LCW Liebert Cassidy Whitmore

Private Education Matters

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

February 2019

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LCW NEWS

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STUDENTS

NEGLIGENCE/LIABILITY

School Potentially Liable Where Coach Oversaw Student Travel to Non-School Athletic Event.

T.M. was a high school student and cross-country athlete at The Blake School. He traveled to a regional meet with other team members and a volunteer coach. This meet was not part of the school's official calendar and occurred after the league's season had ended, so the coaches were not officially allowed to help the runners prepare. However, both the head coach and assistant did in fact help the team. The meet was posted on the team's official schedule and on the website. The assistant coach paid the team's participation fee. In order to comply with rules, the assistant coach arranged for a volunteer coach to actually run the practices with the participants.

The team's coaches also helped coordinate lodging and travel arrangements and emailed parents about the logistics. T.M.'s mother replied that T.M. and others wanted to caravan down and they were fine with letting T.M. drive one of the cars despite the long distance drive. The assistant coach said that would be fine, and estimated they would be on the road approximately five hours. T.M. drove three people—two students and the volunteer coach. T.M.'s mother had stated in the email that he could legally drive passengers, but in reality, the law at that time limited him to driving only one passenger under the age of 20. All three of his passengers were under 20.

The volunteer coach sat in the backseat and noted that he was using his phone during the ride. T.M., possibly also distracted by his phone, swerved over the center divider and hit oncoming traffic. The other car's driver, Gary Fenrich, was killed and his wife was severely injured. The police interviewed the others and the assistant coach said, "why would [T.M.] even be driving that far…what are we doing with a 16 year old driving this distance?" Fenrich sued the school, the head coach, the assistant coach, and the volunteer coach for wrongful death, negligence per se, negligence, and negligent supervision against the school. The claims against the head and assistant coach were dismissed based on the statute of limitations. The school and volunteer coach moved for summary judgment, arguing they owed no duty to members of the public and T.M. was not acting as an agent of the school. The district court dismissed the claims and Fenrich appealed. The court of appeals affirmed, but on different grounds and again Fenrich appealed.

To bring a claim of negligence, Fenrich needed to show that there was a duty of care, a breach of the duty, and injury, and the breach was the cause of the injury. This case turned on the existence of a duty of care. In general, a person does not owe a duty of care to another if the harm is caused by a third party's conduct. There

are exceptions when there is a special relationship between the plaintiff and defendant and the harm is foreseeable, or when the defendant's own conduct creates a foreseeable risk of injury. Here, the school urged the court to hold that as a matter of law, a school never owes a duty of care to non-student third parties for injuries resulting from student conduct. The court declined to do so. The general exceptions should still apply.

Fenrich argued that a special relationship existed because the school stood *in loco parentis* to the student. The court disagreed, and while schools may have a duty of care to students, they do not have parental obligations. Alternatively, Fenrich argued a special relationship existed because the car was a "school bus." This too was not a successful argument, as the statutes defining school bus did not apply to the car T.M. was driving. Since there was no special relationship between the school and the Fenrichs, the court next examined whether the school's own conduct created a foreseeable risk to a foreseeable plaintiff.

The court analyzed the ways in which the school and its employees assumed supervision and control over the trip to Sioux Falls for the cross-country meet. The coaches paid the administrative fee, coordinated travel plans, encouraged runners to participate, visited the team's practices, and approved the plan to let T.M. drive. The assistant coach also assigned T.M. to drive with two students and a volunteer coach under the age of 20. Based on these facts, the court reasoned a fact finder could conclude the school's own conduct was at fault.

Next, the court considered the foreseeability of this risk. The court ultimately found that the question of whether T.M.'s driving created an objectively reasonable expectation of danger to the public was a close call and therefore should not have been dismissed on summary judgment. T.M. had a license, a good driving record, was following the other coach's vehicle and was driving only during daytime. On the other hand, he was only 16, had his license for only 6 months and was driving hundreds of miles with only other teenagers in the car. The possibility of a teenage driver being distracted by his phone is not remote or unlikely. The court here cited a California case on this point. The court of appeals' decision was reversed and summary judgment was denied.

