



# CLIENT UPDATE

News and developments in employment law and labor relations for  
California Public Agencies

JUNE 2020

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



## FIRM VICTORY

### *PERB Dismisses Employee's Unfair Practice Charge Filed Against County.*

LCW Partner [Adrianna Guzman](#) and Associate Attorney [Lars Reed](#) obtained a victory for a County after a former employee filed an unfair practice charge with the Public Employment Relations Board (PERB).

The former employee alleged that the County violated the Meyers-Milias-Brown Act (MMBA) by retaliating and discriminating against her. The employee's allegations stemmed from a Child Protective Services referral regarding the children of her boyfriend, with whom she lived. A social worker issued a final investigation report against the employee and her boyfriend that substantiated allegations of general child neglect. The County's Program Director then added a paragraph to the employee's performance report indicating that she would not be able to work in a certain assignment. This was because County policy prohibited employees with a "substantiated" allegation from working in a particular unit. The County provided the employee with a final copy of the report.

Subsequently, the employee submitted a rebuttal to her performance report as authorized by County policy. The County attached her rebuttal to the report, and placed both documents in her personnel file. Shortly thereafter, the employee provided three weeks' notice of her resignation. The employee then filed an unfair practice charge with PERB three days before her last day of employment.

In order to demonstrate that an employer discriminated or retaliated against an employee in violation of the MMBA, PERB requires the employee to show that: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse employment action against the employee; and (4) the employer took the action because of the exercise of those rights. PERB concluded that the former employee could not show those elements. PERB reasoned that the employee failed to allege with specificity that she participated in any conduct protected under the MMBA or that the County took an adverse employment action against her. It also noted that even if the County took adverse action against her, the employee did not allege sufficient facts to show there was any unlawful motivation. Thus, PERB concluded the employee could not demonstrate a prima facie case of retaliation or discrimination.

While PERB gave the employee the opportunity to amend her claims, she failed to do so. Accordingly, PERB dismissed the unfair practice charge against the County.

### **NOTE:**

*An employee who files an unfair practice charge must establish all of the necessary elements of the claim. If the employee does not, PERB will dismiss the charge and no complaint issues. LCW attorneys strategically challenge unfair practice charges before they reach the complaint stage.*

## LABOR RELATIONS

### *City Policy Prohibiting Stickers On Employees' Hardhats Violated MMBA.*

Employees in the City of Sacramento's Maintenance Services Division (MSD) are required to wear hardhats while working. Six of the seven MSD sections exclusively use a white, full-brimmed hardhat manufactured by ERB Industries (ERB) bearing the City seal. ERB affixes the seal by applying ink directly to the hardhat before shipping the hardhats to the City. An ERB warning label inside each hardhat states "Do not apply adhesive. These chemicals may weaken the shell." Despite this warning, MSD employees sometimes attach headlamps to their ERB hardhats using clips and removable adhesive. The City provides employees in the seventh MSD section an orange hardhat manufactured by Petzl. Like the ERB hardhats, Petzl cautions against applying chemical adhesive or stickers to its hardhats unless those are supplied or recommended by Petzl.

All MSD employees are expected to inspect their hardhat each day before use; however, management is responsible for deciding when to retire or replace a hardhat. In 2016, an MSD Operations General Supervisor became concerned that it was unsafe to adorn the hardhats with any stickers, decals, or paint because these substances could hinder their inspection for signs of wear, cracks, and other deterioration.

In April 2017, the MSD circulated a memorandum to some employees providing that "So as to not compromise the integrity of the protective shell, hardhats must be free of stickers, decals, or any other markings (except for the City seal) and not be painted." Prior to this memorandum, the MSD did not have a written policy regarding the placement of stickers or paint on hardhats. Employees were, however, permitted to wear union pins and other insignia on their work uniforms or other personal property.

The City notified Stationary Engineers Local 39 (Local 39) – an employee organization representing some MSD employees – of the written hardhat policy. Local 39 asserted that the City's policy would infringe on employees' rights to place union insignia on their hardhats. After the City distributed the policy, Local 39 filed an unfair practice charge against the City. The Administrative Law Judge (ALJ) dismissed the charge, finding the policy was justified by the City's legitimate concerns for employee safety. Local 39 subsequently filed exceptions with the Public Employment Relations Board (PERB).

