LIEBERT CASSIDY WHITMORE

PRIVATE EDUCATION MATTERS

News and developments in education law, employment law, and labor relations for California Independent and Private Schools and Colleges.

June/July 2021

INDEX

LCW NEWS

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

STUDENTS

TITLE IX

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

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

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

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

Read the Notice of Interpretation here.

Read the Dear Educator Letter here.

NOTE:

The notice is relevant for private K-12 schools, colleges, and universities that must comply with Title IX of the Education Amendments Act of 1972 (Title IX), including private schools that accepted federal financial assistance through a Paycheck Protection Program (PPP) loan.

EMPLOYEES

WORKERS' COMPENSATION

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 an unpublished decision, this case offers guidance for a rapidly emerging area of law. LCW anticipates that employers may see COVID-19-related litigation in 2021 and beyond.

LABOR RELATIONS

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

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

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

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

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

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

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

The ALJ concluded that Frontier violated the NLRA when it refused to provide the Union with an opportunity to bargain over the effects of its decision to require employees to submit new I-9 forms. The ALJ reasoned that while Frontier's argument that it did not

have to bargain over the decision to require new forms had merit, the Union still had a valid interest in effects bargaining to explore options for reducing or avoiding the impact on employees. The ALJ also concluded that Frontier violated the NLRA by failing to provide the Union with information it requested about the specific deficiencies in each I-9 form and where the faulty forms were stored. Because Frontier had a duty to bargain with the Union over the effects of its requirement that employees submit new I-9 forms, the information the Union sought was presumptively relevant to the Union's role as the exclusive collective-bargaining representative. Frontier appealed.

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

Frontier Communications Corp. & Communications' Workers of Am., AFL-CIO, Dist. 2-13, No. 09-CA-247015 (May 26, 2021).

NOTE:

This case provides guidance on two issues that are very relevant to compliance with the National Labor Relations Act (NLRA): 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.

HOLIDAYS

Juneteenth Established As A Federal Holiday: What Does It Mean For Private Schools?

On Thursday June 17, 2021, President Joe Biden signed legislation to make Juneteenth (June 19) a federal holiday. A federal holiday generally means that non-essential federal government offices and services, such as the United States Postal Service, are closed. Every federal government employee is also paid for the holiday. What does the establishment of Juneteenth as a federal holiday mean for private schools and other private employers? Do you have to close? It depends.

A holiday is generally a commemoration of an event, or of a person or persons. We typically think of holidays as days when employees are off from work, but there are many holidays (including many religious holidays), for which employees do not receive a day off from work. A segment of your employees may want to celebrate such holidays because of their significance to those employees, but to do so would require that they use accrued leaves.

Then, there are those holidays to which virtually every private employer has agreed are days off for employees. These holidays include, for example, Memorial Day, Independence Day, Labor Day and Thanksgiving. Although these are all examples of federal holidays as well, that they are holidays for which employees get the day off from work is because the employer has decided to provide these holidays as celebrated off-work days.

Finally, there are additional holidays (some of which are federal holidays) that some, many or most private employers provide as days off for their employees. Examples of these holidays include Dr. Martin Luther King Jr. Day, Veterans' Day, the Day after Thanksgiving, and Christmas Eve. With these holidays, like the holidays that virtually every employer provides, for the holiday to be a day off from work, it requires an action by the employer to establish the day as such a holiday. This includes in an employee handbook, employment agreement, or for schools that have unionized labor, in a collective bargaining agreement.

That brings us to Juneteenth. The establishment of Juneteenth as a federal holiday does not mean that Juneteenth is a holiday at your school unless your school has already established that the creation of a new federal holiday is a holiday for some or all of your employees, as set forth in an employee handbook, agreement, or collective bargaining agreement for schools that have unionized labor.

