LIEBERT CASSIDY WHITMORE

EDUCATION MATTERS

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

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LCW NEWS

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

U.S. Department Of Education Releases Return To School Roadmap For Individualized Education Programs.

On September 30, 2021, the U.S. Department of Education released a Q&A titled Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act.

The Q&A is the second in a series of Q&As by the Department interpreting the requirements of the Individuals with Disabilities Education Act (IDEA) in light of the COVID-19 pandemic.

The Q&A is focused on school reopening efforts and serves to clarify that despite the COVID-19 pandemic, children with disabilities are entitled to free appropriate public education (FAPE). The topics discussed in the Q&A include meeting timelines, ensuring implementation of initial evaluation and reevaluation procedures, determining eligibility for special education and related services, and providing services that children with disabilities need in order to receive FAPE.

Guidance Issued By The Department Of Education In Dear Colleague Letters Is Not Binding.

Csutoras, who has attention deficit disorder, transferred to Paradise High School during his freshman year. Csutoras requested two accommodations pursuant to a Section 504 plan. The school granted his requests, and allowed him extra time to complete work when necessary and assistance to review his notes to help keep him organized.

Csutoras was assaulted and seriously injured by another student at a high school football game. The assault was not connected to Csutoras's attention deficit disorder. The school was unaware that Csutoras was harassed or bullied prior to the assault. Csutoras sued the school, seeking damages, alleging the school violated the American with Disabilities Act (ADA) and the Rehabilitation Act by failing to satisfy several Dear Colleague Letters issued by the Department of Education Office for Civil Rights and Office of Special Education and Rehabilitative Services between 2000 and 2014. The trial court granted summary judgment in favor of the school, determining the Dear Colleague Letters were not binding. Csutoras appealed to the Ninth Circuit Court of Appeals.

Csutoras argued that the Ninth Circuit should adopt a four-factor test set out in the 2014 Dear Colleague Letter to determine whether certain conduct is a disability-based harassment violation under the ADA and the Rehabilitation Act. The 2014 Letter states the Office of Civil Rights may seek enforcement against a claim violation when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) the school officials knew or should have known about the bullying; and (4) the school does not respond appropriately.

The Ninth Circuit rejected Csutoras's argument and declined to extend the four-factor test to private suits for damages. The ADA and the Rehabilitation Act set a higher bar for plaintiffs seeking damages by requiring that plaintiffs establish the defendant intentionally discriminated against the plaintiff on the basis of their disability or were deliberately indifferent to the disability. Additionally, the Dear Colleague Letters themselves acknowledge that the four-factor test is limited to administrative enforcement actions and suits for injunctive relief, and explicitly state the Letters do not apply to private suits for damages like Csutoras's claim.

The Ninth Circuit also rejected Csutoras's argument that the Dear Colleague Letters provide notice to schools that all disabled students need social accommodations, even if never requested, in order to prevent bullying and harassment. The Ninth Circuit found Csutoras's interpretation of the Dear Colleague Letters "stretch[es] them far afield from what they actually say." The Court reiterated that the law requires plaintiffs to establish deliberate indifference in private lawsuits for damages, meaning "the school's response to the harassment or lack thereof was clearly unreasonable in light of the known circumstances." The Court also noted the school's response to the assault was reasonable, as it conducted a prompt investigation into the investigation and suspended Csutoras's assailant.

After rejecting Csutoras's arguments, the Ninth Circuit held that the Dear Colleague Letters lack the force of law. The Letters themselves disclaim that they hold binding authority and explicitly state they do not apply to private lawsuits for money damages, which was the suit that Csutoras brought. Additionally, the Letters use language like "encourage[ing] schools to "consider" some of the Department of Education's recommendations, which suggest the Letters are non-binding guidance that do not change the elements plaintiffs need to establish in private suits.

The Ninth Circuit also held that Csutoras failed to establish a claim under both the ADA and the Rehabilitation Act. To establish a claim under either statute, Csutoras must show that (1) he is a qualified individual with a disability; (2) he was denied a reasonable accommodation that he needs in order to enjoy meaningful access to the benefits of public services; and (3) the program providing the benefit receives federal financial assistance. Because Csutoras never requested social-related accommodations, the Court held Csutoras cannot establish the second element.

Additionally, because Csutoras is a private plaintiff seeking money damages, he must prove the school intentionally discriminated against him by failing to accommodate him. This can be demonstrated if the school was deliberately indifferent to his disability. To show deliberate indifference, Csutoras must establish the school was on notice of the need for an accommodation.

Because Csutoras never requested any accommodations related to social interactions, bullying, or harassment, the Court held that Csutoras failed to establish the school was on notice for his need for social-related accommodations. The Court also rejected Csutoras' argument that the Dear Colleague Letters made his need for social accommodations 'obvious" and the school's failure to enact the Letters' recommendations was deliberate indifference. The Court stated the Letters cannot by themselves establish Csutoras's burden to demonstrate the school had actual notice of his need for a reasonable accommodations, because whether the need for accommodations was "obvious" is a factual determination.

Ultimately, the Ninth Circuit affirmed the trial court's ruling in favor of the school.

Csutoras v. Paradise High School (9th Cir. 2021) 12 F.4th 960.

Sovereign Immunity Bars Victims Of Childhood Sexual Assault From Recovering Punitive Treble Damages From Public Schools.

X.M., a student at Maple Elementary School, sued Hesperia Unified School District (HUSD), alleging he was sexually assaulted on campus by a school janitor. X.M. sought treble damages under Civil Procedure Code Section 340.1 (Section 340.1), claiming his assault was a result of the school's cover up of a prior sexual assault by the same janitor. The trial court granted HUSD's motion to strike the increased damages request on the grounds that treble damages under Section 340.1 are punitive and barred by Government Code Section 818 of the Government Tort Claims Act (Section 818). Section 340.1 was amended in 2019 to increase the time allowed for plaintiffs sue public agencies for childhood sexual assault and allow for treble damages when the defendant covered up prior childhood sexual assault and the plaintiff was subsequently sexually assaulted.

X.M. filed a petition to vacate the trial court's order, arguing that sovereign immunity does not apply because the primary purpose of the provision is to compensate victims of childhood sexual assault. The question before the Court of Appeal was whether the sovereign immunity provision in Section 818, which bars public agencies from paying punitive damages, applies to victims of childhood sexual assault from recovering treble damages under Section 340.1.

The Court explained that the hallmark of punitive damages is the determination of what amount will be sufficient to punish the defendant and deter future misconduct. The Court of Appeal interpreted Section 818 and held that the goals of both punishment and determent of punitive damages are not advanced if the defendant is a public agency because damages against a public agency only punishes unknowing taxpayers, who took no part in the wrongdoing.

The Court of Appeal explained that treble damages are generally punitive in nature and are not meant to compensate plaintiffs for damages. Section 340.1 allows plaintiffs to recover for damages caused by childhood sexual abuse against the abuser and defendants who are responsible for the actions of the abuser. Section 340.1 allows for treble damages when a defendant covers up a minor's sexual abuse, and the cover up resulted in subsequent sexual assault of the plaintiff, "unless prohibited by another law." The Court of Appeal stated that the clause "unless prohibited by another law" recognizes that treble damages may not be available in every instance.

