October 2021

LCW

Client Update

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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.

Congratulations to Our New Partner!

LCW

Introducing LCW's newest partner, James E. Oldendorph!

James Oldendorph represents employers in cases involving alleged violations of Title VII, the Fair Employment and Housing Act, the Americans with Disabilities Act, the California and United States Constitutions, the Public Safety Officers Bill of Rights and the Firefighters Procedural Bill of Rights Acts, as well as collective and class actions under the Fair Labor Standards Act and the California Labor Code. He also advises clients on injunctions, wage and hour claims, and wrongful discharge actions.

James has extensive experience representing Liebert Cassidy Whitmore (LCW) clients in many forums from federal and state court to the Office of Administrative Hearings to civil service commissions, and arbitration. While James represents all types of employers, he focuses his practice on public safety agencies. James is fluent in Spanish, and utilizes this skill in consulting with LCW's Spanish-speaking clients and in translating and drafting correspondence and contracts in Spanish.

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Read more about SB 278 in our "On The Blog" section on page 26.

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, 2021 WL 4436213 (9th Cir. Sept. 28, 2021) *unpublished.*

& RETALIATION

Note:

Although this case is unpublished, it offers clear guidance that there is no qualified immunity for blatant discrimination on the basis of sex.

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, 854 Fed.Appx. 938 (2021), *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., 68 Cal.Rptr. 5th 882 (2021).

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.

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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, 2012 WL 3878390 (Cal. Ct. App. Aug. 31, 2021), *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.

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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 on this point, 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 hadbecause it has not severed supervisors from 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. Public agencies 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 WL 4167860 (Cal. Ct. App. Aug. 23, 2021).

Note:

> *While this case dealt with exclusive jurisdiction under the EERA collective bargaining law, the MMBA, which applies to local agencies, 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."*

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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 WL 4279562 (Cal. Ct. App. Aug. 24, 2021).

Note:

In a blow to paper conservation efforts, the court noted that public 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, 68 Cal.Rptr.5th 868 (2021).

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.*

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.

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)

Train the Trainer Program

Become a Certified Harassment Prevention Trainer for your Organization!

LCW Train the Trainer sessions will provide you with the necessary training tools to conduct the mandatory AB 1825, SB 1343, AB 2053, and AB 1661 training at your organization.

California Law requires employers to provide harassment prevention training to all employees. Every two years, supervisors must participate in a 2-hour course, and non-supervisors must participate in a 1-hour course.

QUICK FACTS:

- Trainers will become certified to train both supervisors and non-supervisors at/for their organization.
- Attendees receive updated training materials for 2 years.
- Pricing: $2,000 per person. ($1,800 for ERC members).

Upcoming Dates:

Via Zoom

October 22, 2021

9:00 AM - 4:00 PM

INTERESTED?

To learn more about our program, please visit our website below or contact Anna Sanzone-Ortiz 310.981.2051 or asanzone-ortiz@lcwlegal.com.

www.lcwlegal.com/train-the-trainer

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 are Webinars on Demand?

At LCW, we have an extensive list of webinars on demand, recordings of our live webinars. If you missed out on the live stream, don't worry! You can purchase the recording and view it for 10 full business days unlimitedly.

VIsit our website to view our extensive collection of pre-recorded webinars on a variety of important legal topics. Apply various filters to chose from over 50 legal presentations that are specifically designed for California's public employers.

For more information, click here.

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.

Most Recent Webinars on Demand:

Preparing for the Expiration of COVID-19 Supplemental Paid Sick Leave ("SPSL")

The Intersection of Disability Retirement, Disability Accommodation, and Workers' Compensation

Lessons Learned in Litigation & Settlement Agreements

SPOTLIGHT ARTICLE

Taking Another Look at Cafeteria Plans

Featuring: Heather DeBlanc

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." Read the full article below.

By: Lin Grensing-Pophal

Cafeteria plans are getting new attention during the pandemic as a way to let employees select—and fund with pretax dollars—optional insurance benefits and spending accounts that meet their health and caregiving needs.

Also called Section 125 plans (after the relevant section of the tax code), cafeteria plans are used to direct employee contributions to group health plans and 401(k) retirement plans. During the COVID-19 pandemic, however, they've received renewed attention as a way to let employees use pretax dollars to fund supplemental health care, such as critical illness insurance. They also channel salary-deferred contributions to health savings accounts (HSAs), health flexible spending accounts (FSAs) and dependent care FSAs (DC-FSAs), sometimes referred to as dependent care assistance programs, as well as life and disability insurance and even mass-transit debit cards.

