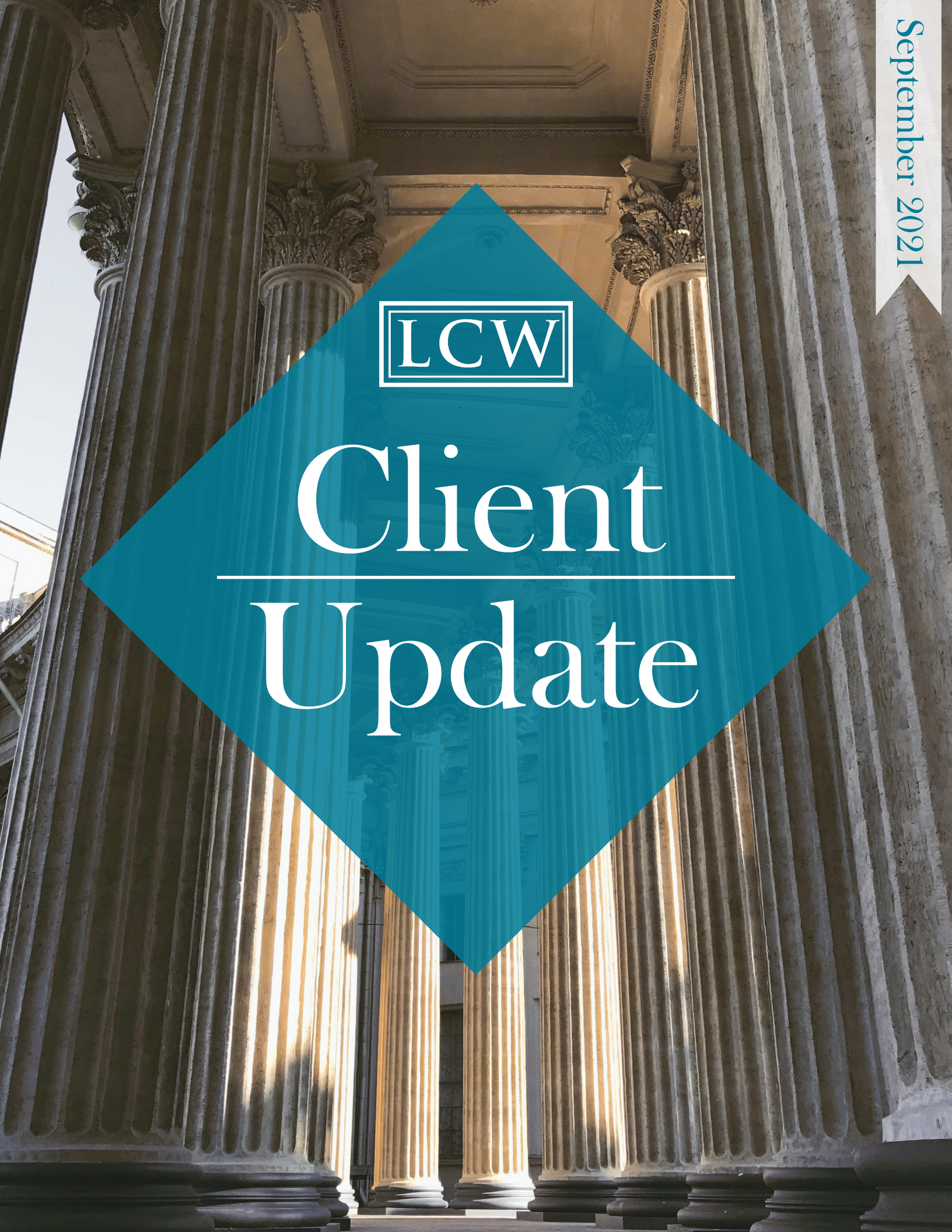

LCW

Client Update

September 2021

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FIRST AMENDMENT

Agency Wins Qualified Immunity From Scientist's Claim That The First Amendment Protected His On-Duty Trial Testimony.

The State of Arizona employed Greg Ohlson was a forensic scientist. Ohlson worked in the Department of Public Safety, Scientific Analysis Bureau (Department). Ohlson's job was to test blood samples for alcohol content, report the findings, and testify about those findings in court.

The Department used a variety of quality control policies, including ensuring the accuracy of blood samples by looking at an entire batch of samples. That quality control policy allowed the Department to identify non-conformities and catch instrument failures or malfunctions that skew test results. Department policy limited criminal defendants to only the individual sample results; absent a court order, the remaining samples in the batch were not disseminated.