California public employees have long had the right to wear union insignia in the workplace. A restriction on the right to display union insignia and messages regarding working conditions is presumptively invalid. Instead, an employer may prohibit employees from displaying union insignia and messages in the workplace only if "special circumstances" exist to justify the prohibition. The employer has the burden of establishing that its policy is justified by special circumstances. PERB has outlined several factors to determine whether such circumstances exist, including whether the insignia could jeopardize employee safety, disrupt employee discipline, or negatively affect the employer.

In this case, PERB found that the City could not establish any foreseeable safety issues arising from stickers on hardhats. PERB reasoned that while employees were required to inspect their hardhats every day, neither the applicable memorandum of understanding nor the MSD policies prescribed any regular inspection of hardhats. Thus, PERB reasoned that the City had not "shown so great a safety-related concern for dented, gouged, or otherwise damaged hardhats that would institute regular and closer inspections of them."

Further, PERB noted that it was undisputed that some MSD employees affixed headlamps to their hardhats using clips and removable adhesive. The City presented no evidence that the adhesive used to affix the headlamps had been supplied by the manufacturer; had damaged the hardhat; or had prevented employees from detecting such damage. PERB also explained that this history of adhesive use on hardhats without incident also weighed against finding special circumstances.

Accordingly, PERB found the City failed to carry its burden of establishing safety-based special circumstances justifying its policy completely banning stickers, decals, and paint on MSD employees' hardhats. Thus, PERB determined that the City's policy interfered with employees' and Local 39's rights under the MMBA.

*City of Sacramento*, PERB Decision No. 2702-M (2020).

#### **NOTE:**

*This case demonstrates that an agency has the burden of proving that special circumstances justify prohibiting union insignia. That proof must include concrete evidence that it is foreseeable that employee safety will be threatened by displaying the insignia and that the agency has acted consistently with its stated concern.*

## COVID-19

### *Assistant Chief Of Police Safely Guides Department Through COVID-19 Exposure.*

In May 2020, a city's police department faced a serious COVID-19 exposure when five police officers and a jailer came into contact with an arrestee with the virus. In response, the department's Assistant Police Chief employed a decision tree prepared by LCW outlining a step-by-step process to respond to COVID-19 exposure. Following the decision tree, the department took the necessary steps to minimize further exposure and ensure the safety of department personnel, including isolating the impacted employees, disinfecting areas of potential exposure, and arranging for testing of the impacted employees. Through the Assistant Police Chief's actions, the department was able to handle a difficult situation in a safe and respectful manner to the benefit of the impacted employees and their co-workers.

#### **NOTE:**

*Agencies are facing unprecedented times in ensuring the health and safety of their personnel in light of the COVID-19 pandemic. LCW is proud to have assisted the city's police department in carrying out this critical public safety duty.*

## RETALIATION

### *Police Officer Fails To Timely File A Government Claim In Whistleblower Retaliation Case.*

James Willis began his employment with the City of Carlsbad's Police Department in 2008. In 2012, Willis created a fictitious email account under a pseudonym, wrote a critical email about another detective who worked in his unit, and sent the email to various news organizations and government entities. In 2013, Willis was reassigned from the crimes of violence unit to patrol. In 2014, Willis was promoted to corporal and elected president of the local police officer's association. In 2015, Willis complained that the Department's monthly performance review for patrol officers constituted an illegal quota under the Vehicle Code because it collected statistical data about arrests and citations. Later that year, Willis was not selected for a promotion to sergeant.

In December 2015, Willis filed a complaint with the Department of Fair Employment and Housing and a government tort claim against the City, including, among other allegations, retaliation based on his reassignment to patrol in 2013 and failure to be promoted in 2015. The City deemed all acts occurring

before June 2015—six months before the date it received Willis's claim—untimely because they occurred beyond the six-month period to present a claim under the Government Claims Act.

In 2016, Willis then brought a civil lawsuit against the City, alleging in part that the City engaged in whistleblower retaliation in violation of Labor Code section 1102.5 by denying him promotions after he reported alleged misconduct by another officer in 2012 and complained in 2015 about the Department program he believed was an unlawful quota system.

Before trial, the City successfully moved to strike Willis's allegations of retaliatory acts that occurred before June 2015 on the grounds that he failed to timely present a government tort claim. The jury ultimately found that the City denied Willis a promotion in part because he reported that the City had engaged in unlawful conduct. However, the jury also found that the City would have still denied Willis the promotion for legitimate independent reasons, and therefore, the court entered judgment for the City on the whistleblower retaliation claims.

