

FIRE WATCH

News and developments in employment law and labor relations for
California Fire Safety Management

AUGUST 2022

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

FIRM VICTORY

Arbitrator Dismisses Union’s Grievance As Untimely.

Senior Counsel **Stefanie Vaudreuil** in our San Diego office was able to show that a union filed its grievance after the applicable deadline had passed. The Memorandum of Understanding (MOU) between the union and the employer stated that the union must file a grievance within 30 calendar days that the union becomes aware, or should have been aware, of the circumstances giving rise to the grievance.

Here, the grievance was filed in May 2021. The grievance alleged that the employer had violated the terms of the MOU by not giving union-represented employees 2.5% salary increases pursuant to a “fairness agreement.” Attorney Vaudreuil and our client were able to show that the union should have known of the salary increase for another bargaining unit when the employer approved that unit’s MOU in January 2020. This MOU also was posted on the employer’s website in March 2020. Further notices were posted in August 2020.

The arbitrator dismissed the entire grievance on grounds of timeliness and our client prevailed.

MEYERS-MILIAS-BROWN ACT

Court Of Appeal Finds PERB Skipped Initial Analysis Of Whether Measure P Had A Significant And Adverse Impact.

In 2016, the County of Sonoma (County)’s Board of Supervisors enacted an ordinance creating the County’s Independent Office of Law Enforcement Review and Outreach (IOLERO) to provide independent review and audit of law enforcement policies and administrative investigations. Among other things, IOLERO could propose independent recommendations or determinations regarding administrative investigations into peace officer conduct.

In 2020, the Board saw a need to expand IOLERO’s powers and duties to enhance law enforcement transparency and accountability. The Board decided to introduce an initiative on the ballot, known as Measure P, for voters to consider during the November election. Measure P proposed numerous changes to IOLERO’s enabling ordinance, including empowering IOLERO to independently investigate: whistleblower complaints; Sheriff’s Office investigations into deaths of individuals in the Sheriff’s custody; and incomplete or otherwise deficient investigations. Measure P also authorized IOLERO to issue subpoenas to compel the production of documents or the attendance and testimony of witnesses. Measure P maintained restrictions on IOLERO from deciding “policies, direct[ing] activities, or impos[ing] discipline on other County departments, officers and employees. It is significant that Measure P did not alter the part of the ordinance that required IOLERO and the Sheriff to collaborate to create protocols to “further define and

specify the scope and process providing for IOLERO's receipt, review, processing, and audit of complaints and investigations in a mutually coordinated and cooperative manner."

On August 6, 2020, the Board passed a resolution to allow Measure P to be placed on the ballot. That same day, the Sonoma County Deputy Sheriffs Association (DSA) and Sonoma County Law Enforcement Association (SCLEA; collectively "Associations") learned of the scheduled vote on the measure and requested the County meet and confer regarding the measure's placement on the ballot. The County did not bargain with the Associations before placing Measure P on the ballot. The voters ultimately passed Measure P by a majority vote.

The Associations, representing officers and other employees working for the Sheriff, filed unfair practice charges against the County. They alleged that the County violated the MMBA by failing to: notify them about Measure P; and bargain over the decision to place the measure on the ballot or the effects of that decision. Informal attempts to resolve the dispute failed, and PERB reviewed the matter.

In its decision, PERB concluded that the County's decision to place certain amendments to Measure P on the ballot was subject to bargaining and that the amendments were subject to "effects" bargaining. As a remedy, PERB severed the subject amendments from Measure P, declaring them void and unenforceable as to those employees who the Associations represented. PERB also ordered the County not to enforce or apply those amendments to employees represented by the Associations, and to meet and confer with them before placing any matter on the ballot that affects employee discipline and/or other negotiable subjects. The County appealed to the California Court of Appeal.

