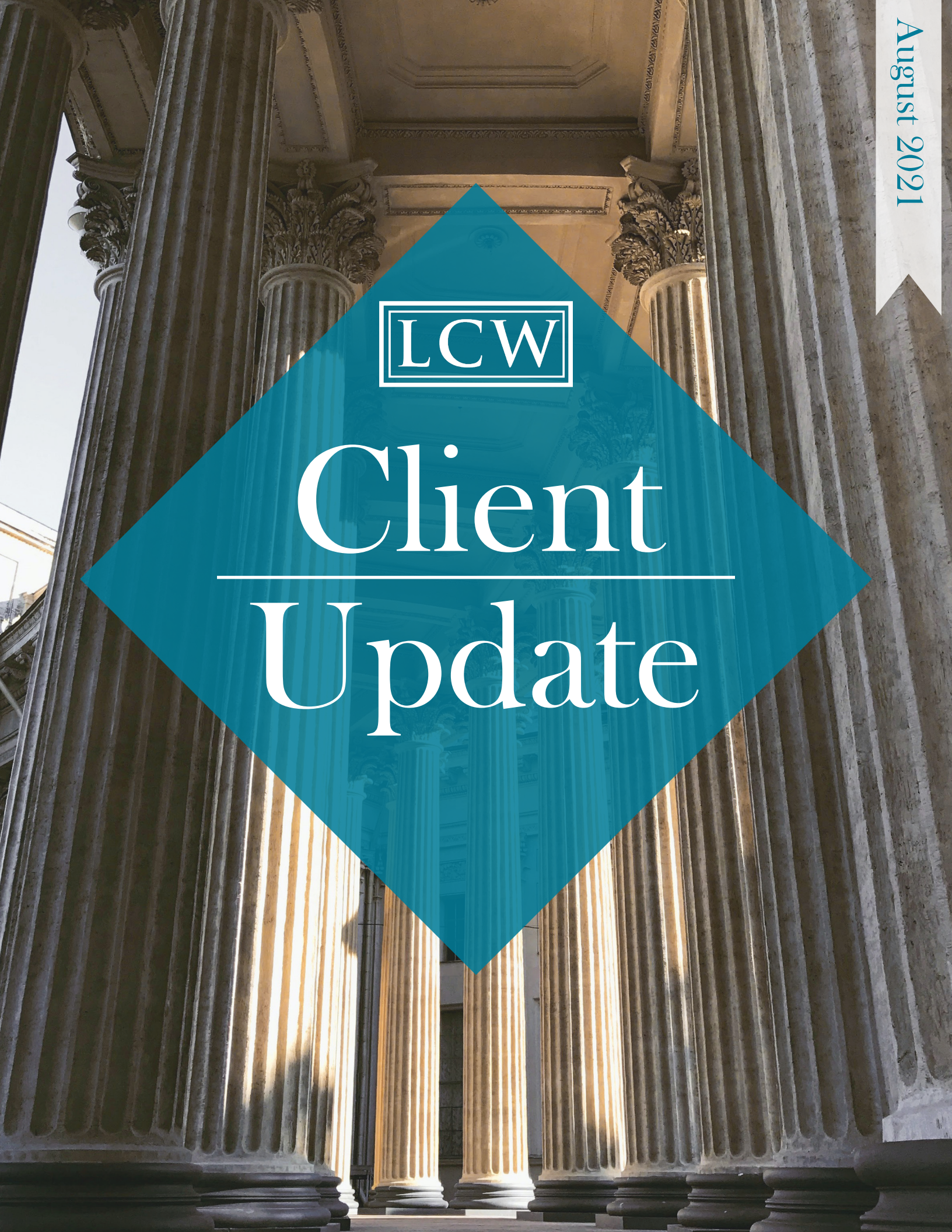


August 2021

LCW

Client Update

TABLE OF CONTENTS

Contributors:

Cynthia O'Neill
Partner | San Francisco
Kaylee Feick
Associate | Los Angeles
Shelline Bennett
Managing Partner | Fresno & Sacramento
Erin Kunze
Associate | San Francisco

Connect With Us!

LinkedIn @lcwlegal

Client Update is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in ***Client Update*** should not be acted on without professional advice. To contact us, please call 310.981.2000, 415.512.3000, 559.256.7800, 916.584.7000 or 619.481.5900 or e-mail info@lcwlegal.com.

FIRM VICTORY

LCW Obtains An Arbitration Victory For A Hospital In A FEHA Case.

LCW Partner **Jesse Maddox** and Associate **Daniel Bardzell** recently obtained a victory on behalf of a hospital in an arbitration involving alleged violations of the Fair Employment & Housing Act (FEHA).

In 2016, a maintenance engineer filed a lawsuit against the hospital and his former supervisor alleging claims for: 1) race harassment; 2) race discrimination; 3) failure to prevent harassment and discrimination; 4) wrongful termination (retaliation); 5) intentional infliction of emotional distress; and 6) negligent infliction of emotional distress. The employee alleged he was forced to go on stress leave in 2014 after: his department director made three comments about race between late 2012 and January 4, 2014; and another manager told him he would be moved to the night shift in March 2014. The employee submitted a written complaint to the hospital about these allegations, and the hospital immediately commenced an investigation. While on leave, the employee submitted a note from his health care provider indicating that he could return to work, but not at any of the hospital's many facilities. As a result, the hospital separated the employee in March 2015 due to its inability to accommodate him. After the employee initiated his lawsuit, the hospital successfully moved to compel arbitration of the issues.

After the employee presented his case at the arbitration, the hospital moved for judgment as to all of the employee's causes of action. As a preliminary matter, the hospital argued that the employee did not timely exhaust his administrative remedies. Under the FEHA at the relevant time, an employee was required to first file a complaint with California's Department of Fair Employment and Housing (DFEH) within one year of the alleged misconduct. In this case, the employee did not file a DFEH complaint until January 16, 2015. Thus, the hospital argued that any harassing conduct prior to January 16, 2014, including all of the alleged comments about race, were time-barred. Further, because the employee did not amend or refile his DFEH complaint after the hospital terminated his employment in March 2015, he did not exhaust his administrative remedies with respect to the termination of his employment.

The hospital argued that even assuming that the employee's claims were not barred, they still failed. For example, as to the harassment claim, the hospital contended that the employee did not prove severe or pervasive harassment. In order to be actionable harassment, the conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create and abusive working environment." Because none of the three comments were physically threatening or egregious, and because they occurred sporadically over a period of 14-months, the employee could not demonstrate they were "severe" or "pervasive."

The hospital also argued that the employee failed to prove his discrimination claim. The employee testified he believe he was being moved from the day shift to the swing shift because of comments he had made during a town hall meeting in early March 2014. Thus, he could not prove that his proposed shift change was based on race, and this allegation could not support a discrimination cause of action. Because the employee asserted he could not work at any hospital facility, there was no evidence the hospital terminated him because of his race, and the hospital had legitimate reasons to end his employment.

