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PRIVATE EDUCATION MATTERS

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

Fall 2021

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LCW NEWS

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

STUDENTS

COVID-19 VACCINE MANDATES

District Court Denies Request For Temporary Restraining Order Against UC Student COVID-19 Requirement.

On July 26, 2021, America's Frontline Doctors (AFLDS) and two students, Carly Powell, and Deborah Choi, (collectively, Plaintiffs) filed a complaint in federal district court against the Regents of the University of California - the governing board of the University of California system (UC System) – and various officials of the UC System, challenging the requirement imposed by the UC System that all students attending a UC System school for fall 2021 be fully vaccinated against COVID-19, with exceptions provided on medical, disability, or religious grounds, deferrals given based on pregnancy, and deferrals of up to 90 days after a COVID-19 diagnosis or treatment.

The complaint alleges five causes of action arising from the UC System's COVID-19 vaccination policy as it applies to students. The first and second causes of action are for declaratory and injunctive relief for violation of the Fourteenth Amendment right to bodily integrity. These causes of action are based on the Plaintiff's contention that Powell and Choi, who are students enrolled in a UC System school and who previously had and "recovered swiftly from Covid-19 with natural immunity," have not provided their informed consent to COVID-19 vaccination. The Plaintiffs also contend that the COVID-19 vaccination is "a form of experimental genetic manipulation," that the vaccine is "ineffective, and dangerous," and that the vaccine mandate is "forced medical experimentation." The Plaintiffs note their belief that the "FDA's classification of Covid-19 vaccination (as emergency use or approved) is not determinative of the experimental status of the vaccination."

The third cause of action is for injunctive relief for violation of the Fourteenth Amendment right to freedom from state created danger. This cause of action is based upon the Plaintiffs' contention that by implementing the COVID-19 vaccination requirement, the UC System is placing Powell and Choi in a "position of actual, particularized danger based upon the deliberate indifference of [the UC System] to a known and obvious danger of Covid-19 vaccine injury." The Plaintiffs contend that the COVID-19 vaccination "carries both known and unknown risk of harm to Plaintiffs and others, such as serious illness and death." The Plaintiffs further assert that the UC System is rejecting science by not allowing Powell, Choi, and other students who have recovered from COVID-19 to demonstrate with the assistance of their doctors that they possess a natural immunity to COVID-19 beyond 90 days.

The fourth and fifth causes of action are for discrimination based on medical condition and genetic status in violation of California's Unruh Civil Rights Act and California Government Code Section 11135. California's Unruh Civil Rights Act prohibits discrimination by business establishments based on medical condition

and genetic information, among other protected categories, while California Government Code Section 11135 prohibits discrimination in a program or activity conducted, operated, administered, or funded by the state, or that receives financial assistance from the state based on medical condition and genetic information, among other protected categories. This cause of action is based upon the Plaintiffs' assertion that the UC System's COVID-19 vaccine mandate discriminates against unvaccinated students by denying them full and equal access to the UC System campuses on the basis of their medical conditions and genetic information.

On July 30, 2021, the court issued an order denying the Plaintiffs' application for a temporary restraining order that would have prevented the UC System from enforcing its COVID-19 vaccine policy to the extent that it rejected pre-screening for natural immunity to COVID-19 beyond 90 days pending a final decision on the merits of the case by the court. In order to succeed in securing the temporary restraining order, the Plaintiffs were required to show that (1) they are likely to succeed on the merits of their claim; (2) they are likely to suffer irreparable harm in the absence of emergency relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest.

The court found that the Plaintiffs were unlikely to succeed on the merits of their first and second claims because there is clearly a rational basis for the UC System to institute the policy requiring COVID-19 vaccination, including for individuals who previously had COVID-19. The court similarly found that the Plaintiffs were unlikely to succeed on the merits of their third claim because evidence from the CDC recommends - based on data from clinical trials - vaccination for those who have contracted and recovered from COVID-19, which supports the UC System's conclusion that "requiring vaccination is far from an "unreasonable risk" or a "known and obvious danger."" The court also found that Plaintiffs were unlikely to succeed on the merits of their fifth and sixth claims under California law because the Eleventh Amendment bars suits for damages or injunctive relief against a state, an arm of the state, its instrumentalities, or its agencies, and also prohibits actions against state officials in their official capacities unless the state waives its immunity and consents to suit, which it did not do here.