The Court of Appeal held that Section 340.1's treble damages provision is punitive. First, the statute allows for damages three times the plaintiff's actual damages if the plaintiff proves the sexual assault was a result of the defendant's cover up of previous sexual assault. Second, treble damages can only be rewarded by a judge or jury, who will consider relevant factors specific to the defendant. The Court of Appeal explained these are common traits of punitive damage provisions in other statutes, and the primary purpose of Section 340.1 is to punish and deter defendants from engaging in future misconduct.

The Court of Appeal rejected X.M.'s argument that compensation is the primary purpose of the treble damages provision. The Court of Appeal stated that nothing in the legislative history of the 2019 amendment indicates compensation was the primary purpose of the changes to Section 340.1. The Court of Appeal explained the legislative history suggests the reason behind extending the statute of limitations was to allow more victims to be compensated for their injuries, and nothing in the materials indicate the same reasoning was behind the treble damages provision. The Court of Appeal further noted the law is already designed to fully compensate victims of childhood sexual assault for pain and suffering, including physical and emotional damages. However, punitive damages are not intended to compensate plaintiffs for pain and suffering.

Ultimately, the Court of Appeal denied X.M.'s petition to seek treble damages because public agencies are immunized from punitive damages under Section 818.

X.M. v. Superior Court of San Bernardino Cty. (2021) 68 Cal. App.5th 1014.

FIRM VICTORY

Police Officer's Suspension For Insubordination Upheld.

LCW Partner James Oldendorph successfully represented a city in a peace officer's disciplinary appeal.

In June 2020, a city's police department (Department) learned of a large protest that was planned in response to George Floyd's killing. The Department's chief of police emailed personnel to advise of a tactical alert, and to order all sworn personnel to report for duty on the day of the protest unless a supervisor instructed otherwise. On the morning of the protest, a police officer informed a sergeant that he would not report because he was going to his family's restaurant due to rioting near that location. The sergeant explained that all sworn personnel were required to report to duty that day in accordance with the tactical alert. The officer reiterated that he would not report as ordered, and that he was going to his family's restaurant. A captain then offered to get the officer's family housed to ensure their safety so that the officer could report for duty as ordered. The officer informed the captain that he still intended to go to the restaurant to protect his family's business. The captain advised that the officer would be deemed insubordinate if he did not report to work. Despite this, the officer did not report as ordered.

The Department found that the officer violated multiple policies by failing to comply with the police chief's emailed directive and the captain's verbal order. The officer's policy violations included unauthorized absence, neglect of duty, disobedience, and insubordination. In January 2021, the officer received a 30-day suspension without pay based on these findings.

The police officer appealed his suspension to the city manager. The city manager upheld the decision. The police officer then filed an appeal for a hearing before the city's personnel board (Board), alleging that he did not follow the directives of his superior officers in order to protect his family. The Board found that the officer's statement to his captain that he needed to protect his family's business did not support this contention. The Board further acknowledged that the Department offered to protect the officer's family, but the officer declined.

The officer also alleged that his conversation with the captain was an improper interrogation in violation of the Public Safety Officers Procedural Bill of Rights Act (POBR). The Board disagreed, nothing that the captain's conversation was not an interrogation, but rather, an offer to provide accommodation to the officer and his family during the protest. The Board found no POBR violation for two reasons. First, the captain did not ask the officer any questions about any rule violation that could lead to discipline. Second, the captain immediately ended the call after the officer confirmed that he was not going to report to work. Based on the foregoing, the Board upheld the police officer's 30-day unpaid suspension.

NOTE:

This case reaffirms that significant discipline is often appropriate in cases of insubordination. In fact, the Board noted that the police officer's conduct represented one of the highest degrees of disloyalty a police officer could display towards their department and community. The Board noted that the officer's conduct likely warranted termination, but that the Department was lenient given the officer's state of mind as to his family's business.

DISCRIMINATION & RETALIATION

No Immunity For Police Chief As To Claims That He Failed To Promote An Officer Based On Her Sex.

In 2017, Julie Ballou, a police officer in Vancouver, Washington, took an examination for promotion to the rank of sergeant. Under Washington civil service rules, a chief of police has discretion to promote any of the three highest-scoring candidates. Between 2013 and 2018, the Vancouver Police Department's Chief of Police, James McElvain, promoted the highest-ranked person on the relevant list.

In the months after the sergeant's promotional exam, McElvain initiated multiple investigations as to Ballou's alleged violations of the Department's report writing policy. While the investigations were pending, McElvain promoted two male officers who ranked lower than Ballou on the promotional list. After the investigations were concluded, Ballou received a letter of reprimand. McElvain informed Ballou that he would not promote her due to these investigations even though she was now the highest scoring officer up for promotion. Previously, two male officers had received promotions to corporal despite having been disciplined after personnel investigations. Moreover, a third male officer had failed to follow the Department's report writing policies, but he was not investigated.

Ballou submitted multiple complaints to the City of Vancouver, including an emailed complaint to the City Manager alleging that she was the victim of sex discrimination. In May 2019, more than a year after she first became eligible for promotion, McElvain promoted Ballou to the rank of sergeant.

Ballou sued, alleging that McElvain violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. She alleged she was discriminated against because of sex as a result of: the internal affairs investigations that the Chief said precluded her eligibility for promotion; and the Chief's decision not to promote her for over a year. Ballou also claimed McElvain retaliated against her for alleging discrimination in her various complaints.

McElvain moved for summary judgment, asserting qualified immunity as to Ballou's claims. Qualified immunity grants government officials performing discretionary functions immunity from civil suits unless the person suing shows that the official violated clearly established statutory or constitutional rights of which a reasonable person would have known. The district court denied the motion, and McElvain appealed.

The Ninth Circuit Court of Appeals accepted the appeal only as to whether the denial of qualified immunity was appropriate as a matter of law. The Ninth Circuit did not agree with McElvain's arguments. As to Ballou's sex discrimination claim under the Fourteenth Amendment, the Ninth Circuit found that Ballou's allegations showed that McElvain's conduct violated her constitutional right to be free from denial of a promotion on account of sex. The Ninth Circuit further held that any reasonable officer would recognize that using an investigation to stall a promotion on the basis of sex was unconstitutional.

McElvain also alleged that Ballou's sex discrimination claim failed because the male officers promoted over Ballou were not sufficiently similar to Ballou to demonstrate disparate treatment on the basis of sex. The Ninth Circuit disagreed, holding that the existence of a similar comparator was not the only way to allege disparate treatment.

As to Ballou's retaliation claim under the First Amendment, McElvain alleged that he was entitled to qualified immunity because Ballou's speech was not a matter of public concern or constitutionally protected. The Ninth Circuit disagreed. It held that Ballou's opposition to sex discrimination in the workplace was inherently speech on a matter of public concern and clearly protected by the First Amendment.