On appeal, the County argued that PERB failed to make a preliminary assessment of whether the Board's decision to place Measure P on the ballot significantly and adversely affected the Associations' members' working conditions. They contended that this failure caused PERB to erroneously conclude that bargaining was necessary before first determining whether the Measure was a matter within the scope of representation under the MMBA. The Court of Appeal agreed with the County.

Both parties agreed that the decision to place Measure P on the ballot was a "fundamental managerial decision". In *Claremont Police Officers Assn. v. City of Claremont*, the California Supreme Court addressed "whether an employer's action implementing a fundamental decision" was subject to the bargaining requirement under the MMBA by establishing a three-prong test. Under the first prong, if the management action does not have a significant and adverse effect on wages, hours, or working conditions of the bargaining-unit employees, then there is

no duty to meet and confer. Only if there is a significant and adverse effect should the second and third prongs be considered.

In this case, however, PERB conceded that it did not apply the *Claremont* test to determine whether Measure P had a significant and adverse effect on wages, hours, or working conditions. Given that there were no provisions of Measure P that on their face impacted wages, hours, or working conditions, the California Court of Appeal reasoned that PERB erroneously skipped the first prong of *Claremont* and failed to establish whether the matter was even within the scope of representation under the MMBA in the first place.

Regarding effects bargaining, the Court noted there was no dispute that Measure P's provisions involving IOLERO: directly accessing, reviewing, and publicly posting body-worn camera video footage; and being able to directly contact witnesses and subjects of investigations, had foreseeable effects that subjected them to the MMBA's effects bargaining requirements. The Court rejected the County's argument that PERB was conflating the firm decision date and the implementation date. The Court agreed with PERB that, in line with past precedent, the County was obligated to bargain those effects with the Associations before placing the Measure on the ballot, not just before implementing the subject amendments.

Finally, the Court concluded that PERB exceeded its authority through its remedial order declaring Measure P's provisions void and unenforceable as to the Associations' members. The Court remanded the matter to PERB to strike its remedial order and determine whether Measure P was within the scope of representation under the MMBA.

County of Sonoma v. Public Employment Relations Board (Sonoma County Deputy Sheriff's Association), 80 Cal.App.5th 167 (2022).

NOTE:

The Court rejected an additional argument from the County that PERB lacked remedial authority over peace officers. The Court concluded that Section 3511 outlining PERB's jurisdiction included peace officer Associations.

AGENCY FEES

County Can Claim "Good Faith" Defense To Employees' Claim For Refund Of Agency Fees.

In 2018, the U.S. Supreme Court held in *Janus v. American Federation of State, County, & Municipal Employees, Council* that a union's compulsory collection of agency fees violated the First Amendment. This holding overruled nearly 40 years of case law precedent.

In response to *Janus*, several public-sector employees filed a class action lawsuit under the federal civil rights law at 42 USC Section 1983 seeking to retroactively recover any agency fees that the Santa Clara County Correctional Peace Officers Association and Santa Clara County took from their salaries. The U.S. district court dismissed the action, holding that the parties' "good faith" reliance on the law pre-*Janus* law meant that they need not return the agency fees.

In a subsequent case, *Danielson v. Inslee*, the Ninth Circuit held that private parties, including unions, may invoke an affirmative defense of good faith to retroactive monetary liability under Section 1983 if they acted in direct reliance on then-binding U.S. Supreme Court precedent and presumptively-valid state law.

However, the question of whether the "good faith" defense applied to municipalities remained open, and this appeal was filed. The Ninth Circuit concluded that, because unions get a good faith defense under *Danielson* to a claim for a refund of pre-*Janus* agency fees, and municipalities' tort liability for proprietary actions is the same as private parties, Santa Clara County was also entitled to a good faith defense to Section 1983 liability for collecting pre-*Janus* agency fees.

Rejecting the employees' arguments, the court noted that the County was only an intermediary that merely facilitated the collection of agency fees from the employees' paychecks and transferred the funds to the Union at the Union's request. Given the County's limited role, the court declined to hold the municipality to a different standard than the Union.