Further, the hospital argued the employee could not establish a causal connection between his complaints

and the alleged adverse acts. Although the complaint alleged the department director harassed him in March 2014, the employee did not present any evidence showing who made the decision to terminate his employment or whether the decision-maker knew about the complaint. Therefore, he could not establish a causal connection between his complaint and his termination.

The hospital also contended the employee could not establish his intentional infliction of emotional distress or negligent infliction of emotional distress claims. The arbitrator agreed, and entered judgment in the hospital's favor on all of the employee's causes of action.

Note:

LCW is proud to have won this arbitration but also to have saved our client the time and expense involved in a trial. Note that while this case involved claims for wrongful termination, intentional infliction of emotional distress, and negligent infliction of emotional distress, public employees are generally barred by case law from bringing such claims against public entity employers. Note also that effective in 2020, the legislature amended the FEHA to extend the time an employee has to file a DFEH claim from one to three years.

Correctional Deputy's Termination Upheld Due To Misconduct And Dishonesty.

LCW Partner **Jennifer Rosner** and Associate Attorneys **James Oldendorph** and **Brian Dierzé** successfully represented a county in a correctional deputy's disciplinary appeal.

In June 2019, a correctional deputy with a sheriff's department (Department) searched a prison inmate's cell after the inmate was disrespectful towards the deputy. During the search, the inmate's commissary and food items were damaged, with some of his items were strewn outside of the cell. The correctional deputy did not prepare a cell search log or activity report.

After the cell search, the correctional deputy allegedly announced over the prison loudspeaker that dayroom privileges – a set number of hours when inmates are allowed to socialize, take a shower, and make telephone calls – were suspended for the entire cellblock. According to the inmate, the correctional deputy announced that the inmate whose cell was searched was to blame for the suspension of dayroom privileges, which caused other inmates to attack the inmate. In responding to the attack, the correctional deputy handcuffed only the attacked inmate. The correctional deputy also did not give the involved inmates Miranda Warnings or interview them. The deputy also closed the incident file without a report, despite being assigned to do so.

The injured inmate then submitted a grievance and a letter to the grand jury. The inmate alleged the correctional deputy orchestrated an attack on him and destroyed his personal property during the cell search. A subsequent investigation found that the correctional deputy violated several of the Department's General Orders, including dishonestly stating that he Mirandized inmates, interviewed inmates, and prepared a written report following the incident. The deputy told the investigator that he merely forgot to submit the written report, and thereafter submitted a report that was poorly written and appeared to be a "cut and paste" job. Based on the investigation findings, the correctional deputy was terminated.

The correctional deputy appealed his termination, alleging that he searched the inmate's cell for potential contraband, such as drugs or alcohol, given the inmate's disrespectful behavior. The hearing officer found, however, that the weight of the evidence showed that the correctional deputy searched the inmate's cell strictly in response to the inmate's disrespectful conduct. The hearing officer cited the correctional deputy's hearing testimony that there was no evidence that the inmate was under the influence of drugs or alcohol before or after the cell search. The hearing officer further found that the search was not conducted properly or professionally given the destruction of the inmate's property and the correctional deputy's failure to prepare a cell search log or activity report documenting the search. The hearing officer determined that the correctional deputy's conduct violated the Department's General Orders and provisions of the applicable memorandum of understanding (MOU) regarding incompetence, inefficiency, negligence, and conduct unbecoming of a custodial deputy.

The correctional deputy further alleged that evidence did not show that he orchestrated the assault and battery of the inmate. The hearing officer agreed, and found that there was conflicting evidence regarding whether the correctional deputy identified the inmate over the cellblock loudspeaker. However, the hearing officer found that the deputy's failure to handcuff all inmates involved in the battery violated the Department's General Orders and MOU provisions.

Lastly, the hearing officer found that the correctional deputy failed to properly investigate the assault, including failing to Mirandize or interview the inmates involved; failed to prepare an incident report; and was dishonest regarding his investigation

of the incident. The hearing officer noted that credibility and honesty are essential traits of a custodial deputy, and that breach of trust is sufficient to terminate the employment of even a long-term deputy with no record of prior discipline.

Note:

This case is another in a long line of cases that finds that termination is an appropriate penalty for peace officer and/or custodial deputy dishonesty due to the position of trust they hold with the communities they serve. Fire safety officers maintain a position of trust with the public, and are held to similar high standards of conduct.

Union's Request For "Clarification" Of Arbitration Award Denied.

LCW Partner **Adrianna Guzman** and Associate Attorney **Jolina Abrena** successfully represented a county in opposing a union's request for clarification of an arbitration award involving a deputy sheriff. The union's request came more than two years after arbitration.

In the original arbitration, a deputy sheriff grieved the removal of his training duties while assigned to a field training officer (FTO) position. The memorandum of understanding (MOU) provided that an FTO receives bonus pay only when assigned training duties. In July 2018, the original arbitration decision found that the department violated the MOU by not providing the deputy with training duties. The arbitrator ordered that the deputy be reinstated as an FTO with training duties and awarded him the bonus pay he would have received had the department not removed those duties. After the arbitrator issued his arbitration decision and award, the union requested that the arbitrator retain jurisdiction until November 21, 2018. Since the union did not seek to re-open the arbitration proceedings, the decision became final and binding on November 22, 2018.

In April 2021, approximately 29 months after the arbitration decision became final and binding, the union requested that the arbitrator clarify the arbitration award. Specifically, the union alleged that the deputy was entitled to "Senior FTO" bonus pay – a higher level of bonus pay – from the time his training duties were removed until the department reinstated those duties in compliance with the arbitration award in 2018. The union argued that its request for clarification did not represent a "reopening" of the prior arbitration because the request did not require consideration of additional testimony or documentation.

The department opposed the union's request for clarification on the grounds that the union waited more than two years after the original decision became final and binding to make its request. The department further noted that the union had the opportunity to submit an application to correct the arbitration decision and award under Code of Civil Procedure section 1284, or to file a petition to correct the arbitration decision and award pursuant to Section 1285.8 and 1288, but failed to do either. The arbitrator agreed, noting that he had neither the authority nor the jurisdiction to clarify the award. Accordingly, the arbitrator denied the union's request for clarification.

Note:

LCW was able to prove that the union was not simply seeking a "clarification" of the arbitration award, but was trying to reopen or correct an arbitration decision and award without a timely motion.

Upcoming Webinar

MOU Overtime: Are You Paying Above the Legal Requirements?

August 26, 2021
10:00 - 11:00am
Register online here!

Final Decision Maker's Involvement Excused Employee From Exhausting His Administrative Appeal.

Jason Briley worked for the City of West Covina as a deputy fire marshal. As deputy fire marshal, Briley oversaw the operations of the Fire Prevention Bureau, which included checking building code plans and existing buildings for Fire Code compliance and conducting fire investigations. For part of his employment, the assistant fire chief, Larry Whithorn, supervised Briley.

In June 2014, Briley complained to the City that several City officials, including Whithorn and the city manager, had: failed to address his reports of Fire Code violations; and allowed a building permit to be issued before the building plans had passed fire inspection. The City hired a private firm to investigate Briley's allegations.