Ohlson felt strongly that the Department should provide the results of all of the samples within a batch to criminal defendants. He suggested releasing the batch data on a public website. Ohlson suggested this approach to his supervisors on multiple occasions. Each time, they informed him that while the release of batch results may be a good idea, it was not feasible because the Department would need technological help. Also, Ohlson's supervisors said they were not authorized to make a Department-wide decision.

Ohlson began creating a private PDF file of all the data within the batches. Part of Ohlson's job duties was to meet with defense attorneys for pre-trial interviews. During those interviews, he began instructing defense attorneys to request the data for the entire batch.

Then, in May 2016, Ohlson testified in a criminal proceeding that the disclosure of the entire batch was necessary to ensure accuracy of the result and that he had a PDF of the batch results he could send to the parties if permitted to do so. Ohlson's supervisors told him he had violated Department policy, counseled him to bring his future testimony in line with policy, and directed him to delete the PDF files. After Ohlson reacted strongly, Ohlson's supervisor gave him a Performance Notation that instructed him to, among other things, adhere to policies, stop scanning of batch results, cease use of job-related legal proceedings to advance his personal views, and align his testimony with the Department's positions.

A few days later, Ohlson testified in another evidentiary hearing. Ohlson testified that his personal belief, after 35 years of job experience, was that batch results should be disclosed. He also expressed his disagreement with his supervisors. He underscored his testimony by stating that it was not in his "best interest in terms of career advancement" to testify as he had.

Following his testimony, the Department placed Ohlson on administrative leave pending investigation by the Professional Standards Unit. After the investigation findings led to a 16-hour suspension, Ohlson gave notice of his retirement.

Ohlson then filed a complaint in federal district court alleging a First Amendment retaliation claim for: "testifying truthfully and completely under oath"; and advocating within the Department for "a change in the manner in which the Department responds to requests in criminal cases for entire batch runs." The district court found that while Ohlson had First Amendment rights to his trial testimony, those rights were not clearly established, so the Department had qualified immunity. After the district court entered judgment in the Department's favor, Ohlson appealed.

On appeal, Ohlson argued that the First Amendment protected both his testimony in court and his advocacy in the workplace concerning the production of batch results.

The Ninth Circuit determined that the only dispute was whether Ohlson was speaking as a private citizen or a public employee. If Ohlson was speaking as a private citizen, his speech was protected by the First Amendment; if he was speaking as part of his duties as a public employee, it was not. The Ninth Circuit disagreed with the district court that Ohlson's speech was protected, in large part because Ohlson spoke against his supervisor's orders. If courts were to protect speech that violates a supervisor's orders, it would be difficult for a public agency to enforce any rules.

The Ninth Circuit also disagreed with the district court's conclusion that because citizens have a duty to testify, Ohlson was speaking as a private citizen. The Ninth Circuit noted that Ohlson was testifying in court as part of his job duties; Ohlson was not called to testify as a private citizen.

The Ninth Circuit noted that the US Supreme Court had not addressed whether a government employee who testifies as part of her job duties has First Amendment protection in that speech. The only US Supreme Court case on the topic involved a government employee whose testimony was not made as part of his job duties. (*See Lane v. Franks*, 573 U.S. 228, 238 n.4 (2014).)

The Ninth Circuit affirmed the district court's ultimate decision that regardless of whether Ohlson had a First Amendment right, the Department was entitled to judgment in its favor because the Department had not violated any clearly established law. Because Ohlson's First Amendment rights were not clearly established, the Department had qualified immunity.

Ohlson v. Brady, 2021 WL 3716784 (9th Cir. Aug. 23, 2021).

Note:

Qualified immunity protects government employees from being sued for violating an individual's civil rights. Qualified immunity is generally available if the law a governmental official or entity violated is not "clearly established." Here the Ninth Circuit noted that after 40 years of US Supreme Court cases on the First Amendment rights of public employees, many free speech issues still remain unsettled.

NEW TO THE FIRM!

Keenan O'Connor is an Associate in the San Diego office of LCW. He is experienced in all phases of litigation, including developing responsive pleading strategies, dispositive motion practice, and all phases of discovery, including crafting written discovery and deposition preparation.