Willis appealed, claiming the trial court erred by striking certain allegations outside of the Government Claims Act's six-month deadline. Willis argued that the deadline to file a government tort claim was either equitably tolled, or his whistleblower retaliation claim had not accrued by reason of the continuing tort/continuing violation doctrine.

First, the court of appeal determined that the doctrine of equitable tolling, which suspends a statute of limitations under certain circumstances to ensure fairness, cannot be invoked to suspend the six-month deadline under the Government Claims Act because the deadline is not a statute of limitations. The court of appeal also stated that tolling would undercut the public policy underlying the deadline, which is to give a public entity prompt notice of a claim to enable it to adequately investigate and settle them without litigation, as appropriate. The court stated that these policy considerations would not be served by tolling the government claim deadline while a plaintiff pursues other legal remedies against a public entity.

Second, the court concluded that the six-month deadline under the Government Claims Act could not be extended as a continuing violation. The continuing violation doctrine allows liability for conduct occurring outside a statute of limitations if the conduct is sufficiently connected to conduct within the limitations period. To establish a continuing violation, an employee must show that the employer's actions are: (1) sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence. However, the court determined that Willis's allegations, including

reassigning him and denying him promotions, were permanent at the time the personnel decisions were made, which precluded application of the continuing violation doctrine.

For these reasons, the court of appeal held the trial court did not abuse its discretion in striking allegations from Willis's complaint due to his failure to present a timely government claim.

*Willis v. City of Carlsbad*, 2020 WL 2394728 (2020).

**NOTE:**

*This case confirms that courts generally interpret an employee's six-month deadline to file a government claim under the Government Claims Act as a strict deadline. Public entities maintain a unique status with respect to these protections since public entities will incur costs in the course of litigation that must ultimately be borne by taxpayers.*

## ATTORNEY'S FEES

### *Trial Court Improperly Applied Local Market Rate When Calculating Fee Award.*

Augustine Caldera is a prison correctional officer at the California State Institute for Men in San Bernardino County. After Caldera's supervisor and other prison employees mocked and mimicked Caldera's stutter, Caldera filed a formal grievance with the California Department of Corrections and Rehabilitation (CDCR) in 2008. The CDCR rejected Caldera's grievance finding that his stutter was not a recognized disability.

After the CDCR rejected Caldera's grievance, Caldera contacted numerous local lawyers in the Inland Empire. However, all of the attorneys Caldera contacted declined to take on his case. An attorney in Pasadena, Todd Nevell, eventually agreed to represent Caldera on a contingency basis. Caldera then brought suit against the CDCR and his supervisor for various causes of action, including discrimination in violation of the Fair Employment and Housing Act (FEHA). After many years of litigation and multiple appeals, a jury returned a verdict in favor of Caldera.

Subsequently, Caldera filed a motion for attorney's fees. Under the FEHA, a court has the discretion to award reasonable attorney's fees and costs to the prevailing party. In calculating the fee award, courts generally multiply the number of hours spent on the case by the attorney's applicable hourly rate. Courts also frequently increase this amount by applying a multiplier to account for other factors such as the difficulty of the litigation and the novelty of the issues. While Caldera requested

\$2,468,365 in attorney's fees, the court ultimately awarded him only \$810,067.50. This was in part because the court found that Nevell's requested \$750 hourly rate was well above the average \$450 to \$550 hourly rate for attorneys in San Bernardino County. Caldera appealed.

On appeal, the court concluded that if an employee must hire out-of-town counsel, the trial court, when setting the hourly rate, must consider the attorney's home market rate, rather than the local market rate. The court reasoned that there was unrefuted evidence that Caldera was unable to find an attorney who would take his case in the Inland Empire, and it noted that the hourly rate the trial court applied was lower than similarly experienced attorneys in Los Angeles County. Thus, the court directed the trial court to recalculate the fee award based on Nevell's home market rate.

*Caldera v. Dep't of Corr. & Rehab.*, 48 Cal.App.5th 601 (2020)

**NOTE:**

*This case demonstrates how substantial attorney's fee awards can be in employment litigation. Attorney's fees can be far greater than expected if the employee has to use legal counsel from outside the area.*

## DID YOU KNOW...?

Whether you are looking to impress your colleagues or just want to learn more about the law, LCW has your back! Use and share these fun legal facts about various topics in labor and employment law.