Ballou v. McElvain and City of Vancouver, (9th Cir. 2021) ___ F.4th ___ [2021 WL 4436213].

Sheriff's Department Defeats Retaliation Claim Because Terminated Employee Could Not Show Pretext.

The Orange County Sheriff's Department (OCSD) terminated Vanessa Hamilton's employment after she failed to report for a mandatory overtime shift in May 2016. Hamilton sued, alleging retaliation in violation of the California Fair Employment and Housing Act (FEHA). OCSD moved for summary judgment. OCSD alleged that Hamilton could identify no evidence to allow a reasonable jury to find that the reasons OCSD gave for her termination (i.e., her failure to report for the overtime shift) were pretexual and retaliatory. The district court granted summary judgment for OCSD and Hamilton appealed.

On appeal, the Ninth Circuit affirmed summary judgment for OCSD. The Ninth Circuit noted that: Hamilton did not dispute that she failed to report for the mandatory overtime shift; and the evidence supported OCSD's conclusion that Hamilton was deceptive as to why she failed to report to work. The Ninth Circuit further found no evidence that other employees were retained after similar misconduct, nor any other evidence from which a jury could infer that OCSD's reasons for terminating Hamilton were untrue.

Hamilton v. Orange County Sheriff's Department (9th Cir. Aug. 3, 2021) 854 Fed.Appx. 938, unpublished.

NOTE:

Courts will deny an employer's motion for summary judgment if there is conflicting evidence as to the employer's reasons for taking adverse action against an employee. But, a summary judgment motion is a powerful tool if the employer's reasons for an adverse action are accurate and consistent.

Stray Remark That Assistant Dean "Wanted Someone Younger" Tanks Employer's Motion.

Linda Jorgensen started working at Loyola Marymount University (University) in 1994. In July 2010, the University appointed Stephen Ujlaki to be the Dean of its School of Film and Television (School). At the time, Jorgensen was over 40 years old.

In 2014, Ujlaki promoted Johana Hernandez to be an Assistant Dean. Hernandez was 30 years old, and she had begun work at the School four years earlier as an administrative assistant. Jorgensen helped train Hernandez, and claimed that Ujlaki "made Hernandez his favorite." Jorgensen alleged she was far more qualified and experienced for the Assistant Dean position than Hernandez. In a particularly insensitive decision, Ujlaki ordered Jorgensen to report to Hernandez.

Jorgensen further claimed that after Hernandez was promoted, Ujlaki and Hernandez sidelined her and left her with few duties. Jorgensen attributed her lost promotion and marginalization to age and gender discrimination. Jorgensen complained to the University, but it rejected her claims. Jorgensen then alleged she was punished for her complaint. Jorgensen sued the University in 2018 and resigned in 2019.

In the trial court, the University contended that Jorgensen was a problem employee who became insubordinate when Ujlaki and his team tried to improve the way the School operated. One Associate Dean – a woman older than Jorgensen – described Jorgensen as the "the most difficult employee I have ever had to manage by orders of magnitude." The University also presented facts that Hernandez's promotion was due to her competence, not age discrimination.

The University moved for summary judgment, arguing that the lawsuit had no merit. The trial court excluded from evidence a sworn statement from Carolyn Bauer, a former School employee. Bauer declared that while she was working at the School, a person expressed interest in another position that was unrelated to the Assistant Dean position Jorgensen sought. According to Bauer's statement, when Bauer told Hernandez about the person's interest in the other position, Hernandez responded she "wanted someone younger". Without this evidence, the trial court found for the University. Jorgensen appealed.

The Court of Appeal concluded that the trial court was wrong to excluded Bauer's sworn statement. Under California precedent, even a non-decision maker's age-based remark "may be relevant, circumstantial evidence of discrimination." Thus, even though Hernandez and not Ujlaki made this age-related remark about another position, the remark was relevant because it showed Hernandez could influence Ujlaki, the School's top decision maker, on all issues including hiring and promotion. The court noted that Ujlaki invited Hernandez to participate in the interviews for Assistant Dean positions and that they discussed hiring decisions. In addition, Ujlaki gave Hernandez a series of special assignments that flouted formal organization lines. Thus, a jury could reasonably conclude Hernandez could influence Ujlaki's decisions. The trial court erred in excluding Bauer's statement because: Bauer quoted Hernandez word-for-word; and Hernandez's remark explicitly described her state of mind.

The Court of Appeal next considered whether Hernandez's remark would have changed the trial court's analysis. In a discrimination case, the employee must first establish a prima facie case, in order to raise a presumption of discrimination. Second, the employer may rebut that presumption by showing it acted for

legitimate and nondiscriminatory reasons. Finally, the employee may attack the employer's legitimate reasons as pretextual or offer other evidence of improper motives.

Here, the Court of Appeal concluded Hernandez's remark would have changed the trial court's analysis. Hernandez's remark she wanted someone younger was unambiguous. Also, there was evidence that: Ujlaki created a pay differential between male and female Associate Deans hired concurrently; and Hernandez was an influential advisor to Ujlaki. People other than Jorgensen were also critical of Ujlaki's leadership. An outside consultant also evaluated Ujlaki's deanship and concluded the faculty consensus was the situation was "too dysfunctional to be allowed to continue." Taking all this evidence into account, the court held that the trial court improperly decided in the University's favor. The court remanded the case for further proceedings.

Jorgensen v. Loyola Marymount Univ. (2021) 68 Cal. App.5th 882.

NOTE:

California's stray remark precedent makes employer motions for summary judgement very difficult to win. A stray remark regarding an unrelated position can still impact a discrimination case, even if someone other than the final decision maker makes the remark.

CALIFORNIA FAMILY RIGHTS ACT

Agency Unlawfully Terminated Peace Officer After He Returned From Leave.

In 2006, the Department of the California Highway Patrol (CHP) hired Stanley Vincent as a peace officer. Vincent, a native of Haiti, stood in loco parentis to his sister, who had paranoid schizophrenia. Vincent regularly traveled to Haiti to help with her care. In 2007 and 2010, Vincent took emergency leave from his CHP duties to care for his sister. On those occasions, CHP did not require him to fill out any forms prior to traveling for these emergencies, nor did it require him to provide any medical certifications.

On November 9, 2014, Haitian law enforcement informed Vincent that his sister had left the family home and was wandering the streets of Port-au-Prince. Vincent informed CHP Sergeant Eric Martinez that he might need to take an emergency leave of absence. The next day, Vincent told Sergeant Brian DeMattia that his sister was missing in Haiti, and requested a two-week leave of absence. Sergeant DeMattia notified Captain Mark D'Arelli that Vincent needed to leave the country to attend to family matters.

On November 11, 2014, Vincent left for Haiti. Over the next three days, two sergeants attempted to contact Vincent about his absence. One of the sergeants requested that Vincent come into the office to determine whether his request met CHP's family leave criteria. Vincent did not respond to these messages.

