber argued that Rosales could not bring a PAGA claim unless or until an arbitrator first decided whether she was an employee who could seek penalties under PAGA on behalf of the state. The trial court denied Uber's motion holding that the parties' arbitration agreement does not bind the State of California, on whose behalf Rosales brought the PAGA claim. Uber appealed the trial court's ruling.

On appeal, Uber argued that the FAA governs the arbitration provision, and under the FAA, the parties' agreement to delegate the issue of arbitrability to the arbitrator is enforceable. The Court of Appeal disagreed and relied on prior California Supreme Court decisions explicitly holding that the FAA does not govern PAGA claims. Uber also relied on federal district court cases that concluded, in other contexts, that an arbitrator must determine the threshold worker classification issue where the arbitration agreement allows. However, the appellate court found that those cases where inapplicable because none involved a PAGA claim. Finally, Uber argued that the threshold classification issue is subject to the FAA because "it is not a PAGA claim at all" but rather a "private dispute." The Court of Appeal rejected Uber's argument ultimately holding that, although Rosales and Uber had a binding arbitration agreement, an arbitrator could not decide whether Rosales was an employee or an independent contract because the arbitration agreement does not bind the State of California, on whose behalf Rosales brought the PAGA claim.

*Rosales v. Uber Technologies, Inc.* (2021) __ Cal.App.5th __ [2021 WL 1711585]

## FIRM VICTORY

***Office Of Administrative Hearings Upholds District's Termination Of Employee 50+ Year Faculty Member.***

LCW Partner **Eileen O'Hare-Anderson** and Associate **Savana V. Manglona** successfully defended an appeal of discipline on behalf of a community college district in the termination of a tenured faculty member before the Office of Administrative Hearings.

In June 2020, the district terminated a tenured faculty member (Respondent) for immoral and unprofessional conduct, dishonesty, evident unfitness for service, and persistent violation of rules. Respondent had worked for the District since 1965.

In addition to an unsatisfactory performance evaluation, Respondent had a history of unprofessional conduct, including yelling at an instructional assistant in front of students, accusing his former dean of "hacking into" his email and shredding positive student evaluations, and asking a student whether the student had complained to the dean about Respondent. Respondent received a Letter of Counseling and Letter of Reprimand in response to his unprofessional conduct. Students also complained to the dean about Respondent's lectures because he showed disturbing and offensive images, including graphic images of lynched African Americans, without providing the necessary context surrounding those images. Throughout the last few years, Respondent also engaged in unprofessional communications with his supervisor, often referring to her as "weak" and "having no back bone."

At the hearing, Respondent testified extensively about his performance review, denying his teaching was deficient in any way and denying that he needed to improve his teaching. Respondent also admitted he did not incorporate any changes to his teaching style after receiving his performance review recommendations, because he did not believe there was anything to change, and he did not agree with the recommendations.

In March 2020, when the shelter in place order went into effect, Respondent failed to communicate with his dean and students, and essentially abandoned his classes and students. He later lied about not knowing how his classes were going forward, even though the District sent numerous emails about the requirement to move his classes online. Students were left confused and concerned, and other faculty members stepped in with little notice to take over Respondent's classes during an already chaotic and unprecedented time. Respondent also lied when he told a campus police officer that he had permission to be on campus while the campus was closed to the public.

The administrative law judge (ALJ) found cause existed to terminate Respondent's employment for unprofessional conduct, dishonesty, and evident unfitness for service and upheld the District's decision to terminate him. As to the unprofessional conduct charge, the ALJ found Respondent's unprofessional communications and behavior towards his dean on multiple occasions, his accusations against his former dean, his failure to contact the District about the status of his classes in March, as well as his confrontations with his instructional assistant and students, each rose to the

level of unprofessional conduct. Respondent worked for the District for over fifty years and was aware of the expectation that he act in a professional manner towards students and colleagues because the District continually reminded him to do so in a Letter of Counseling, Letter of Reprimand, and his dean's verbal and written directives to him. The ALJ also found Respondent was dishonest when he told his students he did not have news about what was happening with online instruction for his class and when he told the campus police officer he had permission to be on campus. Respondent failed to offer any evidence to the contrary. Last, the ALJ applied the relevant Morrison factors, as discussed in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 235, to determine whether Respondent displayed an evident unfitness for service and found that Respondent's conduct taken as a whole, indicates a factual nexus between his conduct and unfitness for service. The District counseled Respondent about his unprofessional and unacceptable behavior towards his colleagues in the Letter of Counseling, Letter of Reprimand, and numerous emails from his dean, yet he refused to change his behavior or correct his conduct. Therefore, the District offered evidence sufficient to show that Respondent's offensive conduct showed a defect in temperament, which supported a finding that he was clearly not fit for teaching.