Fenrich v. The Blake School, (2018) 920 N.W.2d 195.

NOTE:

This case raises several significant issues of liability that commonly occur in private schools. While this case was decided in Minnesota and not California, the legal issues would be the same in California. Schools need to be very clear with parents, students and employees about what events are school sponsored events and what events are not. Allowing communications about non-school sponsored events to occur through school email and other school communications creates potential legal liability for schools by confusing parents and others about what is school sponsored. The coaches' involvement in the planning and travel and preparation for this meet impacted the way the court assessed liability issues and created potential liability where it should not have existed. As an aside, students should never be assigned to drive other students or employees on any school business.

DISABILITY DISCRIMINATION

School District Settles with DOJ Over Use of Robot in Classroom.

Hudson Public School district is subject to Title II of the ADA, which governs public entities. Title III governs private entities like private and independent schools, and has similar obligations. A middle school student at Hudson suffered from an autoimmune disorder that led him to miss more than one-third of the school days between 2014 and 2017.

In 2015, Hudson was offered free use of a device that would allow the student to virtually attend class through the use of a robot, which would see, hear, and move around the classroom under the student's remote control. The robot had monitors and speakers that would allow the student to interact with teachers and fellow students. Hudson failed to take steps to determine whether this aid would be appropriate and to give primary consideration to the student's desire to use this auxiliary aid. The school did not demonstrate that the aid would fundamentally alter the nature of the program or cause an undue burden.

A new superintendent came in 2017, conducted this assessment, and allowed the use of the robot. It is currently being used successfully in conjunction with other accommodations. The school settled with the Department of Justice for failing, prior to 2017, to appropriately assess and consider the use of this

auxiliary aid to allow the student to attend school remotely.

For more information, **click here**.

ATHLETICS

New Law Affecting School Athletics Programs: Distribution of an Opioid Factsheet.

A new law went into effect on January 1, 2019, that impacts all private schools offering extracurricular athletic programs. The new law, SB 1109, provides that private schools must annually distribute a document issued by the Center for Disease Control titled: "Opioid Factsheet for Patients" to each athlete participating in an athletic program that takes place outside of the regular school day. The Factsheet that must be distributed is **available here**.

This new law requires that each athlete and his or her parent sign an acknowledgment of receipt that the athlete and his or her parent has received the Opioid Factsheet before the athlete may participate in practices or a competition. The Opioid Factsheet may be sent and returned through an electronic medium, including by fax or email.

Schools are also required on an annual basis to require each athlete and his or her parent sign a Concussion and Head Injury Information Sheet before the athlete initiates practice or competition. The Concussion and Head Injury Information Sheet recommended for schools by the California Interscholastic Federation **can be found here**.

We recommend that Schools distribute the Opioid Factsheet and the Concussion and Head Injury Information Sheet to athletes and their parents at the same time. We also recommend as a best practice that both parents be required to sign the acknowledgment form.

If you have any questions about this new law and the above described requirements, please reach out to an attorney at our firm.

EMPLOYEES

ARBITRATION AGREEMENTS

Arbitration Agreement's Confidentiality Clause Ruled Substantively Unconscionable.

Constance Ramos was hired as an "income partner" at a law firm in the intellectual property practice group. She holds a degree in physics and computer science and a doctorate in biophysics. She signed a Partnership Agreement, which contained an arbitration clause. The clause provided that each party shall bear its own legal fees and all aspects of the arbitration shall be maintained in strict confidence.

Ramos sought to integrate into her new firm and develop business, but she found the rest of the partnership unsupportive. Less than two years after joining the firm, she was instructed to stop working on billable matters and start looking for a new job. She was the highest billing partner of 2016 and obtained a large litigation victory, but received no bonus for 2016 and the compensation committee cut her salary by 33%. Her salary was cut again the next year and she was left out of planning meetings and left off cases. In July 2017, she resigned and filed a complaint of discrimination.