On November 14, 2014, CHP labelled Vincent absent without leave (AWOL) when he failed to show for work. Six days later, Captain D'Arelli directed CHP to initiate an investigation into Vincent's AWOL status. On November 25, 2014, Vincent contacted Lieutenant Mike Bueno from Haiti and requested an additional eight days of emergency leave. Lieutenant Bueno ordered Vincent to return to work immediately.

On December 4, 2014, Vincent returned to work and submitted documentation about his leave, including medical and financial documents that showed his support for his sister. CHP refused to accept or evaluate the documents, and opened an investigation into "possible adverse action issues" for being AWOL. CHP later expanded the scope of the investigation to include charges of dishonesty and mishandling of evidence based on misdated booking forms. CHP's investigation substantiated all charges against Vincent, but failed to mention that Vincent had requested family care leave before departing for Haiti. Based on the investigation's findings, Commissioner Joseph Farrow terminated Vincent.

Vincent sued CHP for wrongful termination, and violations of the California Family Rights Act (CFRA) and Fair Employment and Housing Act (FEHA). After Vincent prevailed at trial, CHP filed motions for judgment notwithstanding the verdict and a new trial. The trial court denied these motions, and CHP appealed.

On appeal, CHP alleged that Vincent was ineligible for CFRA leave because he did not stand in loco parentis to his sister. The Court of Appeal disagreed, finding that the evidence showed that Vincent provided for his sister, including financially, on a day-to-day basis for nearly two decades.

CHP further alleged that Vincent failed to notify CHP of his in loco parentis claim. The Court of Appeal disagreed, citing to Vincent's notice to Sergeant DeMattia about his family situation before he left for Haiti. Sergeant DeMattia, in turn, informed Captain D'Arelli of Vincent's family's situation. The Court of Appeal also found that any lack of notice to CHP was the result of CHP's failures to follow CFRA regulations and ask Vincent for more information about his parental relationship to his sister.

CHP also alleged that Vincent failed to provide CHP with the requisite medical certification for his CFRA leave. Again, the Court of Appeal disagreed, citing to medical documentation that Vincent provided upon his return from Haiti that CHP refused to accept or evaluate.

Lastly, CHP alleged that Vincent's FEHA claim failed because he did not provide sufficient evidence that CHP intentionally retaliated against him for taking protected leave. The Court of Appeal disagreed. The jury had seen that the CHP's investigation omitted the fact that Vincent requested emergency leave before leaving for Haiti. The Court found that this deliberate concealment supported the jury's determination that CHP possessed retaliatory intent when it fired Vincent.

The Court of Appeal found that substantial evidence supported the jury's determination that Vincent proved his CFRA and FEHA claims.

Vincent v. Department of the California Highway Patrol (Cal. Ct. App. Aug. 31, 2021) 2021 WL 3878390, unpublished.

NOTE:

Employers must be proactive in complying with all requirements of the CFRA, including gathering sufficient information from employees as to their eligibility for protected leave. Here, the Court of Appeal emphasized that the employee had communicated about the need for his leave, but that the employer did not follow up.

LABOR RELATIONS

City Reasonably Applied Its EERR When It Dismissed A Petition For Recognition.

On November 12, 2019, Pasadena Non-Sworn Employees Association (PNSEA) filed a severance and representation petition with the City of Pasadena. PNSEA was seeking recognition as the exclusive representative of a new bargaining unit composed of all non-sworn classifications employed by the City of Pasadena Police Department. The proposed unit would contain 87 employees in approximately 14 separate classifications. PNSEA submitted its petition and proof of support from about 82 percent of the petitioned-for employees. The PNSEA petition requested that the City form the new unit by combining currently unrepresented employees with represented employees carved out from two other bargaining units represented by AFSCME and LIUNA.

Upon receiving PNSEA's request, the City held a hearing to determine if the petitioned-for unit was appropriate. On May 13, 2020, the City denied the petition because PNSEA failed to show: (1) that the classifications in the proposed unit shared a community of interest separate and distinct from the AFSCME and LIUNA units; and (2) a community of interest between the Police Supervisors and the other classifications in the proposed unit.

PNSEA alleged the City was unreasonable in applying its Employer-Employee Relations Resolution (EERR) to the facts and filed a PERB charge.

PERB clarified that because PNSEA was the challenger, it had the burden to show that its proposed unit was appropriate and the City's decision was not reasonable. PERB explained that a unit is appropriate when it has a community of interest separate and distinct from other employees in the existing bargaining units. However, if reasonable minds could differ as to whether a unit is appropriate, PERB will not substitute its judgment for a local agency's determination. However, PNSEA did not have to show that its proposed unit was the most appropriate.

To analyze whether the City acted reasonably in determining that the proposed unit was inappropriate, PERB used the City's EERR unit determination criteria: (1) history of the City's labor relations; (2) labor relations in similar public employment; (3) common skills, working conditions, duties, education; (4) effect on the existing classification structure; and (5) efficiency of City operations.

As to the first factor, the City showed that AFSCME and LIUNA had represented their units since the 1980's, and that severing classifications from those established units could destabilize negotiating relationships. PERB agreed that maintaining historic continuity typically weighed against severance absent proof that the unit was incapable of addressing the needs of a discrete minority within the unit. Here, PNSEA attempted to show that employee relations were unstable and that employees' unique needs were not being addressed. However, PERB sided with the hearing officer, who held that there was a positive history of labor relations spanning decades, and that PNSEA failed to show that any lack of bargaining success was due to the existing units' failure to adequately represent non-sworn employees' interests. This evidence weighed against severing the established units.

With respect to the second factor, PERB found that the City afforded sufficient weight to other cities' practices.

As to the third factor, PNSEA did not present evidence regarding non-sworn employees' common skills, job duties, or educational requirements. However, PNSEA did argue that the classifications in the proposed unit shared a common, unique work environment because

the Police Department operated 24/7 and dealt with potentially unsafe situations. PERB found that these factors were neither unique to the Police Department's non-sworn employees, nor sufficient to warrant severing them from the unit. Thus, PERB found that PNSEA failed to establish that the non-sworn employees shared a community of interest separate and distinct from the AFSCME and LIUNA represented-employees.

As to the fourth factor, PNSEA planned to sever one of the four Maintenance Repairers and three of the 15 Maintenance Assistants from AFSCME to create its unit because these employees worked for the Police Department. PNSEA conceded that while these employees did work for the Police Department, their job duties were common across all City departments and not distinct to the Police Department. Thus, PERB agreed with the hearing officer that PERB generally disfavors splitting a single classification across multiple bargaining units when the employees within that classification perform the same work under virtually the same employment conditions.

Finally, as to the last factor, PNSEA argued that it would be more efficient to put all non-sworn Police Department employees into a single bargaining unit, and that this change would improve employer-employee relations. AFSCME and LIUNA countered that creating a tenth bargaining unit would make labor relations with the City less efficient. Furthermore, the hearing officer worried this could lead to more units seeking to sever in order to form additional units. While PERB found both the City and PNSEA's efficiency arguments speculative, it held that PNSEA was still unable to show that the City unreasonably applied its local rules.