After making his initial complaint, Briley also complained that Whithorn and others had retaliated against him by cancelling his scheduled overtime, moving him to a smaller office, and changing his take-home vehicle. These new allegations were included in the pending investigation.

During this time, Briley also filed grievances raising many of the same claims and alleging that Whithorn had retaliated by giving him a poor performance review. In January 2015, the investigation firm concluded that Briley's allegations were largely unfounded. The then-Assistant City Manager Freeland received the report and adopted the firm's findings. As a result of this investigation, Whithorn's relationship with Briley became "strained."

While this investigation was still pending, Whithorn and the city manager also informed the City of multiple complaints against Briley involving allegations of misconduct and unprofessional behavior. Specifically, Briley was alleged to have: 1) addressed a fire captain in an unprofessional manner and used profanity in addressing a retail worker when responding to a fire alarm at a store; 2) improperly obtained a prospective City employee's personnel form; and 3) used profanity in addressing individuals at a CrossFit gym. The City retained another firm to investigate the allegations against Briley. The investigation ultimately determined that Briley had exhibited a pattern of unbecoming conduct, unprofessional behavior, and incompetence, and that Briley had been untruthful. By this time, Whithorn had been promoted to fire chief.

As fire chief, Whithorn issued Briley a notice of intent to terminate. After a pre-termination meeting, another city official decided to uphold Briley's termination and issued him a notice of termination. Through his counsel, Briley protested his termination and asserted it was "clearly further retaliation against him."

In December 2015, Briley initiated an administrative appeal of his discipline to the City's HR Commission. The City's rules provide that the HR Commission must grant the employee an evidentiary hearing and deliver its recommendations to relevant City officials. For Briley's appeal, the ultimate decisionmakers following the HR Commission's review would have been Whithorn and Freeland. Around this time, Freeland, who had adopted the investigation firm's findings that Briley's retaliation claims were largely unfounded, had been promoted to city manager.

PROCESS

While the HR Commission scheduled Briley's appeal, Briley's counsel notified the commission that Briley would not proceed because the appeal hearing would be futile for several reasons, including that Freeland and Whithorn were biased against him. Briley then initiated a civil lawsuit against the City alleging whistleblower retaliation under Labor Code section 1102.5. The City argued that Briley could not pursue his claims because he failed to exhaust his administrative remedies, but the trial court disagreed. Instead, the court concluded that Briley was excused from pursuing an appeal to the HR Commission. The matter proceeded to trial, and the jury awarded Briley $4 million dollars, including $3.5 million in noneconomic damages. The City appealed.

On appeal, the City claimed, among other arguments, that the trial court: erred in concluding Briley was not required to exhaust his administrative remedies; and abused its discretion in failing to reduce the jury's excessive award for non-economic damages.

The Court of Appeal found for Briley on the failure to exhaust remedies defense. The Court relied solely on Whithorn's involvement in the underling dispute and his expected role in deciding Briley's appeal. Although the Court found that the standard for impartiality in an administrative hearing was lower than in judicial proceedings, the Court determined that Whithorn's involvement in the administrative appeal violated due process. Therefore, Briley was excused from proceeding with his administrative appeal. The court reasoned that due process entitles a person seeking an evidentiary administrative hearing appeal to "a reasonably impartial, noninvolved reviewer." Whithorn's role presented an "unacceptable risk" of bias that excused Briley from exhausting this remedy, given both: Whithorn's personal involvement in the same controversies at issue in the administrative appeal; and the significant animosity between Whithorn and Briley that resulted from Briley's attacks on Whithorn's integrity. The Court was careful to emphasize that it was not making any blanket finding about bias in administrative hearing decision makers. Instead, the Court held "only that as a matter of due process, an official whose prior dealings with the employee have created substantial animosity and whose own conduct and character are central to the proceeding may not serve as a decisionmaker."

The court concluded that the $3.5 million noneconomic damages award was so excessive that it may have resulted from the jury's passion or prejudice. At trial, Briley claimed that his termination had caused him "distress" and that the ordeal was "tough" because: his livelihood was taken away; and he had dedicated eight years to the City. He also stated his termination was "upsetting", and that he had "issues with his sleep" because of financial uncertainty. There was no evidence, however, that any of the problems Briley described were particularly severe. Thus, the court concluded that the jury's total award of $3.5 million in noneconomic damages was "shockingly disproportionate to the evidence of Briley's harm and cannot stand." The court remanded the case for a new trial on Briley's noneconomic damages.

Briley v. City of W. Covina, 66 Cal.App.5th 119 (2021).

Note:

LCW Managing Partner J. Scott Tiedemann, Senior Counsel David Urban, and Associate Alex Wong prepared an amicus brief on behalf of the League of California Cities and California Special District's Association for this case.

Baby Bonanza!

June, July and August have been especially exciting months for our firm. LCW sends huge congratulations to our attorneys and staff who recently welcomed little bundles of joy into the world! We send best wishes to each of our new parents, their partners, families and friends.

Stephanie Lowe, San Diego Associate, welcomed baby Jamie Lowe Larson on June 25.

Anthoy Risucci, San Francisco Associate, welcomed baby Talia Marie Risucci on July 10.

Cynthia Michel, San Diego Legal Secretary, welcomed baby Carina Luz Michel on June 29.

Lars Reed, Sacramento Associate, welcomed baby Fiona Sofie Miner on July 10.

Dana Sever Scott, Sacramento Associate, welcomed baby Benjamin (Benji) Albert Scott on August 1.

The Time To File A Failure-To-Promote Claim Begins When The Employee Knows Or Should Known Of The Decision To Promote Another.

Pamela Pollock is a customer service representative at Tri-Modal Distribution Services, Inc. (Tri-Modal), a freight shipping company. In 2014, Tri-Modal's executive vice-president, Michael Kelso, initiated a dating relationship with Pollock. While Kelso wanted the relationship to become sexual, Pollock did not, so she ended the relationship in 2016. Subsequently, Pollock alleged that Tri-Modal and Kelso denied her a series of promotions, even though she was the most qualified candidate, and that her refusal to have sex with Kelso was the reason.

On April 18, 2018, Pollock filed an administrative complaint with California's Department of Fair Employment and Housing (DFEH) alleging quid pro quo sexual harassment in violation of the Fair Employment and Housing Act (FEHA). In her DFEH complaint, Pollock challenged the promotion of Leticia Gonzalez, among others. As relevant to this appeal, Tri-Modal offered, and Gonzalez accepted, a promotion in March 2017 and the promotion took effect on May 1, 2017. There was no evidence as to whether or when Tri-Modal notified Pollock that she did not receive the promotion. There was also no evidence that Pollock knew or had reason to know that Gonzalez was offered the promotion and accepted it in March 2017.