"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, said Heather DeBlanc, a partner in the Los Angeles office of Liebert Cassidy Whitmore. "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," she explained.

Tax-Advantaged FSAs Still Popular

Bill Sweetnam, legislative and technical director of the Employers Council on Flexible Compensation in Washington, D.C., said that medical FSAs continue to be a popular option offered by employers through cafeteria plans. "The pandemic didn't adversely change their popularity," he observed. Instead, "due to the pandemic, employees' perception of employer-provided health care as a good benefit was reinforced."

The traditional use-it-or-lose-it rules for FSAs, which were relaxed during the height of the COVID-19 pandemic, will be back in effect for the 2022 plan year. However, unlike HSAs, which must be linked with a high-deductible health plan, health FSAs are available to employees regardless of their health insurance plan.

"Our members have surveyed employees who participate in FSAs, and they find that employees worry about the potential loss of amounts contributed to an FSA," Sweetnam said. "Employees will value their FSA benefit even more if they know that the likelihood of losing money is less due to having the carryover provision," allowing participants to roll over up to

$550 of unused funds at the end of the plan year and still contribute up to the maximum in the next plan year.

Sweetnam encouraged employers that don't currently offer an FSA to consider doing so.

"Most employer health plans have deductibles and co-pays, and an FSA will provide a tax-efficient way for their employees to pay those health expenses that aren't covered by their employer's health plan," he noted.

The Big Picture

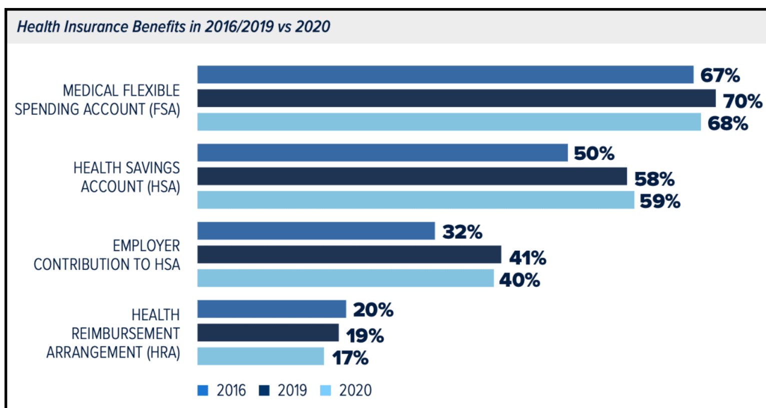
Employers shouldn't just take for granted that their employees understand the potential benefits of or how their cafeteria plans work, benefits advisors say. Simply offering benefits through a cafeteria plan is never enough to assure appropriate use. Communication and education are must-do's during open enrollment or when onboarding new hires.

"I am a big believer in total rewards," said Jennifer Barton, who heads World Insurance Associates' employee benefits division. Barton recommends that employers do a total rewards gap assessment. "I think now more than ever, that's important for an organization to assess," she said. Employees' benefits-related needs have shifted and changed during the pandemic—employees' priorities are likely to remain different than they were in the past, especially for those continuing to work remotely, she said.

For instance, while commuter benefits may have been popular before the pandemic, they are likely less so now in some cases, Barton said. Meanwhile, the varying needs of employees working from home, including those related to the care of children and others, is likely to spur interest in caregiving benefits such as DC-FSAs.

"I think the most important thing an HR person could do today is to take stock of what they have for their employees, and then go out and talk to employees" about the benefits they value, those they don't see much value in and those they don't have access to but would like to receive, Barton said.

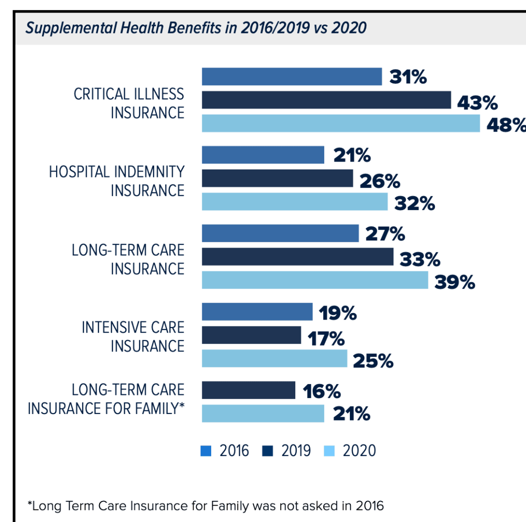
Whether employee input is gathered through surveys, focus groups or some other means, it's important, she added, "to understand what's critical today given the changing dynamics that employees are facing both at home and in the workplace."