If Juneteenth has not already been established at your school as a holiday to which employees would be entitled to a day off from work, your school can decide to implement a new practice of providing this holiday as time off from work for employees. This would require amending your policy on paid holidays in the employee handbook, and for schools that have unionized employees, it would require an agreement with the union, since adding Juneteenth as a holiday is a mandatory subject of bargaining over which you need to meet and confer.

NOTE:

If you have any questions about Juneteenth being established as a federal holiday, please reach out to an LCW attorney. We will be happy to help you.

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 because 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 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 An inaccurate description 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.

BUSINESS & FACILITIES

CONTRACTS

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 damage 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 court 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. v. Mahony (2021) 63 Cal.App.5th 719.

NOTE:

This case affirms 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.

ARBITRATION

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 online 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 were 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) 63 Cal.App.5th 937, *review filed* (June 8, 2021).

NOTE:

In light of this decision, private K-12 schools, colleges, and universities should be aware that workers classified as independent contractors who are parties to arbitration agreements may nevertheless be able to bring a PAGA claim against their employer for Labor Code violations.

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 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.

DID YOU KNOW...?

Each month, LCW provides quick legal tidbits with valuable information on various topics important to private K-12 schools, colleges, and universities in California:

- **Los Angeles County Passed An Employee Paid Leave for Expanded Vaccine Access:** On May 18, 2021, the Los Angeles County Board of Supervisors approved an urgency ordinance, titled Employee Paid Leave for Expanded Vaccine Access, which grants paid leave to an employee to travel to and from a COVID-19 vaccine appointment, to receive the COVID-19 vaccine injection, and to recover from any symptoms related to receiving the COVID-19 vaccine that prevents the employee from being able to work or telework. The ordinance applies to workers performing work in unincorporated areas of Los Angeles County. A full time employee who has exhausted all available COVID-19 Supplemental Paid Sick Leave under Labor Code Section 248.2 (SPSL) is entitled to up to four hours of additional paid leave per COVID-19 injection. A part time employee who has exhausted all available SPSL is entitled to the prorated amount of four hours per injection based on their normally scheduled work hours over the two-week period preceding the injection. The ordinance also contains required postings and recordkeeping requirements, as well as penalties for employees who fail to provide the leave. The ordinance is effective retroactive to January 1, 2021, and remains in effect until August 31, 2021.

- **Equal Employment Opportunity Commission Launches Sexual Orientation and Gender Identity (SOGI) Discrimination Webpage:** In June 2021, the Equal Employment Opportunity Commission (EEOC) launched a Sexual Orientation and Gender Identity (SOGI) Discrimination website with information on the protections from discrimination based on sexual orientation and gender identity under Title VII of the Civil Rights Act of 1964 (Title VII). For more information, visit the Sexual Orientation and Gender Identity (SOGI) Discrimination webpage.

- **The U.S. Supreme Court Decides Landmark Case on Student Free Speech which has Implications for California Private High Schools:** On June 23, 2021, the U.S. Supreme Court issued a decision finding that a high school violated a cheerleader's First Amendment rights when it disciplined her for a short, profane Snapchat post she created off-campus and on a Saturday. The case is important to private high schools in California due to California's "Leonard law" (Education Code, Section 48950), which affords statutory free speech rights to high school students in private schools (and to a limited extent in private religious schools). For more information, read the LCW special bulletin here.

- **Cal/OSHA Adopts New COVID-19 Regulations:** On June 17, 2021, the Occupational Safety and Health Standards Board (OSHSB) adopted an amended version of the Emergency Temporary Standards (Cal/OSHA COVID-19 Regulations). These amendments affect many of the requirements that have been in place since OSHSB initially adopted the regulations in November 2020, including those related to employees' use of face coverings, physical distancing at worksites and the installation of partitions between workstations. For more information, read the LCW special bulletin here.

- **LA County Summer Camp Guidance:** On June 23, 2021, Los Angeles County updated its reopening protocols for summer camps to no longer require face coverings outdoors for campers and staff regardless of vaccination status. For more information, visit the LA County Reopening Protocol for Day Camps webpage.

