LCW

LIEBERT CASSIDY WHITMORE

Education *Matters*

News and Developments in Labor Relations and Education Law for School and Community College District Administration

February 2011

CONTENTS

DEPARTMENTS

Education Matters

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

SCHOOL DISTRICTS

STATE MANDATED PROGRAMS

Although State's Practice Of Nominally Funding Mandated Programs Is Unconstitutional, Court May Not Order State To Stop This Practice Or To Reimburse $900 Million To School Districts.

The California Constitution requires the State to pay for any costs of a state mandate requiring a school district to implement a new program or service. As a consequence of budget issues, however, the State has not paid the full cost of these programs and services since 2002. Instead, the State has paid school districts a nominal amount for each mandate and promised to pay the balance at some indefinite time in the future. The Legislature, instead of appropriating the entire cost of a program, has appropriated only $1,000 per mandate imposed on school districts. For example, in 2007-08, the estimated cost of mandated programs was over $160 million, but the Legislature appropriated $38,000.

In 2007, the California School Boards Association and several school districts (School Districts) sued the State, challenging its practice of deferring full payment to an indefinite time. The School Districts requested that the court declare the State's practice of nominally funding mandated programs unconstitutional; order the State to either appropriate the full costs or suspend the obligations of the mandated service or program; and order reimbursement for all previous costs incurred in providing state-mandated programs. In opposition, the State argued that the California Constitution does not require that it pay the costs immediately, and that the School Districts already have a statutory remedy for unfunded mandates.

The trial court found that the State's practice of deferring all but a nominal amount of the payments violated article XIII B, section 6, of the California Constitution, and that the School Districts were entitled to declaratory and injunctive relief. The trial court declined, however, to order the State to reimburse the School Districts for prior costs, reasoning that this order would violate the separation of powers between the judiciary and legislative branches. The trial court also held that the School Districts do not have an alternative remedy because Government Code section 17612 does not apply until the Legislature completely deletes the mandate funding from the Budget Act, which was not the case here.

The Court of Appeal declared that the State's practice of deferring full appropriation to an indefinite future date violates the language and intent of the California Constitution. In essence, the Court reasoned, the State is shifting the actual costs of the mandates to local school districts, which is inconsistent with the fundamental principles of article XIII B, section 6, of not forcing local agencies to bear the State's costs.

However, the Court reversed the trial court's order for injunctive relief. Where a party seeks, via a writ of mandate, to compel another party to take certain actions in the future, such as complying with funding mandates, that party must first show that

it has no remedy at law. The Court determined that Government Code section 17612 provides the School Districts adequate remedy at law in that it allows districts to request a superior court in California to declare an unfunded mandate unenforceable for a year. The trial court had interpreted section 17612 to only allow such declaratory relief where the Legislature completely failed to fund a mandate, which would leave the School Districts without a remedy because the Legislature continued to nominally fund the mandates. However, the Court of Appeal overruled this interpretation and held that based on the intent of the statute, nominal funding does not prevent a school district from using section 17612 to seek relief.

The Court also determined that the trial court's order of injunctive relief improperly compelled the Legislature to commit a discretionary act, namely to include School District mandate items in the annual Budget Bill, and either fully fund these mandates or suspend them. Further, the Court held that ordering the Legislature to commit these discretionary acts would interfere with the exclusive powers of the Legislature.

Lastly, the Court held that the trial court correctly denied the School Districts' request for the State to reimburse $900 million in outstanding debt because such an order would violate the separation of powers doctrine. A court may not compel the Legislature to pay funds, except in the rare situation where appropriate funds already exist and are available for the specified purpose. The School Districts were unable to show that sufficient appropriated funds already existed to pay for these past mandated programs. Therefore, the Court refused to act in a budgetary or legislative role, and refused to compel the State to pay its outstanding debt to the School Districts.

California School Boards Assn. v. State of California (2011) --- Cal.App.4th --- [2011 WL 453247].

DISTRICT OF CHOICE

School Districts May Limit Number Of Out-Of-District Student Transfers To Ten Percent Of Average Daily Attendance For The Duration Of The District Of Choice Program.

Historically, students have been required to attend the school in which the residency of either their parents or legal guardians is located, subject to specified exceptions. In 1993, the "District of Choice" legislation was passed. The legislation authorizes the governing board of any school district "to admit pupils residing in another school district to attend any school in that district, as specified." The legislation requires each school district that elects to accept transfers to adopt a resolution establishing the number of transfers that will be accepted and to ensure that the pupils admitted are selected through a random, unbiased selection process. In addition, the bill authorizes districts of residence to limit the number of outbound transfer students each year.

In 2004, the District of Choice legislation was recodified in Education Code section 48300 et seq., in an article captioned "Pupil Attendance Alternatives." In a recent case, the Court of Appeal held that Education Code section 48307, subdivision (b), allows districts of residence to limit the number of out-of-district transfers to ten percent of the average daily attendance for the entire duration of the District of Choice Program.

The case arose when Rowland Unified School District (Rowland) filed suit to prevent Walnut Valley Unified School District (Walnut Valley) from enrolling any more students who reside within RUSD's boundaries. The two school districts were competing for students and for the funding those students would bring. Walnut Valley had declared itself a District of Choice and sought to process 590 applications from Rowland students. Rowland, however, argued that ten percent of its students had already transferred out of its district since the beginning of the District of Choice program and, therefore, it could refuse to allow additional students to transfer.

Section 48307, subdivision (b), states: "A school district of residence with an average daily attendance of less than 50,000 may limit the number of pupils transferring out to 3 percent of its current year estimated average daily attendance and may limit the maximum number of pupils transferring out for the duration of the program authorized by this article to 10 percent of the average daily attendance for that period." Therefore, section 48307, subdivision (b) establishes two caps: (1) A school district of residence may limit the number of outbound transfers "to 3 percent of its current year estimated average daily attendance..." and (2) A school district of residence "may limit the maximum number of pupils transferring out for the duration of the program authorized by this article to 10 percent of the average daily attendance for that period."

Accordingly, Rowland argued that, as a school district with an average daily attendance of less than

50,000, it was entitled to limit the total number of students transferring out of its district for the duration of the District of Choice program to 10 percent of the average daily attendance. Its average daily attendance from 1995 to 2009 was 17,527.60, meaning that it could limit the maximum number of students transferring out of its district to 1,752.60.

On the other hand, Walnut Valley argued that the 10 percent cap applied only to those students currently enrolled at Rowland. Ten percent of Rowland's average daily attendance for the year was 16,029, which according to Walnut Valley's argument, would place the ten-percent cap on Rowland at 1,602 students. Accordingly, because there were only 742 Rowland students enrolled in Walnut Valley that year, Walnut Valley argued it was entitled to enroll the additional 590 Rowland students.

The trial court found in favor of Rowland. The trial court ruled that Rowland had already met the ten percent cap provided in Education Code section 48307.

The Court of Appeal affirmed the trial court's ruling, holding that section 48307 provides that the ten percent cap applies cumulatively for the duration of the District of Choice program.

In ruling that Rowland had already met its cap, the Court held that under the plain language of the statute, the ten percent cap is based on Rowland's average daily attendance for the "duration of the program" - i.e., the entire duration of the District of Choice program. Further, Education Code section 48307 also allows a district to limit its out-of-district transfers to three percent of its current year estimated average daily attendance. The Court noted that if the ten percent cap applied to the current year's daily attendance, as Walnut Valley argued, this three percent cap would be superfluous.

The Court of Appeal also addressed, for the first time on appeal, the point at which the durational cap on student transfers out of district is calculated. Although Walnut Valley argued that the District of Choice program commenced in 2004, when it was recodified, the Court held that the program actually commenced in 1994, because the initial authorizing legislation was passed in 1993.

Walnut Valley Unified School Dist. v. Superior Court of Los Angeles County (2011) --- Cal.Rptr.3d --- [2011 WL 242427].

REDISTRICTING

Redistricting After The 2010 Census: School & Community College Districts.

The U.S. Census counts every resident in the United States. It is mandated by Article I, Section 2 of the Constitution and takes place every 10 years. In 2010, the U.S. held its decennial census. The data collected by the decennial census determines the number of seats each state has in the U.S. House of Representatives and is also used to distribute billions in federal funds to local communities. The census results provide information regarding the population and race of individuals residing within particular trustee areas of school and community college districts.

California's Education Code section 5019.5 requires redistricting by certain school and community college districts following each decennial federal census. These school districts and community college districts have until March 1, 2012 to comply. The California Voting Rights Act also imposes an ongoing requirement applicable to school districts and community college districts to avoid racially polarized voting. Districts may also be subject to certain redistricting provisions of the federal Voting Rights Act. Redistricting requirements are specific to each district.

If you have questions about redistricting requirements applicable to your district, you should consult with counsel.

■ STUDENTS

SPECIAL EDUCATION

School District Not Entitled To Award Of Attorneys' Fees Under IDEA Where Parents Sought Compensatory Education For Autistic Child And Did Not File Suit For An Improper Purpose.

C.P., an autistic child, enrolled in Prescott Unified School District in Arizona. When he started school in 2003, C.P. could not respond to his name, could barely speak, and ran away from adults. Three years later, he had made some progress, but still lacked significant motor skills and remained at a pre-school level of education. C.P.'s parents filed a complaint against the District, alleging it failed to provide C.P. with a free appropriate public educa-

tion (FAPE) in violation of the Individuals with Disabilities Education Act (IDEA).

The Administrative Law Judge ruled in favor of the District, and the parents appealed to district court, adding to their claim alleged violations of the ADA, section 504 of the Rehabilitation Act, and the Due Process Clause. The district court agreed with the District that it had provided C.P. a FAPE and, in ruling that the parents brought suit without foundation and for an improper purpose, awarded the District attorneys' fees of approximately $140,000. The parents appealed.

The Ninth Circuit Court of Appeals held that the District did not deprive C.P. of a FAPE and addressed each of the parents' claims in turn: (1) although the parents claimed the District failed to include an autism expert on C.P.'s IEP team, the IDEA does not require the team to include an expert; (2) the parents presented no evidence that the District did not tailor and revise C.P.'s IEP as required by the IDEA; (3) the parents presented no evidence that the methods selected by the IEP team were inappropriate; (4) despite the parents' allegations to the contrary, C.P.'s IEPs contained measurable annual goals; and (5) there was evidence, although not constant, of C.P.'s progress over the years.