The court also found that the Plaintiffs failed to establish that AFLDS, Powell, or Choi would suffer irreparable injury in the absence of a temporary restraining order. AFLDS had only shown the some of its physician members may provide care to UC System students who disagree with the Policy, which is not enough to show harm, much less irreparable harm, to AFLDS. Further, contrary to the Plaintiffs' assertions, Powell and Choi are not being forced to be vaccinated. Instead, they are being given a choice to get vaccinated, seek an exemption (if applicable), or transfer elsewhere. The court noted that precedent has established that [a] delay in collegiate or graduate education isn't typically irreparable harm."

The court next found that the balance of equities and the public interest weighs heavily against the requested relief. The court noted that vaccine "address a collective enemy, not just an individual one," and Plaintiffs' decision to refuse vaccination does not affect them alone. The court found that the public health and safety concerns surrounding COVID-19 and the well-being of the campus community and the general public, outweighed the Plaintiffs' interest in refusing the COVID-19 vaccine.

Therefore, the court denied the Plaintiffs' application for a temporary restraining order preventing the UC system from enforcing its COVID-19 vaccine mandate.

America's Frontline Doctors, et al. v. Kim A. Wilcox, et al (Case No. EDCV 21-1243 JGB (kkx)) Order DENYING Plaintiffs' Ex Parte Application for Temporary Restraining Order (July 30, 2021).

NOTE:

While a final decision on the merits of the Plaintiffs' claims is pending, the decision by the district court is instructive of what the final decision may be. Also worth noting, is on August 11, 2021, the Ninth Circuit Court of Appeals denied the Plaintiffs' request that the court intervene on their behalf.

NEGLIGENCE

Parents Failed To Show That Football Likely Caused Their Sons' Deaths.

Parents Kimberly Archie and Jo Cornell filed a lawsuit against Pop Warner Little Scholars, Inc., (Pop Warner) alleging that Pop Warner failed to provide for the safety and health of their children. Specifically, Archie and Cornell alleged that Pop Warner football caused their sons' to experience brain damage, known as chronic traumatic encephalopathy (CTE), which caused their sons to engage in suicidal or reckless behavior. They further alleged that such suicidal or reckless behavior led to their sons' deaths.

The district court disagreed with Archie and Cornell and found in favor of Pop Warner. The court determined that Archie and Cornell's two experts had only shown through their testimony that Pop Warner football could have caused CTE and that CTE is linked to suicidal and reckless behaviors. Therefore, the court found that the experts had only showed that Pop Warner football was a

possible cause or could have caused their sons' deaths, and not that Pop Warner football was a substantial cause of their sons' deaths, as was legally required. Ultimately, the court found that the expert opinions were unreliable and thus inadmissible.

Archie and Cornell appealed. On appeal, the Ninth Circuit affirmed the district court's holding, and agreed entirely with the district court's decision and reasoning.

Archie v. Pop Warner Little Scholars, Inc (9th Cir., Sept. 10, 2021, No. 20-55081) 2021 WL 4130082.

NOTE:

Private K-12 schools, universities, and colleges owe a general duty of care to their students to protect them from foreseeable harm, which includes during extracurricular activities, such as athletics.

UNRUH CIVIL RIGHTS ACT

Unruh Act Claim Requires Bona Fide Intent To Use Services.

Cheryl Thurston is blind and uses screen reader technology to access the internet and read website content. Thurston brought an action against Omni Hotels Management Corporation (Omni), alleging that Omni's website is not fully accessible to the blind and the visually impaired. Specifically, Thurston claimed that Omni's website contained access barriers (e.g., lack of alternative test, empty links, or redundant links) that denied her full and equal access to the website that deterred her from visiting and determining whether to stay at Omni's hotels. Thurston alleged that Omni intentionally discriminated against her in violation of California's Unruh Civil Rights Act (Unruh Act) and Title III of the Americans with Disabilities Act (ADA), which generally require that businesses provide full and equal access to individuals with disabilities.