At the time Pollock filed her DFEH complaint, the FEHA required employees seeking relief to file an administrative complaint with the DFEH within one year "from the date upon which the alleged unlawful practice . . . occurred." Pollock argued her failure to be promoted occurred on the May 1, 2017 date that Gonzalez began her promotion, so her April 2018 administrative complaint was timely. Tri-Modal and Kelso argued, however, that its failure to promote Pollock "occurred" in March 2017 when Gonzalez accepted promotion, so Pollock filed her complaint too late.
The trial court concluded that the failure to promote occurred in March 2017 when Gonzalez was offered and accepted the promotion. Thus, the trial court found that Pollock's claim was time-barred, and the Court of Appeal agreed. The Court of Appeal then awarded costs on appeal to all of the defendants. However, the court did not address whether Pollock's underlying claim was "frivolous, unreasonable, or groundless when brought" or that she "continued to litigate after it clearly became so." After Pollock petitioned for a rehearing on the award of costs and the Court of Appeal denied her petition, the California Supreme Court granted review.

The California Supreme Court held that for a FEHA failure to promote claim, the statute of limitations to file a DFEH complaint begins to run when an employee knows or reasonably should know of the employer's refusal to promote the employee. Although there was no evidence in this case when Pollack knew of Gonzalez' promotion, Pollack's legal papers in opposition to Kelso's motion for summary judgment did not dispute that Gonzalez was offered and accepted the promotion in March 2017.

In addition, the Court held that the FEHA's directive that a prevailing FEHA defendant "shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigation after it clearly became so" also applies to an award of costs on appeal. The Court concluded the Court of Appeal erred in awarding costs on appeal to Tri-Modal and Kelso without first finding whether Pollock's underlying claim was objectively groundless.

Pollock v. Tri-Modal Distribution Servs., Inc., 2021 WL 3137429 (Cal. July 26, 2021).

Note:

At the time of the alleged misconduct here, the FEHA provided that an administrative complained needed to be filed with the DFEH within one year. The California Legislature expanded that time to three years. This case also demonstrates how important it is to carefully respond to alleged facts in a summary judgement motion.

LABOR RELATIONS

City Reasonably Interpreted Its EERR To Process A Decertification Petition.

From 2016 to 2020, the Long Beach Supervisors Employees Association (LBSEA) exclusively represented the Skilled & General Supervisor Unit (Supervisor's Unit) at the City of Long Beach. However, in July 2020, the International Brotherhood of Electrical Workers, Local 47 (IBEW) filed a decertification petition and an accompanying proof of support seeking to represent the unit. IBEW submitted its petition on letterhead bearing the address and telephone number of its Diamond Bar office. IBEW also attached two nearly identical lists of classifications to its petition; but, each list included one classification not listed in the other. According to the IBEW petition, LBSEA no longer had majority support among employees in the Supervisors Unit, and approximately 67% of unit employees had signed cards authorizing IBEW to represent them. On two of the 64 cards, the IBEW union number was missing. Only the number "47" was listed on one of the two cards.

The City's Employer-Employee Relations Resolution (EERR) details the City's processes for: establishing appropriate bargaining units; and formally recognizing exclusive bargaining representatives. In order to establish a bargaining unit, the EERR requires a recognition petition to "indicate by classification the unit of employees claimed to be appropriate" and be "accompanied by proof of employee approval of no less than thirty percent (30%) of the employees in the proposed unit." Proof of support may be in the form of: signed authorization card; a verified authorization petition; or employee dues deduction authorizations.

Similarly, under the EERR, a union may also file a petition that the incumbent union no longer represents a majority of the employees in its bargaining unit. Like the recognition petition, this decertification petition must be accompanied by "written proof that at least 30% of employees in the unit do not desire to be represented by the formally recognized employee origination." The decertification petition must also include the petitioner's name, address, and telephone number; the name of the incumbent union; and a statement that the petitioner shall agree to abide with any existing Memorandum of Understanding (MOU) covering said employees. A decertification petition can only be filed during certain time periods before the expiration of a MOU. Pursuant to the EERR, the employer is required to post notice of the petition in employee areas and the question concerning representation created by a valid decertification petition is decided through a secret ballot election.

On July 15, 2020, the City concluded IBEW had submitted a decertification petition that complied with the requirements of the EERR. The City's Labor Relations Manager subsequently notified IBEW and posted a notice. Along with the notice, the Labor Relations Manager posted a list of all classifications in the Supervisors Units; that list included 14 classifications that were not on either of the lists IBEW had attached to its petition.

Subsequently, LBSEA filed an unfair practice charge against the City alleging, among other claims, that the City unlawfully accepted the Petition even though IBEW deviated from the procedure established in the City's EERR. After an evidentiary hearing, the Administrative Law Judge (ALJ) concluded that the City violated its EERR, the Meyers-Milias-Brown Act (MMBA), and Public Employment Relations Board (PERB) Regulations by: 1) applying a rule concerning revocation of proof of support that was not contained in

the EERR; and 2) disclosing to IBEW the identity of two employees who had sought to revoke their support for the Petition. However, the ALJ ruled in the City's favor as to the other allegations in the complaint and dismissed the claims. LBSEA filed exceptions regarding those dismissed claims. PERB then reviewed the ALJ's proposed decision.

First, LBSEA argued that because IBEW failed to include a statement it would abide with any existing MOU covering bargaining unit employees and failed to properly describe the Supervisors Unit, the City improperly approved the petition. PERB disagreed. Instead, PERB concluded that this missing information was "immaterial" and the EERR did not require an exhaustive list of classifications included in the unit. In addition, PERB noted IBEW exercised due diligence in attempting to determine the classifications in the Supervisors unit, both by examining the City's website and submitting a CPRA request. When these efforts led to slightly different lists, IBEW attached both lists in an abundance of caution. For these reasons, PERB concluded the City reasonably approved IBEW's petition.

Second, LBSEA alleged that IBEW filed it petition outside the period specified in the EERR. However, PERB determined the City reasonable interpreted the EERR provision as applying only when an MOU is in effect. Because no MOU was in effect on July 13, 2020, the City reasonably concluded that the EERR did not bar the petition.

Third, LBSEA contended the City was required to reject IBEW's authorization cards because they only stated that the signatory employees wanted IBEW to represent them, without mentioning decertification of the incumbent representative. Once again, PERB disagreed. PERB reasoned that under the EERR, authorization cards designating a petitioning union to represent them in their employment relations with the City provides sufficient evidence that the employees wish to both decertify and replace their exclusive representative. Thus, IBEW's proof of support complied with the EERR.

Finally, LBSEA argued PERB should cancel future election proceedings. However, because the violations LBSEA established were so limited, PERB concluded they would not tend to prevent a fair election going forward. For these reasons, PERB affirmed the ALJ's proposed decision.

City of Long Beach, PERB Dec. No. 2771-M (June 9, 2021).

Note:

Following its decision, PERB ordered the City to process the petition filed by IBEW and post the notice for Supervisors Unit employees.

Television Station Violated NLRA By Implementing Changes After The CBA Expired.

