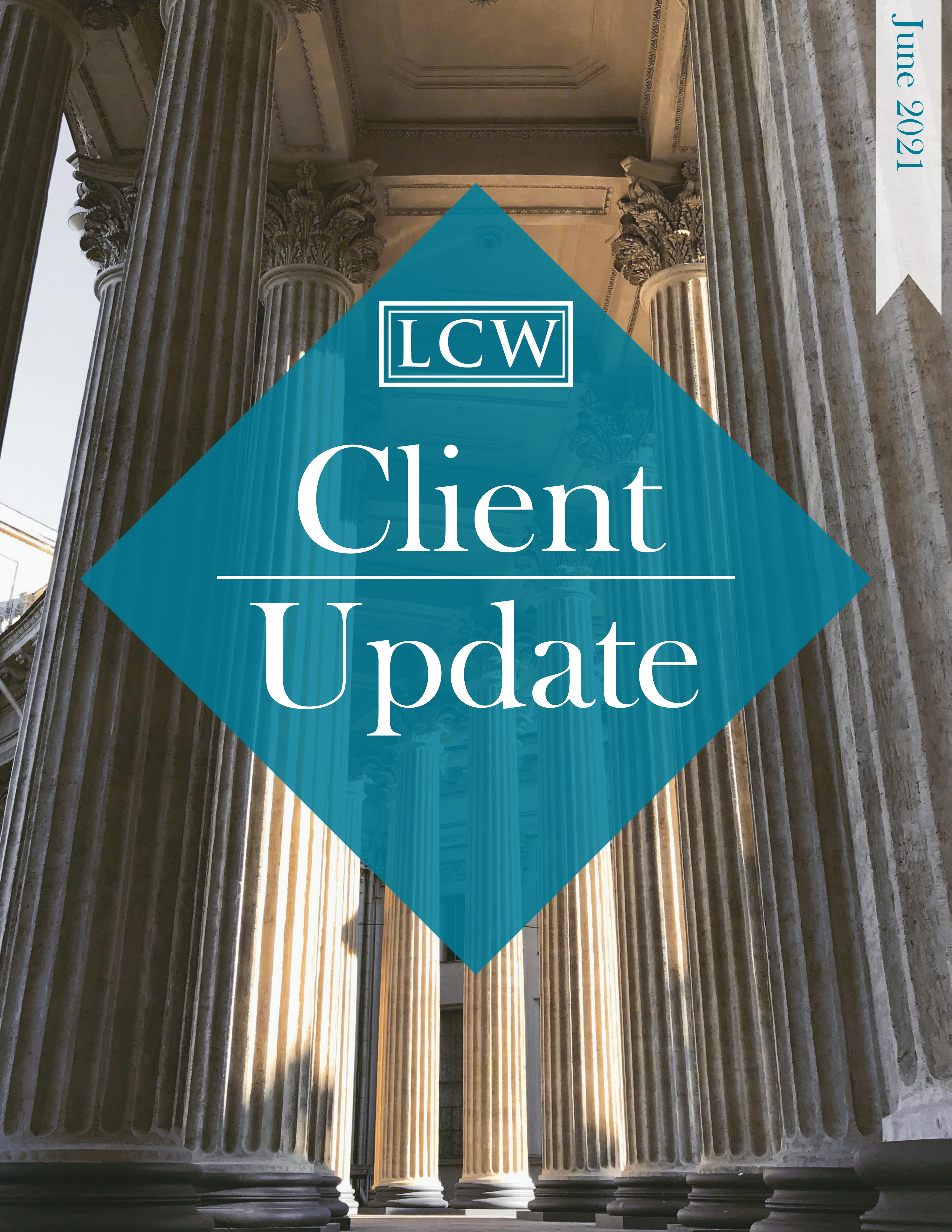
June 2021

LCW

# Client Update



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# 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 outlined 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.*

# LCW In The News

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

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.

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.