The firm moved to compel arbitration under the terms of the partnership agreement, arguing she was a partner and not an employee. Ramos argued her claims were outside the scope of the arbitration agreement because that agreement was limited to disputes about the Partnership Agreement. She claimed to be an employee for purposes of antidiscrimination protections under California law. The trial court granted the motion to compel arbitration and Ramos filed a writ of mandate, since orders to compel arbitration are not immediately appealable the way denials of those motions are appealable. The court noted that it would only grant writ review of orders compelling arbitration in unusual circumstances or exceptional situations. The court found it was appropriate to do so here.

The court analyzed the language of the arbitration clause and noted it stated that arbitration was required any "dispute or controversy of a Partner or Partners arising under or related to this Agreement... or the Partnership." The court held that Ramos's claims for discrimination, retaliation, and fair pay

did relate to the partnership and the Partnership Agreement. Therefore, the claims fell within the scope of the arbitration provision.

In analyzing the enforceability of the arbitration agreement, the court found that Ramos was an employee who lacked the requisite control to be an employer. Therefore, the agreement was subject to the requirements of *Armenderiz*, the California case pertaining to the enforceability of arbitration agreements. *Armenderiz* outlined certain requirements that must be met to preserve statutory rights like those under FEHA in an arbitral forum. These requirements include neutral arbitrators, no limitation of statutory remedies, sufficient discovery, a written arbitration decision, and employer-covered cost provision.

The agreement at issue here failed to meet all of these requirements. First, the agreement stated the arbitrator cannot override the decision of the partnership, but this would mean that the arbitrator could not decide Ramos was entitled to certain forms of relief denied her by the partnership. Second, the agreement requires the party to split costs. This is not permissible where Ramos is in the position of employee, as she is with respect to her claims of discrimination and retaliation. Furthermore, the clause requiring confidentiality precludes Ramos from engaging in discovery that could be helpful to her case. The confidentiality language in the agreement is very broad and covers "all aspects of the arbitration." Ramos would violate this clause if she attempted to informally contact or interview any witnesses outside the formal discovery process. The court went on to say that requiring discrimination cases be kept secret unreasonably favors the employer and discourages plaintiffs from filing claims. The confidentiality provisions rendered the agreement unconscionable.

The court went on to hold that the unconscionable aspects of the agreement could not be severed, as they permeated the entire agreement and severing them would require the court to re-write aspects of the agreement. The entire agreement was therefore void.

Ramos v. Superior Court of San Francisco County (2018) 28 Cal. App.5th 1042.

Arbitration Agreement Governs Who Decides Threshold Questions of Arbitrability.

Archer and White is a company that distributes dental equipment. It sued Henry Schein, Inc. over a business dispute, seeking both damages and injunctive relief. The contract between the two companies contained an arbitration provision, agreeing to be governed by the rules of the American Arbitration Association (AAA). Schein asked the court to refer the dispute to arbitration. White objected, arguing that a complaint seeking injunctive relief was not subject to arbitration. The question became: does the judge or an arbitrator decide whether the dispute was subject to arbitration?

Under the Federal Arbitration Act, arbitration is a matter of contract and courts must enforce contracts according to their terms. Some courts of appeal have decided that this threshold arbitrability question should be decided by the judge if the underlying argument for arbitration itself is "wholly groundless." Here the Supreme Court declared this "wholly groundless" exception is inconsistent with the FAA and with Supreme Court precedent.

If a contract between two parties designates questions of arbitrability to an arbitrator, then the court must uphold that provision of the contract. While it is true that the court initially decides if a valid arbitration agreement exists, once that is decided, the court must enforce it according to its lawful terms. The "wholly groundless" exception relies on the argument that it is a waste of time and resources to send the question to the arbitrator when the argument for arbitration is groundless. But here the Supreme Court noted that fair-minded people may decide differently, and it is for the arbitrator to decide if the terms of the agreement say so.

Henry Schein, Inc. v. Archer and White Sales, Inc. (2019) 139 S.Ct. 524.

WAGE AND HOUR

Employer Subject to Penalties Under PAGA Where Records Showed Employees Were Not Paid Penalties for Missed Meal Breaks.

Kileigh Carrington was a former Starbucks employee who filed a representative Private Attorney General Act claim for failure to provide meal period premium

payments for missed meal breaks. Carrington's time records showed she twice started her meal break after working more than five hours without receiving the premium payment during her five-month employment at Starbucks.