The management of the KOIN television station and the union representing the station's employees, the National Association of Broadcast Employees & Technicians (the Union), entered into a collective bargaining agreement (CBA). After the CBA expired, management made two changes to the terms and conditions of employment. First, management began requiring employees to complete an annual motor vehicle and driving history background check. Under the Employee Guidebook referenced in the CBA, these background checks were only required for employees who were involved in an on-duty motor vehicle accident. Second, management began posting employee work schedules two weeks in advance. While this was consistent with the expired CBA, since at least 1993, station managers had posted schedules four months in advance. The Union filed charges with the National Labor Relations Board (NLRB) alleging these two unilateral changes constituted unfair labor practices.

The NLRB noted that after a CBA has expired, unilateral changes are permissible during bargaining only if the CBA "contained language explicitly providing that the relevant provision" that permitted the change "would survive contract expiration." Because there was no such language in this CBA, the NLRB concluded the television station violated the National Labor Relations Act (NLRA). The NLRB ordered the television station to rescind the changes, bargain with the Union before imposing further changes, and post remedial notices. The NLRB then petitioned the Ninth Circuit Court of Appeals for enforcement of those orders.

On appeal, management asserted that it was entitled to make the changes under the "contract coverage" doctrine. The "contract coverage" doctrine is a method of contract interpretation that analyzes whether the contract's language granted the employer the right to act unilaterally. The Ninth Circuit disagreed. The court reasoned that the NLRA recognizes that an employer's unilateral changes during negotiations creates "an untenable power imbalance infringing on the employees' rights to bargain and their rights to

organize." As a result, the NLRA freezes the terms and conditions of employment upon expiration of the CBA, until negotiations reach an impasse, unless the parties explicitly agree to a waiver. The Ninth Circuit therefore reasoned that because the CBA did not allow management to make unilateral changes to terms and conditions of employment in "clear and unmistakable language," management's changes violated the NLRA. Thus, the Ninth Circuit ordered the television station to comply with the NLRB's order.

Nat'l Lab. Rels. Bd. v. Nexstar Broad., Inc., 2021 WL 2909026 (9th Cir. July 12, 2021).

Note:

While the NLRA does not apply to public agencies, this case offers valuable guidance. LCW attorneys can help agencies determine whether they are able to implement changes after the expiration of an MOU.

WAGE & HOUR

California Law Allows The "Rate-In-Effect" Method To Calculate The Regular Rate Of Pay.

In 2011, a group of employees from several Buffalo Wild Wings franchises sued the owners of their restaurants for violations of California wage and hour law on behalf of themselves and others. The employees were employed in various capacities, including server, bartender, certified trainer, manager-in-training, and shift lead.

In 2014, the trial court partially granted the employees' motion for class certification and certified multiple classes and subclasses. One such subclass, the dual rate overtime subclass, alleged the owners paid certain employees different rates of pay for performing the same type of work during the same pay period and, as a result, underpaid certain employees for overtime work. Specifically, these employees asserted that the owners violated Labor Code sections 510 and 1194 by using the "rate-in-effect method" instead of the "weighted average method" for calculating the regular rates of pay for dual rate employees.

Labor Code section 510 requires that employees be compensated at a rate of no less than 1.5 times the employee's regular rate of pay for all work in excess of eight hours in one workday and 40 hours in any one workweek. When an employee works at two different pay rates rather than a fixed rate during a single workweek, employers must calculate the regular rate of pay based on both rates. For these dual rate employees, two methods for calculating the regular rate of pay have been developed: the weighted average method and the rate-in-effect method.

The weighted average method adds all hours worked in the week and divides that number into the total compensation for the week. Under the rate-in-effect method, the regular rate of pay is the hourly rate in effect at the time the overtime hours begin. The rate-in-effect method has the added benefit of being a simpler method for computing overtime pay. However, California's Division of Labor Standards Enforcement (DLSE) Manual has endorsed the weighted average method.

While the trial court initially certified multiple classes and subclasses, it ultimately decertified all classes but the dual rate overtime subclass. In a separate trial related to another portion of employees' claims, the trial court ruled in favor of the owners, finding that: 1) the employees failed to exhaust the necessary administrative remedies; 2) their dual rate claim was barred by the statute of limitations; 3) they failed to prove that owners' use of a rate-in-effect method to calculate overtime in dual rate workweeks violated any labor law; and 4) even if the owners did violate the law by using the rate-in-effect method to calculate overtime, the impact on the employees was negligible. Based on the trial court's ruling, the owners moved to decertify the dual rate overtime subclass, and the trial court granted the motion. The parties also stipulated to dismiss the employees' other claims under the Private Attorney's General Act (PAGA) so that only the individual claims remained. The employees appealed.

On appeal, the appellate court noted that the trial court gave a single reason for decertification of the dual rate overtime subclass: the employees, who had proposed the separate trial in the first place, were bound by the trial court's finding that the owners did not violate any law by using the rate-in-effect method of calculating the overtime rate. The appellate court agreed, finding

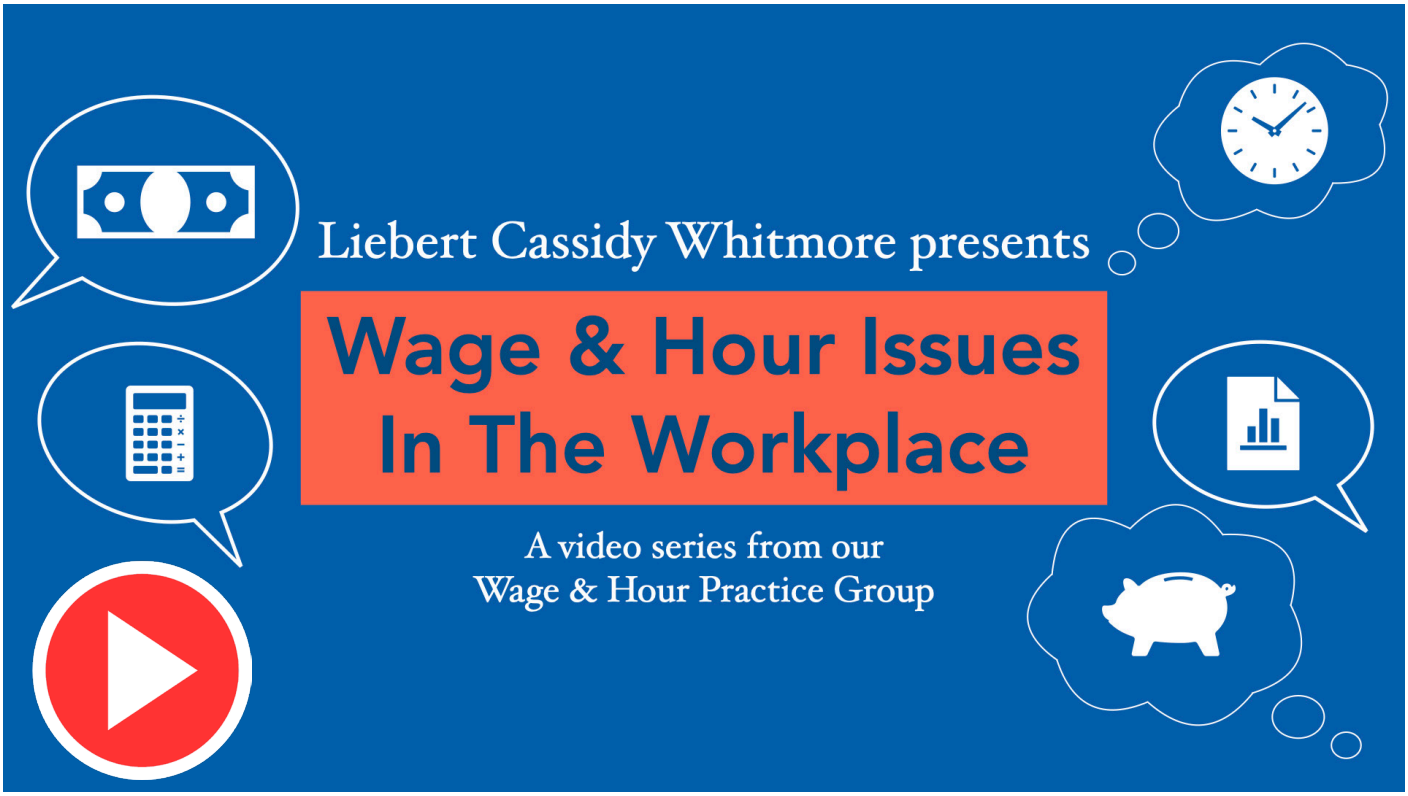
that although the DLSE Manual has endorsed the weighted average method, the statements in the DLSE Manual are not binding. Further, the court noted that while a California Supreme Court case cited the weighted average method, the issues in that case were different. In summary, California law did not make the weighted average method the exclusive method for calculating the regular rate of pay for dual rate employees.