At trial, the evidence produced showed that Thurston visited Omni's website on multiple occasions between May 2015 and June 2019 and searched for a hotel room in Palm Springs or San Diego, and encountered accessibility issues. However, Thurston did not attempt to reserve an Onmi hotel using a third party website or by calling Omni directly as her screen reader did read Onmi's phone number. Thurston also never looked at other hotel websites and never actually made a hotel reservation on these occasions. Expert testimony also demonstrated that her outdated internet browser, outdated screen reader software, and lack of proficiency using a screen reader could have caused the issues Thurston experienced when she tried to access Onmi's website.

The trial court instructed the jury that in order for Thurston to establish her Unruh Act claim, the evidence had to show that either Thurston attempted to use Omni's website for the purpose of making a hotel reservation or to learn about Omni's prices and accommodations to decide whether to make a hotel reservation. The jury found that the evidence did not make this showing, rejected Thurston's claim, and found in favor of Omni. Thurston appealed, arguing that to prevail on her claim, the evidence need not show that she used Omni's website for the **purpose** of making a hotel reservation, and the trial court erred by providing this instruction to the jury.

On appeal, the court noted that while it is unnecessary for Thurston to show she was a client or customer of Omni to prevail on her Unruh Act claim, she did have to show she had a "bona fide intent" to book a room. The court found that the trial court's jury instruction properly directed the jury to determine whether Thurston had that bona fide intent. Therefore, the court upheld the trial court's instruction. The court also upheld the jury's conclusion that Thurston failed to present evidence showing a bona fide intent to book a room.

Thurston v. Omni Hotels Management Corporation (2021) 2021 WL 4315811.

NOTE:

While the public accommodation at issue in this case was a hotel, the decision indicates that a similar analysis may apply in other types of public accommodations, and require that an individual bringing an Unruh Act claim show evidence of a bona fide intent to use services or purchase goods.

TITLE IX

San Jose State University To Pay $1.6 Million And Implement Corrective Measures To Remedy Title IX Violations.

On September 21, 2021, the Justice Department's Civil Rights Division and the U.S. Attorney's Office for the Northern District of California reached a settlement with San Jose State University (SJSU) in response to an investigation conducted by the Justice Department under Title IX of the Education Amendments of 1972 (Title IX) that uncovered over a decade of inadequate responses to reports of sexual harassment and sexual assault made by female student-athletes against an SJSU athletic trainer.

The Justice Department's investigation specifically found that beginning in 2009, female student-athletes reported to SJSU that an athletic trainer subjected them to repeated, unwelcome sexual touching of their breasts, groins, buttocks, and/or pubic areas during treatment in the campus training facilities, and that SJSU ineffectively responded to the reports, which exposed additional student-athletes to harm. The Justice Department also found that SJSU retaliated against two employees for reporting the allegations made against the athletic trainer to school officials. The first employee repeatedly reported the allegations to school officials, and eventually reported them to the NCAA because the employee felt that SJSU was not adequately addressing the allegations. SJSU gave the employee low performance evaluations and admonished the employee as a result. After the second employee reported the allegations to school officials, SJSU reduced the employee's job responsibilities and ultimately terminated the employee.

The agreement requires SJSU to pay $1.6 million dollars to the individuals who were sexually harassed by the athletic trainer and who participated in the investigation. The agreement also requires SJSU to take other measures, such as:

- Significantly improve SJSU's process for responding to complaints of sexual harassment;
- Bolster the Title IX Office by revising the office structure and providing adequate authority, independence, and resources to the Title IX Coordinator;
- Publicize Title IX policies and protocols and develop user-friendly materials so everyone in the SJSU community knows how to report Title IX concerns;
- Improve the policies and procedures of the SJSU Sports Medicine and Athletics Training Program to prevent sexual harassment by athletic trainers;
- Deliver training to student-athletes and SJSU Athletics employees on giving and receiving informed consent for medical treatments and athletic training services;
- Survey SJSU Athletics employees to assess their understanding of SJSU policies and identify barriers to reporting;
- Take concrete steps to prevent retaliation under Title IX, including through training that provides clear examples of prohibited conduct; and
- Provide supportive measures and remedies to current and former student-athletes who were sexually harassed by the athletic trainer.