Carrington's primary witness at trial was a vice president of the company who testified that employees are required to record their time by clocking in and out, including meal breaks. Starbucks's policy states that in certain situations, a manager may decide not to pay the meal break period. This includes situations where the employee was scheduled to work no more than five hours but because the employee punched in or out "slightly" late, the break did not begin until just after the five-hour mark. In those cases, the managers were supposed to assess the circumstances and decide if the premium should be paid. If the employee clocked out three minutes late because she made herself a beverage before leaving, for example, the premium might not be paid.

Carrington testified that she always punched out immediately after being instructed to start her meal break. She also said she ended up working past her required shift "lots of times" at the request of her supervisor when the store was busy. The expert witnesses at trial analyzed Starbucks's data and found that over 8.3 million shifts, there were 133,000, or 1.6%, that lasted between five hours and one minute and five hours and 14minutues. Of these shifts, around 75% did not result in a meal period premium being paid to the employee who started their break late.

The trial court found Carrington did establish that she started her break late twice without receiving a meal period premium. But the court also noted that Starbucks's violations were minimal and it did have systems in place to try to comply with the law. Rather than imposing $50 per violation, the court imposed only $5. With approximately 30,000 violations in the PAGA class, the total penalty was only $150,000. Still, Starbucks appealed.

The court of appeal explained that employers have an obligation to provide a 30-minute, uninterrupted meal break for an employee who works a shift of more than 5 hours. The employer is not, however, obligated to police meal breaks and ensure that no employees are working. If the employer knows that an employee missed or was unduly delayed in taking the meal break because the employee was asked to work or otherwise impeded the break, then the employee must pay not only the time worked, but also a one-hour meal break premium.

Carrington produced evidence that she started her meal late on two occasions. She also produced evidence that she was asked to work beyond her shift many times. Furthermore, the violations were not so brief as to be considered *de minimus* under the law. Here the time records clearly showed the start and stop times, and managers were trained to talk to employees, and ask about the circumstances surrounding their time and then decide if the premium was required. The court rejected the argument that the *de minimus* doctrine should apply in such a scenario. Starbucks's policy resulted in numerous instances where employees worked more than five hours without a meal break and were not paid a premium.

The court did agree that the reduced penalty due to Starbucks's general good faith efforts was appropriate. The judgment was affirmed.

Carrington v. Starbucks Corporation (2018)—Cal. Rptr.3d—2018 WL 6695970.

NOTE:

Time keeping records are critical for defending against wage and hour claims, and those records must include meal break data. All non-exempt employees should be recording their time each day including all time worked and breaks so the time record is accurate. Under the law the burden is on the employer to prove the employee took the meal break at the appropriate time.

DISABILITY DISCRIMINATION

Privately-Owned Religious Hospital Waived Right to Bring Exemption Defense from ADA Claim.

Linda Reed was hospitalized at Columbia St. Mary's Hospital. Reed suffers from several disabilities, including tardive dyskinesia, bipolar disorder and PTSD. Reed uses a portable communication device called a Dynavox to help her generate speech. She entered the hospital reporting suicidal thoughts and stayed for four days. She alleged that the hospital denied her use of her Dynavox, withheld her medical records, and the staff attempted to give her medication she was allergic to, among other claims.

The most serious allegation was that she was put in a seclusion room and denied the use of her Dynavox. She attempted suicide in the room and discharged a day later.

Reed sued the hospital under Title III of the ADA, alleging discrimination and denial of reasonable modification. The hospital responded with several affirmative defenses, but did not assert a religious exemption from the ADA in its initial responsive documents. Title III, which governs private schools with respect to their students (not to their employees, which are governed by Title I), exempts from its requirements "religious organizations" and "entities controlled by religious organizations, including places of worship."

The district court ruled that the hospital did not waive or forfeit this defense by not asserting it initially and that Reed was not prejudiced by the hospital's failure to assert this defense earlier. The district court then found that the hospital was controlled by the Catholic Church and therefore it fell within Title III's religious exemption.