PERB also analyzed whether the City unreasonably declined to find a community of interest between supervisory and non-supervisory classifications. PERB said that an MMBA employer may not categorically require that all employees with supervisory duties be excluded from any bargaining unit that contains non-supervisors; rather, supervisory duties at most may be relevant to unit determination solely as one of numerous community of interest factors. Under the City's EERR, however, PERB noted that supervisors would be required to be in a separate unit from non-supervisors. PERB noted that since the City's EERR conflicted with the MMBA, the City's EERR would be unenforceable as to that rule. However, PNSEA had not challenged the City's rule; it challenged only the application of this rule. PERB found that the City still had a valid reasons to deny PNSEA's proposed unit and the City had not severed non-supervisors from their existing units.

Lastly, PERB determined that because the PNSEA never established that the City rejected an alternate unit comprised solely of 12 Police Supervisors, it did not need to consider whether such a rejection would be reasonable.

In light of these findings, PERB ultimately dismissed PNSEA's claim that the City unreasonably applied its EERR when it dismissed their petition.

City of Pasadena, PERB Dec. No. 2788-M (September 1, 2021).

NOTE:

This case shows that the party challenging a decision on the appropriateness of a unit has the burden of proof. Educational entities should ensure they are not only following the criteria listed in their respective Employee-Employer Relations Resolutions, but that those criteria are consistent with PERB regulations.

PERB Retains Exclusive Jurisdiction Over Most Unfair Practice Charges.

Sharon Curcio worked for the Fontana Unified School District (District) as a teacher. While at work, Curcio learned that her personnel file included derogatory statements about her. Curcio asked to review these statements, but the District refused. Curcio then sought assistance from her union, the Fontana Teachers Association (FTA) and the California Teachers Association (CTA).

The FTA and CTA examined Curcio's request and declined to provide her with an attorney. Curcio then filed an unfair practice charge with the Public Employees Relations Board (PERB) claiming that FTA and CTA breached their duties of fair representation and committed unfair practices in violation of the Educational Employment Relations Act (EERA).

In response, FTA argued that Curcio's filing was untimely because CTA informed Curcio in May 2016 that it would not pursue her request. Curcio waited until December 2016 to file her charge. FTA argued that the Government Code prohibits PERB from issuing a complaint more than six months after the filing of the charge. In addition, CTA argued that it did not breach a contractual duty by declining to provide Curcio with an attorney because it was not the exclusive representative of Curcio's bargaining unit. PERB dismissed Curcio's charge and decided not to issue a complaint. After PERB upheld its decision on appeal, Curcio filed a writ petition in superior court alleging that PERB's appellate decision was an abuse of discretion.

PERB responded, arguing that its decision not to issue a complaint was not subject to judicial review. PERB noted that in general, there is a bar on judicial review of a PERB decision not to issue a complaint. PERB further argued that while the Supreme Court has identified three exceptions to this bar, Curcio did not plead any of them. The trial court agreed with PERB. Curcio, undeterred, appealed again.

At the Court of Appeal, Curcio argued that PERB's exclusive jurisdiction to determine whether to issue a complaint is merely a rule of exhaustion of administrative remedies and that she met that requirement. FTA and CTA countered that PERB had exclusive jurisdiction to determine whether Curcio had alleged an unfair practice. The court agreed with FTA and CTA.

The Court of Appeal explained that Curcio was not required to pursue her claim before PERB as a matter of exhaustion of remedies, but rather as a requirement under the EERA. This is because the EERA makes PERB the exclusive forum for these claims. PERB's authority over unfair practices removed the superior court's power to hear lawsuits alleging the same unfair practices.

When Curcio filed a petition with the superior court to review PERB's denial of her unfair practice charge, the court ruled against her because she did not plead any one of the three exceptions to PERB's jurisdiction. Then, when the superior court dismissed her petition, Curcio did not try to appeal it, thus making the decision final. Since Curcio did not appeal the ruling, the Court of Appeal reasoned it did not have jurisdiction to review the superior court's decision that Curcio had not and could not plead one of the three exceptions. Therefore, the court concluded the superior court ruled correctly. PERB's decision should stand since PERB has exclusive jurisdiction to determine whether Curcio pleaded an unfair practice charge.

Curcio v. Fontana Teachers' Ass'n (2021) 68 Cal.App.5th.

NOTE:

While this case dealt with exclusive jurisdiction under the EERA collective bargaining law, the MMBA, which applies to public educational entities, also provides PERB with exclusive jurisdiction over unfair practice charges. The MMBA at Government Code Section 3309.5 provides "The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board."

BROWN ACT

County Was Wrong To Make Agreement Available For Public Inspection Only After The Board Meeting.

In 2011, Squaw Valley Real Estate LLC (Squaw) proposed to develop a resort on approximately 94 acres near Lake Tahoe. Shortly thereafter, Placer County began environmental review for the project under the California Environmental Quality Act. The County released a draft Environmental Impact Report (EIR) that analyzed the project's potential impacts. Several parties expressed concern over the County's analysis. For example, the California Attorney General's (AG's) office warned that absent additional environmental review, the office would file litigation challenging the County's EIR.

Subsequently, the County posted the agenda for an upcoming meeting of its Board of Supervisors (Board), during which the Board would consider whether to approve the EIR. Among other things, the agenda said that at its November 15, 2016 meeting, the Board would consider "a recommendation from the Placer County Planning Commission for APPROVAL of the following: (1) a resolution to certify the Village at Squaw Valley Specific Plan Final EIR; and (2) an ordinance to approve the Development Agreement relative to the Village at Squaw Valley Specific Plan". At the same time, the County posted the agenda, the County also made available for public inspection the documents discussed on the agenda, including the proposed development agreement.

The same day the County posted the agenda, two deputy AG's met with counsel for the County and Squaw. During the meeting, the parties agreed the AG would not sue if Squaw paid an air quality mitigation fee. The County then updated the development agreement accordingly. At 5:36 p.m. on November 14, 2016, County counsel emailed the updated agreement to the County clerk. After receiving the email, the County clerk placed copies of the updated agreement in an office where the public could inspect County records. But that office was only open from 8:00 a.m. to 5:00 p.m. on weekdays. At 5:42 p.m., the County clerk emailed the updated documents to all Board members. The Board met the next day. Sierra Watch, a conservation non-profit organization, attended. The Board voted to approve the agreement.

Sierra Watch challenged the County's approval in two lawsuits, including one which alleged the County approved the project in violation of the Ralph M. Brown Act. The Brown Act imposes several requirements on local agencies that are intended to ensure the openness of legislative body's actions and deliberations.

Sierra Watch contended the County violated two sections of the Brown Act: (1) Section 54954.2, which requires counties to post an agenda at least 72 hours before each meeting "containing a brief general description of each item of business to be transacted or discussed at the meeting; and (2) Section 54957.5, which requires counties that distribute any meeting material to their boards less than 72 hours before an open meeting to make that material "available for public inspection . . . at the time the writing is distributed to all, or a majority of all, of the [board] members."