SHRM Research Shows ...

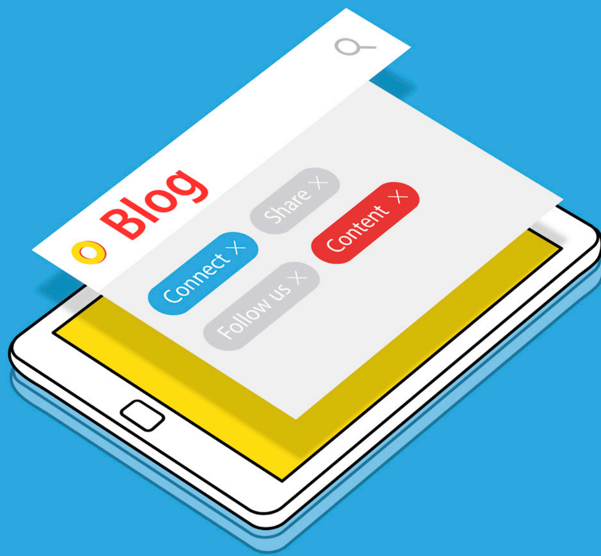
HSAs have been the fastest-growing type of health account but medical FSAs remained the most popular last year, offered by 68 percent of respondents while HSAs were offered by 59 percent, according to the Society for Human Resource Management's 2020 Employee Benefits survey. Responses from 2,504 HR professionals were collected from Sept. 28 through Nov. 10, 2020.

Organizations also expanded supplemental health benefits in almost every category last year as the pandemic caused higher-than-usual rates of illness and hospitalizations. (Long-term care insurance premiums, unlike premiums for supplemental health insurance, generally cannot be paid on a pretax basis.)



Lin Grensing-Pophal, SHRM-SCP, is a Wisconsin-based business journalist with HR consulting experience.

You can find the article on SHRM's *website* here.



ON THE BLOG

Gov. Newsom Signs Senate Bill 278, Which Greatly Increases Public Employer Exposure to Damages for CalPERS Compensation Reporting Errors

By: Steven M. Berliner & Michael Youril

On September 27, 2021, Governor Newsom signed Senate Bill (SB) 278, which adds Government Code Section 20164.5 and will go into effect on January 1, 2022. SB 278 greatly increases the potential costs to CalPERS agencies for reporting errors, by creating new and in some cases retroactive financial exposure for CalPERS agencies already struggling to fund their pension obligations. Specifically, SB 278 would shift almost all of the consequences for reporting later disallowed compensation to the employer.

For context, the Public Employees' Retirement Law (PERL) provides a defined benefit retirement plan for public agency employees administered by CalPERS. The Public Employees' Pension Reform Act of 2013 (PEPRA) made changes to the categories of compensation that can be included in some employees' retirement benefit calculation. The statutes, regulations, and administrative guidance concerning which items are reportable are complex and can be confusing, which sometimes leads to unintended reporting errors. In addition to the complicated regulatory scheme, the items of compensation are often the product of negotiations, which sometimes causes the parties to inadvertently negotiate criteria that makes the item non-reportable on technical grounds (e.g., adding additional criteria to qualify for the benefit that are not expressly contained in the regulations). It is not uncommon for these issues to go back years or even decades because the language is rolled over into successor labor agreements.

Under pre-SB 278 law, if CalPERS determined that a disallowed item of compensation was included when calculating a retiree's retirement benefit allowance, the retiree had to pay CalPERS back the amount of the overpayment, and retirement allowance payments were reduced prospectively based on what the retiree would have received if the improper item of compensation had not been included. CalPERS generally may collect amounts that were overpaid within the last three years. Essentially, the individual must pay back and stop receiving that which they were never entitled to in the first place.