The Summary of the Department's Title IX Investigation of San Jose State University and Related Findings can be found here, and the Resolution Agreement between The United States of America and San Jose State University can be found here.

NOTE:

Regardless of whether Title IX applies, private K-12 schools, colleges, and universities have a duty to take appropriate steps to address and correct reports of sexual harassment and sexual assault against their students by employees.

EMPLOYEES

DISCRIMINATION

Court Should Not Have Excluded Stray Remark That Assistant Dean "Wanted Someone Younger."

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. At one point, 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. Rptr. 5th 882.

NOTE:

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. This case highlights the importance of effective discrimination, harassment, and retaliation training for both supervisors and non-supervisors to help reduce and/or eliminate this type of conduct in the workplace and limit liability for employers.

CONTRACTS

Employer Failed To Prove That Employee Signed Arbitration Agreement.

Maureen Bannister worked in the administrative offices at a skilled nursing facility for approximately 30 years before Marinidence Opco LLC (Marinidence) purchased the facility. One year after the purchase, Marinidence terminated Bannister.

Thereafter, Bannister filed a lawsuit against Marindence alleging discrimination, retaliation, and defamation. Marinidence filed a motion to compel arbitration, alleging that when it purchased the facility, Bannister electronically signed an arbitration agreement when completing the paperwork for new Marinidence employees. Bannister opposed the motion and asserted that she never saw or electronically signed the arbitration agreement during the onboarding process, and presented evidence to that effect.

The trial court held that Marindence failed to prove that Bannister signed the arbitration agreement and denied its motion to compel arbitration. Marindence appealed.

On appeal, the court noted that Marinidence presented evidence that Bannister signed the arbitration agreement during the onboarding process, including that employees had to enter their first and last name and Social Security number in order to access the online onboarding portal and had to complete the W-4 tax withholding and emergency contact form before accessing the arbitration agreement. Marinidence also presented two declarations from employees Barbara Matson and Brian Ullrich who asserted that they sat next to Bannister for 30 to 45 minutes while she completed the entire onboarding process on the computer. Matson and Ullrich did not affirmatively state they witnessed Bannister click "I

accept" or electronically sign the arbitration agreement. However, Bannister presented evidence that she did not touch the computer during that process and never reviewed or signed any arbitration agreement. Bannister asserted that Matson completed the onboarding process herself on her laptop for employees without their participation, and was able to do so because she had access to employees' first and last names and Social Security numbers from their personnel files. Bannister further asserted that Matson asked Bannister for her information including her tax withholdings and emergency contacts and did not show her the laptop screen as she entered the information or provide her any copies of documents. Bannister also asserted that as Matson completed the onboarding process for Bannister and other employees, she did not inform them about an arbitration agreement nor did she have them click "I agree" or otherwise electronically sign the arbitration agreement. Bannister presented evidence through emails between herself and Matson, that Matson continued to complete the onboard process for employees remotely from her office after leaving the facility.

The court found that substantial evidence supported the trial court's conclusion that Marinidence failed to authenticate the electronic signature on the arbitration agreement as Bannister's, and that the trial court reasonably held that Matson and Ullrich's declarations did not establish that Bannister herself electronically signed the arbitration agreement. The court noted that Bannister was not "assigned a unique, private user name and password such that she is the only person who could have accessed the onboarding portal and signed the agreement; instead, the evidence showed … Matson had access to the information necessary to access the onboarding portal via employee personnel records."

The court affirmed the trial court's ruling and conclusion that Marinidence failed to meet its burden of proving the existence of an arbitration agreement by a preponderance of the evidence. Marindence failed to show that the signature on the arbitration agreement was put there by Bannister, and Bannister's evidence showed that she was not the only person who could have executed the arbitration agreement.