The Seventh Circuit disagreed and held that the defense should not have been considered at all because it was asserted too late. There was no excuse for failing to assert the defense earlier, and discovery had already closed by the time the hospital raised this defense, which did impact Reed's ability to gather relevant information. The district court's granting of summary judgment for the hospital was reversed.

Reed v. Columbia St. Mary's Hospital (2019) --F.3d. --, 2019 WL 494073.

NOTE:

Not every religious school or private college will be automatically exempt from Title III of the ADA. However, those that are exempt are not required under the ADA to accommodate students with disabilities. However, there are many other reasons why such schools do choose to accommodate students, including their own internal school policies. It is important to remember that Title I of the ADA, which applies to employees, does not have a religious exemption.

NON-SOLICITATION

Non-Solicitation Agreement Ruled Invalid.

John Barker brought a claim against his former employer alleging that his employment agreement was unlawful and he was denied rights under the employer's benefit plan. At issue in this motion was whether Insight Global's non-solicitation clause in the employment agreement was valid. Initially, the district court dismissed Barker's claims related to the non-solicitation clause, stating his allegations did not constitute a valid claim. Here the court allowed for reconsideration due to a change in the law.

After the initial claim was dismissed, the California Court of Appeal decided a case called *AMN Healthcare v. Aya Healthcare Services, Inc.* In that Case, the court held a non-solicitation clause invalid because it infringed on the former employee's ability to perform his next job as a recruiter. The court voided that provision as violating the Business & Professions Code. In doing so, the court set a new standard for analyzing this issue.

Here the court took the reasoning in *AMN* and held that California law is properly interpreted to invalidate employee non-solicitation provisions. This seems to be a broadening of the *AMN* decision because in *AMN* the employee was a recruiter whose actual job duties were to recruit candidates, making solicitation part of his ability to work. But, the court here found the *AMN* court's reasoning persuasive and granted Barker's motion for reconsideration on this point.

Barker v. Insight Global 2019 WL 176260.

NOTE:

This is the first case after AMN to address this issue in a context that did not involve recruitment as a job duty. It is possible that this matter could be appealed and the higher court will instead hold that AMN's ruling is limited. In the meantime, employers should be wary about including non-solicitation clauses in employment agreements or severance agreements. If an agreement does contain such language, the employer should make sure there is also a strong severability provision so that the clause can be removed if necessary by a court.

BUSINESS AND FACILITIES

BENEFITS

A New Tax To Nonprofits That Provide Parking Benefits to Employees Deadline of March 31, 2019 to Change "Employee-Only Parking" Designations.

This filing season some schools may be subject to new unrelated income business tax ("UBIT") on qualified transportation fringe benefits ("QTFB"), including qualified parking. An employer provides "qualified parking" if the employer owns, leases, pays for, or reimburses employees for parking.

Normally, tax-exempt nonprofit schools do not pay income taxes. An exception to this rule exists for income generated by a trade or business regularly carried, but unconnected to the charitable or educational purposes of the school. If more than $1,000 in unrelated business income is earned in a tax-year, the school must file Form 990-T and pay a tax on the income, called Unrelated Business Income Tax ("UBIT"). However, numerous exclusions and exemptions apply to UBIT and, accordingly, many schools have never filed Form 990-T or paid UBIT.

Remarkably, and confusingly, one of the things included in the 2017 Tax Cuts and Jobs Act was a new UBIT tax on the amount of QTFBs, including parking, provided by tax-exempt employers to their employees. The purpose of this new tax is to create parity between nonprofits and for-profit business, who lost the ability to deduct the value of QTFB's as a business expense. It's as confusing as it sounds! There is a new UBIT tax, normally assessed on business income, now being assessed on employee parking!

In response to the numerous questions about this confusing situation, the IRS recently issued **Notice 2018-99** and **Notice 2018-100**, to provide tax-exempt nonprofits some guidance.

Notice 2018-99 provides guidance on how to determine the amount of UBIT due for qualified parking.