- On April 23, 2020, the Equal Employment Opportunity Commission issued updated guidance concerning the Americans with Disabilities Act and the Rehabilitation Act. The guidance explains how employers may respond to the public health emergency caused by COVID-19. Most notably, the guidance suggests that employers may test employees for COVID-19 if the employer follows certain requirements.
- On May 6, 2020, Governor Gavin Newsom issued Executive Order N-62-20 establishing "presumptive eligibility" for workers' compensation benefits to any employee who is directed to report to their place of employment and then subsequently contracts COVID-19 during the time period between March 19 and July 5, 2020.
- The California Department of Public Health (CDPH) has indicated that office-based businesses may reopen if they meet certain conditions. In addition to being located in a county that the state has permitted to move to the next stages of Phase 2,

CDPH requires that a facility also must perform each of the following steps in order to open: (1) Perform a detailed risk assessment and implement a site-specific protection plan; (2) Train employees on how to limit the spread of COVID-19, including how to screen themselves for symptoms and stay home if they have them; (3) Implement individual control measures and screenings; (4) Implement disinfecting protocols; and (5) Implement physical distancing guidelines.

## CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's employment relations consortiums may speak directly to an LCW attorney free of charge regarding questions that are not related to ongoing legal matters that LCW is handling for the agency, or that do not require in-depth research, document review, or written opinions. Consortium call questions run the gamut of topics, from leaves of absence to employment applications, disciplinary concerns to disability accommodations, labor relations issues and more. This feature describes an interesting consortium call and LCW answered the question. We will protect the confidentiality of client communications with LCW attorneys by changing or omitting details.

**Question:** A city human resources manager contacted LCW to inquire about travel time under the Fair Labor Standards Act (FLSA). Specifically, the human resources manager asked if the agency needed to compensate an employee for travel time if the employee starts the workday telecommuting from home and is then directed to attend a meeting at a city worksite.

**Answer:** Under the FLSA, travel time during the workday is compensable. Accordingly, the employee would be entitled to compensation for the time spent traveling between his or her home telework assignment and the city worksite. However, the attorney pointed out that if the employee ends his or her work shift at the city worksite, the travel returning home would be commute time that is not compensable under the FLSA.

## BENEFITS CORNER

### *New Options To Increase Flexibility For Section 125 Cafeteria Plan Benefits.*

In response to COVID-19, a new [IRS notice](#) allows employers to amend their IRC Section 125 cafeteria plan to provide employees with increased flexibility for the remainder of 2020. The Notice loosens restrictions on mid-year election changes for employer-sponsored health coverage and extends deadlines for applying unused funds under a Health Flexible Spending Arrangement (Health FSA) or Dependent Care Assistance Program (DCAP). Employers looking to incorporate either option into their plan must adopt a plan amendment.

#### Mid-Year Election Changes

For mid-year elections made during calendar year 2020, a plan may permit employees who are eligible to make salary reduction contributions under the plan to make the following changes:

#### *Employer-Sponsored Health Coverage Elections*

- Make a new election on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage;
- Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis; or
- Revoke an existing election on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.

#### *Health FSA or DCAP*

- Revoke an election;
- Make a new election; or
- Decrease or increase an existing election.

#### Deadlines for Applying Unused Funds

For unused amounts remaining in a Health FSA or DCAP as of the end of a grace period or plan year ending in 2020, the plan may permit employees to apply the unused amounts to pay or reimburse medical care expenses or dependent care expenses, respectively, incurred through December 31, 2020.

Employers should refer to the IRS notice for additional information.

### *Temporary Extension Of COBRA And Special Enrollment Periods.*

[Guidance](#) from the Department of Labor and the IRS extends certain COBRA and special enrollment periods due to the Coronavirus National Emergency.



The extensions correspond to a coronavirus “Outbreak Period” from March 1, 2020 until 60 days after the end of the Coronavirus National Emergency or such other date announced in future guidance.

Most notably, during the term of the Outbreak Period, the clock stops on the following key COBRA deadlines (among others) and then restarts after the Outbreak Period ends:

- The 44-day deadline after a qualifying event for the employer (if also the plan administrator) to provide a COBRA election notice;
- The subsequent 60-day period for a qualified beneficiary to elect COBRA continuation coverage;
- The 45-day deadline for making an initial COBRA premium payment following the initial election; and
- The 30-day deadline for making subsequent monthly COBRA premium payments, which follows the first day of the coverage period for which payment is being made; and

The guidance provides several examples, including the following:

*Individual A works for Employer X and participates in X’s group health plan. Due to the National Emergency, Individual A experiences a qualifying event for COBRA purposes as a result of a reduction of hours below the hours necessary to meet the group health plan’s eligibility requirements and has no other coverage. Individual A is provided a COBRA election notice on April 1, 2020. What is the deadline for A to elect COBRA?*