- **CDPH Face Covering Guidance For Schools:** The California Department of Public Health (CDPH) clarified on June 15, 2021, that face coverings remain required ***indoors*** in K-12 schools, childcare, and other youth settings, regardless of vaccination status. However, the CDPH noted that this may change as updated guidance from the Centers for Disease Control and Prevention (CDC) is forthcoming. For more information, visit the CDPH Face Coverings Q&A webpage.

LCW BEST PRACTICES TIMELINE

Each month, LCW presents a monthly timeline of best practices for private and independent schools. The timeline runs from the fall semester through the end of summer break. LCW encourages schools to use the timeline as a guideline throughout the school year.

JUNE

□ Consider conducting exit interviews:

- Conduct at the end of the school year for employees who are leaving (whether voluntarily or not). These interviews can be used to improve the organization and can help defend a lawsuit if a disgruntled employee decides to sue. In some cases the school may not want to conduct an exit interview, such as where it is already very clear why the person is leaving.

MID-JUNE THROUGH END OF JULY

□ Update Employee and Student/Parent Handbooks:

- The handbooks should be reviewed at the end of the school year to confirm that the policies are legally compliant, consistent with the employment agreements and enrollment agreements that were executed, and current with the latest best practice recommendations. The school should also add any new policies that it would like to implement upon reflection from the prior school year and to prepare for the upcoming school year.

□ Conduct review of the school's Bylaws (does not necessarily need to be done every year).

□ Review of insurance benefit plans:

- Review the school's insurance plans, in order to determine whether to change insurance carriers. Insurance plans expire throughout the year depending on your plan. We recommend starting the review process at least three months prior to the expiration of your insurance plan.
    - Workers Compensation Insurance plans generally expire on July 1.
    - Other insurance policies generally expire between July 1 and December 1.

AUGUST

Conduct staff trainings, which may include:

□ Sexual Harassment Training:

- A school with five or more employees, including temporary or seasonal employees, must provide sexual harassment training to both supervisory and nonsupervisory employees every two years. Supervisory employees must receive at least two

hours and nonsupervisory employees must receive at least one hour of sexual harassment training. (California Government Code § 12950.1.)

□ Mandated Reporter Training:

- Prior to commencing employment, all mandated reporters must sign a statement to the effect that they have knowledge of the provisions of the Mandated Reporter Law and will comply with those provisions. (California Penal Code § 11166.5.)

□ Risk Management Training such as Injury and Illness Prevention and CPR.

□ Distribute Parent/Student Handbooks and collect signed acknowledgement of receipt forms, signed photo release forms, signed student technology use policy forms, and updated emergency contact forms.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

ISSUE: A Human Resources manager contacted LCW to inquire about whether the school 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 school had been providing a temporary schedule accommodation to an employee who was caring for her mother. The employee's mother had Alzheimer's.

RESPONSE: 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 leave to care for the family member under the federal Family and Medical Leave Act (FMLA), the California Family Rights Act (CFRA), and/or California Paid Sick Leave.

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." 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." Therefore, while the school is not required to provide accommodations for this employee under the ADA, it should be careful not to engage in conduct towards the employee that could be considered discrimination because of the employee's association with a disabled family member and should provide the employee information about her eligibility for leave under the FMLA, CFRA, and/or California Paid Sick Leave.

Firm Publications

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

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

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

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

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

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

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

New to the Firm

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

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MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Customized Training

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

July 29 **"Training Academy for Workplace Investigators: Core Principles, Skills & Practices for Conducting Effective Workplace Investigations - Part 1"**
California Association of Independent Schools | Webinar | Shelline Bennett

July 30 **"Training Academy for Workplace Investigators: Core Principles, Skills & Practices for Conducting Effective Workplace Investigations - Part 2"**
California Association of Independent Schools | Webinar | Shelline Bennett

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