Schools that Reimburse Employees or Pay a Third Party for Employee Parking:

Schools that reimburse employees or pay a third party for employee parking must use the total annual amount paid as the basis for calculating UBIT. If that amount exceeds the monthly limitation on the exclusion from deduction that applies to for-profits ($260 per employee per month in 2018, $265 for 2019), the excess amount is treated as employee compensation and excluded from UBIT.

Schools that Own or Lease All or a Portion of a Parking Facility

Schools that own or lease all or a portion of a parking facility for their employees' use, must determine what amount of those expenses are attributable to employee parking. A parking facility includes a parking lot, indoor and outdoor garage, other structure, or other areas where employees may park, on or near the business premises, or near a location from which the employee commutes to work (but does not include parking on or near the property used for residential purposes). Parking expenses include, but are not limited to, maintenance, utility costs, insurance, property taxes, leaf removal, landscaping costs, and attendant expense. Employers may use any "reasonable method" to determine the share of those expense attributable to employees, but the IRS suggests the following approach:

> Reserved Spots for Employees: If a school provides reserved employee parking spots (e.g. signage such as "Employee Parking Only" or a separate area for employee parking), then the school must determine the percentage of total spots exclusively reserved for employees, and multiple that by total parking expenses. The resulting amount is taxable income to the school. However, schools have until March 31, 2019 to decrease or eliminate reserved parking (retroactive to January 1, 2018, the effective date of the tax). Schools can do this by taking down "Employee Parking Only" or similar signage or eliminating reserved employee only parking zones.
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> Parking Not Reserved for Employees: The school must also examine the primary use of the parking that does not include reserved employee parking. "Primary use" means greater than 50% of actual or estimated usage of the spots in the parking facility during normal hours on a typical day. If the primary use of the remaining or unreserved parking spots is to provide parking to the general public (including, for example, students, congregants, or vendors), then the parking expenses for that use are not subject to UBIT. However, if the

primary use of the unreserved parking is not for the general public, then the school will be subject to UBIT.

Schools With Reserved Spaces for Others (Visitors; Non-Employees): The school may deduct a proportionate amount for designated non-employee spaces from UBIT the school would otherwise owe. Schools will owe UBIT on parking facilities unless those facilities' primary use benefits the general public. A school can then deduct from that amount, any proportionate amount attributable to reserved spaces for others.

Reconcile the Use with Amount Owed: The IRS expects a nonprofit employer to reasonably determine the amount of UBIT owed for all employee use of parking. Nonprofit employers are expected to reconcile the amount of UBIT owed for employee-reserved parking, with those portions of parking that are not otherwise taxable (i.e. where the primary use is for the general public and when spots are designated for visitors or other non-employees). The IRS explains that methods to determine employee use may also include actual or estimated usage.

IRS Notice 2018-99 provides several examples of the above "reasonable method" calculations to determine the share of expenses attributable to employee parking.

This new law means that many nonprofits may be paying UBIT for the first time. Schools may not have paid quarterly estimated income taxes as required, which can result in an additional tax assessment. The IRS will provide a nonprofit with relief from the additional tax assessment for the period before December 17, 2018, if:

(1) the underpayment in quarterly payments resulted from the changes to the tax treatment of QTFBs;

(2) the nonprofit was not required to file Form 990-T for the taxable year preceding the nonprofit's first taxable year ending after December 31, 2017; and

(3) the nonprofit timely files Form 990-T and pays the amount reported. To claim the waiver, a school must write "Notice 2018-100" on the top of its Form 990-T.

We strongly encourage schools that provide employee parking to assess compliance with these provisions and determine how the IRS's recent guidance applies to their operations.

LCW BEST PRACTICES TIMELINE

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

DECEMBER/FEBRUARY

- Review and revise/update annual employment contracts.
- Analyze teacher and administrator recruiting needs for the next school year.
- Conduct audits of current and vacant positions to determine whether positions are correctly designated as exempt/non-exempt under federal and state laws.
- Ensure computer-use policies are updated, especially if they will be used for enrollment and hiring of staff.