Bannister v. Marinidence (2021) 64 Cal.App.5th 541.

NOTE:

This case adds to the dearth of case law related to electronic signatures and the issues that may arise related to the authenticity of electronic signatures. The safest and most conservative course of action is to require signatures on hard copies of contracts, such as enrollment and employment agreements. If private K-12 schools, colleges, and universities utilize electronic signatures on documents, they should implement measures to verify and prove that the person whose electronic signature appears on the contract is the person who actually signed the contract.

ARBITRATION

Ninth Circuit Ended Preliminary Injunction That Prevented Enforcement Of AB 51.

On October 10, 2021, Governor Gavin Newsom signed Assembly Bill 51 (AB 51) into law. AB 51 adds Section 432.6 to the Labor Code, which prohibits waiver of any right, forum, or procedure, including the right to file and pursue a civil action or complaint, for a violation of the California Fair Employment and Housing Act (FEHA) or the Labor Code as a condition of employment, continued employment, or the receipt of any employment-related benefit. Section 432.6 similarly prohibits an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights. Due to its position in the Labor Code, violations of Section 432.6 may result in a misdemeanor and punishment of up to six months in county jail and/or a fine of up to one thousand dollars. AB 51 also adds Section 12953 to the Government Code, making violations an "unlawful employment practices" under the purview of the Department of Fair Employment and Housing.

On December 9, 2019, before AB 51 was to take effect on January 1, 2020, the United States Chamber of Commerce (US Chamber) filed a complaint for declaratory and injunctive relief, seeking a declaration that AB 51 was preempted by the Federal Arbitration Act (FAA) and asking the court to preliminarily and permanently enjoin California from enforcing the statute. The same day, the US Chamber also filed a motion for a preliminary injunction, and then filed a motion for a temporary restraining order. The motion for temporary restraining order was granted on December 30, 2019.

A hearing on the US Chamber's motion for a preliminary injunction was held on January 10, 2020, and on February 7, 2020, the court issued the preliminary injunction, which prevented California from enforcing AB 51 as to arbitration agreements covered by the FAA. California appealed, and the Ninth Circuit Court of Appeals granted review.

On appeal, the Ninth Circuit first explained the concept of preemption and under what circumstances AB 51 may be preempted by the FAA.

The Ninth Circuit explained that the Supremacy Clause essentially provides that if a state law confers rights or imposes restrictions that conflict with federal law, then

the federal law takes precedence and the state law is preempted. Preemption by the FAA can arise in two ways: (1) through impossibility, where "it is impossible ... to comply with both state and federal requirements"; or (2) through obstacle, where a "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Nevertheless, the FAA contains a "saving clause" that permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but does not permit invalidation based upon defenses that apply only to arbitration or that derive their meaning from the fact than an agreement to arbitrate is at issue.

To fall within the saving clause and avoid preemption by the FAA, AB 51 must "put arbitration agreements on an equal plane with other contracts." To put differently, if AB 51 treats arbitration agreements less favorably than any other contract and allows for an agreement to arbitrate to be invalidated or not enforced in circumstances where another contract would be enforced or deemed valid, then AB 51 would be preempted by the FAA.

AB 51 may also be preempted by the FAA if it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress," which, with regard to the FAA, is to "ensure that private arbitration agreements are enforced according to their terms.

The Ninth Circuit first held that the FAA does not preempt Section 432.6 because it focuses on pre-agreement employer behavior and the FAA does not take effect until after an agreement is executed. The Ninth Circuit also held that Section 432.6 is not an obstacle to the FAA because the FAA is intended to promote enforcement of consensual arbitration agreements, and Section 432.6 only bans non-voluntary arbitration agreements.

The Ninth Circuit further held that Section 432.6 does not affect the enforceability of existing arbitration agreements that are otherwise enforceable under the FAA, and reasoned that Section 432.6 makes it unlawful for employers to mandate arbitration agreements as a condition of employment, but does not affect the enforceability of those agreements.