In addition, the court noted that by using the rate-in-effect method for calculating the regular rate of pay, the owners conferred a net benefit on dual rate employees. For example, the employees' expert testified that one of the dual rate employees worked seven dual rate periods. Of those seven periods, one resulted in the employee receiving 98 cents less overtime pay than he would have received using the weighted average method, and six periods resulted in a total of $34.31 more overtime pay. Thus, the employee received $33.33 more overtime pay due to the owners' use of the rate-in-effect method. The employees' expert also determined that in total, the employees were paid $2,065.74 more because the owners had used the rate-in-effect method instead of the weighted average method. Thus, the court concluded that imposing penalties of any amount against the owners would be unjust. Accordingly, the court affirmed the trial court's decision and determined that the owners did not violate California employment law.

Levanoff v. Dragas, 65 Cal. App. 5th 1079 (2021).

Note:

This case interpreted California wage and hour law, which generally applies to private employers. The federal law – the Fair Labor Standards Act ("FLSA") – generally applies to public agencies. Under the FLSA, when an employee has more than one rate of pay, the regular rate of pay is "the weighted average of such rates." However, the FLSA allows the rate-in-effect method if the overtime compensation was paid pursuant to an agreement or understanding arrived at between the employer and the employee in advance of performance of the work.



2 Day Internal Affairs Investigation Seminar

October 19, 2021 | 9:00am - 4:00pm
AND
October 20, 2021 | 9:00am - 4:00pm

The Internal Affairs investigation is a key element in whether an agency will be successful in imposing discipline. What do decision makers, hearing lawyers and courts look for in an IA report? This two-day course will unlock the difference between an IA that supports discipline versus those that undermine it.

This **POST-approved** course provides a complete guide to conducting a fair and thorough internal affairs investigation that will create a defensible disciplinary action in the event of sustained findings. You will gain an understanding of the impact that good decision-making and strategy have on the agency's success in defending IAs and winning appeals.

This 2-day seminar will encompass legal aspects of a properly conducted IA Seminar, including topics such as:

- Overview of the Peace Officers' Bill of Rights (POBR) and consequences of violations for your agency
- Best practices in initiating and organizing the IA investigation
- How to obtain documents and other evidence
- Interview techniques and transcript recommendations, plus pitfalls to avoid
- Identifying common mistakes during IA investigations and solutions
- Current and emerging legal trends in public safety allegations and discipline

WHERE? City of Tustin Community Center at the Market Place (located behind Rubio's Coastal Grill & across California Pizza Kitchen)
2961 El Camino Real, Tustin, CA 92782

PARKING? Complimentary parking at location inside outdoor shopping center

WHO SHOULD ATTEND? Experienced and Aspiring HR and Labor Relations Professionals.

MCLE? Liebert Cassidy Whitmore is an approved MCLE provider. Participating attorneys are eligible for 12 hours of MCLE. The person from your agency that registers for this webinar will receive the official set of MCLE forms. In order to receive your MCLE credit, you will need to complete and return these forms that will be available at the workshop.

CANCELLATION POLICY? Cancellations must be received by October 12, 2021, to receive a full refund. No refunds will be given after that time. All credit card refunds requested after 45 days from the registration will be subject to a 10% refund charge. Participant substitutions are accepted any time prior to October 18, 2021.

QUESTIONS? Please email Kaela Arias at karias@lcwlegal.com or 310.981.2087

REGISTER HERE!

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.

- During the COVID-19 pandemic, Governor Gavin Newsom issued executive orders suspending various post-retirement employment requirements. Effective July 1, 2021, the following post-retirement requirements are reinstated: 1) retirees must serve a 180-day wait period after retirement (exceptions apply); and 2) if a retirement incentive is received, no exceptions are available to the 180-day waiting period. However, other post-retirement requirements, including the 960-work hour limit, continue to be suspended. (CalPERS Circular Letter No. 200-046-21.)

- The California Court of Appeal recently concluded that the County of San Diego properly withheld the "Location" and "Location Address" columns on a spreadsheet showing each confirmed COVID-19 outbreak in the County pursuant to the catchall exemption under the California Public Records Act. The court found that County submitted uncontradicted evidence that disclosing the exact location of an outbreak would have a chilling effect on the public's willingness to cooperate with contract tracing efforts. (*Voice of San Diego v. Superior Ct. of San Diego Cty.*, 2021 WL 3012737 (Cal. Ct. App. July 16, 2021).)

- On June 17, 2021, President Biden signed legislation to make Juneteenth (June 19) a federal holiday. If an agency has a provision in a labor agreement, personnel rules, Municipal Code or other document that specifically states that the agency will provide all federal holidays to its employees, or that the agency will provide all newly declared/established federal holidays to its employees, the agency would be required to add Juneteenth.

NEW TO THE FIRM!

Marek Pientos 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.

Joseph Suarez is an Associate in our Los Angeles office where he provides advice and counsel to cities, counties, and other public agency and nonprofit clients in all matters pertaining to employment and labor law.

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.

Dana Sever Scott is an Associate in our Sacramento office where she advises public/private schools, colleges and nonprofit organizations across the state. Dana provides representation and counsel in transactional, administrative, governance and advice and counsel matters.

Eugene Zinovyev is an Associate in the San Francisco office of LCW. A skilled litigator, Eugene has tried over a dozen cases in both state and federal courts and he notably helped secure a defense verdict after a 16-day trial on behalf of an accreditation agency for public and private schools.