On appeal, the California Court of Appeal determined the County's agenda was misleading in violation of Section 54954.2. The agenda indicated its Board would "consider a recommendation from the Placer County Planning Commission" to adopt "an ordinance to approve the Development Agreement relative to the Village at Squaw Valley Specific Plan." At the time, the County also shared a copy of the agreement that the Planning Commission had recommended. However, the agreement the Board considered was substantially different from the agreement on the agenda because it contained the eleventh-hour air quality mitigation fee. Thus, the Court concluded the agreement was altered without notice, and thereby misled the public. Even though the court found the County's agenda was inaccurate, the Court determined that Sierra Watch failed to show the County violated Section 54954.2. Thus, the court declined to nullify the approval of the project.

Next, the court concluded that the County also violated Section 54957.5. The court disagreed with the County's argument that it placed the documents in an office where records are "available for public inspection" at the same time it distributed them to the Board. The court reasoned that the documents were not available for public inspection because the office was closed when the Board members received the documents. Relying on the plain language of the statute, the court found that that the County did not make the documents available for public inspection at the time they were distributed to all of the Board members.

Sierra Watch v. Placer Cty. (2021) 69 Cal.App.5th 1.

NOTE:

In a blow to paper conservation efforts, the court noted that public educational entities cannot satisfy Section 54957.5 by merely posting materials online.

California AG Decides Appointees To A JPA May Discuss A Matter Pending Before That JPA During Separate Open Meetings With Their Own Member Agencies.

The Indian Wells Valley Groundwater Sustainability Agency (IWVGSA) is a joint powers authority (JPA) that manages local groundwater pursuant to the Sustainable Groundwater Management Act. The IWVGSA is responsible for implementing a Groundwater Sustainability Plan, and for providing technical and financial assistance to local groundwater agencies. The IWVGSA can also impose penalties for groundwater extraction that violates the Plan.

Five local agencies created the IWVGSA and comprise its voting members. Each member agency appointed a representative to serve on the IWVGSA's board of directors. In advance of IWVGSA board meetings, two member agencies hold their own meetings and take public comment on matters pending before the JPA. They then advise or direct their respective JPA appointees on those pending matters.

The California Attorney General (AG) considered two questions as to the IWVGSA's procedures: (1) whether the Brown Act prohibits IWVGSA board members from discussing matters that are pending before the JPA when they attend open public meetings of the member agency; and (2) whether procedural due process allows a member agency of a JPA to discuss with its JPA appointee, at the member agency's open meeting, how to decide an adjudicative matter pending before the JPA.

First, the AG concluded that discussions, between member agencies and the IWVGSA board members they appoint, about pending JPA matters would not violate the Brown Act. This is because these discussions would occur at open public meetings and there would be no collective deliberation by a majority of the members of any legislative body outside of an open meeting. The AG noted that the Brown Act does not regulate the individual conduct of individual members of any legislative body. Rather, the Act is concerned with collective deliberation among a majority of the members of a legislative body. Because only one IWVGSA board member – the JPA appointee – would be attending the member agency's open meeting, the IWVGSA members would not be deliberating with each other in violation of the Brown Act.

Second, the AG found that depending on the particular circumstances, discussing how to decide an adjudicative matter pending before the JPA could violate procedural due process by infringing on a party's right to a neutral, impartial decision-maker. When an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires

a fair tribunal. This requires, among other things, an impartial adjudicator who is "free of bias for or against a party." The AG concluded that a member agency's discussion of the pending matter could compromise the appointee's neutrality in at least two ways: (1) the appointee could be relying on evidence that is outside the record before the IWVGSA, or prejudge the matter prior to the adjudicatory proceeding; or (2) the discussion, coupled with the agency's position of influence over the appointee, could create independent due process concerns. However, the AG noted this inquiry would require "careful inquiry into the circumstances in the particular case."

Opinion of Rob Bonta, Attorney General, No. 18-201 (September 17, 2021).

NOTE:

Although the AG's opinions are not binding law, they are often persuasive to courts. This opinion illustrates the complexities to consider when evaluating the conduct of appointees to a JPA.

JOINT EMPLOYMENT

Shell Was A Joint Employer Of Its MSO-Operated Gas Stations.

Equilon Enterprises (Shell) owned more than 300 Shell branded gas stations in California. Shell operated these stations through its "Multi-Site Operated" or "MSO" model. Shell would enter into nonnegotiable agreements with an "MSO operator" who in turn operated the stations. The agreements leased the station's convenience store and car wash to the operator, and required the operator's employees to perform all of the work at the station, including motor fuel services that were outside the lease. For the fuel services, the operators received a $2,000 monthly fee and a reimbursement amount that Shell unilaterally set. Typically, these stations were leased as groups in clusters, but Shell had the authority to add or remove individual stations to and from the MSO operator's cluster at any time. Shell could also terminate the MSO contracts on six months' notice. MSO operators were required to: use Shell's electronic point of sale cash register system; follow detailed terms for the operation of Shell's motor fuel business; provide daily reports; and submit to inspections. Shell also controlled the hours of the stations and required operators to grant Shell access to their bank accounts.

The MSO contract called for the operators to hire, fire, train, discipline, and maintain payroll records for their own employees. However, the operators did not have discretion to modify their employee's tasks, which were described in the MSO contract and in Shell's manuals.

Santiago Medina was a cashier and later a station manager at a Shell station that MSO operator R&M Enterprises (R&M), operated. Upon his promotion to station manager, R & M designated Medina as a salaried employee. Medina worked in excess of eight hours a day and 40 hours a week without overtime pay until a California Division of Labor Standards audit in 2008 prompted his reclassification. During his employment, Medina was paid directly by R&M, but he was trained according the Shell's manuals. While Medina took direction from R&M supervisors and its owner, he also reported certain issues directly to Shell. In December 2008, R&M terminated Medina's employment.

After his termination, Medina sued Shell and R&M as "joint employers" on behalf of himself and other similarly-situated employees. Medina asserted causes of action against Shell and R&M for misclassification, failure to pay overtime wages, failure to pay missed break compensation, and violations of California Business and Professions Code Section 17200. After significant litigation on other actions pending against Shell elsewhere in California, the trial court granted Shell summary judgment. Medina appealed.

In California, an entity is an employer or a joint employer if it does any of the following: (1) exercises control over wages, hours, or working conditions, directly or indirectly, or through any agent or any other person; or (2) suffers or permits a person to work; or (3) engages a person. Under the "suffer or permit to work" standard, the entity is liable if it knew of and failed to prevent the work from occurring.

On appeal, the court considered two other decisions--*Curry v. Equilon Enterprises, LLC and Henderson v. Equilon Enterprise, LLC*--that addressed a similar issue at Shell gas stations. However, the Court of Appeal noted significant differences between these cases. In Medina's case: Shell employees told Medina they had the power to fire him, or have him fired; the flow of payments for fuel went directly to Shell; Shell had power over the MSO operator's bank account; and Shell could add or remove individual stations to and from the MSO operator's cluster at any time, for any reason. In light of these differences, the court determined Medina's case was different from the cases in which the courts determined Shell was not a joint employer.