With respect to attorneys' fees, the Court of Appeals reversed the district court's award to the District. A school district may recover attorneys' fees from an attorney if the attorney's complaint was frivolous, unreasonable, or without foundation. In addition, a school district may recover fees from parents or their attorney if the suit was brought for any improper purpose, such as to harass or cause unnecessary delay.

The Court held that the parents' complaint did not lack foundation because the parents sought an available remedy, namely compensatory education for C.P. Although the IDEA does not provide damages as a remedy, compensatory education is an appropriate form of equitable relief under the IDEA. Given that the parents presented plausible arguments, although ultimately unsuccessful, to obtain additional educational benefits for C.P., their complaint was not frivolous. Because the suit was not frivolous and the parents did not seek to harass the District, the Court also held, as a matter of law, that the parents did not file suit for an improper purpose. Accordingly, the Court reversed the district court's award of attorneys' fees to the District.

R.P. v. Prescott Unified School Dist. (9th Cir. 2011) --- F.3d --- [2011 WL 343966].

Special Education Student Was A Prevailing Party Under The IDEA Despite Rejecting District's Settlement Offer And Ultimately Receiving Less Relief Than Provided For In The Offer; But, Prevailing Party Only Entitled To Attorneys' Fees For Work Done Through Date Of Settlement Offer.

The El Paso Independent School District (EPISD) in Texas determined that G.G., a special education student in the District, was entitled to 60 minutes of speech therapy per week. During the 2004-05 and 2005-06 school years, however, he was deprived of 17.83 hours and 19.55 hours of speech therapy, respectively. Gary G., on behalf of G.G., raised his concerns to the District and met with the District to review G.G.'s IEP.

On September 12, 2006, the District offered, as a settlement, 56.5 hours of compensatory therapy. The offer did not include attorneys' fees. By September 12, Gary G.'s attorney had spent 13.8 hours working on this case. Gary G. rejected the District's offer and filed a complaint with the Texas Education Agency. A week later the District reaffirmed its settlement offer at a resolution meeting, but Gary G. and his attorney refused to accept the offer.

In November 2006, at a due process hearing, a hearing officer determined that EPISD must provide G.G. with only 19.55 hours of compensatory therapy, rather than the greater amount outlined in the settlement offer, because under state law his claims for the 2004-05 school year were time-barred. Gary G. filed suit in district court challenging the hearing officer's ruling and seeking attorneys' fees as the prevailing party.

The district court upheld the award of 19.55 hours of compensatory therapy and determined that Gary G. was the prevailing party because the relief ordered by the hearing officer materially changed the legal relationship between the District and Gary G. The district court found that Gary G. did not unreasonably protract the litigation, in that he was justified in rejecting the settlement offer, but reduced the attorneys' fees award ($44,572) because Gary G. was unsuccessful in his claim for relief for the 2004-05 school year. The District appealed.

The Court of Appeal addressed the issues of (1) whether Gary G. is a "prevailing party" for purposes of receiving attorneys' fees, even though he rejected a settlement offer and obtained less educa-

tional relief from the district court than offered by the settlement; and, if so, (2) whether Gary G. was justified in rejecting the District's offer because it did not include attorneys' fees.

Only a "prevailing party" is eligible to receive attorneys' fees under the Individuals with Disabilities Education Act (IDEA). The Court determined that Gary G. is a prevailing party because the hearing officer's order altered the legal relationship between the parties, in that it mandated the District to ensure G.G. receives a FAPE he had otherwise been denied. According to the Court, the fact that Gary G. ultimately received relief that was no more than what the District originally offered does not deprive him of his "prevailing party" status.

Accepting that Gary G. was a prevailing party, the Court next turned to whether Gary G. was entitled to attorneys' fees. In general, under the IDEA a prevailing party may not receive attorneys' fees for services provided after a settlement offer is made, as long as the offer is made more than ten days before the administrative proceeding, the offer is not accepted within ten days, and the ultimate relief received is not more favorable. However, a parent may receive an award of attorneys' fees where he or she was substantially justified in rejecting the settlement offer.

Here, the District made its offer more than ten days before the hearing and Gary G., in rejecting it, received less favorable relief. Further, Gary G. was not justified in rejecting the offer because the resulting agreement would have been enforceable in federal court and because at that point in time, Gary G.'s attorney had spent relatively few hours on the case. Had Gary G. paid the small amount of attorneys' fees at that time, the matter would not have continued for another three years. Accordingly, the Court upheld the district court's award of attorneys' fees for fees incurred through the September 12, 2006, the date of the settlement offer, but denied fees for all subsequent attorney work.

Gary G. v. El Paso Independent School Dist. (5th Cir. 2011) --- F.3d --- [2011 WL 285230].

WAIVERS

Injured Motocross Driver's Claims Of Ordinary Negligence Are Barred By Signed Release Despite Fact That Driver Did Not Read Release And Motocross Company Did Not Inform Driver That He Was Signing A Release At Time Of Signature.

On June 17, 2007, Jerid Rosencrans drove to the Starwest Motocross Track in his truck with his motorcycle in the truck's bed. He stopped his truck at the entrance booth, where an employee gave him a clipboard with a release document and asked Jerid to sign it. At the time, there were roughly ten cars waiting in line behind Jerid.

The document was entitled "Release and Waiver of Liability Assumption of Risk and Indemnity Agreement" and contained nine paragraphs that set forth the waiver and release. Underneath the paragraphs were multiple horizontal lines for a patron to print and sign his or her name and next to the signature lines contained the statement, "I have read this release." Within approximately 10 seconds after the employee handed him the clipboard, Jerid printed and signed his name.

While on the track, Jerid fell while attempting to jump his motorcycle from a ramp. Jerid's fall occurred near a platform where "caution flaggers," or employees who are responsible for waiving caution flags after a motorcyclist has fallen in case other motorcyclists are not able to view the injured motorcyclist, are positioned. Although Jerid was not hurt from the fall, he was struck approximately 30 seconds later by another motorcyclist, and then struck again roughly 20 seconds after the first strike. Although Jerid's accident occurred near a platform, the caution flagger was not on the platform at the time of his injuries.

Jerid and his wife sued Starwest for ordinary and gross negligence, negligent training and supervision and loss of consortium. Starwest moved for summary judgment, which is a request that the court rule in one party's favor based on certain facts without proceeding to a trial. Starwest argued that Jerid's claims were barred by his signed release. The trial court agreed and granted summary judgment in Starwest's favor. Jerid and his wife appealed.

Jerid argued that the release was unenforceable because the Starwest employee represented the document as a sign-in sheet, the release was written in

small font, the employee never informed Jerid he was signing a release, Jerid did not know he was signing a release, the title of the document was obscured by the metal clip of the clipboard, Starwest did not give Jerid a copy of the release, and there was insufficient time for Jerid to read the release while stopped at the entrance booth. Specifically, Jerid asserted that the release was void because of the legal principle of "fraud in the execution," meaning that the promisor to a contract was deceived as to the nature of his act and did not know what he was signing or did not intend to enter into a contract at all, thus rendering the contract void.

The Court of Appeal explained that a contract will not be considered void if the plaintiff had a reasonable opportunity to discover its true terms. Here, the Court noted that Jerid was able to read English and had attended college. The Court further noted that Jerid was given the opportunity to read the release before signing it. Although Jerid was in his truck and there were roughly 10 cars waiting in line behind him, Jerid could have read the release while waiting in line or could have pulled his truck over to read the document. There was no evidence to suggest that Jerid was forced to sign the release or that he was denied the opportunity to read it. As such, the Court held that the release was enforceable and that Jerid had waived his right to sue Starwest for ordinary negligence as well as negligent hiring and supervision.

With regard to Jerid's gross negligence claim, the Court explained that gross negligence claims cannot be released. Thus, the Court was required to independently analyze whether Jerid's gross negligence claim could proceed. To establish such a claim, a plaintiff must establish the traditional elements of a negligence claim, namely, duty, breach, causation and damages. However, in a gross negligence claim, the plaintiff must further allege extreme conduct by the defendant.

Here, the Court determined that a jury could view Starwest's failure to post a caution flagger on the platform near Jerid's fall as an extreme departure from the ordinary standard of conduct. Moreover, a jury could further conclude that had a caution flagger been posted, Jerid's injuries could have been avoided. As such, a triable issue of fact remained and the Court could not grant summary judgment on this cause of action. Jerid was thus permitted to pursue his claim for gross negligence against Starwest.

Rosencrans v. Dover Images, Ltd. (2011) --- Cal.Rptr.3d --- [2011 WL 523364].

NOTE:

Although this case concerns a motocross company, the legal principles surrounding releases and waivers apply equally to public school waiver forms, such as those used for student field trips. To be enforceable, the waiver given by a parent or legal guardian must be knowing and voluntary. Thus a waiver form must include all of the known risks inherent in the activity or trip in order for the waiver to effectively bar future claims against the District. For this reason, waiver forms should be tailored to specific activities or trips and include all of the necessary information so that the signing parties are sufficiently informed.

■ CERTIFICATED EMPLOYEES

TEMPORARY EMPLOYEES

School District Does Not Have Mandatory Duty To Classify Employee Serving In Limited Capacity As High School Baseball Coach As Probationary Employee.

In 2002, the Manhattan Beach Unified School District hired Michael Neily, a certificated teacher, to coach high school baseball. Starting in January 2003, the District employed Neily as a full-time teacher as well as a baseball coach. In June 2004, however, the District relieved Neily of his teaching duties, but continued to employ him as a baseball coach. In June 2009, the District advised him of its intent to terminate his employment altogether.

Shortly thereafter Neily tried to initiate a grievance against the District, but learned that the District considered him to be a temporary employee and therefore not a member of the Manhattan Beach Unified Teachers Association. Neily filed a petition for a writ of mandate in the trial court, arguing that the District had unlawfully classified him as a temporary employee and that the District must classify him as either a probationary or substitute employee. He also alleged that the District's notification of his termination on June 18, 2009 was untimely.

The trial court denied Neily's petition, determining that Education Code section 44919 classifies a baseball coach as a temporary employee and that, as a temporary employee, the District could notify him of his termination any time up until the end of

the school year, which according to the Education Code, is the last day of June. Neily appealed the trial court's ruling and the Court of Appeal affirmed.

There are four types of teacher classifications: permanent and probationary employees, who are employed for a school year; temporary employees, who are hired as needed because a regular employee has been granted a long-term leave of absence or is experiencing a long-term illness; and substitute employees, who are hired from day to day to fill the position of regular employee.