LCW In The News

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

Partners **Mark Meyerhoff**, **Morin Jacob** and Associate **Paul Knothe** penned "Free Speech in the Age of Facebook" for the July/August 2021 issue of *Sheriff & Deputy Magazine*. In the piece, the attorneys address the importance of developing and enacting updated agency social media policies that balance employees' First Amendment rights. The article also shares details on how to the courts determine whether employee posts are protected speech or inflammatory remarks that may not serve in the interest of the law enforcement agency or in preserving public trust.

Associate**Alex Volberding** spoke with KABC-TV anchors John Gregory and Rachel Brown during an Aug. 7, 2021, segment centered on vaccine mandates at the workplace. Alex provided details on the segment topic, including: legal implications surrounding vaccination and/or weekly testing measures for city and state employees; the prospect of upcoming FDA vaccine approval and what this means for employers/employees; the ramifications of private employers who require employee proof of vaccination; and potential legal challenges that could stem for these measures and mandates.

Partner **Shelline Bennett's** article "Codes of conduct and ethics in the public sector" was published in the Aug. 24, 2021 edition of *American City & County*. The piece, which is part two of her series addressing the prevalence of bad behavior from elected officials, provides elected officials useful tips on constructing a governing code of conduct and specific measures and consequences for those who fail to abide by established rules.

Former Fire Chief Was Wrongly Accused Of Pension Spiking.

Peter Nowicki was employed with the Moraga-Orinda Fire District (District) from 1983 until 2009. In July 2006, Nowicki became the District's fire chief. Nowicki had an employment contract with a four-year term. Later, Nowicki and the District agreed to two contract amendments. The amendments granted Nowicki added benefits, including salary increases, annual vacation and holiday "sell-backs," and additional vacation and administrative leave credit. Nowicki was a member of the Contra Costa County Employees' Retirement Association (CCCERA), which administers pensions for Contra Costa County.

On January 30, 2009, two-and-a-half years into his term as fire chief, Nowicki retired for personal reasons. Nowicki's contract said he was eligible for retirement benefits under the then-applicable formula, which took into account a member's "highest annual compensation earnable." When Nowicki retired, his retirement allowance was based on the total of his final year's salary, plus the vacation leave and holiday cash-outs he took during his final year of employment.

In late 2013, CCCERA began a "lookback project" to review past incidents of unusual compensation increases at the end of employment, and to determine if pension spiking had occurred through "members' receipt of pay items that were not earned as part of their regularly recurring employment compensation during their careers."

In August 2015, Nowicki received a letter from CCCERA's Board of Retirement (Board) that the Board had scheduled a hearing to determine whether adjustments to his retirement allowance were warranted. The letter noted that before the Board adjusted Nowicki's retirement benefits, it would give him the opportunity to present his position and any relevant information. Following a September 2015 open public meeting on the issue, CCCERA sent Nowicki a letter stating that the Board had determined he had caused his final compensation to be improperly increased at the time of retirement, and therefore, his retirement allowance would be reduced from $20,448.09 to $14,667.74 per month. CCCERA also informed Nowicki that his retirement allowance had been overpaid from January 2009 through September 2015 and that Nowicki would be responsible for repaying the overpayments plus interest, which totaled $585,802.90.

Nowicki subsequently filed a petition for writ of administrative mandate requesting an order rescinding the Board's decision to reduce his pension benefit and reinstating the benefit as originally calculated. The trial court denied Nowicki's writ after determining that Nowicki did not meet his burden of establishing that the Board's decision to decrease his monthly allowance was an abuse of discretion. Nowicki appealed.

The California Court of Appeal reversed the trial court's ruling. The statute at issue in this case was Government Code Section 31539, subdivision (a)(2), which provides that the board of retirement may, in its discretion, correct any error made in the calculation of a retired member's monthly allowance if "the member caused his or her final compensation to be improperly increased or otherwise overstated at the time of retirement and the system applied that overstated amount as the basis for calculating the member's monthly retirement allowance." On appeal, Nowicki argued that there was no evidence of impropriety on his part, given that he acted to increase his final year's compensation under CCCERA's own rules and he simply sold benefit accruals back in his final year, as he had in prior years.

First, the Court of Appeal considered the meaning of "improperly" as used in Section 31539. Relying on the history behind the statute's enactment, the court concluded that the use of the word "improperly" unquestionably reflected an intent for subdivision (a)(2) to address actual wrongdoing.