However, the Ninth Circuit concluded that the civil and criminal penalties imposed by AB 51 and Government Code Section 12953 were preempted by the FAA because they effectively punished employers for entering into arbitration agreements and were an obstacle to the purposes of the FAA.

A divided panel of the Ninth Circuit vacated the preliminary injunction granted by the district court, which paved the way for California to begin enforcing the elements of the AB 51 not preempted by the FAA. Judge Sandra Degal Ikuta wrote a dissent to the opinion, calling AB 51 a "too-clever-by-half workaround" meant to block the formation of arbitration agreements, which is preempted by the FAA. Judge Ikuta also noted California's previous attempts to pass laws disfavoring arbitration, which have not withstood challenge.

Chamber of Commerce of United States v. Bonta (9th Cir. 2021) 2021 WL 4187860.

NOTE:

The U.S. Chamber has filed a petition for rehearing en banc, which if granted, means that the case will be reheard before eleven of the twenty-nine judges of the Ninth Circuit instead of the typical panel of three judges.

BUSINESS & FACILITIES

JOINT EMPLOYMENT

Joint Employers Found Jointly Liable For Labor Code Violations.

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; to follow detailed terms for the operation of Shell's motor fuel business; to provide daily reports; and to 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 to 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 fire an employee directly. 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.Rptr.5th 868.

NOTE:

In the joint employment context, the individual is considered an employee of the primary employer, but is also found to be an employee of the secondary employer. The consequence is that joint employers are responsible, both individually and jointly, for compliance with wage and hour laws. For private K-12 schools, colleges, and universities there is a risk they may be found to be joint employers of contractors or vendors retained to perform services for them. It is important to analyze the relationship with contractors and vendors fully to determine whether there is a risk that a joint employer relationship could be found, and to have contracts in place expressly stating that the private K-12 school, college, or university is not a joint employer.

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...?

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

- **California Becomes First State in Nation to Announce COVID-19 Vaccine Mandate for School Admission:** On October 1, 2021, Governor Newsom announced a forthcoming statewide COVID-19 vaccine mandate for both school staff and students. For students, the California Department of Public Health (CDPH) will be adding the COVID-19 vaccine to other vaccinations required for in-person school attendance—such as measles, mumps, and rubella. Click here and here for more information.
- **City of Berkeley COVID-19 Vaccine Requirement:** On September 1, 2021, the City of Berkeley issued a Health Order requiring certain businesses to obtain proof of full vaccination from all workers and check proof of full vaccination of patrons 12 years and older prior to allowing a patron's entry to an indoor portion of the business's facility. The Health Order went into effect on September 3, 2021. Click here for more information.

- **City of Los Angeles COVID-19 Vaccine Ordinance:** On October 6, 2021, the Los Angeles City Council passed an ordinance that will require patrons to show proof of a COVID-199 vaccination in order to enter certain indoor spaces, such as restaurants, gyms and fitness venues, entertainment and recreation venues, and personal care establishments. The ordinance takes effect on November 4, 2021. Click here for more information.

- **FCC to Open Second Application Window for Emergency Connectivity Fund:** The FCC opened a second application window for the Emergency Connectivity Fund from September 28 - October 13. These funds can be used by schools to purchase laptops, tablets, hotspots, and other forms of connectivity for students and teachers. Click here for more information.

- **Updated EANS Funding Frequently Asked Questions:** On September 17, 2021, the U.S. Department of Education issued updates to its Frequently Asked Questions Emergency Assistance to Non-Public Schools (EANS) Program as authorized by the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSA Act) and the American Rescue Plan Act of 2021 (ARP Act). The FAQs contains new and clarified information about EANS funding. Click here for more information.

- **2019-20 Private School Universe Survey Results Released:** On September 22, 2021, the National Center for Education Statistics Issues (NACES) released the results from its Characteristics of Private Schools in the United States: Results From the 2019-20 Private School Universe Survey. Click here for more information.