Neily argues that pursuant to Education Code section 44916 the District was required to provide him with a written statement indicating that it was classifying him as a temporary employee and that its failure to comply with this requirement entitled him to probationary status by default. The Court of Appeal disagreed with Neily, holding rather that where the Education Code expressly defines a certain position as temporary, the fact that a school district does not follow section 44916 does not invalidate the temporary status classification of the position. In this case, Education Code section 44919(b) expressly provides that employees "who are employed to serve in the limited assignment supervising athletic activities of pupils" are temporary employees. Because Neily served solely in a limited capacity as a baseball coach, the Court held that the District correctly classified him as a temporary employee.

Further, the Court held that the District provided Neily with proper notice of his termination. Education Code section 44954 requires a district to give notice to a temporary employee by the end of the school year, which, as defined in section 37200, is June 30. Therefore, the District's notice on June 18 was timely.

Neily v. Manhattan Beach Unified School Dist. (2011) --- Cal.Rptr.3d --- [192 Cal.App.4th 187].

BUSINESS AND FACILITIES

INVERSE CONDEMNATION

Public Entity May Only Be Sued For Inverse Condemnation When Its Occupancy Of Land Is Unlawful.

In *Cobb v. City of Stockton*, the California Court of Appeal held that claims for inverse condemnation do not accrue until there has been a wrongful occupation of the subject property. In this case, the City of Stockton filed an eminent domain action on October 23, 1998, to acquire property owned by a trust. On December 31, 1998, the court entered an order granting the City prejudgment possession of the property and the City subsequently built a public roadway over the property. Based on the City's failure to prosecute, the trial court dismissed the City's eminent domain action on October 9, 2007. Less than a year later, on March 14, 2008, the trustee of the property, Michael Cobb, sued the City for inverse condemnation. The City argued that Cobb's claim was barred by the five-year statute of limitations. The trial court agreed with the City and entered judgment in its favor.

Cobb appealed, challenging the trial court's dismissal of his inverse condemnation claim. The central inquiry on appeal was whether Cobb's cause of action accrued when the City took possession of the property or when the City's eminent domain action was dismissed. The City again argued that Cobb's claim accrued when the City took possession in 1998. Cobb argued that his action accrued when the City's possession became unlawful. Cobb claimed that the City's possession became unlawful in 2007 when the court dismissed its eminent domain proceeding.

The appellate court was critical of the trial court's logic, which would force property owners to file protective inverse condemnation claims every time a condemning authority took prejudgment possession of the property to protect against the possibility that the eminent domain proceeding would be dismissed at a later date. The court sought to avoid this inefficient outcome and reversed the trial court's decision.

The appellate court explained that a cause of action generally accrues upon the occurrence of the last element of a cause of action, i.e., when the aggrieved party is entitled to bring suit for their harm. The court noted that Cobb could sue for

inverse condemnation under a theory of trespass or adverse possession. However, Cobb could not have sued for trespass while the City's eminent domain proceeding was pending because the City's occupancy of the property was authorized by court order and trespass requires entry without permission. Likewise, Cobb could not sue for adverse possession while the eminent domain proceeding was pending because the City did not possess the property under a claim of right, an element required for a successful adverse possession or prescriptive easement claim. Because the court order granting the City possession of the property only gave a temporary right of occupancy, it was only after that temporary right expired that Cobb's claim accrued and the applicable statute of limitations began to run. Accordingly, the City's temporary right of possession expired when the eminent domain proceeding was dismissed in 2007. Because Cobb filed his inverse condemnation proceeding less than one year after the City's eminent domain action was dismissed, his action was timely and the trial court erred in entering judgment in the City's favor.

Cobb v. City of Stockton (2011) --- Cal.Rptr.3d --- [192 Cal.App.4th 65].

■ WAGE AND HOUR

FAIR LABOR STANDARDS ACT

City Must Include Sick, But Not Vacation Leave Buy Backs In The FLSA Regular Rate Of Pay; Employer Used Appropriate Method To Calculate FLSA Overtime.

The City of Albuquerque had similar collective bargaining agreements (CBAs) with its police officers, fire fighters, transit workers, clerical and technical employees. The CBAs generally provided overtime compensation for work beyond an employee's normal daily, weekly schedule, and on holidays, which was more generous than the FLSA requires. The City counted paid leave time towards the CBA overtime threshold, but not towards the FLSA overtime pay threshold. The City included straight time and add-on payments in an employee's FLSA regular rate, but did not include vacation or sick leave buy-back.

The City calculated an employee's wage under the FLSA and under the applicable CBA and then paid the employee the greater amount of the two. The City included straight time and add-on payments in an employee's FLSA regular rate, but did not include vacation or sick leave buy-back. To arrive at the regular rate of pay, the City multiplied the total hours worked by the straight time rate and then added the add-on payments. This sum was divided by the total number of hours worked, and the quotient was the hourly regular rate. FLSA wages were calculated by multiplying the hourly regular rate by total hours worked and then adding one-half the regular rate multiplied by overtime hours. The City did not count hours of paid leave towards the FLSA overtime threshold, but did count the paid leave towards the overtime threshold for CBA overtime, so that an employee did not receive FLSA overtime unless he or she actually worked more than forty hours in a week.

The employees brought a collective action against the City for several violations of the FLSA overtime pay requirements. The district court granted summary judgment and judgment at a bench trial to the City on all but one claim. Both parties appealed. The Tenth Circuit Court of Appeals reversed, in part, holding that the City should have included sick-leave buy backs in the regular rate of pay, but not the vacation-leave buy backs, but affirmed on the other claims.

The Court agreed with the U.S. Department of Labor and the Eighth Circuit and held that sick-leave buy backs were akin to "attendance bonuses" and should be included in the regular rate of pay, while vacation leave buy-backs should not. The U.S. Department of Labor has stated that "attendance bonuses" should be included in the regular rate of pay because they are intended to induce an employee to work more steadily, more efficiently or more rapidly. Pay for not taking sick leave induces an employee to avoid unscheduled absences and not to abuse sick leave. As a result, it must be included in the FLSA regular rate.

FLSA-required overtime applies only to "hours worked" and not to paid leave time. Thus, the Court held that the City was not required to pay FLSA overtime for paid leave, even though paid leave is considered "hours worked" for purposes of contractual overtime in the CBA.

The Court further held that the City used the proper divisor to calculate the employee's regular rate of pay for FLSA purposes. The City first totaled the workweek's straight time pay and add-ons. The City then divided this sum by the hours actually worked by the employee. As a result, the value of the add-ons decreased as an employee worked more over-

time. However, the City was not required under the FLSA to divide the weekly compensation by the CBA's "normal workweek."

Finally, the Court held that the City's use of a one-half multiplier, rather than one and one-half, did not violate the FLSA because the City first applied the regular rate to all hours worked. The FLSA does not require that the employee receive the regular rate for all hours worked and the regular rate and one-half for overtime hours.

Chavez v. City of Albuquerque (10th Cir. 2011) --- F.3d --- [2010 WL 108708].

Note:

This case establishes a majority view (along with the 8th Circuit and the Department of Labor) that sick leave buy-back is included in the regular rate of pay. While the 9th Circuit Court of Appeals has not ruled on either sick or vacation leave buy-backs, it is likely the 9th Circuit would side with the majority view on both issues. This case also contains an excellent discussion of the proper method for calculating the regular rate of pay. The case specifically validates the approach whereby an employer divides total non-overtime compensation by all hours actually worked in the workweek (instead of scheduled hours) to determine the regular rate.

Payroll Processing Company Was Not A "Joint Employer" And Not Liable For Unpaid Wages.

Reactor Films produced television commercials for different companies on location throughout Los Angeles County. John Futrell and other persons were either off-duty or retired police officers who Reactor hired to provide traffic and crowd control services. Reactor contracted with Payday California, Inc. to provide payroll processing services for Reactor. Payday required Futrell to submit an IRS W-4 and employment eligibility verification forms, issued Futrell a W-4 at the end of the year stating that Payday was the "employer," and issued payroll checks to Futrell with Payday as the payer. Payday also paid workers' compensation and unemployment insurance on behalf of Reactor's employees.

In 2006, Futrell commenced a class action against Reactor and Payday on behalf of himself and others who provided traffic and crowd control services. The class action alleged various violations of the California Labor Code and the Fair Labor Standards Act (FLSA) for unpaid overtime wages. Futrell alleged that he was only paid at 1.5 times his hourly wage for all overtime hours, and that several of his overtime hours should have been paid at the double-time rate.

Payday claimed it was not Futrell or other class members' "employer" for purposes of unpaid overtime wages. The trial court granted Payday's motion for summary adjudication and Futrell appealed. The Court of Appeal affirmed.

In actions to recover unpaid wages under California law, the applicable Industrial Wage Order defines the employment relationship and those who may be held liable for unpaid wages. Several of those Wage Orders, including the one applicable in this case, defines employment to mean: (a) to exercise control over the wages, hours, or working conditions; or (b) to suffer or permit to work; or (c) to engage, thereby creating a common law employment relationship. The FLSA defines "employer" as any person or entity acting directly or indirectly in the interest of an employer in relation to an employee. In FLSA cases, courts apply an "economic realities test" and consider "the totality of circumstances," including whether the alleged employer had the authority to hire and fire the employee, whether the alleged employer supervised and controlled the employee's work schedules and the conditions of his or her employment, and whether the alleged employer determined the rate and method of payment and maintained employment records.

As a matter of first impression, the Court held that an entity does not have "control over wages" for purposes of California law unless that entity has the power or authority to negotiate and set an employee's rate of pay; it is not enough that the entity is involved in preparing the paycheck. There was no evidence that Payday had control over when Futrell worked, where he worked, nor did it hire Futrell. There was no employment relationship because Futrell did not perform services for the benefit of Payday, nor were his services an integral part of Payday's operations. Payroll documents passed between Futrell and Payday did not establish an employer-employee relationship under California law.

The Court further held that Payday was not an employer under the FLSA. Under the FLSA "economic realities test," the predominant factor is control. Payday prepared paychecks on behalf of

Reactor Films; Payday did not control Futrell's hours or scope of work, nor did it have the power to hire or fire Futrell.

Futrell v. Payday California, Inc. (2010) 190 Cal.App.4th 1419 [119 Cal.Rptr.3d 513], rehg. den., rev. filed.

■ EMPLOYMENT

SEXUAL HARASSMENT

Defense Verdict Overturned Because Employer Was Aware Employee Was Sexually Harassed But Took No Preventative Action.