The court further noted several points of disagreement between its analysis and the *Curry* and *Henderson* opinions. First, the court noted it did not agree with the conclusion in *Curry* and *Henderson* that Shell did not control the employees' hours, wages, or working conditions because it controlled only the MSO operator and not the employees.

The court pointed to Shell's extremely detailed technical instructions for managing the stations, and that Shell prohibited deviations from those instructions. Moreover, Shell's system of unilaterally setting reimbursements for labor costs while mandating hours of operation for the stations had the practical effect of controlling employee wages.

Second, the court disagreed with the *Curry* and *Henderson* courts' conclusion that Shell did not "suffer or permit" the employees to work because Shell lacked the power to directly fire the employees. However, the court noted that the "suffer or permit" test includes entities who lack the power to directly fire an employee. In any event, Shell could have removed employees from a station by removing the station (or all of its stations) from the MSO operator's cluster.

For these reasons, the court concluded that if an MSO operator is unable to pay its employees, Shell should bear that risk. Thus, the MSO operator and Shell were joint employers and Shell could be liable if the MSO operator was unable to pay an employee's wages.

Medina v. Equilon Enterprises, LLC (2021) 68 Cal.App.5th 868.

NOTE:

This case shows how different judges can disagree with another's analysis. In two prior cases involving Shell gas stations-- Curry and Henderson – the judges found that Shell was not a join employer. LCW previously reported on the Curry case in its August 2018 Client Update.

BENEFITS CORNER

Reminder: Cost Of Home Testing For COVID-19 Is An Eligible Medical Expense.

Earlier this month, the IRS issued an announcement reminding all taxpayers that the cost of home testing for COVID-19 is an eligible medical expense that can be paid for or reimbursed under health FSAs, HSAs, HRAs, or Archer MSAs. The IRS explained that the cost to diagnose COVID-19 is an eligible medical expense for tax purposes. The IRS also issued a reminder that the costs of personal protective equipment (PPE) for the primary purpose of preventing the spread of COVID-19 (e.g., masks, hand sanitizer, and sanitizing wipes) are eligible medical expenses that can be paid or reimbursed under these arrangements. Also, as a reminder, other requirements must also be followed for an expense to qualify for reimbursement under a health FSA, HSA, HRA, or Archer MSA. For example, for a FSA or HRA, the plan document must permit the reimbursement or otherwise allow reimbursement of any expense that qualifies as a medical expense under the Internal Revenue Code and applicable regulations.

IRS Provides Draft 2021 ACA Reporting Forms And Instructions.

The IRS issued draft Affordable Care Act (ACA) information reporting forms and instructions for 2021. The main ACA reporting forms are Forms 1094-B & 1095-B, which minimum essential coverage providers must file to report coverage information to the IRS, and Forms 1094-C and 1095-C, which applicable large employers (ALEs) must file to provide information to the IRS to administer employer shared responsibility penalties and assess eligibility for premium tax credits. There were no notable changes to the draft forms for the 2020 tax year, but draft Form 1095-C and its instructions reflect two new codes (1T and 1U).

The 1T code is used when the applicable individual and spouse receive a Health Reimbursement Arrangement (HRA) offer of coverage from the employer, where the affordability was determined using the employee's primary residence zip code. This code excludes dependents as recipients of the HRA coverage that was offered by the employer.

The 1U code uses different criteria for determining affordability. The 1U code should be used when an applicable individual and spouse receive an HRA offer of coverage from the employer where the affordability was determined using the employee's primary employment site zip code affordability safe harbor. This code also excludes the individual's dependents as recipients of HRA coverage.

The 1T and 1U codes refer to HRA coverage. HRAs are IRS-approved, employer-funded health benefits used to reimburse employees for monthly out-of-pocket medical expenses and health insurance premiums.

Form 1095-C instructions also include new Line 14 codes: 1V-1Z, all of which are reserved for future use. Additionally, the Form 1095-B and 1095-C instructions no longer mention an automatic extension for an employer to furnish statements to individuals, but instead simply note the normal January 31, 2022 due date and explain how to request a discretionary 30-day extension. Prior references to penalty relief for reporting incomplete or incorrect information no longer appears in the draft forms.

Keep in mind that the IRS has only issued draft instructions, and it may include additional changes in the final forms and instructions. Employers should ensure they review the IRS' draft and final instructions to comply with all applicable requirements and timelines to avoid any costly penalties.

Important deadlines to keep in mind include:

- January 31, 2022 - Individual statements for 2021 must be furnished (this can be a copy of the Form 1095-C)
- February 28, 2022 - Paper IRS returns for 2021 must be filed
- March 31, 2022 - Electronic IRS returns for 2021 must be filed (Note: electronic returns are required for employers filing 250 or more returns)

DID YOU KNOW...?

Whether you are looking to impress your colleagues or just want to learn more about the law, LCW has your back! Use and share these fun legal facts about various topics in labor and employment law.

- On September 30, 2021, Governor Newsom signed SB 2 into law, which creates a state-wide system for increasing accountability for peace officer misconduct. Many aspects of this law go into effect on January 1, 2022.

- On September 27, 2021, Governor Newsom signed SB 278, which adds Government Code Section 20164.5 effective January 1, 2022. SB 278 greatly increases the potential costs to CalPERS agencies for reporting errors. This new law creates new, and in some cases, retroactive financial exposure for CalPERS agencies who are already struggling to fund their pension obligations. SB 278 would shift almost all of the consequences for reporting later disallowed compensation to the public agency employer.

- On September 16, 2021, Governor Newson signed Assembly Bill AB 361 into law, to amend the Ralph M. Brown Act. The new law allows legislative bodies to continue to meet virtually during the present public health emergency if the legislative body meets certain procedural requirements.

CONSORTIUM CALL OF THE MONTH

Question: A human resources manager contacted LCW to ask whether an agency can require an employee to test for COVID-19 to return to work when an employee is experiencing symptoms but has not had any exposure to COVID.

Answer: Most public health orders require employees with COVID-19 symptoms to isolate/quarantine and follow the return-to-work criteria. Thus, an employer cannot require a negative test to allow an employee to return to work. However, if the employee can obtain a letter from a doctor saying the symptoms are not COVID-19 related, then the employee may return to work before the conclusion of the quarantine period. Local public health orders will state the applicable quarantine/isolation requirements.

New to the Firm

Jack Begley is an Associate in the Los Angeles office of Liebert Cassidy Whitmore. He is experienced in labor and employment matters, including wage and hour law and the Fair Employment and Housing Act. He has handled varied phases of litigation, has experience defending client depositions and conferring with clients on case status and discovery responses, and is a keen legal researcher.

He can be reached at 310.981.2016 or jbegley@lcwlegal.com.