- **LCW Return to School/Work Resources:** LCW has prepared toolkits of essential materials to assist schools with the return to school and work for the 2021-2022 school year, including the following: (1) Back to School in a COVID-19 World: Essential Materials for California Private Schools – Fall 2021 (Non-Consortium Members); and (2) Back to School in a COVID-19 World: Essential Materials for California Private Schools – Fall 2021 (Consortium Members). For more information about additional materials available from LCW, please visit the LCW Knowledge webpage under the "Other Resources" tab.

LCW BEST PRACTICES TIMELINE

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

OCTOBER 1ST THROUGH 15TH

□ File Verification of Private School Instruction

- Every person, firm, association, partnership, or corporation offering or conducting private school instruction on the elementary or high school level shall between the first and 15th day of October of each year, file with the Superintendent of Public Instruction an affidavit or statement, under penalty of perjury, by the owner or other head setting forth the following information for the current year:

(a) All names, whether real or fictitious, of the person, firm, association, partnership, or corporation under which it has done and is doing business.

(b) The address, including city and street, of every place of doing business of the person, firm, association, partnership, or corporation within the State of California.

(c) The address, including city and street, of the location of the records of the person, firm, association, partnership, or corporation, and the name and address, including city and street, of the custodian of such records.

(d) The names and addresses, including city and street, of the directors, if any, and principal officers of the person, firm, association, partnership, or corporation.

(e) The school enrollment, by grades, number of teachers, coeducational or enrollment limited to boys or girls and boarding facilities.

(f) That the following records are maintained at the address stated, and are true and accurate:

1. The attendance of the pupils in a register that indicates clearly every absence from school for a half day or more during each day that school is maintained during the year (Education Code Section 48222.)

2. The courses of study offered by the institution.

3. The names and addresses, including city and street, of its faculty, together with a record of the educational qualifications of each.

(g) Criminal record summary information of applicants that have been obtained pursuant to Section 44237.

NOVEMBER THROUGH JANUARY

□ Issue Performance Evaluations

- We recommend that performance evaluations be conducted on at least an annual basis, and that they be completed before the decision to continue employment for the following school year is made. Schools that do not conduct regular performance reviews have difficulty and often incur legal liability terminating problem employees - especially when there is a lack of notice regarding problems.

  ▪ Consider using Performance Improvement Plans but remember it is important to do the necessary follow up and follow through on any support the School has agreed to provide in the Performance Improvement Plan.

□ Compensation Committee Review of Compensation before issuing employee contracts

- The Board is obligated to ensure fair and reasonable compensation of the Head of School and others. The Board should appoint a compensation committee that will be tasked with providing for independent review and approval of compensation. The committee must be composed of individuals without a conflict of interest.

□ Review employee health and other benefit packages, and determine whether any changes in benefit plans are needed.

□ If lease ends at the end of the school year, review lease terms in order to negotiate new terms or have adequate time to locate new space for upcoming school year.

□ Review tuition rates and fees relative to economic and demographic data for the School's target market to determine whether to change the rates.

□ Review student financial aid policies.

□ Review, revise, and update enrollment/tuition agreements based on changes to the law and best practice recommendations.

□ File all tax forms in a timely manner:

- Forms 990, 990EZ

  ▪ Form 990:

  - Tax-exempt organizations must file a Form 990 if the annual gross receipts are more than $200,000, or the total assets are more than $500,000.

  ▪ Form 990-EZ

  - Tax-exempt organizations whose annual gross receipts are less than $200,000, and total assets are less than $500,000 can file either form 990 or 990-EZ.

  ▪ A School below college level affiliated with a church or operated by a religious order is exempt from filing Form 990 series forms. (See IRS Regulations section 1.6033-2(g)(1)(vii)).

  ▪ The 990 series forms are due every year by the 15th day of the 5th month after the close of your tax year. For example, if your tax year ended on December 31, the e-Postcard is due May 15 of the following year. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is the next business day.

  ▪ The School should make its IRS form 990 available in the business office for inspection.