Joyce Turman was a resident monitor at a halfway house in Salinas, California from 1999 to 2004. The halfway house was owned and operated by Turning Point of Central California wherein federal and state prisoners were housed to transition them into the workforce and society prior to their full release on parole. Residents were subject to strict regulations and regular drug testing.

Turman's job duties included conducting urinalysis drug testing of residents and citing residents for disciplinary violations. Turning Point had a policy that only female employees may drug test female residents; and male employees, male residents. Turman wrote up residents for various violations such as intoxication, profanity, disrespect and fighting. Residents would frequently complain to Turman's supervisor, who would side with the residents and reverse the citations.

While Turman was at work, male residents would also proposition her for sex, make sexual gestures in front of her, and refer to her with sexual slurs. Turman complained to her supervisor who told her that the residents did not mean it, that she should try to be nicer to the residents, and should not issue the residents so many citations.

Turman originally worked the overnight shift which allowed her to work a second job during the daytime. In 2003, Turman's shift changed and Turman complained because it conflicted with her second day job. Turman was later terminated as part of a reduction in staffing.

Turman sued Turning Point for gender discrimination in violation of the Fair Employment and Housing Act (FEHA) based on disparate treatment and for hostile work environment based on resident abuse. The jury decided that although Turman was subjected to severe and pervasive sexual harassment, Turning Point did not fail to take all corrective measures to prevent the harassment. Judgment was entered in favor of Turning Point. Turman appealed, claiming that the Turning Point failed to take any preventative measures. The Court of Appeals agreed with Turman.

Under FEHA, employers may be liable if non-employees sexually harass an employee, and the employer knows or should have know of the conduct and fails to take immediate and appropriate corrective action. The jury found that the halfway house residents sexually harassed Turman and that Turman's supervisors were aware of the hostile work environment. However, there was no evidence that Turman's supervisor or Turning Point took any corrective actions. Turning Point's only defense at trial was that harassment by prisoners was inherently part of the job. This, however, did not absolve Turning Point of its legal responsibility under FEHA to take immediate and appropriate action to alleviate the abuse. As a result, the jury's finding in the special verdict was not supported by substantial evidence, and the judgment was reversed.

Turman v. Turning Point of Central California (2010) 191 Cal.App.4th 53 [119 Cal.Rptr.3d 166], rehg. den. & rev. filed.

PREGNANCY HARASSMENT / RETALIATION / PRIVACY

Employer's Comments About The Change In Timing And Length Of Maternity Leave Were Not Unlawful; Employee Had No Privilege In Communications To Her Attorney Over Company's Email.

Gina Holmes was hired by Petrovich Development Company in June, 2004 as an executive assistant to an owner of the company, Petrovich. The Company's policy on Company e-mail, internet and computer use was included in the employee handbook that Holmes signed. The policy stated that employees were prohibited from sending or receiving personal e-mails, that employees who use the Company's resources to create or maintain a personal message had no right of privacy with respect to that message, that others may be able to read or access the employee's emails, and that the Company may inspect all files or messages at any time for any reason.

The month after she was hired, Holmes told Petrovich she was pregnant, that her child was due on December 7, that she planned to work up until her due date and would then be out on maternity leave for six weeks. The following month, in response to Petrovich's e-mail about staffing assignments while Holmes was on leave, she then stated she would begin a maternity leave of up to four months on November 15.

Petrovich e-mailed Holmes stating that Holmes had not been honest when she previously stated she was only taking six weeks off. Petrovich stated that this was an extreme hardship on his small business, that he knew she had rights under the law and that he had no intention of violating those laws. Holmes explained her reasoning and stated that she did not know if she could continue working for him. Petrovich forwarded Holmes' e-mail exchange to the Company's co-owner, the two employees who handled human resources functions, and the Company's in-house counsel. Petrovich then e-mailed Holmes that he wished she would not resign and would like her to stay on. Holmes responded that they would move forward in a positive direction. Holmes later learned that Petrovich had forwarded her previous e-mail to others in the Company and became upset.

Holmes sent an e-mail to her friend who was an attorney to ask for a referral to an employment attorney. She said that her employment was unbearable, and that she did not want to quit, but that she did not know how to make the situation better. The next day, Holmes e-mailed Petrovich saying that she had been upset since his very first e-mail to her and that she felt she had no alternative but to quit.

Holmes sued the Company for sexual harassment, retaliation, violation of the right to privacy and other causes of action. The trial court granted the Company's motion for summary judgment as to Holmes' causes of action for sexual harassment, retaliation, and constructive discharge. At the jury trial, Holmes said her emails to her attorney could not be used in evidence because they were attorney-client privileged communications. The trial court found no privilege or that the privilege was waived and admitted them into evidence. The jury returned a verdict in the Company's favor. Holmes then lost her appeal.

To prevail on a claim of hostile work environment sexual harassment based on pregnancy, an employee must prove that she was the recipient of conduct or comments that were (1) unwelcome, (2) because of her pregnancy or a condition related to pregnancy, and (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment. The conduct must be both subjectively and objectively severe or pervasive.

During the two months that Holmes worked for the Company, there was no severe or pervasive pattern of harassment. Petrovich's e-mails to Holmes, in context, showed nothing more than that Petrovich made some critical comments due to the stress of being a small business owner who must accommodate a pregnant woman's right to maternity leave. He recognized Holmes' legal rights, stated he would honor them, that he was not asking for her resignation, that he wished she would stay, and that they would make it work. While Holmes subjectively felt the comments were offensive, a reasonable person in Holmes' position would not have found them so offensive as to create a hostile working environment.

In order to prove a claim of constructive discharge, the employee must show that her working conditions were so extraordinary and egregious that no diligent and reasonable employee would remain on the job. If an employee fails to demonstrate the severe or pervasive harassment necessary to support a hostile work environment claim, it will be impossible for him or her to meet this higher standard for constructive discharge. Holmes failed to prove a hostile work environment and thus, her constructive discharge claim failed.

To support a claim of retaliation, an employee must show (1) that he or she exercised protected rights; (2) that the employer took an adverse employment action against the employee; and (3) that the employer took that adverse action because of the employee's exercise of protected rights. Holmes did use her protected rights when she notified her employer she was taking maternity leave, but she failed to show that the Company took an adverse employment action because of her notification. Petrovich did not reduce her salary, benefits or work hours, nor did he or the Company terminate her. Petrovich only forwarded her e-mail to those persons in the Company who needed to know that Holmes had changed the anticipated date of her pregnancy leave and that she might be quitting.

The California Evidence Code provides that a privileged and confidential communication between an attorney and client is information transmitted between the two in the course of that relationship and in a confidential manner. A communication does not lose its privilege if it is communicated by electronic means or because the persons involved in

the delivery or storage of electronic communication may have access to the content of the communication. However, a client may waive the privilege if he or she discloses a significant part of the communication or has consented to disclosure by her words or conduct.

The Court held that Holmes' email to her attorney was not privileged because Holmes used the Company's e-mail account after being warned that it was to be used only for Company business¸ that e-mails were not private, and that the Company would randomly and periodically monitor its technology resources to ensure compliance with the policy.

Holmes v. Petrovich Development Co., LLC (2011) 191 Cal.App.4th 1047 [119 Cal.Rptr.3d 878].

SEXUAL ORIENTATION HARASSMENT / RETALIATION

Employee Who Was Fired Two Days After Complaining About Harassment Based On Sexual Orientation Could Pursue Retaliation Claim.

Shane Dawson was an employee of Entek International in Oregon. Some of Dawson's co-workers were aware that Dawson was homosexual. Over several weeks Dawson's co-workers and a lead trainer made slurs and other offensive comments based on his sexual orientation. Dawson would ask his co-workers to stop, but they would only stop for a couple of days. Dawson's lead trainer would often hear the comments, but made no attempts to stop them.

Dawson took a day off from work in response to the stress from his negative work environment. Dawson called the general number and asked the person who answered to let his supervisor know that he was taking the day off. Entek recorded the day as a "no-show/no-call day" because Entek's procedure required employees to report their absence to a supervisor. The next day, Dawson told a human resources employee that he wanted to make a complaint of harassment based on his sexual orientation. Dawson also identified the alleged harassers. Two days later, he was terminated, allegedly for his failure to call a supervisor before missing work. When Dawson tried to explain why he missed work and about his complaint of harassment, his supervisor told him he was being terminated for his attendance and that they would "deal with the other situation."

Dawson sued for sexual harassment and retaliation under Title VII, among other causes of action. The trial court granted summary judgment in favor of Entek and Dawson appealed. The Ninth Circuit Court of Appeals reversed as to the claim of retaliation.

To prove retaliation under Title VII, an employee must show that he engaged in a protected activity, he was subsequently subjected to an adverse employment action, and that a causal link existed between the two. The employer must then show that the challenged action was taken for legitimate non-retaliatory reasons. If the employer does so, the employee then has to show the employer's stated reason was a pretext for retaliation.

Dawson engaged in protected activity when he visited human resources to discuss his treatment and file a complaint. The fact that he was terminated less than 48 hours after his complaint, coupled with the discussion of the reasons for his missing work and his harassment complaint at the time of his termination, indicated a retaliatory motive.

Dawson v. Entek International (9th Cir. 2011) 630 F.3d 928.

PRIVACY

Employer Had A Legitimate Business Need For Information About Prior Drug Abuse For Background Checks.

The National Aeronautics and Space Administration ("NASA" or "Government") is an independent federal agency which has a workforce consisting of both federal civil servants and contract employees who are employed by Government contractors. The Jet Propulsion Laboratory ("JPL"), a NASA facility, is staffed exclusively by contract employees. In 2007, 28 JPL employees objected to mandatory background checks on the grounds that some of the inquiries violated their constitutional right to "informational privacy." The employees objected to a form questionnaire that asked them about treatment or counseling for recent illegal drug use. They also objected to a form which was sent to their designated references that asked "open-ended" questions about the applicant's "suitability for government employment and security," "honestly and trustworthiness," "financial integrity" and "mental and emotional stability." At the time they were hired, background checks were only required for federal civil servants. Since then, contract employees with long-term access to federal facilities were required to

complete background checks. JPL said that anyone failing to complete the background check would face termination.

Employees of JPL sued NASA for violation of their constitutional right to informational privacy. They sought to enjoin NASA's background checks. The district court declined to issue a preliminary injunction. The Ninth Circuit Court of Appeals reversed, and found that the background forms were likely unconstitutional. NASA appealed and the U.S. Supreme Court reversed.