Firm Publications

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

LCW Managing Partner Scott Tiedemann weighed in on Senate Bill 2 and what it means for policing practices in the Oct. 12 23*ABC News Bakersfield* article "ACLU, Faith in the Valley say Department of Justice, Bakersfield Police reform plan not enough." Concerning the newly signed bill that allows for police decertification based on misconduct, Scott said, "The accountability division is going to investigate police officers for what they call serious misconduct and the police accountability board is going to make recommendations to the overall post-commission about revoking certification for police officers that they believe have engaged in serious misconduct." He added that police officers will be investigated for misconduct due to the bill.

LCW Partner Steve Berliner penned "Public Agency Risks Grow Under New Calif. Pension Law," which was published in the Oct. 8 Employment Authority section of *Law360*. In the piece, Steve addresses Senate Bill 278, which was recently signed into law by Gov. Gavin Newsom and takes effect on Jan. 1, 2022. Steve explains how the bill will impact public agencies that contract with the California Public Employees' Retirement System and details how employee pensions are affected.

LCW Managing Partner Scott Tiedemann commented on Governor Gavin Newsom's recent signing of SB 2 into law, which will decertify peace officers who have committed serious misconduct. In the Oct. 4 *Daily Californian* article "Gov. Newsom signs bill to decertify peace officers for serious misconduct," Tiedemann stated that while POST was previously used only to deliver certificates to peace officers who work in California, POST will now be able to revoke certificates under the new bill. Tiedemann also said SB 2 has its shortcomings. For instance, the definition of "unreasonable" use of force is still unclear and the bill does not address police force retention issues or how increased police scrutiny may attract lower quality applicants who may be prone to more police misconduct. "When you look at this law in general, there are ideas that are really good. When the details are examined and they're applied to different situations, there are going to be problems," said Tiedemann.

LCW Partner Heather DeBlanc weighed in on cafeteria plans—optional spending accounts and insurance benefits that meet health and caregiving needs—in the Oct. 5 *SHRM* piece "Taking Another Look at Cafeteria Plans." Heather states that, "Cafeteria plans are a necessity if your employees are making salary-reduction elections so that a portion of their salary, pretax, is directed toward [health or other insurance] premiums and tax-advantaged spending accounts. In order for an employee to divert salary to pretax premiums, a cafeteria plan document must be in place and approved by the governing body of the employer."

In the article "ERMA Legal Update: Legal Obligations Related to Managing Employee Requests for Religious Accommodations," LCW Associate Alex Volberding explores religious accommodations in regard to COVID-19 vaccination mandates and sheds light on employees' rights pertaining to religious beliefs. The piece was written in partnership with the Employment Risk Management Authority.

LCW

LABOR RELATIONS CERTIFICATION PROGRAM

The LCW Labor Relations Certification Program is designed for labor relations and human resources professionals who work in public sector agencies. It is designed for both those new to the field as well as experienced practitioners seeking to hone their skills. Participants may take one or all of the classes, in any order. Take all of the classes to earn your certificate and receive 6 hours of HRCI credit per course!

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2. November 3 & 4 - Trends & Topics at the Table
3. December 9 & 16 - Communication Counts!

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Learn more about this program here.

WEBINARS

2022 Legislative Update for Public Agencies

California Governor Gavin Newsom signed into law a number of new bills passed in this year's Legislative Session that will impact California employers. Many of these new laws will go into effect on January 1, 2022. This webinar will provide an overview of key new legislation involving labor and employment laws that will impact California's public agencies.

REGISTER TODAY!

PRESENTED BY:
Che Johnson

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Upcoming Dates:

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www.lcwlegal.com/train-the-trainer

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Oct. 27 **"Maximizing Performance Through Documentation, Evaluation and Corrective Action"**
San Gabriel Valley ERC | Webinar | Ronnie Arenas

Oct. 28 **"Public Meeting Law (The Brown Act) and the Public Records Act"**
Ventura County Schools Self-Funding Authority ERC | Virtual | Monica M. Espejo

Nov. 3 **"Advanced FLSA"**
Central Coast ERC | Webinar | Lisa S. Charbonneau

Nov. 4 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
Bay Area ERC | Webinar | Jack Hughes

Nov. 4 **"Maximizing Supervisory Skills for the First Line Supervisor - Part 2"**
East Inland Empire ERC | Webinar |

Nov. 4 **"Disaster Service Workers - If You Call Them, Will They Come?"**
Mendocino County ERC | Webinar | Lisa S. Charbonneau

Nov. 4 **"Exercising Your Management Rights"**
Southern CA CCD ERC | Webinar | T. Oliver Yee

Nov. 4 **"Supervisor's Guide to Understanding and Managing Employees' Rights: Labor, Leaves and Accommodations"**
West Inland Empire ERC | Webinar | Jack Hughes

Nov. 5 **"An Employment Relations Primer for Community College District Administrators and Supervisors"**
Bay Area CCD ERC | Webinar | Richard Bolanos

Nov. 5 **"The Disability Interactive Process"**
Central CA CCD ERC | Webinar | Jennifer Rosner

Nov. 9 **"Public Service: Understanding the Roles and Responsibilities of Public Employees"**
San Mateo County ERC | Webinar | Ronnie ArenasWW

Nov. 10 **"Prevention and Control of Absenteeism and Abuse of Leave"**
Napa/Solano/Yolo ERC | Webinar | T. Oliver Yee

Nov. 10 **"Difficult Conversations"**
North State ERC | Webinar | Erin Kunze

Customized Training

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

Oct. 29 **"Title IX: Training Series: Part 1"**
San Jose-Evergreen Community College District | Webinar | Eileen O'Hare-Anderson

Nov. 4 **"Mandated Reporting"**
Foothill-De Anza Community College District | Webinar | Amy Brandt

Nov. 5 **"Title IX: Training Series: Part 3"**
San Jose-Evergreen Community College District | Webinar | Eileen O'Hare-Anderson

Nov. 10 **"Performance Management 101"**
Yuba Community Colege District | Webinar | Eileen O'Hare-Anderson

Nov. 11 **"Title IX: Training Series: Part 2"**
San Jose-Evergreem Community College District | Webinar| Eileen O'Hare-Anderson

Speaking Engagement

Nov. 17 **"Town Hall - Legal Eagles"**
Community College League of California CCLC Annual Convention | Virtual | Eileen O'Hare-Anderson & Pilar Morin & Laura Schulkind

Nov. 18 **"Emerging from COVID-19: What Districts Should Do to Prepare"**
CCLC Annual Convention | Virtual | Meredith Karasch

Nov. 19 **"Hot Topics and Emerging Issues with CalPERS and CalSTRS"**
CCLC Annual Convention | Virtual | Alysha Stein-Manes

Seminars/Webinars

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

Oct. 27 **"FLSA Academy Day 3"**
Liebert Cassidy Whitmore | Webinar | Lisa S. Charbonneau

Oct. 28 **"FLSA Academy Day 4"**
Liebert Cassidy Whitmore | Webinar | Lisa S. Charbonneau

Nov. 3 **"Trends & Topics at the Table - Part 1"**
Liebert Cassidy Whitmore | Webinar | Richard Bolanos

Nov. 4 **"Trends & Topics at the Table - Part 2"**
Liebert Cassidy Whitmore | Webinar | Richard Bolanos

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