Next, the court analyzed whether the evidence of Nowicki's pre-retirement conduct

supported a finding that he caused his "final compensation to be improperly increased or otherwise overstated at the time of retirement." The court noted that Nowicki's contract expressly allowed for annual salary adjustments. While his original contract did not include benefit sell-back provisions, it did permit contract amendments by mutual written agreement. In addition, Nowicki had previously utilized the sell-back provisions in his prior battalion chief contract every year between 2000 and 2006. Nowicki twice used the sell back provisions, and his amended contract permitted him to do so. This was also permitted under the law and CCCERA guidelines in place at the time.

The court also found the Board's lookback project the Board used standards that took effect in 2013 and were only to be applied prospectively. The Board had no authority to apply the 2013 standards to Nowicki's 2009 retirement.

The Court of Appeal concluded that the Board erroneously applied subdivision (a)(2) to Nowicki. The court found that "it simply is not plausible that the Legislature intended to empower retirement boards to target long retired county employees who had negotiated with their employer for contract terms permitted under then-existing law and county retirement association guidance, solely because those acts enabled them to increase their final compensation at the time of retirement." Thus, the trial court erred in denying Nowicki's petition for writ of mandate.

Nowicki v. Contra Costa Cty. Employees' Ret. Ass'n, 67 Cal.App.5th 736 (2021).

Note:

In 2013, the Legislature enacted the Public Employees' Pension Reform Act (PEPRA) to curb pension spiking. PEPRA would also have prohibited Nowicki's conduct, had it occurred after 2013.

Are you involved as a volunteer for a nonprofit organization? You may be interested in our Nonprofit Newsletter and Nonprofit Legislative Round Up.

In addition to our public agency practice, the firm also assists nonprofit organizations across the state.
To learn more, visit our Nonprofit Page.

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!

LABOR CODE

Employee Forced To Pay For Her Employer's Business Losses Has A Potential Labor Code Claim.

Krizel Gallano worked as a cashier and customer service representative for Burlington Coat Factory (Burlington) at its Daly City store. In March 2014, loss prevention personnel confronted her in a room at the back of the store about mistakes she purportedly committed that resulted in business losses. She was then allegedly coerced into signing a statement confessing to the mistakes, which included processing a return of perfume that resulted in a loss of $400 and ringing up items that had been mismarked by other employees with the wrong price tags. Burlington characterized these mistakes as "fraudulent" returns and other acts of "shoplifting."

After signing the confession, Gallano was directed to sign a promissory note establishing a personal debt of $880 for the losses her employer had allegedly sustained. Burlington told her that if she paid the amount owed on the promissory note and resigned, it would not pursue criminal charges against her. Gallano resigned, and no criminal proceedings were ever initiated against her in connection with her employment at Burlington. However, Gallano received two civil demand letters from a law firm seeking $350 for "shoplifting, theft, or fraud."

In 2015, Gallano filed a class action complaint against Burlington. She declared that the purpose of her complaint was to stop Burlington's "unlawful practice of intimidating its employees into indemnifying the company for [its] ordinary business losses." She alleged that Burlington had a practice of mischaracterizing routine retail mistakes as theft, such a processing fraudulent returns or selling mis-tagged items, and intimidating employees into signing promissory notes to shoulder the debt for the company's financial losses. Gallardo asserted a cause of action for violations of Labor Code Section 2802, among other claims. After significant litigation, the case made its way to the California Court of Appeal.

On appeal, one of the issues the court considered was whether Gallano could maintain a claim for violations of Labor Code Section 2802. Section 2802 provides that "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge or his or her duties." To prove a violation of Section 2802, an employee must therefore establish that: (1) he or she made expenditures or incurred losses; (2) the expenditures or losses were incurred in direct consequence of the employee's discharge of his or her duties, or obedience to the directions of the employer; and (3) the expenditures or losses were necessary.

While Burlington argued that Gallano could not meet the first element because she "never paid Burlington any money in relation to the promissory note or the civil

demand letters," the court disagreed. The Court of Appeal reasoned that to "incur" is "to become liable or subject to." When Gallano signed the promissory note, she incurred an economic loss. She became legally obligated under the promissory note, subject to debt collection efforts, and possible exposure to civil liability. For these reasons, the court concluded that an employee may incur a "loss" for purposes of Section 2802 when the employer causes or directs the employee to become personally liable for a necessary business-related expense. Thus, Gallano could maintain her claim.

Gallano v. Burlington Coat Factory of California, LLC, 2021 WL 3616152 (Cal. Ct. App. Aug. 16, 2021).