The Supreme Court avoided a longstanding constitutional question by declining to address whether the right to "informational privacy" actually exists under the Constitution. The Court simply assumed that the background checks implicated a Constitutional right, and held that the challenged background forms do not violate the right to "informational privacy." The Court found that the Government had the right to conduct the background checks because of its interest as an employer and proprietor in managing its internal operations. The Court further stated that reasonable investigations of applicants and employees aid the Government in ensuring the security of its facilities and in employing a competent workforce. The Court emphasized that a government employer need not demonstrate that questions asked in background checks are the least restrictive means of obtaining the information, as long as the questions are job-related.

The Court found that the Government's stated purpose in asking the drug treatment and counseling questions-to identify mitigating factors for employees who had used illegal drugs-was reasonable and "humane." The Court also found that it was reasonable to ask references "broad, open-ended questions about job suitability" to identify strong candidates. The Court stated that the widespread use of these questions for employment purposes in the public and private sector further demonstrated their reasonableness. Finally, the Court noted that any private information gathered in the background checks was protected in most instances from disclosure to third parties without the written consent of the employees.

National Aeronautics and Space Admin. (NASA) v. Nelson (2011) 131 S.Ct. 746.

Note:

The decision does not examine California law or the Americans With Disabilities Act. Moreover, it was decided in the context of work connected with space exploration. Public employers are still limited by other laws (and in California by the state constitution), however, from asking private questions. In particular, questions about drug counseling and treatment are still prohibited under the ADA and FEHA prior to a conditional offer of employment, as those laws protect recovering and recovered drug addicts who no longer use drugs from discrimination. Thus, public employers should continue to limit their hiring and background check processes to applicants and to ensure that the scope of the inquiry is designed to only determine if the applicant can perform the essential duties of the job and would be a competent employee.

FREE SPEECH

Probation Unit Manager Could Be Sued For Coercing An Independent Contractor To Terminate An Employee Who Testified As An Expert Witness.

Richard Clairmont was a Program Manager for Sound Mental Health (SMH), a private company which provided treatment to criminal defendants. Defendants paid SMH directly. However, unlike other treatment providers, SMH had a contract with the Municipal Court which provided SMH with equipment and office space. SMH agreed to attend meetings with the Probation Unit as needed. SMH was considered an "independent contractor."

Clairmont was subpoenaed to testify as an expert witness in a hearing on behalf of a criminal defendant who was enrolled in another provider's treatment program. The issue was whether the provider unfairly terminated the defendant's treatment. The Probation Unit sought to invoke jail time and other sanctions against the defendant. Clairmont testified concerning when it might be appropriate to terminate a treatment program. A Probation Unit staff member heard the testimony and told Joni Wilson, Manager of Probation Services.

Wilson contacted Clairmont's supervisor at SMH regarding Clairmont's testimony and two weeks later Clairmont was terminated. SMH advised Clairmont that the Probation Unit had lost trust in the integrity of SMH's program and had no choice but to terminate Clairmont. Clairmont filed suit against SMH and Wilson under 42 U.S.C. § 1983 alleging he was terminated in violation of his First Amendment right to Free Speech. The trial court granted Wilson's motion for summary judgment

finding Wilson was entitled to qualified immunity from suit. Clairmont appealed and the Ninth Circuit Court of Appeals reversed.

A public official generally cannot be sued, on qualified immunity grounds, based on his or her actions in the performance of his or her official governmental duties. An exception to qualified immunity is if the official's conduct violated a constitutional right and that right would have been clearly established to the public official in light of the specific context of the case.

The Court first considered whether Clairmont was a public employee as opposed to a private citizen because the test for determining whether Clairmont's right to Free Speech was violated would vary depending on his employment status. If a public employee is at issue, a court will find a violation of Free Speech only when: (1) the employee spoke on a matter of public concern as a private citizen, rather than as a public employee; (2) the speech was a substantial or motivating factor in an adverse employment action; (3) the employer did not have an adequate justification for treating the employee differently from other members of the general public; and (4) the employer cannot show that it would have taken the same adverse action absent the protected speech.

The Court applied the public employee test because of the nature of the relationship between the Municipal Court and SMH, the nature of the services SMH provided, and Clairmont's role in providing the services. These factors made Clairmont's relationship with the Municipal Court analogous to that of an employer and employee.

The Court found that Clairmont spoke on a matter of public concern regarding the treatment of a criminal defendant. Clairmont did not speak as part of his official duties since he was subpoenaed to testify in a case in which he did not have any personal or professional involvement. The facts appeared to indicate that Clairmont was fired because of Wilson's comments to his supervisor about Clairmont's subpoenaed testimony. There was a lack of evidence that Clairmont's speech caused disruption to the workplace or interfered with working relationships, or that Wilson had an adequate justification for pressuring SMH to terminate Clairmont. Clairmont's deposition testimony and emails among staff suggested that it was only after Clairmont's testimony and Wilson's subsequent threats, that SMH decided to terminate him. Thus, there were triable issues as to whether SMH would have terminated Clairmont for other reasons unrelated to his speech.

The Court held that case law would have alerted a reasonable person in Wilson's position that it would be unlawful to retaliate against an employee for having testified in a criminal proceeding pursuant to a subpoena. As a result, Clairmont's First Amendment rights were clearly established at the time of his alleged retaliatory firing. Accordingly, Wilson could be sued and was not entitled to qualified immunity.

Clairmont v. Sound Mental Health (9th Cir. 2011) --- F.3d --- [2011WL 149371].

■ HEALTHCARE BENEFITS

CALPERS MEDICAL

CalPERS Issues Circular Letter Discussing Implementation Of The Patient Protection And Affordable Care Act As To Discontinuing Health Care Coverage Due To An Employee's Reduction In Working Hours.

The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Affordability Reconciliation Act of 2010 prohibits, in part, rescission of health care coverage due to an employee's reduction in working hours. A "rescission" occurs where the cancellation or discontinuance of health coverage has a retroactive effect. Thus, health care coverage may only be cancelled or discontinued prospectively. This is effective as of January 1, 2011.

To ensure compliance with this new federal requirement, CalPERS has implemented changes to its Automated Communications Exchange System (ACES) that is intended to prevent employers enrolled in CalPERS medical (also known as the Public Employees' Medical and Hospital Care Act or PEMHCA) from discontinuing health care coverage retroactively due to a reduction in an employee's working hours. The Circular Letter provides instructions for cancelling or discontinuing health coverage due to a reduction in working hours through ACES. This does not affect current procedures on retroactive cancellations for changes that take place in the employee's life, such as death of a family member.

CalPERS Circular Letter No. 600-067-10 (Dec. 22, 2010).

LABOR RELATIONS

BARGAINING

Employer Did Not Violate EERA When It Deducted From Employees' Paychecks The Amount Of A Health Benefits Premium Increase During Negotiations Because CBA's Language Setting Out Employer's Specific Contribution Amount Created Status Quo.

The Sonoma County Office of Education (SCOE) and a local SEIU chapter were parties to a collective bargaining agreement (CBA) that was effective through June 30, 2009. The health insurance provision of the CBA stated in part, "[F]or the 2008-09 fiscal year, SCOE will contribute towards health benefits for full time employees at 100% of the cost of Kaiser High Option at the 2008-2009 rate at each of the enrollment levels . . . ." The parties were negotiating a successor agreement when this CBA expired. During negotiations, SEIU proposed that SCOE pay 100% of the health benefits cost, while SCOE proposed only contributing at the 2008-09 rates. While negotiations continued, Kaiser raised its rates effective October 1, 2009. After the rate increase, SCOE deducted from employees' paychecks the health insurance premium above the 2008-09 rates.

SEIU filed an unfair practice charge with PERB, alleging that SCOE made an unlawful unilateral change when it deducted the premium increase from employees' paychecks. It claimed that the status quo at the time that the CBA expired was for SCOE to pay 100 percent of the cost of employees' health benefits.

An employer's unilateral change in terms and conditions of employment violates its duty to bargain in good faith when: (1) the employer breaches or alters the parties' agreement or past practice, (2) the employer did not give the other party notice or an opportunity to bargain over the change, (3) the change amounts to a change in policy, and (4) the change concerns a matter within the scope of representation. When a CBA expires, the employer must maintain the status quo that the expired agreement created pending completion of negotiations.

In this case, the Board found that SCOE's deduction of the increase in premiums from employees' paychecks was not an unlawful unilateral change because the CBA established the 2008-2009 health insurance premium rate as status quo. The Board based its finding on the plain language of the CBA, as well as the fact that SEIU presented no evidence of a bargaining history or past practice that would suggest a different interpretation. In addition, the Board distinguished the language of this CBA, which set out a specific contribution amount for particular years, from contracts where an employer obligates itself to provide a certain level of benefits.

Sonoma County Office of Ed. (2011) PERB Dec. No. 2160-E [35 PERC --].

ARBITRATION

Employee Cannot Arbitrate Grievance If Alleged Wrong Occurred After Expiration Of MOU.

An expired MOU between the County and the Union contained a grievance arbitration process. After the expiration of the MOU, Hitchcock was terminated and sought to invoke arbitration under the grievance process contained in the expired MOU. The County denied the request.

Hitchcock filed an unfair practice charge with PERB alleging the County interfered with his protected rights and retaliated against him for engaging in protected conduct (serving as Union president). The Board agent dismissed the charge. Hitchcock appealed to the PERB and the PERB adopted the Board agent's dismissal.

An arbitration clause in a collective bargaining agreement expires with the agreement except for disputes that: (1) involve facts and occurrences that arose before the expiration of the MOU; (2) involve post-expiration conduct that infringes on rights accrued or vested under the agreement; or (3) survive the expiration of the agreement under normal principles of contract interpretation.

It did not matter that Hitchcock's protected conduct, that is, serving as Union president, occurred during the life of the MOU. Hitchcock's termination, grievance filing, arbitration request and arbitration denial all occurred after the expiration of the MOU. Thus, because none of the alleged conduct occurred before the expiration of the agreement, Hitchcock did not have a right to arbitrate.

County of Orange (2011) PERB Dec. No. 2155-M [35 PERC --].

EMPLOYEE REPRESENTATION

Union Did Not Breach Its Duty Of Fair Representation By Declining To Continue To Pursue Disciplinary Grievance On Behalf Of Employee.