# 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.

***Note:***

*While this is not a published Northern District of CA 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 conducted 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*, No. 09-CA-247015 (May 26, 2021).

***Note:***

*While NLRB precedent is not binding on PERB, NLRB decisions often provide persuasive guidance in construing California's public sector labor relations statute – the Meyers- Milias- Brown Act (MMBA). This case provides guidance on two issues that are very relevant to MMBA 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 & 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's 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 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 WL 1852009 (Cal. Ct. App. Apr. 26, 2021).

**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 WL 2024516 (9th Cir. May 21, 2021).

**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 WL 1905229 (Cal. Ct. App. May 12, 2021).)

- 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.*, 63 Cal.App.5th 1099 (2021).)

- 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 WL 1940272 (Cal. Ct. App. May 14, 2021).)

# 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.

## The 411: What is the Liebert Library?

The Liebert Library is LCW's online collection of trusted legal training and reference materials. LCW is known across California for its extensive preventative trainings and thorough guides on a variety of labor, employment, and education law topics. The Library is a collection of workbooks (reference guides), sample forms, templates, and model personnel policies.

The Library brings these materials together in one place and makes them available to subscribers from anywhere at any time. The collection is continuously updated to ensure the materials contain the latest legal developments and practical applications.

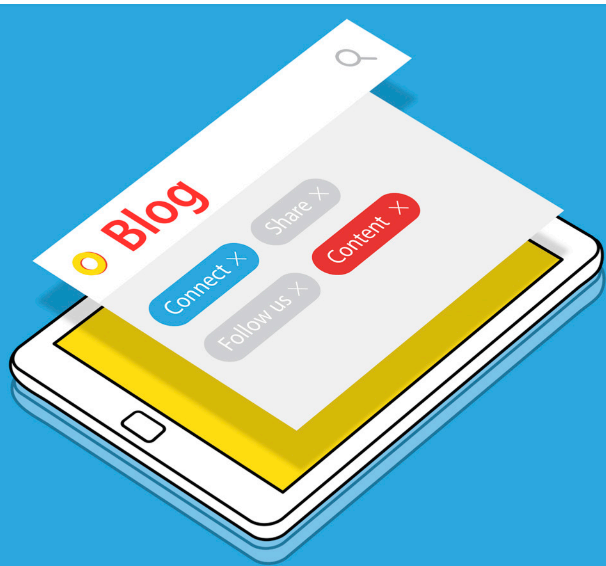
# Question:

A Human Resources manager contacted LCW to inquire about whether the agency 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 agency 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.*, 2 Cal. App. 5th 1028 (2016), 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." (Id. at 1032.) 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." (Id. at 1042.)




# ON THE BLOG

## CalPERS Requirements Public Agencies Should Know Heading into the New Fiscal Year

By: Stephanie Lowe

As public agencies head into the end of the 2020-2021 fiscal year and prepare for the 2021-2022 fiscal year, it is the perfect time of year for agencies that contract with the California Public Employees' Retirement System ("CalPERS") to refresh their knowledge about upcoming deadlines and requirements. Below are the key CalPERS deadlines and requirements agencies should know.

**End of Year Payroll Reporting Deadlines**

Public agencies must ensure that they meet CalPERS' closing deadlines for accounts and records for the fiscal year ending June 30, 2021. Reporting on time allows CalPERS to timely process the payroll earned period and adjustment reports and enables CalPERS to provide the proper service, contributions, and interest to member accounts. All payroll reports for the last complete earning period ending in June 2021 must be created and posted in myCalPERS by the original due date or before 5:00 p.m. on July 29, 2021, whichever due date is earlier. Inaccurate reporting may lead to inaccurate member information. (See CalPERS Circular Letter: 200-024-21.)