NOTE:

It is unsettled whether Labor Code Section 2802 applies to public entities. In the teleworking context, however, the most risk adverse approach is to reimburse public employees for some teleworking expenses if the employer requires the employee to work from home because of the COVID-19 pandemic. LCW attorneys can assist in determining whether agencies need to reimburse certain employee expenses.

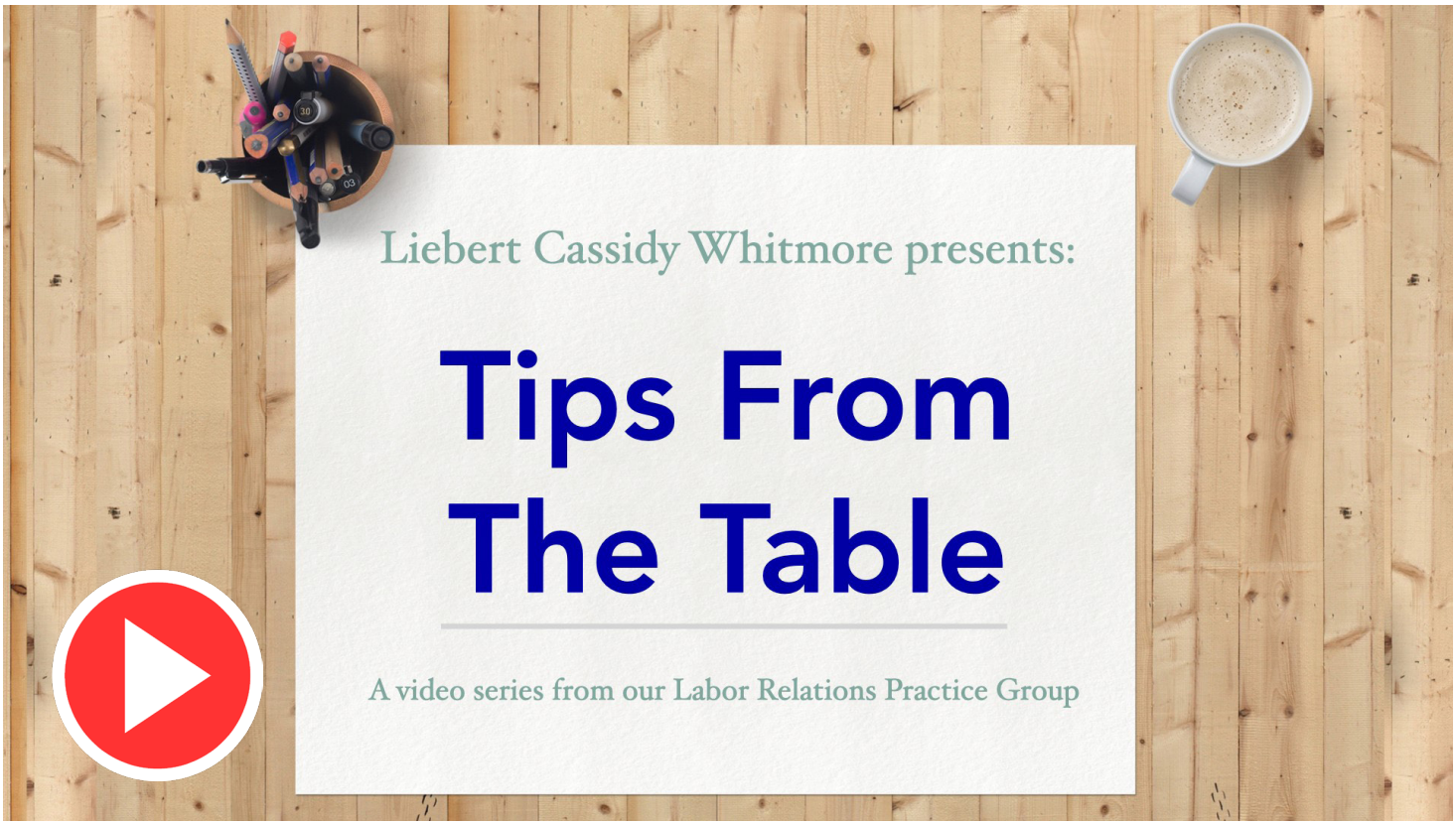
DID YOU KNOW...?

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.

- The temporary Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) health insurance premium subsidy Congress granted to eligible individuals through the American Rescue Plan Act of 2021 (the ARP) will expire at the end of September 2021. Employers should be aware of their obligation to timely notify COBRA recipients of this fact.