FEBRUARY- MARCH

- Prepare/Issue Enrollment/Tuition agreements for the following school year.
- Review field trip forms and agreements for any Spring/Summer field trips.
- Tax documents must be filed if School conducts raffles:
  - Schools must require winners of prizes to complete a Form W-9 for all prizes $600 and above. The school must also complete Form W-2G and provide it to the recipient at the event. The school should provide the recipient of the prize copies B, C, and 2 of Form W-2G; the school retains the rest of the copies. The school must then submit Copy A of Form W2-G and Form 1096 to the IRS by February 28th of the year after the raffle prize is awarded.

FEBRUARY - APRIL

- Post job announcements and conduct recruiting.
- Resumes should be carefully screened to ensure that applicant has necessary core skills and criminal, background and credit checks should be done, along with multiple reference checks.

CONSORTIUM CALL OF THE MONTH

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

ISSUE: A school CFO called and told the attorney that she knew the school was required to have a non-discrimination policy, but did not know the details about what that meant in terms of the school's obligations to publicize it.

RESPONSE: The attorney explained that in order to qualify for tax-exempt status the IRS requires a non-profit 501(c)(3) corporation to include a non-discrimination statement in its Articles of Incorporation or Bylaws or other governing instrument. The Bylaws should include the following language: "The School admits students of any race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the school. It does not discriminate on the basis of race, color, national and ethnic origin in administration of its educational policies, admission policies, tuition assistance programs, and athletic and other school-administered programs." The statement also needs to be published or broadcast annually. The protected categories listed in this statement are the only ones required by the IRS for these purposes. Other non-discrimination policies may include a wider group of protected categories.

The statement must also be included in all of a School's brochures and catalogues dealing with student admissions, programs, and scholarships. This includes the School's website and admissions application.

Finally, a School must include a reference to its racial nondiscriminatory policy in other written advertising that it uses as a means of informing prospective students of the School's programs, such as placing advertisements in a newspaper. The following short form statement may be used for such advertisements: "The School admits students of any race, color, and national or ethnic origin."

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NEW TO THE FIRM

Austin Dieter joins our San Francisco office where he provides advice and counsel as well as litigation assistance to the firm's public entity clients. Austin is experienced in a full array of employment matters, including wage and hour claims under FLSA, discrimination, harassment and retaliation claims under FEHA and Title VII, and disability discrimination claims under the ADA. He can be reached at 415.512.3052 or adieter@lcwlegal.com.

CONGRATULATIONS ON YOUR RETIREMENT, MELANIE POTURICA!

While many individuals spend years contemplating what they want to do with their careers, **Melanie Poturica** knew exactly what she wanted to do at 10 years old – become an attorney. From working tirelessly as a passionate litigator to becoming the firm's first female Managing Partner, Melanie Poturica paved the way for future Liebert Cassidy Whitmore attorneys and staff. A fierce advocate and dedicated leader, Melanie helped grow the firm from six passionate attorneys to nearly 100 trusted advisors and experts in offices across California. Harmonizing an incredibly successful professional career filled with victories on behalf of her clients with the equally rewarding responsibilities associated with motherhood, Melanie's unique ability to create long-lasting relationships with Liebert Cassidy Whitmore attorneys and clients is a major contribution to the firm's continued success.

The San Francisco native's journey as a Liebert Cassidy Whitmore attorney began in 1980. Beginning her career as an associate, Melanie graduated to a partner in 1985. Much of Melanie's early work consisted of litigating lawsuits involving discrimination and harassment. Her love of being in court and researching and writing on legal issues fueled her passion for her litigation practice. While Melanie quickly established herself as a vigorous litigator at the firm, she also balanced her work with motherhood.

Melanie welcomed her first-born, Vincent, and her new responsibility as Partner in the same week in 1985. Although Melanie loved her new role as Partner, she decided to focus on her young family, and began working at the firm part-time in 1987. "While I loved the work, it was torturous to be away from my family," Melanie said. Melanie worked a reduced schedule until 1993, continuing to litigate and handle hearings. During this time, Melanie and her husband welcomed their daughter, Mari.