Moreover, the County's conduct to collect and transfer agency fees had been directly authorized under both state law and decades of U.S. Supreme Court jurisprudence. The very purpose of a "good faith" defense is to allow private parties to rely on binding judicial pronouncements and state law without concern that they will be held liable retroactively due to changing precedents. The Ninth Circuit concluded that same principles of equity and fairness applied to municipalities. Accordingly, it affirmed the lower court's dismissal of the case.

Allen v. Santa Clara County Correctional Peace Officers Association, 38 F.4th 68 (9th Cir. 2022).

GOVERNMENT IMMUNITY

CHP Was Not Immune From Wrongful Death Lawsuit Caused By On-Duty CHP Officer.

In the early morning of October 14, 2019, Danuka Silva was riding with another passenger in the back of a rideshare vehicle driven for Uber. While on the freeway,

the driver abruptly stopped the vehicle and demanded the two passengers exit, refusing to pull to the shoulder first. As the passengers attempted to cross the freeway to safety, Sergeant Richard Langford's patrol car struck and killed Danuka while Langford was responding to an emergency call concerning an altercation on the freeway.

On February 5, 2020, Marakkalage and Shirin Silva filed a complaint alleging causes of action for negligence and wrongful death, as well as a survival cause of action claims for negligence and wrongful death. They alleged Langford violated Vehicle Code Section 22350 for which California Highway Patrol (CHP) was liable as Langford's employer. At the time of the collision, Langford was driving at an excessive speed without activating his patrol car's lights and sirens.

Langford and CHP each demurred to the first amended complaint, arguing the complaint was barred by investigative immunity conferred under Government Code Section 821.6. This law provides, "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." The trial court granted both demurrers and this appeal followed.

Because Langford was immune from suit under Vehicle Code Section 17004, the California Court of Appeal declined to consider whether he was immune under 821.6. However, the Court did reason that even if Langford was immune from suit under Section 821.6 (in addition to his immunity under Vehicle Code Section 17004), it does not follow that CHP was immune.

The Court first noted that Government Code Section 821.6 immunity, like Vehicle Code Section 17004 immunity, expressly applies only to a "public employee." The court agreed with the Silvas's argument that CHP's immunity does not necessarily flow from any investigative immunity Langford may have under Section 821.6 because the language in Government Code Section 815.2(b). That law limits the public entity's immunity if "otherwise provided by statute." In this case, Vehicle Code Section 17001 provides a separate statutory basis for CHP liability: "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment." Therefore, because the first amended complaint specifically alleged CHP was liable under Vehicle Code Section 17001, it was therefore CHP's burden to establish its affirmative defense of governmental immunity, which it failed to do.

Silva v. Langford, 79 Cal.App.5th 710 (2022).

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.

Question: For firefighters who work schedules of 2 days on and then 4 days off, how should a Fire District calculate the amount of baby bonding leave the firefighter is eligible to take? For baby bonding, what are the limits on intermittent leave requests? Can the District require employees to take a full 2-day "tour" off?

Answer: Under the FMLA and CFRA, twelve workweeks of leave means the equivalent of twelve of the employee's normally scheduled workweeks. Here, the District should count out how many 2-day "tours" an employee would be scheduled for over 12 weeks to determine how many days of baby bonding (FMLA/CFRA) leave the employee is eligible to take.

For baby bonding leave, the FMLA/CFRA have different rules about minimum increments. Under the FMLA, the employee can only take intermittent leave for baby bonding if agreed to by the employer. Under the CFRA, employees are permitted to take leave in increments of

two-weeks at a minimum, and employers must grant a request for leave of less than two weeks on any two occasions. Assuming that these two types of leave will be running concurrently, the District must follow the CFRA rules because they are more protective of the employee.

The District cannot require that an employee take a full tour off. For instance, if a firefighter requests leave for a three-week period, the District cannot require an employee to change the duration of the leave request because they will return in the middle of a tour. Similarly, for the two instances in which an employee is entitled to take leave of less than two weeks' duration, the District cannot stop the employee from taking leave on only one day of a tour.