The City demoted Eric Gallardo, a public works maintenance worker, for using his cell phone while working during a traffic flagging assignment. Gallardo filed a grievance alleging the discipline was excessive as compared to the punishments other employees received for similar types of misconduct. Gallardo's superintendent met with Gallardo and a Union steward to discuss the grievance. Gallardo allegedly felt threatened and intimidated by some of the superintendent's comments. Gallardo later requested the Union steward to provide a written statement verifying the superintendent's statements. The Union steward refused, stating he did not view the comments as threatening.

Gallardo contacted the Union's business representative to request that the steward be required to provide a written statement. The Union's business representative met with Gallardo's Department Director. The Union's business representative later notified Gallardo and informed him that the Union decided not to pursue Gallardo's grievance because Gallardo's demotion appeared to be for just cause, and because Gallardo's actions showed a lack of regard for the safety of his co-workers.

Gallardo then contacted the Union's staff attorney who also refused to direct the Union steward to prepare a written statement. The Union's staff attorney agreed with the business representative's resolution of Gallardo's grievance. Gallardo filed an unfair practice charge with PERB alleging the Union breached its duty of fair representation. The Board agent dismissed and Gallardo appealed. The PERB affirmed the dismissal.

The Myers-Milias-Brown Act does not expressly impose a statutory duty of fair representation upon employee organizations. The courts have held that unions do owe a duty of fair representation to their members, and this duty requires unions to refrain from representing their members arbitrarily, discriminatorily, or in bad faith. The duty of fair representation extends to grievance handling.

The PERB agreed that Gallardo failed to state a *prima facie* case because he failed to allege facts which would show that the Union's conduct was arbitrary, discriminatory or in bad faith. The PERB noted that mere negligence or poor judgment in the handling of a grievance does not constitute a breach of the Union's duty of fair representation. The unfair practice charge did not demonstrate that the Union's decision was without a rational basis, was arbitrary or was based on invidious discrimination.

International Brotherhood of Electrical Workers, Local 1245 (2010) PERB Dec. No. 2146-M [35 PERC 9].

■ RETIREMENT

GOVERNMENTAL PLANS

Retirement Plans Offered By Public Employer, But Marketed By Public Employees' Union, Were Not Subject To ERISA.

The National Education Association (NEA) is a nationwide public employee labor union. The NEA provides its members insurance coverage, discounts, and other services many of which were provided through NEA's Member Benefits Corporation (NEAMBC). The NEA, through NEAMBC, worked with Nationwide Life Insurance Company and later with Security Benefit Life Insurance Company to offer the NEA "Valuebuilder Plan" to its members. The Plan was purported to be a Section 403(b) retirement plan which included the option for members to enroll in a "Valuebuilder annuity" maintained by either Nationwide or Security Benefit. NEA negotiated the terms of the Valuebuilder annuities, exclusively endorsed the Valuebuilder annuities as favorable retirement savings vehicles, and aggressively marketed the Valuebuilder annuities to NEA members. In exchange, Nationwide and Security Benefit paid royalties and annual fees to NEA amounting to approximately $2 million per year, took on the salaries of 110 NEAMBC representatives, and contributed to NEA charitable foundations.

The NEA did not fully disclose to its members the nature or amount of the payments it received from Nationwide and Security Benefit. Instead, NEA marketed the Valuebuilder annuities as the most favorable retirement option for its members, despite the fact that they charged fees that were as much as ten times those charged on comparable annuity contracts. NEA members' public school district employers offered 403(b) retirement plans which included NEA's Valuebuilder annuities. NEA members chose the Valuebuilder annuities instead of other annuities made available by their employers.

Members of NEA and employees of local public school districts who enrolled in the Valuebuilder annuities sued the NEA, NEAMBC, Security Benefit, and Nationwide for breach of their fiduciary responsibilities in violation of ERISA. The Defendants moved to dismiss the lawsuit for failure to state a cause of action. The district court granted the motion and Plaintiffs appealed. The Ninth Circuit Court of Appeals affirmed.

ERISA was enacted to protect the interests of participants in employee benefit plans and their beneficiaries. ERISA generally applies to any employee benefit plan, including retirement plans, if it is established and maintained by any employer or by an employee organization or by both. However, there are several exceptions. For example, "governmental plans" are exempted from ERISA. A "governmental plan" is a plan established or maintained for its employees by the government of the United States or any state, or any political subdivision thereof. Section 403(b) plans provide employees of public schools, churches, and non-profit organizations with the ability to make pre-tax contributions toward the purchase of annuities through salary-reduction agreements. Section 403(b) plans are a type of retirement plan. However, in order to obtain preferential tax treatment, the employer must decide upon the selected annuities for its employees.

The Court held that the school districts' various section 403(b) defined contribution plans were employee pension benefit plans, but were not "established or maintained" by NEA, NEAMBC, Security Benefit or Nationwide. The section 403(b) plans were established and maintained by the public school districts, regardless of whether or not the districts made contributions towards those plans on behalf of its employees. As such, they are "governmental plans" exempt from coverage under ERISA.

Daniels-Hall v. National Education Association (9th Cir. 2010) 629 F.3d 992.

CALPERS GOLDEN HANDSHAKES

CalPERS Limits Window Periods For Golden Handshakes During 2011 In Order To Allow CalPERS To Implement The "My|CalPERS" System For Employers.

CalPERS has been in the planning and implementation stages of switching CalPERS employers to CalPERS' new reporting system, known as "my|CalPERS" and away from the previous system employers used for reporting data to CalPERS. This switch is anticipated to take place in the Fall of 2011.

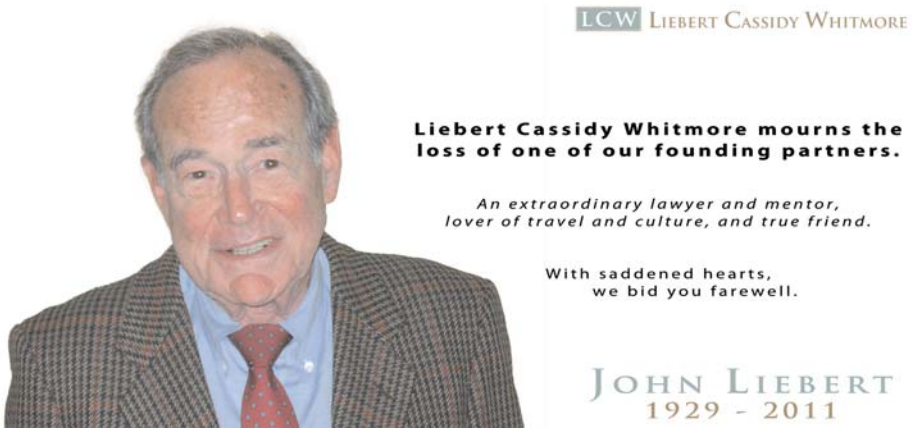
In the meantime, CalPERS will suspend or stop certain business process changes when the migration occurs. Among those are two pre-implementation activities that may impact agencies before the actual conversion period.

The first affects employers who intend to implement a CalPERS statutory "Golden Handshake," which allows employers to provide an incentive of up to two years of service credit to eligible employees who choose to retire by a date specified. Employers who implement a window period of 180 days for employees to elect the Golden Handshake must have opened the window period by December 30, 2010 and must close it by June 30, 2011. For employers who implement a window period of 90 days, those window periods must be open by March 30, 2011 and close by June 30, 2011. Resolutions of governing boards to implement a CalPERS Golden Handshake that are submitted to CalPERS after June 30, 2011 will be held until after the "my|CalPERS" system is implemented.

Second, requests for bulk forms and publications will not be accepted by fax, telephone, or U.S. mail after January 1, 2011. All requests must be made by e-mail to Public_Agency_Requests@calpers.ca.gov.

CalPERS Circular Letter No. 200-075-10 (Dec. 22, 2010).

§



John Liebert, pre-eminent public sector labor relations attorney and founding member of Liebert Cassidy Whitmore passed away on Monday, February 7, 2011. He was 81.

John emigrated as a boy from Nazi Germany, living in Holland when Hitler struck, and navigating to New York on ships that were attacked by German U-Boats. He entered with thousands of refugees through Ellis Island with his mother and two brothers, to start a whole new life in America. John grew up in New York City and earned his Bachelor's degree from the University of California, Berkeley and his Juris Doctorate from the Hastings School of Law, University of California, San Francisco.

John built his outstanding reputation in public sector labor relations by successfully representing hundreds of public agencies - including cities and counties, schools, colleges and special districts - throughout California, Arizona, and Nevada. He negotiated hundreds of labor agreements; his expertise encompassed the full sweep of public sector labor and employment law. John is also known for pioneering and establishing labor and employment training programs throughout the state of California.

John began his legal career with the City of Sacramento, first serving as a Deputy City Attorney, then as Assistant City Manager and finally as Labor Relations Counsel. He left Sacramento to join Paterson & Taggert, where he met Dan Cassidy. Together, along with four other attorneys, John and Dan formed our firm in 1980 and grew it into California's leading public management labor, employment, and education law firm with over 70 attorneys in four offices. John served as the firm's first Managing Partner before turning the reins over to Melanie Poturica upon his transition to part-time retirement in 1995.

During the course of his career, John served as a spokesperson for the League of California Cities, National Public Employer Labor Relations Association, and the California State Association of Counties, testifying before legislative committees and federal and state executives on topics ranging from application of the Fair Labor Standards Act to, and extension of the jurisdiction of the Public Employment Relations Board over local agencies. He was recognized by both the National and California Public Employer Labor Relations Associations with their highest awards of excellence.

John was an accomplished writer and lauded speaker. He made hundreds of presentations on a wide variety of employment and labor topics to many professional organizations throughout the country, and thousands of public sector managers continue to benefit from his development of our firm's Employment Relations Consortiums

John has remained very active in the firm, providing mentoring to our attorneys and serving as the sole editor of our monthly *Client Update* newsletter since its inception 30 years ago.

John was preceded in death by his wife, Marijke and son, Doug. He is survived by son Drew, daughter Deb, son in law Chuck, daughters in law Heidi and Barbara, 9 grandchildren, 2 great grandchildren and hundreds of colleagues, friends and mentees who will forever be in his debt and collectively strive to honor his legacy.

The family requests that any remembrances be made to the American Diabetes Association.

LCW Announces New San Diego Office

Los Angeles, CA, January 31, 2011…Liebert Cassidy Whitmore, a leading California employment law firm has announced the firm has opened a San Diego office. **Judith Islas** and **Frances Rogers**, well known members of the San Diego legal community, will run the new office.