- On July 29, the U.S. Department of the Treasury announced regulatory changes providing new qualifying reasons for tax credits under the American Rescue Plan Act (ARPA). Eligible employers may now claim payroll tax credits if they provide Emergency Paid Sick Leave (EPSL) or Emergency Family and Medical Leave (EFML) to employees who take time off to either: 1) accompany an individual to receive an immunization against COVID-19; or 2) care for an individual who is recovering from an immunization against COVID-19. The expanded EPSL and EFML leave provisions are discretionary, and the associated tax credits are limited to employers that provide such leave between April 1 and September 30, 2021, in compliance with the ARPA.

- A public agency has 10 days to provide an initial response to a public records request notifying the requestor whether their request seeks disclosable records. (Gov. Code, § 6253, subd. (c).)



BENEFITS CORNER

IRS Clarifies Substantiation Requirements For Health FSA Debit Card Programs.

On June 25, 2021, the IRS released two information letters that address how an employee can substantiate a request for reimbursement of a medical expense under a Section 125 cafeteria plan health flexible spending arrangement (health FSA) debit card program. A health FSA allows expenses paid or reimbursed to an employee to be excluded from gross income. Some employers issue debit cards to employees to pay for medical expenses covered under a health FSA.

Letter 2021-0003 explains that IRS rules require medical expenses to be verified by a third party in order to be excludable from the employee's gross income. Proper substantiation for such expenses includes: (1) a description of the service or product; (2) the date of the service or sale; and (3) the amount of the expense.

Special issues arise when an employee's medical expenses are reimbursed with a debit card linked to a health FSA account. Specifically, a debit card transaction may not collect all of the information needed to substantiate the expense. If the transaction does not include all of the required information, the administrator of the health FSA must request additional information from the employee to substantiate the expense. If the employee cannot provide the information in a timely manner, the plan administrator must deactivate the employee's health FSA debit card.

Letter 2021-0013 discusses IRS rules for using a debit card to substantiate health FSA expenses, as described in Proposed Treasury Regulations Section 1.125-6. Specifically, an independent third party must provide the employer with a statement verifying the medical expense, either automatically or after the debit transaction. If, at the time and point of sale, the third party provides information to verify that the charge is for a medical expense, then that expense is substantiated without the need for further review. Also, the health FSA sponsor may coordinate with an employee's insurance provider to use information provided in an explanation of benefits to substantiate a debit card charge without requiring more information.

Plan administrators can also approve payment of an employee's recurring medical expenses incurred with certain providers that match the amount, medical care provider, and time period of previously-approved expenses without additional substantiation.

An employer may impose stricter standards than those described above to ensure that the health FSA is used only to pay or reimburse medical expenses.

Although these letters do not change existing law, employers may find them useful in navigating what debit card transaction information is needed to substantiate reimbursement requests.

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 city manager contacted LCW to ask whether part-time employees qualify for COVID-19 supplemental paid sick leave.	**Question:**
Answer:	Provided other statutory requirements are met, part-time employees are entitled to COVID-19 Supplemental Paid Sick Leave (SPSL) under Labor Code Section 248.2. Part-time employees are entitled to a proportionate amount of SPSL that full-time employees receive. If the part-time employee works irregular hours, the agency should conduct a six-month look back to determine the average number of hours worked and calculate the proportionate entitled to SPSL based on that number.

What is the Liebert Library?

The Liebert Library is LCW's online collection of workbooks (reference guides), sample forms, templates, and model personnel policies. The site is continuously updated to ensure the materials contain the latest legal developments and practical applications.

Subscriptions Levels:

Basic

Provides access to LCW workbooks in a digital readable PDF format (but not downloadable).

LCW Consortium Members: $405 per year
Non-Members: $450 per year

Premium

Provides unlimited access to LCW workbooks in digital format, as well as over 400 sample forms, model policies, and checklists that can be downloaded and used as templates. Additionally, Premium Members also receive a $15 discount on any workbook they choose to purchase.