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 fire safety.

- The State of California recently released a herd of over 600 goats to help prevent wildfires. The goats consume hard to reach dry underbrush that wildfires thrive on.
- California's 2022 COVID-19 Supplemental Paid Sick Leave 80 hour maximum does not apply to firefighters. Under Labor Code 248.6(b)(2)(B), firefighters are entitled to an amount of COVID-19 supplemental paid sick leave equal to the total number of hours the employee was scheduled to work for that workweek, and are not limited to the 80 hour cap that applies to other employees.



LCW In The News

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

- Partner **Geoff Sheldon** and Attorney **Paul Knothe** authored an insightful article titled "For The Record" in the May/June issue of *Sheriff & Deputy* that addresses SB16 and the laws surrounding The Freedom of Information Act. Agencies in California are strongly advised to work closely with their legal advisors to ensure they are complying with the public's right to information and officers' confidentiality rights as to not leave themselves open to liability for violations of those rights. Click [here](#) for access to the full article (Page 62-63).
- Attorney **Lisa S. Charbonneau** authored an article for Law360 titled "Firefighter Overtime Suits Show Complexities under FLSA." With the knowledge gained from working side by side with fire departments, Lisa states, "[Firefighter] schedules are just very hard to fit into normal pay practices and normal overtime rules. The FLSA partial exemption seeks to account for those unique hours but it's still pretty complicated to administer."
- Attorney **Lisa S. Charbonneau**, who regularly advises public employers in California on wage and hour compliance, shared her thoughts on seasonal employment in "Summer Shines Spotlight On Seasonal Wage Exemption," which was published in the June 24th Employment Authority section of *Law360*. In the piece, Lisa addresses employment overtime exemption laws and how they affect seasonal employers. To read the full article, please click [here](#) (Law360 subscription required).

Welcome To LCW!



We are thrilled to announce that Kim Robinson has joined LCW's management team as the Director of Human Resources!

Kim Robinson comes to us after serving as the Vice-President of Human Resources and Administration for Child360 (formerly LAUP), a non-profit organization. Prior to her time at Child360, Kim acted as the Manager of HR and Administration at a national law firm for 5 years and the HR Administrator for an international law firm for over 15 years, respectively.

"With her background in law and human resources, Kim is a leader in her field. We welcome her to the firm and look forward to her contributions," LCW Managing Partner J. Scott Tiedemann stated. "I have no doubt she will be a key player in shaping our employee's experience and upholding our LCW values."

Please join us in welcoming Kim to the firm!



Train Today.

LCW has created an engaging, interactive, and informative On-Demand training program. This training tool is easy to use lets your employees watch at their own pace and is led by one of our expert attorneys. The training also has quizzes incorporated throughout to assess understanding and application of the content. Once an employee successfully completes the training they will be issued a certificate of completion.

Need to train one employee now?

Individual employees can view the training here by clicking on one of the below links:

[One Hour Non-Supervisory Version](#)

[Two Hour Supervisory Version](#)

Training 10 or more employees?

We are here to help! Contact us at on-demand@lcwlegal.com with questions on discounted Agency-wide pricing.

WWW.LCWLEGAL.COM/EVENTS-AND-TRAINING/ON-DEMAND-TRAINING

NEW TO THE FIRM!



Troy M. Heisman, an associate in our San Francisco office, provides advice and counsel regarding a variety of employment law matters as an experienced investigator and litigator. Troy litigates in both state and federal court and has experience from pre-litigation through trial.



Aleena Hashmi, an associate in our Los Angeles office, is a skilled trial attorney who provides representation and counsel to clients in all litigation matters. Before joining LCW, Aleena gained legal expertise through her work at the Office of the Attorney General and the Los Angeles County District Attorney's Office, where she conducted preliminary hearings, jury trials, and authored appellate briefs.