Scott Tiedemann, Firmwide Managing Partner announced the firm's continued growth in California saying, "Opening an office in San Diego was a logical step for our firm. We have many clients in San Diego, Imperial, and Orange Counties to whom we can provide even better service from our San Diego office. Also, Judith and Frances live in San Diego and provide us with a solid foundation for success. We are very excited to start our 31st year in business by establishing a local presence in San Diego."

Judith Islas has more than 20 years practicing in labor, education and employment law. Ms. Islas has an extensive background in all types of employment litigation at the trial and appellate levels, in both state and federal courts, including discrimination, harassment, discipline and wrongful termination, and other employment based claims on behalf of public entities including cities, counties, special districts, school districts and universities, as well as on behalf of independent schools, and some private employers. Ms. Islas also represents employers, in various administrative proceedings, including in disciplinary proceedings and contractual disputes before arbitrators, boards, and commissions, discrimination complaints before the DFEH, EEOC, and wage and hour disputes before the Division of Labor Standards Enforcement.

Frances Rogers provides representation and legal counsel to clients in all matters pertaining to labor, employment and education law. Ms. Rogers has extensive litigation, arbitration, and administrative hearing related experience, including deposition and discovery, settlement, court proceedings and advocacy before State and local administrative officers and tribunals. Ms. Rogers is experienced in conducting and assisting with investigations pertaining to harassment, discrimination, internal affairs and other employee misconduct. Ms. Rogers also advises public agencies on retirement issues, including local safety disability retirement and compliance with other state and federal employment laws. In 2009 and 2010, Ms. Rogers was chosen as a Northern California Rising Star in the field of Employment & Labor Law.

Liebert Cassidy Whitmore's office is located at:

501 W. Broadway, Suite 800
San Diego, CA 92101
main: 619.400.4955
fax: 619.400.4956

Congratulations

Southern California SuperLawyers® 2011 Published

(Left to Right) Melanie Poturica, Brian Walter and John Liebert

Liebert Cassidy Whitmore Congratulates Our Los Angeles Attorneys

Melanie Poturica, Brian Walter and John Liebert

Selected for inclusion in *Southern California Super Lawyers* 2011

We congratulate **Melanie Poturica**, **Brian Walter** and **John Liebert** for being recognized for their work in Employment and Labor Law.

We're pleased that their peers have recognized them for this honor and congratulate them on their efforts on behalf of our clients.

Melanie Poturica has been with Liebert Cassidy Whitmore since the firm's inception in 1980. She has been its Managing Partner since 1995, but as of October 2010 has transitioned back to full-time law practice.

Brian Walter represents clients in all aspects of employment and labor law, including counseling on employment and labor relations matters, labor negotiations, training and presentations, employee discipline matters, administrative hearings, investigations and litigation.

John Liebert received this award prior to his passing on February 7, 2011 in recognition of of his status as a pre-eminent public sector labor relations attorney. John represented hundreds of public agencies - including cities and counties, schools, colleges and special districts - throughout California, Arizona, and Nevada.

**Super Lawyers® are based on ballots mailed to attorneys in California asking them to vote for best lawyers they had personally observed in action. Nominees then are put through a selection process including peer review and credential fact checking. "Rising Stars" must be under the age of 40 or in practice less than 10 years.*

Congratulations to LA Associate **Danielle Eanet.** She and her husband Matthew welcomed the arrival their daughter Alexis Rachel Eanet on January 10, 2011. We wish Danielle, Matthew and baby Alexis much happiness!

Annual Public Sector Employment Law Conference

We invite you to join us for the **Annual Liebert Cassidy Whitmore Public Sector Employment Law Conference** on March 17 and 18 at the Newport Beach Marriott Hotel & Spa. The conference is geared towards Public Agency Management and includes a variety of informative and entertaining presentations that offer practical lessons for success in the workplace, including an Education Track. **Participants receive a comprehensive reference guide with all conference materials.** The "Ask The Expert" booth will be back again this year and will be staffed continuously by attorneys near the conference table.

Highlighted Sessions

- Early Retirement Incentives for Community Colleges and K-12 Districts: If, When...and How
- You Be the Judge: Truth is Stranger Than Fiction!
- Law Enforcement on Campus -- Are You Making the Grade?
- You're Not the Person I Hired! Unearthing an Applicant's Past Before It Buries You
- Health Care Reform: Dispelling the Myths, Preparing for the Realities
- Town Hall -- Free Speech or Costly Mistake?

Visit lcwlegal.com/lcw-conference for more information

We hope you can join us!

Celebrating 30 Years

Online registration is available at www.lcwlegal.com/lcw-conference.

§

Firm Publications

Mark Meyerhoff and **Frances Rogers** co-authored the article, "Ethics, Conflicts of Interests, and California Law" which appeared in the January//February 2011 issue of CSDA Magazine The complete article can be read online at http://lcwlegal.com/lcw-attorney-authored-articles or search for the keywords, "Ethics, Conflicts of Interest."

Mark Meyerhoff and **Alex Wong** of our Los Angeles office co-authored the article, "Your Rights Under FERPA," which appeared in the January 2011 issue of Campus Safety Magazine The complete article can be read online at http://lcwlegal.com/lcw-attorney-authored-articles or search for the keywords, "FERPA, Campus Safety."

To view archive articles, please go to: http://lcwlegal.com/lcw-attorney-authored-articles?archive=1

Train the Trainer Seminars

Teach Mandatory Harassment Training
Become a Certified AB 1825 Trainer

Los Angeles, San Francisco, Fresno, and San Diego
March 29, 2011

Time: **9:00 a.m. - 4:00 p.m.**
Location: **Liebert Cassidy Whitmore Offices**
Cost: **$1,500 each or $1,350 each if ERC Member**

A key component of Government Code Section 12950.1 (AB 1825), compliance is the provision of presenting harassment training to all supervisory employees every two years and to new supervisors within 6 months of their assumption of a supervisory position.

Liebert Cassidy Whitmore is offering **"Train the Trainer"** sessions to provide you with the necessary tools to conduct mandatory AB 1825 training for your agency.

You are eligible to attend LCW's Train the Trainer session if you meet any of the following:

1. "Attorneys" serving as in-house counsel, admitted for two or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964, or

2. "Human resource professionals" or "harassment prevention consultants" working as employees with a minimum of two or more years of practical experience in one or more of the following; a) designing or conducting discrimination, retaliation and sexual harassment prevention training; b) responding to sexual harassment complaints or other discrimination complaints; c) conducting investigations of sexual harassment complaints; or d) advising employers or employees regarding discrimination, retaliation and sexual harassment prevention, or

3. "Professors or instructors" in law schools, colleges or universities who have a post-graduate degree or California teaching credential and either 20 instruction hours or two or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964.

Attendees Receive:

- 6 hours of instruction to be completed in one day
- Facilitator Guide, PowerPoint slides and case studies (on disc and hard copy) complete with detailed speakers' notes for use in future presentations
- Participant Guide for distribution in their future presentations
- Legal updates, where warranted, through 2012, including updated slides and facilitator/participant guides
- Certificate of Attendance for "Train the Trainer session"
- Ability for 5 employees from their own agency to attend the pre-scheduled workshop

Registration:

Visit www.lcwlegal.com/lcw-seminars for more information and to register online. Please contact Anna Sanzone-Ortiz at ASanzone-Ortiz@lcwlegal.com or (310) 981-2051 for more information on how to bring this training to your agency.

Management Training Workshops

Firm *Activities*

Consortium Workshop Training

February 10	**"Current Developments in Workers Compensation"** Los Angeles County Human Resources Consortium | Los Angeles | Doug Bray
February 10	**"Legal Issues for Negotiators"** and **"Advanced FLSA"** San Diego ERC | San Marcos | Peter Brown
February 11	**"Adjunct Faculty"** Central CA CCD ERC | Webinar | Mary Dowell
February 16	**"The Meaning of At-Will, Part-Time and Contract Employment"** and **"The ABCs of Sustaining Discipline"** Napa/Solano/Yolo ERC | Vacaville | Jack Hughes
February 16	**"Supervisory Skills for the First Line Supervisor/Manager"** Sonoma/Marin ERC | Rohnert Park | Kelly Tuffo
February 17	**"Leaves, Leaves & More Leaves"** Orange County Human Resources Consortium | San Clemente | Laura Kalty
February 17	**"A Supervisor's Employment Relations Primer"** Imperial Valley ERC | Imperial | Donna Evans
February 23	**"Advanced Labor Negotiations Roundtable"** and **"Legal Issues for Negotiators"** North State ERC | Red Bluff | Jack Hughes
February 23	**"Public Sector Employment Law Update"** and **"The ABCs of Sustaining Discipline"** Ventura/Santa Barbara ERC | Santa Barbara | Laura Kalty
February 23	**"Ethics in Public Service"** Humboldt County ERC | Eureka | Morin I. Jacob
February 23	**"Finding the Facts: Disciplinary and Harassment Investigations"** and **"Employee Due Process Rights and 'Skelly': A Guide to Implementing Public Employee Discipline"** Monterey Bay ERC | Watsonville | Todd Simonson
February 24	**"Public Sector Employment Law Update"** Gold Country ERC | Webinar | Laura Kalty
February 24	**"Prevention and Control of Absenteeism and Abuse of Leave"** Humboldt County ERC | Fortuna | Morin I. Jacob
March 1	**"Human Resources Academy"** Bay Area Jewish Schools Consortium | Foster City | Morin Jacob
March 2	**"Introduction to Public Service"** and **"Public Sector Employment Law Update"** Bay Area ERC | Sunnyvale | Richard Bolanos
March 2	**"Issues and Challenges Regarding Drugs and Alcohol in the Workplace"** South Bay ERC | Torrance | Donna Evans
March 2	**"Exercising Your Management Rights"** South Bay ERC | Torrance | Mark Meyerhoff
March 2	**"Employees and Driving"** San Mateo County ERC | Webinar | Jack Hughes