BENEFITS CORNER

IRS Tax Relief Extended For Employer Leave-Based Donation Programs Aiding COVID-19 Victims.

On June 30, 2021, the IRS announced via IRS Notice 2021-42, a one-year extension to the special federal income and employment tax treatment/relief for leave-based donation programs aiding victims of the COVID-19 pandemic. Leave-based donation programs allow employees to forgo their accrued leaves (vacation, sick, personal leave, etc.) in exchange for cash payments from the employer to charitable organizations. Usually, these donations would still have to be included as part of the employee's income for tax purposes. Last year, the IRS provided relief from this tax issue via IRS Notice 2020-46, which also provided that employees electing to forgo leave would not be treated as having constructively received gross income or wages.

IRS Notice 2021-42 extends this tax relief from January 1, 2021 through December 31, 2021 regarding cash payments made to charitable organizations described in section 170(c) and that provide COVID-19 relief. Employees, however, cannot claim a deduction for the leave that they donated to their employer. Although an employer may deduct these cash donation payments under Internal Revenue Code sections 162 or 170, if they meet the requirements of either section. For example, the cash contributions must be to a qualifying organization, such as a non-profit or religious organization.

Especially for those employers who have already established such leave-based donation programs, the IRS's announcement provides confirmation that the favorable tax treatment of leave-based donations can continue, at least through 2021.

LCW In The News

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

Associate **Alex Volberding** weighed in on employers' newfound interest in requiring COVID-19 vaccinations for employees in the July 29 *Daily Journal* article "Employers showing more interest in required vaccinations." Alex shared that in relationship to California unionized workforces and public colleges/universities "the analytical framework … can be reasonably extended to cover other public employers."

In a July 23 KRON4 news segment, LCW Partner **Peter Brown** discussed the legality of vaccination mandates and the potential for legal challenges as some employers now push for mandatory vaccinations for their government employees.

Partner **Michael Blacher** recently weighed in on the Supreme Court's decision to avoid making any sweeping decisions on LGBTQ bias laws after its recent ruling that Philadelphia violated the religious rights of a foster care agency that refused to place children with same-sex couples. In the June 17 *Law360* article "3 Takeaways From High Court's Ruling In LGBTQ Rights Fight" Michael noted that the high court's ruling "recognized that Philadelphia intended to discriminate based on religion" though it left the Employment Division v. Smith precedent intact.

Partner **Heather DeBlanc** and Associate **Stephanie Lowe** penned "What Benefits Administrators Should Know … Temporary Flexibilities for Health FSAs and DCAPs" for the July 2021 issue of *HR News*. The piece details some of the flexibilities in health FSAs and DCAPs created by the IRS in response to the COVID-19 pandemic.

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.

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 On Demand training?

At LCW, we have developed a comprehensive suite of on-demand training services dedicated to California's public agencies.

Our easy-to-use training tool offers employees an interactive and engaging way to satisfy all of California's harassment prevention and ethics training requirements and encourage thorough absorption and application of the material.

Participants may download a certificate of completion at the end of the course.

A human resources analyst contacted LCW to ask whether an employee was entitled to Supplemental Paid Sick Leave (SPSL, Labor Code Section 248.2) to care for a spouse who had a reaction to the COVID-19 vaccine.	**Question:**
Answer:	If the employee is only requesting leave to care for a spouse who is experiencing side effects from the COVID-19 vaccine, the employee would not be entitled to SPSL under Labor Code Section 248.2 because that is not one of the seven qualifying reasons in that law. However, that situation would likely be a valid use of sick leave under Labor Code Section 246.5 for "Diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member."

SPOTLIGHT ARTICLE

Decorum and Civility in the Public Sector

By: Shelline Bennett

LCW Partner Shelline Bennett's article "Decorum and civility in the public sector" was published in the July 27, 2021 edition of *American City & County*. The piece provides helpful pointers that aid elected officials in preserving decorum and civility on the job. See article below.

In a two-part set of articles, we look at an issue confronting agencies at their highest levels—the elected body engaged in increasingly bad behavior and what can be done to guide them back to decorum and civility. The first article identifies some of the issues confronting agencies and provides a foundation for addressing the issues—educating elected officials; the second article will include specific measures and consequences.

How elected officials conduct themselves is being given critical attention at our national, state and local levels. Whether they are seasoned or new to their public roles, their behavior can negatively affect their agencies and reflect poorly on the public they serve, such as in the following examples:

- An elected official receives a complaint directly from an employee alleging harassment against a supervisor, and the official promises the employee the "harassing" supervisor will be dealt with handily.
- An elected official involves herself directly in the discipline of an employee and wants copies of the employee's personnel file to review.
- The agency is ready to present its last, best, and final proposal at the bargaining table, and the mayor meets individually with the union representative and advises he can get more for the group than the 2.5 percent the council authorized.
- An elected official is increasingly using social media and has taken a liking to the "like" function. The official is commenting on employees' and other officials' posts, some positive, some negative, and some within the governing body's jurisdiction. When confronted, the official adamantly asserts free speech rights and state and federal constitutional privacy rights.
- During public meetings, officials have started interrupting and speaking over each other, having side conversations and referring to each other by nicknames.
- For public meetings held virtually, elected officials turn their video camera off so only a black screen with their name printed is in view, and when called upon, there is radio silence.
- At the dais, a board member regularly elevates his voice, and at times, is described as yelling and even spitting, laced with a bit of profanity. The board member asserts this is what he was elected to do—speak passionately on

behalf of his constituents. He also asserts that he is exercising his First Amendment free speech rights, which no one dare tread upon, and if anyone does, he will file an anti-slap motion.

- Officials have started asserting that the bad behavior at meetings is rising to a level of fearing for physical safety; as a result, demands are made to move seats away from offenders, have a sergeant at arms present during all meetings, and if voices are raised, calls to 911 are made, as well as filing of temporary restraining orders.

Although extreme, the above examples have unfortunately become more commonplace. The corresponding challenge is that elected officials set the tone, tenor and behavior that agencies look to emulate—from the top down. The example our officials set is watched closely by agency employees and the public that is being served. When our elected fall short of the high standards we expect of them, they need guidance to help direct them back onto the civility path. If they do not modify their behavior accordingly, there must be consequences evidencing that an agency does not tolerate inappropriate conduct.

Leadership and ethics go hand in hand, require good character, honesty and personal integrity. The age-old adage is true—people follow willingly, with greater productivity, if their leaders are individuals they respect. Elected officials and senior management can help bring out the best in each other, and the first step is being knowledgeable about rules of the elected roadways.

Educate and remind elected officials about their roles. When it comes to personnel issues, staying out is generally a best business practice. Typically, the head of the agency—the city manager or county executive officer—is the designated official charged with overseeing employees. The governing body generally has no right to manage or direct employees. Personnel matters within a board's jurisdiction are limited, and a governing body can only act at a duly convened meeting, by a majority vote. If they act individually, outside of the meeting, they potentially expose the agency and themselves to legal liabilities and risk losing the legislative shield of immunity.