John LaCrosse is an associate in LCW's San Diego office. As an experienced litigator, John assists clients with matter including labor and employment, governance, student discipline issues, and special education. He is also has experience in all aspects of the discovery process, including interviewing witnesses, and regularly conducts extensive and in-depth research.

Kiyoshi Din is an associate in our San Francisco office who provides representation and counsel to public agencies, educational institutions and non-profit organizations across the state. He is a litigator with experience in all aspects of the discovery process, including conducting pre-trial interviews and extensive in-depth research.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Trainings

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| Aug. 4 | “Human Resources Academy II”
Monterey Bay, NorCal & Sonoma/Marin ERCs Webinar Melanie L. Chaney & Matt Doyle |
| Aug. 11 | “Difficult Conversations”
Bay Area & Gateway Public & Orange County & San Diego ERCs Webinar Christopher S. Frederick & Alicia Arman |
| Aug. 11 | “Distinguishing Between Discipline And Disability Accommodation”
Gold Country & West Inland Empire ERCs Webinar Mark Meyerhoff |
| Aug. 11 | “The Future is Now - Embracing Generational Diversity and Succession Planning”
Humboldt County ERC Webinar Lisa S. Charbonneau & Hadara R. Stanton |
| Aug. 11 | “Moving Into the Future: Telecommuting and Remote Work”
LA County HR Consortium Webinar Alysha Stein-Manes & Daniel Seitz |

- Aug. 17** **“Workplace Bullying: A Growing Concern”**
North State & San Mateo & South Bay ERCs | Webinar | Erin Kunze
- Aug. 24** **“Difficult Conversations” and “Human Resources Academy I”**
San Joaquin Valley ERC | Ceres | Michael Youril
- Sept. 1** **“Maximizing Supervisory Skills for the First Line Supervisor”**
Coachella Valley ERC | Coachella | Nicholas M. Grether
- Sept. 7** **“Public Service: Understanding the Roles and Responsibilities of Public Employees”**
Central Coast & Monterey Bay ERCs | Webinar | Nicholas M. Grether
- Sept. 7** **“Maximizing Supervisory Skills for the First Line Supervisor Part 1”**
NorCal & Sonoma/Marin ERCs | Webinar | Dana Burch
- Sept. 7** **“Employees and Driving”**
North State ERC | Webinar | Tony G. Carvalho
- Sept. 7** **“Labor Negotiation Strategies”**
Orange County Human Resources Consortium | Webinar | Peter J. Brown
- Sept. 8** **“Maximizing Supervisory Skills for the First Line Supervisor”**
East Inland Empire ERC | Fontana | Nicholas M. Grether
- Sept. 8** **“Nuts & Bolts: Navigating Common Legal Risks for the Front Line Supervisor”**
Gold Country & Humboldt County & Imperial Valley & Mendocino County & North San Diego County & Orange County ERCs | Webinar | Che I. Johnson
- Sept. 8** **“Prevention and Control of Absenteeism and Abuse of Leave”**
Los Angeles County Human Resources Consortium | Webinar | Danny Y. Yoo
- Sept. 14** **“Moving Into the Future: Telecommuting and Remote Work”**
Central Valley & Napa/Solano/Yolo & San Mateo County ERCs | Webinar | Daniel Seitz
- Sept. 15** **“Workplace Bullying: A Growing Concern”**
Gateway Public & West Inland Empire ERCs | Webinar | Christopher S. Frederick
- Sept. 21** **“Moving Into the Future: Telecommuting and Remote Work”**
Bay Area & San Diego & San Gabriel ERCs | Webinar | Daniel Seitz
- Sept. 21** **“Maximizing Supervisory Skills for the First Line Supervisor Part 2”**
NorCal & Sonoma/Marin ERCs | Webinar | Dana Burch
- Sept. 28** **“Human Resources Academy I”**
Imperial Valley & Ventura/Santa Barbara ERCs | Webinar | Matt Doyle
- Sept. 28** **“Human Resources Academy II”**
San Joaquin Valley ERC | Ripon | Jack Hughes
- Sept. 28** **“Distinguishing Between Discipline and Disability Accommodation”**
San Joaquin Valley ERC | Ripon | Jack Hughes