March 2	**"FLSA: New Developments and Hot Topics"** and **"Performance Management: Evaluation, Documentation and Discipline"** NorCal ERC | Concord | Cepideh Roufougar
March 3	**"Super Manager or Super Spy: The Use of Technology in Monitoring Employee Conduct"** Gateway Public ERC | Lynwood | Pilar Morin
March 4	**"Public Works Construction Project: From Bidding to Completion"** Central Coast Personnel Council (CCPC) Consortium | Santa Barbara | Chris Fallon
March 4	**"The ABCs of Sustaining Discipline"** and **"Exercising Your Management Rights"** Northern CA CCD ERC | Sacramento | Donna Williamson
March 4	**"Managing Performance through Evaluation"** Southern California Community College Districts ERC | Mission Viejo | Mary Dowell
March 4	**"Embracing Diversity/Creating a Culture of Respect"** CCPC Consortium | Santa Barbara | Donna Evans
March 9	**"The ABCs of Discipline"** and **"Emerging Legal Issues for Private Schools"** Bureau of Jewish Education Consortium | Los Angeles | Melanie Poturica
March 9	**"Advanced Retirement Issues for California's Public Employers"** and **"Labor and Employment Relations Issues During Lean Economic Times"** San Gabriel Valley ERC | Alhambra | Steve Berliner
March 10	**"The ABCs of Sustaining Discipline"** and **"Principles for Public Safety Employment"** Central Valley ERC | Kerman | Scott Tiedemann & Jesse Maddox
March 10	**"Issues and Challenges Regarding Drugs and Alcohol in the Workplace"** and **"The ABCs of Sustaining Discipline"** San Joaquin Valley ERC | Tracy | Jack Hughes
March 10	**"Managing the Marginal Employee"** LA County Management Attorneys Consortium | Los Angeles | Donna Evans
March 11	**"Student Health, Safety and Discipline"** Central CA CCD ERC | Webinar | Laura Schulkind
March 23	**"A No Holes Barred Approach to Employee Body Piercing, Tattoos and Dress Codes"** and **"Annual Audit of Your Personnel Rules"** Ventura/Santa Barbara ERC | Santa Barbara | Michael Blacher
March 24	**"Super Manager or Super Spy: The Use of Technology in Monitoring Employee Conduct"** and **"Performance Management: Evaluation, Documentation and Discipline"** West Inland Empire ERC | Ontario | Pilar Morin
March 24	**"The ABCs of Sustaining Discipline"** and **"Principles for Public Safety Employment"** North State ERC | Chico | Todd Simonson
March 24	**"The Meaning of At-Will, Part-Time & Contract Employment"** Orange County Human Resources Consortium | San Clemente | Mark Meyerhoff
March 29	**"Managing Employee Injuries, Disability and Occupational Safety"** North San Diego County ERC | Oceanside | Doug Bray
March 30	**"Super Manager or Super Spy: The Use of Technology in Monitoring Employee Conduct"** and **"Embracing Diversity"** Central Coast ERC | San Luis Obispo | Pilar Morin

<u>Customized Training Presentations</u>

February 10	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Oxnard | Donna Evans

February 11	**"Preventing Workplace Harassment, Discrimination and Retaliation"** Contra Costa County | Martinez | Cynthia O'Neill
February 14	**"The ABC's of Sustaining Discipline"** City of Richmond | Jack Hughes
February 16	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Westminster | Laura Kalty
February 16	**"Public Sector Employment Law Update"** County of Los Angeles | Los Angeles | Melanie Poturica
February 16	**"Mitigating Employment Liability Risks for Law Enforcement"** Employment Risk Management Authority | Walnut Creek | Scott Tiedemann
February 18	**"Preventing Workplace Harassment, Discrimination and Retaliation"** Housing Authority of the County of Merced | Merced | Gage Dungy
February 18	**"El Toro Water District Managing Performance Through Evaluation"** El Toro Water District | Lake Forest | Donna Evans
February 22	**"FMLA"** Eastern Municipal Water District | Perris | Donna Evans
February 23	**"Performance Management & Finding the Facts: Disciplinary and Harassment Investigations"** Superior Court of California, County of Lake | Lakeport | Kelly Tuffo
February 25	**"Generational Diversity"** Foothill-De Anza Community College District | Los Altos Hills | Laura Schulkind
February 28	**"Student Discipline"** UC Berkeley Principal Leadership Institute | Berkeley | Laura Schulkind
March 1	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Westminster | Laura Kalty
March 3	**"EEO Training"** Merced Community College District | Merced | Eileen O'Hare Anderson
March 3	**"Collective Bargaining"** Buellton School District | Santa Ynez | Mary Dowell
March 3	**"Skelly Training"** City of Riverside | Scott Tiedemann
March 4	**"Ethics in Public Service"** Marin County Housing Authority | San Rafael | Jack Hughes
March 4	**"Supervisory Skills for the First Line Supervisor/Manager"** Allan Hancock College | Santa Maria | Mark Meyerhoff
March 9	**"Skelly Training"** City of Riverside | Scott Tiedemann
March 10, 11	**"Prevention and Control of Absenteeism and Abuse of Leave"** and **"Super Manager or Super Spy"** City of Beverly Hills | Mark Meyerhoff
March 14	**"Safety"** UC Berkeley Principal Leadership Institute | Berkeley | Laura Schulkind
March 14	**"Public Sector Employment Law Update"** City of Richmond | Jack Hughes
March 16	**"Preventing Workplace Harassment, Discrimination and Retaliation"** and **"Ethics in Public Service"** Three Valleys Municipal Water District | Claremont | Laura Kalty

March 22	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Simi Valley | Donna Evans
March 24	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Santa Barbara | Donna Evans
March 24	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Glendale | Laura Kalty
March 28	**"Harassment"** UC Berkeley Principal Leadership Institute | Berkeley | Laura Schulkind
March 29	**"Harassment Prevention: Train the Trainer"** Liebert Cassidy Whitmore | Los Angeles | Laura Kalty
March 29	**"Harassment Prevention: Train the Trainer"** Liebert Cassidy Whitmore | San Francisco | Suzanne Solomon
March 29	**"Harassment Prevention: Train the Trainer"** Liebert Cassidy Whitmore | Fresno | Shelline Bennett
March 29	**"Harassment Prevention: Train the Trainer"** Liebert Cassidy Whitmore | San Diego | Judith Islas
March 30	**"Legal Update"** Redwood Empire Municipal Insurance Fund | San Francisco | Cynthia O'Neill

Speaking Engagements

February 17	**"Legal Update"** Southern California Labor Relations Council (SCLRC) | Lakewood | Scott Tiedemann
February 17	**"Closing the Deal"** SCLRC | Lakewood | Richard Kreisler
February 18	**"What You Need To Know About Local Government Law"** Special District Institute (SDI) | Anaheim | Mark Meyerhoff
February 18	**"Dollars and Sense! Attracting, Retaining and Compensating"** SDI | Anaheim | Donna Evans
February 21	**"Town Hall - Reflecting, Question, and Planning Together"** National Business Officers Association (NBOA) Symposium | Washington DC | Michael Blacher
February 22	**"Tough as Nails: Ironclad Enrollment Agreements"** NBOA Symposium | Washington DC | Donna Williamson
February 22	**"Advanced Retirement Issues for California's Public Employers"** California Society of Municipal Finance Officer (CSMFO) | Burlingame | Cepideh Roufougar
February 22	**"My Disability Made Me Do It! Employee Discipline and the Interactive Process"** NBOA Symposium | Washington DC | Michael Blacher
February 22	**"Advanced Retirement Issues"** CSMFO | Burlingame | Cepideh Roufougar
February 23	**"The Great Balancing Act"** Association of California Community College Administrators (ACCCA) | Long Beach | Laura Schulkind & Joung Yim
February 23	**"The Top 5 Things You Need to Know About Being an Effective Labor Negotiator During These Challenging Times"** CSMFO | Burlingame | Peter Brown

February 23	**"Advanced Wage and Hours Issues for Independent Schools"** NBOA Symposium | Washington DC | Donna Williamson
February 23	**"Ethics"** CSMFO | Burlingame | Cepideh Roufougar
February 24	**"Crisis Management: How to Approach Chaos in an Organized and Thoughtful Manner"** National Association of Independent Schools (NAIS) Annual Conference | National Harbor | Michael Blacher
February 24	**"Mentee "Class of 2010" Graduation & Legal Eagles Panel"** ACCCA | Mary Dowell, Eileen O'Hare Anderson, Laura Schulkind, Frances Rogers, Chris Fallon
February 24	**"Student and Employee Disability Discrimination and Accommodation"** NAIS Annual Conference | National Harbor, MD | Melanie Poturica
February 24	**"Solidarity Forever: Administrators Joining Unions - What Does and Doesn't it Mean?"** ACCCA | Long Beach | Mary Dowell & Sue Erhlich
February 24	**"Speech We Love to Hate: Harassment Policies Clashing With Free Speech -Where are We Now?"** ACCCA | Long Beach | Mary Dowell & Camille Goulet
February 25	**"Employee Privacy and Investigations in an Online World"** NAIS Annual Conference | Washington DC | Donna Williamson
February 25	**"Going Global: Lessons Being Learned"** NAIS Annual Conference | National Harbor, MD | Melanie Poturica
February 25	**"Town Hall: You've Got Questions, We've Got Answers"** NAIS Annual Conference | National Harbor, MD | Michael Blacher
March 10	**"Substance Abuse"** County Counsel's Assoc. of CA Employment Law Spring 2011 Study Section Conference | Seaside | Cynthia O'Neill
March 10	**"Legislative and Case Law Update"** County Counsel's Assoc. of CA Employment Law Spring 2011 Study Section Conference | Seaside | Cynthia O'Neill
March 10	**"Retirement Issues"** County Counsel's Assoc. of CA Employment Law Spring 2011 Study Section Conference | Seaside | Cepideh Roufougar
March 11	**"Elimination of Bias"** Disability Retirement Attorney Roundtable | Oakland | Cepideh Roufougar
March 17, 18	**"Liebert Cassidy Whitmore Public Sector Employment Law Conference"** Liebert Cassidy Whitmore | Newport Beach
March 18	**"Negotiations 101"** California Charter Schools Association | San Diego | Donna Williamson
March 21	**"FLSA Issues for Police and Fire"** National Public Employer Labor Relations Association (NPELRA) Conference | San Diego | Peter Brown
March 23	**"Top 20 things You Need to Know About Being a Negotiator"** NPELRA | San Diego | Donna Williamson
March 24	**"Absenteeism and Abuse of Leave"** NPELRA | San Diego | Frances Rogers

Liebert Cassidy Whitmore

6033 West Century Blvd., 5th Floor
Los Angeles, CA 90045

Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in *Education Matters* should not be acted on without professional advice. To contact us, please call (310) 981-2000, (559) 256-7800 or (415) 512-3000 or e-mail info@lcwlegal.com.