LCW Consortium Members: $900 per year
Non-Members: $1,000 per year

LCW Sample COVID-19 Related Personnel Policies

The LCW Sample COVID-19 Related Personnel Policies are available on the Liebert Library as part of your subscription! The following policies have been recently added:

- Religious Accommodation Request Form for Policy Requiring COVID-19 Vaccination
- Disability Accommodation Request Form for Policy Requiring COVID-19 Vaccination
- Mandatory Vaccination Policy With Vaccines Approved Under Emergency Use Authorization

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Webinars

SPOTLIGHT ARTICLE

Codes of Conduct and Ethics in the Public Sector

By: Shelline Bennett

LCW Partner Shelline Bennett's article "Codes of conduct and ethics in the public sector" was published in the Aug. 24, 2021 edition of *American City & County*. The piece, which is part two of her series addressing the prevalence of bad behavior from elected officials, provides elected officials useful tips on constructing a governing code of conduct and specific measures and consequences for those who fail to abide by established rules. Please see the full 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 identified some of the issues confronting agencies and provided suggestions for addressing the issues. This second article captures the suggestions and legal concepts in a governing body code of conduct, with specific measures and consequences.

Now that elected officials have been reminded of their roles relative to personnel matters and day-to-day operations, and they have been educated on what is expected of them in key legal areas, a foundation is established for engaging in ethical and professional behavior.

The next step in the process is to capture these important reminders and legal concepts in a governing body code of conduct. Codes of conduct and ethics help elected officials navigate the vast and complex laws they are expected to comply with. Agencies may have outdated codes or none at all. Senior management can assist their boards by presenting them with new or revised codes of conduct and ethics for consideration.

Inherent in such codes is a key concept—civility. Media coverage of national and various state events has placed a spotlight on civility and decorum at our highest levels. By updating codes of conduct, public agencies can turn the spotlight on promoting and renewing their commitments to civility in the workspaces and public service. Civility goes beyond the law and is more than simply good manners. It is the core of mutual respect and requires that we speak in ways that are respectful, restrained and responsible, and we avoid rude, demeaning or bullying conduct and statements.

Codes of conduct and ethics can take various forms, including stand-alone policies or encompassed within a comprehensive set of governance policies. The codes can be abbreviated, high-level documents with core concepts, or they can be detailed with specific examples.

Whatever the format, these codes should start with core values: integrity, responsibility, fairness, accountability, professionalism, decorum, respect for elected or appointed officials, staff, and the public, and appropriate and efficient use of public resources. Then generally, they should include statements about responsibilities of public office, dedicated service and conflicts of interest.

Codes that provide specific examples can include statements such as:

- While a councilmember is speaking, members shall not interrupt and shall not engage in or entertain private discussions.
- Members are encouraged to use formal style, including appropriate titles, in addressing the public, staff and each other.
- Members shall refrain from use of profanity, emotional outbursts, personal attacks or any speech or conduct that tends to bring the organization into disrepute. Members are to maintain a neutral tone of voice at all times.

The creation or revision of codes of conduct can include input from individual elected officials, staff and the public. Once drafted, the document can be presented for formal adoption.

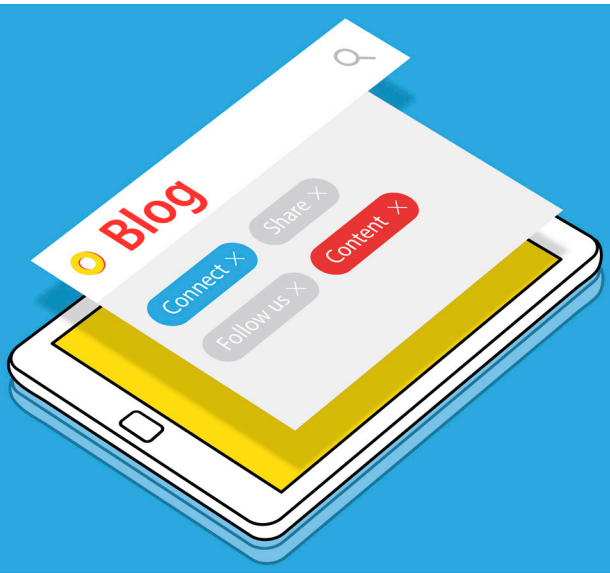
Ultimately, there needs to be accountability if there is a violation of the code standards. The code should outline the process for reporting alleged violations and possible investigations. Following completion of a fact-finding process resulting in sustained allegations, a governing body may take action to publicly censure the elected official. At a minimum, a public censure shows an agency is distancing itself from offending behavior.

Once elected officials have set the pace with an updated code, a platform is created for the agency to approach its employees and their bargaining groups to discuss updates to similar policies for management and staff. For represented employees, if the updates include counseling or discipline for violations of the policy, an obligation to negotiate prior to implementation of the new policy is likely triggered.