In 1993, Melanie came back to LCW to work full-time and became a Partner for the second time. Two years later, Melanie became LCW's first female Managing Partner. "Managing the firm was the highlight of my career," she said when asked what her favorite memory as an attorney has been. Melanie thrived on the communication aspects of her work, including human resources and client and business issues. Although Melanie is a brilliant and dedicated attorney, she acknowledges that much of her success is directly related to her supportive family. "I am deeply indebted to my husband [who is also a lawyer] and [my] children for the sacrifices they made on my and the firm's behalf," Melanie said.

As Managing Partner, Melanie regularly travelled throughout the state to visit clients and colleagues. It was during this time that she developed many meaningful, personal relationships with clients and colleagues alike. Melanie explained, "As much as I like litigating, my favorite thing [is] working with clients,"

"Melanie cares deeply about our clients' issues, both on a legal and personal basis," said LCW's current Managing Partner, J. Scott Tiedemann. Fellow Partner, Michael Blacher, echoed Scott's sentiment. "She took the founding partners' vision and turned it into our culture: an unqualified commitment to the client, a passion and purpose in our work, a dedication to one another, and an unwavering devotion to ethical behavior," expressed Michael. Melanie continued as the firm's Managing Partner until 2010. Under her leadership, LCW expanded our statewide consortiums, created our annual conference, and expanded our public sector and non-profit practice to include independent schools.

In 2010, as Scott transitioned to Managing Partner, he and Melanie co-managed the firm. With the torch successfully passed, Melanie wound down her litigation practice and began working part-time in 2014. With plans to spend more time with her family, travel, and continue serving her community, Melanie is now heading in to a new stage in her life – full retirement.

Melanie has made it her duty to establish not only a firm built on integrity and leadership but also family and balance. Her retirement is well earned and much deserved and we send her off with gratitude and love.

Firm Activities

Consortium Training

Mar. 19 **"Drugs"**
CAIS | Webinar | Julie L. Strom

Mar. 28 **"Ministerial Exception's Application to California's Religious Schools"**
Bay Area Independent Schools Consortium | Webinar | Michael Blacher

Speaking Engagements

Mar. 1 **"Responding to Complaints of Student and Employee Misconduct in the #MeToo Era"**
NAIS Annual Conference | Long Beach | Tekakwitha Pernambuco-Wise & Linda K. Adler & Grace Chan

Mar. 4 **"Courageous Authenticity: Do You Care Enough to Have Critical Conversations?"**
National Business Officers Association (NBOA) Annual Meeting | San Diego | Michael Blacher & Elizabeth Tom Arce & Rebecca Rowland

Mar. 4 **"Construction: Transforming Your Campus in Our Evolving World"**
NBOA Annual Meeting | San Diego | Heather DeBlanc & Matt Riddle & Trip Thomas & Dean Quiambo

Mar. 4 **"Responding to Complaints of Students/Employee Misconduct in the #MeToo Era"**
NBOA Annual Meeting | San Diego | Linda K. Adler & Grace Chan & Elise DeYoung & Sarah Braughler

Mar. 5 **"Sexual Abuse Investigations: Assessing the Difficult Issues"**
NBOA Annual Meeting | San Diego | Michael Blacher & Suzanne Bogdan & Grace Lee & David Wolowitz

Mar. 6 **"How a Partnership with Law Enforcement Keeps Your School Safe"**
NBOA Annual Meeting | San Diego | Brian P. Walter & Patricia Merz

Mar. 6 **"Lessons Learned: Five Must-Follow Practices to Prepare for the (un)Expected"**
NBOA Annual Meeting | San Diego | Judith S. Islas

Mar. 6 **"Riding Together: Risk and Liability in the Ride-Share Era"**
NBOA Annual Meeting | San Diego | Heather DeBlanc & Darrow Milgrim

Seminars/Webinars

Mar. 6 **"Train the Trainer Refresher: Harassment Prevention"**
Liebert Cassidy Whitmore | Los Angeles | Christopher S. Frederick

Mar. 13 **"Train the Trainer: Harassment Prevention"**
Liebert Cassidy Whitmore | San Francisco | Erin Kunze

Mar. 21 **"Communication Counts!"**
Liebert Cassidy Whitmore | Roseville | Jack Hughes & Kristi Recchia

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