**July 30, 2021 Reporting Deadline for Out-of-Class Assignments**

CalPERS agencies must report the number of hours worked by employees in "out-of-class appointments" to CalPERS no later than July 30, 2021. Government Code section 20480 expressly defines "out-of-class appointment" as "an appointment of an employee to an upgraded position or higher classification by the employer or governing board or body in a vacant position for a limited duration." A "vacant position" is defined as "a position that is vacant during recruitment for a permanent appointment." The definition of "vacant position" excludes a "position that is temporarily available due to another employee's leave of absence." The compensation for the appointment must also be stated in a collective bargaining agreement or a publicly available pay schedule.

CalPERS requires agencies to certify "out-of-class appointments" for each member through myCalPERS no later than 30 days following the end of each fiscal year. The information requested by CalPERS includes: the member's name, permanent position title and "out of class" position title; beginning and end date of the out-of-class appointment; pay rates of both the permanent and out-of-class positions; and special compensation and total earnings.

Failure to report the information may result in penalties under Section 20480 and notification to CalPERS Office of Audit Services to initiate an audit of the employer's records.

Please see CalPERS Out-of-Class Reporting Frequently Asked Questions for more information about reporting out-of-class assignments.

**CalPERS' Suspension of Work Hour Limitation for Retired Annuitants Performing Services to Ensure Adequate Staffing During the COVID-19 Emergency Remains in Effect**

In response to Governor Gavin Newsom's March 2020 Executive Order N-25-20 at the beginning of the COVID-19 pandemic, CalPERS issued Circular Letter 200-015-20. The letter explains that any hours worked by a retired annuitant to "ensure adequate staffing during the state of emergency will not count toward the 960-hour per fiscal year limit." In addition, the 180-day wait period between retirement and returning to post-retirement employment is suspended. Most other retired annuitant restrictions, including the limitations on permissible compensation and the prohibition of any benefits in addition to the hourly rate, remain in effect. However, the exception only applies to the extent that the retired annuitants are working to "ensure adequate staffing during the state of emergency." The exception does not automatically cover all retired annuitant appointments and a case-by-case assessment is necessary.

The suspension of the retired annuitant work hour limitation and wait period exceptions remains in effect until the state of emergency has been lifted. Agencies should be aware that they must continue to notify the director of the California Department of Human Resources of any individual employed pursuant to these waivers by emailing CAStateofEmergency@calhr.ca.gov.

**Track Hours Worked for Out-of-Class Appointments, Retired Annuitants, and Part-Time/Temporary Employees**
Looking ahead to the next fiscal year, agencies should ensure that they have a system in place to track hours worked for certain groups of employees. Accurate and timely tracking of hours will cut down on potential liability if an employee inadvertently meets or exceeds their work hours limitation. Agencies should track work hours for out-of-class appointments, which are limited to 960 hours per fiscal year. Agencies should also track the work hours for retired annuitants, which is limited to 960 hours per fiscal year if the retired annuitant is not hired to ensure adequate staffing during the COVID-19 state of emergency (otherwise CalPERS has suspended the work hour limitation as described above). Agencies should record the hours worked by part-time/temporary employees, including those hired on a seasonal, intermittent, on-call, limited-term, or irregular basis who must be monitored for enrollment in CalPERS membership. These employees will generally be eligible for CalPERS membership after 1,000 hours of paid service (including paid leaves) or 125 days (if paid on a daily or per diem basis) in a fiscal year.

**2022 Minimum Employer Contribution for PEMHCA (CalPERS Medical)**
For employers that provide benefits under the Public Employees' Medical and Hospital Care Act ("PEMHCA" or "CalPERS medical") CalPERS recently announced that the new 2022 minimum employer contribution for members is $149. (See CalPERS Circular Letter: 600-026-21.) This is a 4.1% increase from the 2021 minimum employer contribution ($143). Although the increase does not go into effect until January 1, 2022, public agencies should be aware of this increase and take it into account for budgeting purposes as they prepare for the new fiscal year. Beginning January 1, 2022, CalPERS will automatically update billing to reflect the new $149 amount for contracting agencies that have designated the PEMHCA minimum as their monthly employer health contribution.

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