Customized Training

- Aug. 9** **“POBR”**
City of Lathrop | Jesse Maddox

Aug. 9 “Preventing Workplace Harassment, Discrimination and Retaliation”
County of San Luis Obispo | Webinar | Yesenia Z. Carrillo

Aug. 10 “Implicit Bias”
Irvine Ranch Water District | Irvine | Laura Drottz Kalty

Aug. 31 “Implicit Bias”
Irvine Ranch Water District | Irvine | Laura Drottz Kalty

Sept. 15 “Reasonable Suspicion”
City of Roseville | Webinar | T. Oliver Yee

Sept. 17 “Preventing Workplace Harassment, Discrimination and Retaliation”
City of Clovis | Yesenia Z. Carrillo

Sept. 20&22 “Preventing Workplace Harassment, Discrimination and Retaliation”
City of San Carlos | Erin Kunze

Sept. 29 “Law and Standards for Supervisors”
Orange County Probation Department | Santa Ana | Danny Y. Yoo

Seminar/Webinars

Aug. 18 “The Rules of Engagement: Issues, Impacts & Impasse - Part 1”
Liebert Cassidy Whitmore Labor Relations Certification Program | Webinar | Richard Bolanos

Aug. 25 “The Rules of Engagement: Issues, Impacts & Impasse - Part 2”
Liebert Cassidy Whitmore Labor Relations Certification Program | Webinar | Richard Bolanos

Sept. 14 “FLSA Academy Day 1”
Liebert Cassidy Whitmore | Webinar | Lisa S. Charbonneau

Sept. 15 “FLSA Academy Day 2”
Liebert Cassidy Whitmore | Webinar | Lisa S. Charbonneau

Sept. 20 “FLSA Academy Day 3”
Liebert Cassidy Whitmore | Webinar | Peter J. Brown

Sept. 21 “FLSA Academy Day 4”
Liebert Cassidy Whitmore | Webinar | Peter J. Brown

Sept. 21 “Compliance”
Liebert Cassidy Whitmore | Webinar | Lisa. S. Charbonneau

Sept. 22 “Nuts & Bolts of Negotiations - Part 1”
Liebert Cassidy Whitmore Labor Relations Certification Program | Webinar | Laura Drottz Kalty & Peter J. Brown

Sept. 29 “Nuts & Bolts of Negotiations - Part 2”
Liebert Cassidy Whitmore Labor Relations Certification Program | Webinar | Laura Drottz Kalty & Peter J. Brown

Speaking Engagements

- Aug. 24** **“Town Hall - Legal Eagles”**
California Special Districts Association (CSDA) Annual Conference | Palm Desert | T.Oliver Yee & I. Emanuela Tala
- Aug. 25** **“Organizational Resiliency After COVID: Employees Are Always at the Heart of the Matter”**
Urban Water Institute | San Diego | I. Emanuela Tala
- Sept. 9** **“Labor and Employment Litigation Update”**
League of California Cities Annual Conference and Expo | Long Beach | Geoffrey S. Sheldon & Elizabeth Tom Arce
- Sept. 19** **“Introduction to Labor Relations for Elected Officials”**
California Special Districts Associations (SDLA) 2022 Special District Leadership Academy Napa | Napa | Jack Hughes
- Sept. 20** **“Defining Board & Staff Roles and Relationships”**
California Special Districts Associations (SDLA) 2022 Special District Leadership Academy Napa | Napa | Che I. Johnson
- Sept. 20** **“Public Sector Employment Law Update”**
Public Agency Risk Management Association (PARMA) Fall Training Conference | Fresno | Shelline Bennett

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