There is opportunity to lay a civil foundation at each agency and renew a commitment to ethical and respectful behavior, and it starts with the governing body. Once officials are reminded about steering clear of personnel matters, as well as what is expected of them in key legal areas, they can then work more effectively to implement and adhere to a code of conduct that helps maintain the desired civility and decorum in public service.

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

Five Common Pitfalls in the Reasonable Accommodation Process

By: Melanie Chaney

Under the federal Americans with Disabilities Act (ADA) and California Fair Employment and Housing Act (FEHA), the employer has the duty to identify and implement a reasonable accommodation to allow a disabled employee to perform the essential functions of the job. Common pitfalls for employers in determining appropriate accommodations are:

1. Over-reliance on the written job description

Job descriptions are critical in the disability interactive process for identifying the essential functions of the job. This is one reason why we repeatedly urge employers to update job descriptions. However, the employer should refrain from over-relying on the written job description for identifying the essential functions without considering what is actually occurring in the workplace. For instance, a written job description for a parks maintenance worker may list removal of trees as an essential job function and state that this function requires the worker to use a heavy piece of equipment such as a wood chipper. However, in practice the maintenance workers may have only removed one tree in the last several years. So this essential function may not be essential after all. This is a fact specific determination that should be made on a case-by case basis. The important thing for the employer to do when determining the essential functions is to make the relevant inquiries of incumbents and supervisors for the job position and consider how the job is currently being performed.

2. Failure to consider leave of absence or telework as an accommodation

A leave of absence may constitute a reasonable accommodation especially where it could rehabilitate a disabled employee well enough for him or her to be able to return to work, even if the employee has exhausted leave allowance. The employer, however, cannot require an unpaid leave of absence if the employee can work with a reasonable accommodation. The employer is also not required to provide an indefinite leave of absence as a reasonable accommodation.

Further, since the pandemic, employers have found that telework has become feasible for more job positions as a possible reasonable accommodation. If the job position lends itself to telework, this is another possible temporary accommodation to consider.

3. Failure to recognize employer's ongoing obligation to engage in the interactive process

In general, it is the responsibility of the individual with a disability to notify the employer that he or she needs an accommodation, and initiate the reasonable accommodation interactive process. However, even in the absence of such notification, the employer must inquire whether an employee with a known disability is in need of a reasonable accommodation. Awareness of a potential need for accommodation could be imputed to the employer from such sources as a physician's note or conduct observed by co-workers, and thus trigger the employer's duty to engage in the interactive process. Importantly, once a reasonable accommodation is agreed upon, that does not end the employer's obligation to engage in the interactive process. The accommodation provided should be reviewed periodically to ensure that it is still reasonable and remains effective in allowing the employee to perform the essential functions of the job.

4. Failure to consider all vacant positions for reassignment

Reassignment to a vacant position should be considered in these circumstances: (1) accommodation within the individual's current position would pose an undue hardship; (2) the employee can no longer perform the essential functions of the current position even with accommodation; (3) if both the employer and employee agree that reassignment is preferable; or (4) if the employee so requests.
The employee with a disability is entitled to preferential consideration for assignment to a vacant position over other applicants and incumbent in-house candidates, unless doing so would violate a bona fide seniority system.

5. Failure to analyze the undue hardship defense thoroughly

Undue hardship is an ADA and FEHA defense to the employer's obligation to provide reasonable accommodation to a disabled employee. The employer must affirmatively show that a requested accommodation creates an undue hardship. While the employer may consider the impact of an accommodation on the ability of other employees to do their jobs, the employer may not claim undue hardship solely because providing an accommodation has a negative impact on other employees, such as triggering accusations or complaints that the disabled employee is receiving "special treatment." Employers will sometimes also cursorily conclude that the requested accommodation is too expensive and would cause financial difficulty and therefore is an undue hardship. However, financial difficulty per se is not enough. There are numerous factors, including cost, which must be evaluated in the context of each employer (e.g., cost vs. the employer's budget or financial ability), when evaluating an undue hardship defense. Employers should review all the ADA and FEHA factors and carefully analyze whether a requested accommodation would cause undue hardship. Keep in mind that hardship is not enough to justify denying accommodations. The hardship must be "undue." The hardship must create a significant difficulty or expense to the employer. In enacting the ADA and FEHA requirements, Congress and the California legislature intended that some hardships must be shouldered by employers in order to accommodate disabled employees and applicants.

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