***NOTE:***

*This case illustrates the importance of documenting employee performance issues. LCW attorneys are available to assist districts through the entire faculty termination process, from drafting the statement of charges to representing the district at the hearing.*

### *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 educational entities 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 educational entities 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 educational entities against allegations of unpaid overtime and can assist educational entitiesto limit or eliminate liability.*

## PERSONNEL RECORDS

***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) 63 Cal.App.5th 503.

***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) 63 Cal.App.5th 761.

***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.*

## DISCRIMINATION

***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.* (2021) 62 Cal. App. 5th 289.

***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.* (2021) 11 Cal.5th 158.

***NOTE:***

*This case confirms the judiciary's trend to broadly define "public work." Educational entities that 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,* (2021) 62 Cal.App.5th 583.

***NOTE:***

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

## CONSORTIUM CALL OF THE MONTH

**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 district had already sent a letter accepting the resignation and was in the process of recruiting for the vacancy. The district's Board Policies and Administrative Procedures did not address recession of resignation letters. The manager asked if the district was required to allow this individual to rescind her resignation.

**Answer:** In the absence of any Board Policy, Administrative Procedure, collective bargaining agreement, 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 district already accepted the employee's resignation and began recruiting, the district was not required to allow the employee to rescind her resignation.

## 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, an educational entity's collective bargaining agreement 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 entity's jurisdiction. (Government Code § 54952.2(b)(3).)

# Firm Publications

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

LCW 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.

LCW Managing Partner and general counsel for the Los Angeles County Police Chiefs Association J. Scott Tiedemann was quoted in the April 28 *San Francisco Chronicle* article "State Supreme Court needed to resolve conflict in police disciplinary procedure." The piece by Courts Reporter Bob Egelko detailed a case involving Oakland police in which a state appeals court ruled that officers being questioned by a disciplinary agency have no right to see the agency's confidential reports until the questioning is over. This ruling conflicts with another appeals court ruling and the dispute must now be resolved by the state Supreme Court. Scott said the new ruling "will have an immediate and positive impact on how law enforcement agencies conduct effective misconduct investigations."

LCW Associate Alex Volberding was quoted in the May 11 article "Inland Regional Center in San Bernardino requiring employees to get coronavirus vaccine" published in the *Daily Bulletin.* The piece discusses the COVID-19 vaccination mandate the San Bernardino Center gave its employees, with the exception of those with a medical condition or conflicting religious belief. Alex highlighted the law in respect to this mandate.

LCW Partner Shelline Bennett provided viewers details on vaccination mandates for employees returnig to workplaces during a Fox 26 (Fresno) Eye on Employment segment. During the segment, Shelline also covered reasonable accommodation as well as healthy and safe workplaces.

LCW Partner Peter Brown and Associate Alex Volberding authored the article "Guidance on COVID-19 and the Fair Labor Standards Act" in the May 12 issue of the *Daily Journal.* The piece explores the Department of Labor's updated guidance on the FLSA and its application to common COVID-19-related circumstances faced by employers during the pandemic.

Managing Partner J. Scott Tiedemann and Associate Allen Acosta recently penned the article "Pressure to Terminate" for the May/June 2021 issue of *Sheriff & Deputy Magazine.* The piece provides sheriffs critical tips on protecting the integrity of internal investigations—particularly during periods when the public is demanding that a deputy be terminated and criminally charged for their on-the-job actions. Further, the article shares how to provide transparency to the public while maintaining due process for the officer involved.

# New to the Firm

**Marek Pienkos** is an Associate in the San Diego office of LCW where he provides representation and counsel to clients on labor and employment matters. Marek has extensive litigation experience representing employers with respect to claims of discrimination, retaliation, wrongful termination, harassment, and wage and hour violations.

He can be reached at 619.481.5905 or mpienkos@lcwlegal.com.

LCW WEBINAR

## Hiring CalPERS Retirees- Do's and Don'ts

**REGISTER TODAY!**

**WEDNESDAY, June 9, 2021 | 10:00 AM**

Retirees continue to fill an important role for public agencies by allowing access to experienced professionals to perform short term special projects. If done the right way, the relationship is beneficial to the agency and the retiree. If done the wrong way, it could be financial catastrophe. The rules are getting increasingly complex and there are many little-known requirements waiting to trap you. This webinar will address the basic rules as well as the potential traps to avoid. Sign up today!