SB 278 Transfers Almost All of the Risk of Misreported Compensation to the Employer

SB 278 requires *local agencies* to pay CalPERS the full cost of any overpayments made to the retiree based on the disallowed compensation and pay a 20-percent penalty of the amount calculated as a lump sum of the actuarial equivalent value of the difference between the retiree's pension calculated with the disallowed compensation and the pension calculated without the disallowed compensation for the projected duration of the benefit. In other words, in addition to paying CalPERS directly for any overpayments actually received and retained by the retiree, the employer must also pay a 20-percent penalty of the present value of the projected lifetime and survivor benefit. Ninety percent of the penalty is paid directly to the retiree and 10 percent is paid as a penalty to CalPERS. While the remedies are harsh, the version of SB 278 that was originally introduced would have required the employer to pay 100 percent of the value of the lost benefits to the retiree as a lump-sum payment or annuity.

With respect to retired members, the penalty is triggered where the following conditions are met:

1. The compensation was reported to the system and contributions were made on that compensation while the member was actively employed;
2. The compensation was agreed to in a memorandum of understanding or collective bargaining agreement between the employer and the recognized employee organization as compensation for pension purposes and the employer and the recognized employee organization did not knowingly agree to compensation that was disallowed;
3. The determination by the system that compensation was disallowed was made after the date of retirement; and
4. The determination by the system that compensation was disallowed was made after the date of retirement.

The statutory language raises several questions that will require guidance from CalPERS or may need to be litigated. First, the statute does not explain when compensation was agreed to in a collective bargaining agreement "as compensation for pension purposes." For example, if an item of compensation is provided in a collective bargaining agreement and reported to CalPERS, but the collective bargaining agreement is silent on whether the item is reportable to CalPERS, do those two facts in combination trigger the statute? Prospectively, can employers avoid application of the statute by affirmatively stating in the collective bargaining agreement that no representations are made as to whether an item will be included in pension calculations unless CalPERS affirmatively confirms that the item is reportable?

Second, it is not clear how the retroactive component of the statute will be applied. The statute applies to any prospective determinations and also to determinations made on or after January 1, 2017, if the appeal rights of the retiree have not been exhausted. A CalPERS' determination made after the enactment of the statute could potentially apply to decades of previously misreported compensation, and in many cases would impact an entire bargaining group covered by a particular labor agreement. Employers will likely need to argue that the statute operates only prospectively, except for unresolved ongoing appeals of determinations that were made after January 1, 2017.

Third, and similar to the retroactive issues discussed above, it is uncertain how CalPERS and courts will apply the statute to compensation that was incorrectly reported before January 1, 2022, but where CalPERS' decision to exclude the compensation is not made until after January 1, 2022. If the statute is interpreted to have broad retroactive effect, it may very well incentivize CalPERS to start aggressively auditing local agencies, because any unfunded liabilities for inadvertently misreported compensation would be shifted directly to the employer and compensation carrying unfunded liabilities can be removed from the books. CalPERS also receives a portion of the prospective reduction of benefits as a penalty against the agency. The potential combined retroactive liability and penalties for public employers could be significant – and impossible to predict. While SB 278 has a provision for CalPERS to review labor agreements prospectively and provide guidance, the statute does not specify that CalPERS' approval will be binding and prevent a later negative determination.

Fourth, the statute of limitations applicable to repayment is going to need to be resolved, likely through litigation. CalPERS has taken the position in the past that the three-year statute of limitations that applies to recovery of overpayments from retirees, does not apply to collections of overpayments from employers. SB 278 is silent on how far back collections can be pursued for overpayments on determinations that come within the statute's reach.

For current employees, SB 278 does not make significant changes, as it allows improper contributions to act as a credit towards a public agency's future contributions, and any contributions paid by the employee on the disallowed compensation is returned. There are no overpayments to address because the employee has not yet retired or started receiving a retirement allowance.

What Can Public Agencies Do Now to Prepare for SB 278

In preparing for SB 278, public agencies should review all their collective bargaining agreements covering CalPERS' members and scrutinize each item of compensation that is reported to CalPERS to ensure that the item is indeed reportable under applicable statutes, regulations, and administrative guidance. If not, the agency should take action to correct the language or the practice that makes it non-reportable. This will not resolve existing liability for overpayments in case of a CalPERS' audit, but it may reduce the potential liability for future retirees. These changes would also be subject to meet and confer requirements. Depending on how aggressively the statutory language is applied, agencies may need to start looking at more drastic measures, such as moving away from special compensation items and to higher base salary, as the majority of these issues involve misreported items of special compensation.

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