*Answer: Individual A is eligible to elect COBRA coverage under Employer X’s plan. The Outbreak Period is disregarded for purposes of determining Individual A’s COBRA election period. The last day of Individual A’s COBRA election period is 60 days after June 29, 2020, which is August 28, 2020.*

The Outbreak Period likewise extends special enrollment periods required under HIPPA, during which an eligible employee or dependent may enroll in the employer’s group health plan following a qualifying event (e.g., loss of other coverage). Generally, group health plans must allow such individuals to enroll if they are otherwise eligible and if enrollment is requested within 30 days of the qualifying event (or within 60 days in certain circumstances).

Employers should refer to the guidance for additional information and sample scenarios.

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**PLEASE NOTE: We will not have a newsletter for the month of July and will resume in August.**

**For the latest COVID-19 information,  
visit our website:**

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- **Complimentary Templates**
  - **Special Bulletins**
  - **Related Trainings**

[www.lcwlegal.com/responding-to-COVID-19](http://www.lcwlegal.com/responding-to-COVID-19)



## FIRM PUBLICATIONS

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

Los Angeles Senior Counsel [David Urban](#) was featured in the *Daily Journal* article, “Constitutional Experts Weigh in on New Videoconferencing Marriage Order.”

San Diego Partner [Frances Rogers](#) and Los Angeles Associate [Kate Im](#) authored an article for the *Santa Monica Observer* titled “Medical Marijuana for School Students? It’s Now Authorized in California.”

Los Angeles Partner [Oliver Yee](#) and Los Angeles Associate [Alysha Stein-Manes](#) authored an article for *Law360* titled “Telework Transition Holds Key Lessons for Public Agencies.”



## MANAGEMENT TRAINING WORKSHOPS

### Firm Activities

#### Consortium Training

- Jun. 11**      **“Finding the Facts: Employee Misconduct and Disciplinary Investigations”**  
South Bay ERC | Webinar | Melanie L. Chaney
- Jun. 17**      **“Maximizing Supervisory Skills for the First Line Supervisor Part 1”**  
Monterey Bay ERC | Webinar | Kristi Recchia
- Jun. 17**      **“Maximizing Supervisory Skills for the First Line Supervisor Part 1”**  
Orange County Consortium | Webinar | Kristi Recchia
- Jun. 18**      **“Supervisor’s Guide to Understanding and Managing Employees’ Rights: Labor, Leaves and Accommodations”**  
L.A. County Human Resources Consortium | Webinar | Laura Drottz Kalty
- Jun. 18**      **“Maximizing Performance Through Evaluation, Documentation and Corrective Action”**  
San Mateo County ERC | Webinar | Erin Kunze
- Jun. 25**      **“Maximizing Supervisory Skills for the First Line Supervisor Part 2”**  
Monterey Bay ERC | Webinar | Kristi Recchia
- Jun. 25**      **“Maximizing Supervisory Skills for the First Line Supervisor Part 2”**  
Orange County ERC | Webinar | Kristi Recchia
- Jul. 9**        **“Public Sector Employment Law Update”**  
Mendocino County ERC | Webinar | Richard S. Whitmore
- Jul. 29**      **“Ethics For All”**  
Monterey Bay ERC | Webinar | Kristi Recchia

#### Customized Training

- Jun. 11**      **“Preventing Workplace Harassment, Discrimination and Retaliation”**  
City of Stockton | Webinar | Kristin D. Lindgren
- Jun. 16**      **“Preventing Workplace Harassment, Discrimination and Retaliation”**  
City of Stockton | Webinar | Gage C. Dungy
- Jun. 16**      **“Navigating Public Sector Employment”**  
Orange County Sanitation District | Webinar | T. Oliver Yee
- Jun. 23**      **“Unconscious Bias”**  
City of Tracy | Webinar | Kristin D. Lindgren
- Jun. 29**      **“Privacy Issues in the Workplace”**  
City of Richmond | Brian J. Hoffman
- Jul. 8, 9**     **“Preventing Workplace Harassment, Discrimination and Retaliation”**  
City of Walnut Creek | Jack Hughes



**Jul. 21**      **“Payroll Issues”**  
City of Oxnard | Amit Katzir

**Speaking Engagements**

**Jun. 12**      **“The Tension Between Privacy and the Public’s Right to Know”**  
Law Seminars International Public Records Act Litigation Seminar | Webinar | Geoffrey S. Sheldon

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