**PRESENTED BY: Steven Berliner**

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!

LCW's LRCP provides professionals the opportunity to demonstrate that they have mastered the knowledge, skills and abilities to operate at a high level of expertise in the field of Public Sector Labor Relations.

**Learn more about this program by visiting https://www.lcwlegal.com/lrcp.**

**LRCP Upcoming Classes:**

**7/21 & 7/28 - Nuts & Bolts of Negotiations**

**8/18 & 8/25 - The Public Employment Relations Board (PERB) Academy**

**9/19 & 9/16 - Nuts & Bolts of Negotiations**

MANAGEMENT TRAINING WORKSHOPS

## Firm Activities

**Consortium Training**

**Jun. 2** **"The Art of Writing the Performance Evaluation"**
Humboldt County ERC | Webinar | I. Emanuela Tala

**Jun. 2** **"Maximizing Supervisory Skills for the First Line Supervisor - Part 1"**
Monterey Bay ERC | Webinar | Kristi Recchia

**Jun. 2** **"Managing the Marginal Employee"**
NorCal ERC | Webinar | Erin Kunze

**Jun. 2** **"The Art of Writing the Performance Evaluation"**
North State ERC | Webinar | I. Emanuela Tala

**Jun. 2** **"Maximizing Supervisory Skills for the First Line Supervisor - Part 1"**
Orange County ERC | Webinar | Kristi Recchia

**Jun. 2** **"The Art of Writing the Performance Evaluation"**
San Gabriel Valley ERC | Webinar | I. Emanuela Tala

**Jun. 3** **"The Art of Writing the Performance Evaluation"**
North San Diego County ERC | Webinar | Stephanie J. Lowe

**Jun. 3** **"The Art of Writing the Performance Evaluation"**
San Mateo County ERC | Webinar | Stephanie J. Lowe

**Jun. 3** **"Legal Issues Regarding Hiring"**
West Inland Empire ERC | Webinar | Melanie L. Chaney

**Jun. 10** **"A Guide to Implementing Public Employee Discipline"**
Bay Area ERC | Webinar | Kevin J. Chicas

**Jun. 10** **"A Guide to Implementing Public Employee Discipline"**
Imperial Valley ERC | Webinar | Kevin J. Chicas

**Jun. 10** **"Advanced FLSA"**
San Diego ERC | Webinar | Elizabeth Tom Arce

**Jun. 16** **"The Art of Writing the Performance Evaluation"**
Gold Country ERC | Webinar | I. Emanuela Tala

**Jun. 16** **"Maximizing Supervisory Skills for the First Line Supervisor - Part 2"**
Monterey Bay ERC | Webinar | Kristi Recchia

**Jun. 16** **"Maximizing Supervisory Skills for the First Line Supervisor - Part 2"**
Orange County | Webinar | Kristi Recchia

**Jun. 16** **"Introduction to the FLSA"**
Sonoma/Marin ERC | Webinar | Lisa S. Charbonneau

**Jun. 16** **"The Art of Writing the Performance Evaluation"**
South Bay ERC | Webinar | I. Emanuela Tala

**Customized Trainings**

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

**Jun. 11** **"Title IX"**
Santa Clarita Community College District | Webinar | Jenny Denny

**Jun. 28** **"Confidence to Lead: How To Engage as Our Work Environment Evolves"**
Santa Clarita Community College District | Webinar | Eileen O'Hare-Anderson

**Speaking Engagements**

**Jun. 17** **"EEO & Diversity, EEO Plan, and Recruitment Strategies"**
Association of Chief Human Resource Officers (ACHRO) Human Resources Academy | Webinar | Laura Schulkind & Greg Smith & Irma Ramos

**Jun. 24** **"CHRO Emerging Leaders: EEO & Diversity, EEO Plan, and Recruitment Strategies"**
ACHRO | Laura Schulkind & Greg Smith & Irma Ramos

**Seminars/Webinars**

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

**Jun. 2** **"Title IX Training Part 2: Title IX Informal Resolutions and Investigations"**
Liebert Cassidy Whitmore | Webinar | Jenny Denny

**Jun. 9** **"Hiring CalPERS Retirees- Do's and Don'ts"**
Liebert Cassidy Whitmore | Webinar | Steven M. Berliner

**Jun. 17** **"The Rules of Engagement: Issues, Impacts & Impasse: Part 1"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Peter J. Brown

**Jun. 24** **"The Rules of Engagement: Issues, Impacts & Impasse: Part 2"**
Liebert Cassidy Whitmore | Webinar | Kristi Recchia & Peter J. Brown



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