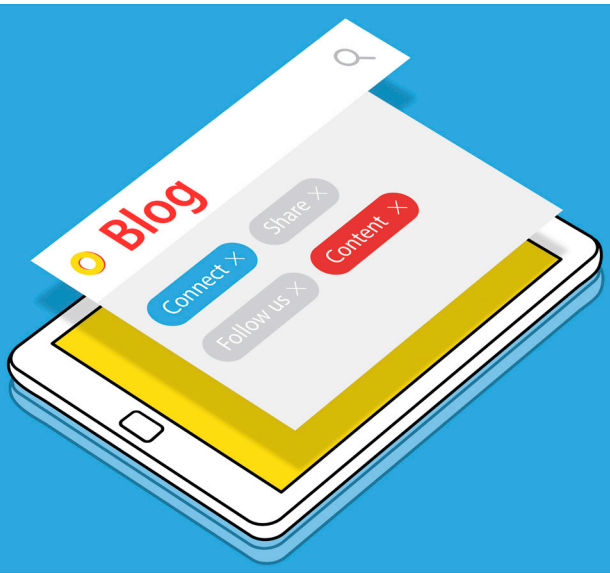
In addition to creating legal liability, what elected officials say in their individual capacities may be asserted as legal admissions against the agency's interests; jeopardize the integrity of the employee discipline-appeal process; and ultimately undermine the agency's command structure and hierarchy. If an individual official is communicating directly with employees or unions about negotiations and bargaining proposals, issues arise of potential bad faith direct dealing, bypassing designated negotiators, and undermining the designated lead negotiator's authority.

Next is to make sure your elected officials know what is expected of them in key legal areas: harassment, discrimination, retaliation, and ethics and conflicts of interest. It is important to make sure every elected official is complying with all mandated trainings. Training topics can include: protected classifications, hostile work environments, bullying, intent versus perception, what to do when an employee comes directly to you with a complaint, confidential information, conflicts of interests, recusal and disqualification, bias and fair process, incompatible offices, misuse of public funds, and transparency laws. With an understanding of these key legal concepts, a proper foundation is established for engaging in ethical and professional behavior.

Editor's Note: The next article in this set will begin with capturing these important legal concepts in a governing body code of conduct, with specific standards and consequences.

Shelline Bennett is a partner with Liebert Cassidy Whitmore, one of the largest public employment firms in California. Bennett's practice includes representation in disciplinary appeals, administrative hearings, arbitrations, mediations, and labor relations and negotiations, including serving as lead negotiator at bargaining tables. She can be reached at sbennett@lcwlegal.com.

Click here to view the article on our website.



ON THE BLOG

Do You Have Seasonal Workers? What To Know About Health & Retirement Benefit Obligations

By: Erin Kunze

As the summer season winds down, so do public agency departments that hire seasonal workers to staff summer camps, pools, extended park and recreation hours, and a myriad of season-specific facilities and activities. But, just how do seasonal workers impact the agency's health and retirement benefit obligations?

1. The Affordable Care Act (ACA), Seasonal Worker Exception
The number of seasonal workers you hire may impact whether your agency is subject to certain ACA obligations. Under ACA, employers that have at least fifty (50) full-time employees, including "full-time equivalent" employees, on average during a particular year, qualify as "Applicable Large Employers" subject to the Act's shared responsibly and employer information reporting provisions for offers of minimum essential coverage.* However, ACA provides a limited exception to the Applicable Large Employer calculation for employers with "seasonal workers." (Note: Admittedly, there's a lot of ACA jargon here. For a primer on ACA, we recommend reviewing our March 2014 post.)

Under the exception, an employer will not be considered an Applicable Large Employer if the following are both true:

- The employer's workforce exceeds 50 full-time employees (including full-time equivalents) for 120 days or fewer during a calendar year; and
- The employees in excess of 50 during that period were "seasonal workers."

This exception is narrow, and must be carefully applied. For the purposes of ACA, a "seasonal worker" must be a worker who performs labor or services on a "seasonal basis," such as a ski instructor or retail workers employed exclusively during holiday seasons. Seasonal based work means work that "ordinarily" pertains to or is of the kind exclusively performed during certain seasons or periods of the year, and which, "from its nature," may not be continuous or carried on throughout the year. Accordingly, if your agency's camp, park, or swimming pool is only operated during summer months, or if it operates at a high demand or for extended hours, only during summer months, the employees associated with the limited seasonal operation may qualify as "seasonal workers" under ACA. If the employment of those workers also lasts 120 days or less, they may be excluded from the agency's Applicable Large Employer assessment.

As an aside: we caution that ACA also uses the term "seasonal employee," which is used in the employer shared responsibility provision, in a different context than "seasonal worker."

2. California's Healthy Workplaces, Healthy Families Act
Despite the ACA requirements discussed above, seasonal workers may be entitled to paid sick leave under California's Healthy Workplaces, Healthy Families Act. Even a part-time, seasonal worker will be entitled to accrue paid sick leave

if the employee works for at least 30 calendar days in a year. However, the employee must be employed for at least 90 days before he/she is entitled to use accrued time. When it comes to seasonal workers, be sure to check the 30/90 day requirements against your agency's sick leave policy. In some cases, the agency's policy may be more generous. In addition, employees returning to your agency for seasonal work within one year from their prior date of separation, are entitled to have previously accrued and unused sick days reinstated.

3. The Public Employees' Retirement Law (PERL), Seasonal Employment Exception
Careful consideration is required when determining whether "seasonal" workers are entitled to membership in the Public Employees' Retirement System (PERS). Under the PERL, certain part-time or limited term employees are excluded from membership in PERS. Under any circumstance when the employer hires an employee who is already a member of PERS, the employee must be enrolled in membership with the employer, even if a seasonal worker. In addition, if full-time employment has a fixed term of more than six months, or more than one-year for a part-time employment (an average of at least 20 hours per week), the employee is entitled to membership. If seasonal employment in fact exceeds six months of full-time service or one year of part-time service (at least an average of 20 hours per week), the employee must be enrolled in membership with CalPERS. The most often cited membership thresholds for "seasonal" employees is 125 days of service (if paid on a "per diem" basis) or 1,000 hours of services (if paid on a basis other than "per diem") in a fiscal year. If paid service equals or exceeds 125 days or 1,000 hours in a fiscal year, the employee will be entitled to membership. As summer comes to a close, and seasonal employees may still be "on the books," PERS employers should review the actual number of hours and days the employee has worked in the current fiscal year, to determine whether the employee may now, or soon, be entitled to PERS membership.

For those of you ramping up on employees in the fall/winter season, begin planning ahead today. Fix contract terms for seasonal workers, ensure they do not exceed work hour / day limits established by the PERL or ACA. At the same time, ensure that your seasonal workers accrue paid sick leave, if they work for your agency for at least 30 days. And fear not; cooler days are ahead!

Click here to visit our blog!

Events & Training

For more information on some of our upcoming events and trainings, click on the icons below:

Consortium

Seminars

Webinars


LCW
Liebert Cassidy Whitmore