- Other required Tax Forms common to business who have employees include Forms 940, 941, 1099, W-2, 5500

□ Annual review of finances (if fiscal year ended January 1st)

- The School's financial results should be reviewed annually by person(s) independent of the School's financial processes (including initiating and recording transactions and physical custody of School assets). For schools not required to have an audit, this can be accomplished by a trustee with the requisite financial skills to conduct such a review.

- The School should have within its financial statements a letter from the School's independent accountants outlining the audit work performed and a summary of results.

- Schools should consider following the California Nonprofit Integrity Act when conducting audits, which include formation of an audit committee:

  ▪ Although the Act expressly exempts educational institutions from the requirement of having an audit committee, inclusion of such a committee reflects a "best practice" that is consistent with the legal trend toward such compliance. The audit committee is responsible for recommending the retention and termination of an independent auditor and may negotiate the independent auditor's compensation. If an organization chooses to utilize an audit committee, the committee, which must be appointed by the Board, should not include any members of the staff, including the president or chief executive officer and the treasurer or chief financial officer. If the corporation has a finance committee, it must be separate from the audit committee. Members of the finance committee may serve on the audit committee; however, the chairperson of the audit committee may not be a member of the finance committee and members of the finance committee shall constitute less than one-half of the membership of the audit committee. It is recommended that these restrictions on makeup of the Audit Committee be expressly written into the Bylaws.

JANUARY/FEBRUARY

□ Review and revise/update annual employment contracts.

□ Conduct audits of current and vacant positions to determine whether positions are correctly designated as exempt/non-exempt under federal and state laws.

CONSORTIUM CALL OF THE MONTH

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

ISSUE: A Human Resources Manager for an independent school explained to an LCW attorney that the school is requiring all employees who are unvaccinated or not fully vaccinated against COVID-19 to undergo COVID-19 testing twice a week. The Human Resources Manager asked whether the school must pay for the time it takes for the employee to be tested.

RESPONSE: The LCW attorney explained that an employer that requires an employee to obtain a COVID-19 test must pay for the time it takes for the testing, including travel time. The time it takes for employees to take a COVID-19 test required by their employer is considered "hours worked" under because the employer is exercising its control over the employee by requiring the employee to perform a task. The LCW attorney shared the current guidance from the California Department of Industrial Relations on COVID-19 testing, and explained that some schools are beginning to offer on-campus COVID-19 testing to employees during or immediately before or after the work day to attempt to offset some of the costs associated with off-site testing.

Firm Publications

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

LCW Managing Partner Scott Tiedemann weighed in on Senate Bill 2 and what it means for policing practices in the Oct. 12 *23ABC 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.

New to the Firm

Jack Begley is an Associate in the Los Angeles office of LCW. He is experienced in labor and employment matters, including wage and hour law and the Fair Employment and Housing Act, and has handled varied phases of litigation, defended client depositions, conferred 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.

Alicia Arman is an Associate in the San Francisco office of LCW where she advises clients on education, labor and employment law matters. Aly has worked in both private schools and charter schools and as such has particular interest in education law.

She can be reached at 415.512.3015 or aarman@lcwlegal.com.

Hannah Dodge is an Associate in the San Francisco office of LCW where she advises clients on education, labor and employment law matters. She is experienced in facilitating discovery motions, evidentiary hearings and trial conferences, and has further expertise managing motions and trials, and mediating and resolving student-parent-university disputes.

She can be reached at 415.512.3056 or hdodge@lcwlegal.com.

LCW LIEBERT CASSIDY WHITMORE

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

November 29, 2021

9:00 AM - 4:00 PM

INTERESTED?

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

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

In addition to our private education practice, the firm also assists nonprofit organizations across the state. To learn more, visit our Nonprofit page.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

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

Nov. 16 **"Addressing Off Campus Social Media Use by Faculty and Students"**
ACSI Consortium, BJE Consortium, CAIS Consortium & Golden State Independent School Consortium | Webinar | Brian P. Walter

Customized Training

Nov. 8 **"Training Academy for Workplace Investigators: Core Principles, Skills & Practices for Conducting Effective Workplace Investigations"**
The Bishop School | Webinar | Judith S. Islas

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