LCW Liebert Cassidy Whitmore

Briefing Room

News and developments in employment law and labor relations for California Law Enforcement Management.

June 2017

INDEX

LCW NEWS

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

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RETIREMENT

CalPERS Announces New Disability Retirement Mandates and Local Agency Audits.

If you think you have mastered the cumbersome and confusing process of disability retirement, think again. The California Public Employees' Retirement System (CalPERS) recently published a Circular Letter with new disability retirement mandates.

In the letter, CalPERS announced that it is auditing the industrial disability retirement (IDR) process for 60 contracting agencies. As part of the audit, we expect CalPERS to request medical records and safety officer personnel records to assess the validity and ensure legal compliance of IDR claims. In addition, CalPERS will audit whether agencies who granted IDR to members younger than 50 are re-evaluating whether those members are still eligible for IDR.

The new or little known requirements discussed in the letter are highlighted below. In addition, because many local agencies do not have a formal policy that sets forth the procedures for determining disability and industrial disability retirement, agencies should strongly consider adopting such a policy in light of the due process concerns related to the separation process and CalPERS' direction that such a policy is necessary.

Duty to Provide Relevant Personnel and Medical Records

According to CalPERS, before an employer starts the process of a disability retirement determination, it must forward all relevant personnel documents and medical records to CalPERS and obtain CalPERS' determination that the member is eligible to apply for disability retirement, in the following circumstances:

Please Note: To celebrate the upcoming summer break, we will combine the July and August 2017 issues of this newsletter.

Check your inbox in August for information on the latest legal developments.

- Disciplinary process underway prior to the member's separation from employment.
- The member was terminated for cause.
- The member resigned in lieu of termination.
- The member signed an agreement to waive his or her reinstatement right as part of a legal settlement (i.e., Employment Reinstatement Waiver).
- The member has been convicted of or is being investigated for a work-related felony.

Evidence of Continuous Disability

A qualifying disability must be permanent or "extended and uncertain." CalPERS indicates that "extended and uncertain" means the disability will last at least 12 consecutive months from the date of the application. In the past, CalPERS used an unofficial six-month measurement.

CalPERS will require medical records evidencing members' physical or mental inability to perform the duties of their position, from one year before their last day of physical work to the present, in order to establish a continuous disability. There must be medical evidence from the last day of physical work to the present, with no gaps in the medical treatment longer than six months.

Confirmation of a Permanent and Stationary Date for Industrial Disability Retirement

If a workers' compensation claim preceded an industrial disability retirement and there was a dispute concerning the date on which the member became permanent and stationary, the employer or member must now make a "Petition for Finding of Fact" before the Workers' Compensation Appeals Board (WCAB). The WCAB must certify the date on which the member's condition became permanent and stationary. This date then becomes the effective date of the member's retirement.

Inevitably, this will create a problem for members who have not been found permanent and stationary by the qualified or agreed-upon medical examiner, but who otherwise qualify for an industrial disability retirement. These members may be denied an IDR. In some cases, a member's workers' compensation case may go on for years. This means employers may find themselves providing advanced disability pension payments for much greater periods of time.

Duty to Re-Evaluate Disability Retirees

The Circular Letter also requires that a contracting agency conduct regular re-evaluations of determinations for disability retirees who are under voluntary service retirement age. The purpose "is to verify whether the recipient remains physically or mentally disabled from the position which they disability retired for the condition(s) that they were approved for."

How This Affects Your Agency

A. Disclosure of Peace Officer Personnel Records

CalPERS has and will continue to demand the disclosure of peace officer personnel records to determine a member's eligibility for disability retirement if the officer was terminated or discipline is pending. But Penal Code section 832.7 establishes that peace officer personnel records (or information obtained therefrom) are confidential and may not be disclosed in any criminal or civil proceeding without the peace officers written consent or a *Pitchess* motion (the discovery procedure required to access peace officer personnel records). Thus, there is a potential conflict between CalPERS' right to these records under the Government Code and the prescribed discovery procedures required under *Pitchess*.

Agencies should avoid unilaterally disclosing

peace officer records without first notifying the officer concerning the request and obtaining his or her consent/waiver in writing. If the officer decides not to provide consent to disclosure, the agency should consult with legal counsel.

B. Disclosure of Medical Records

Under California's Confidentiality of Medical Information Act ("CMIA"), an employer is generally prohibited from using, disclosing, or knowingly permitting its employees or agents to use or disclose medical information pertaining to an employee unless the employer first obtains written authorization from the employee. There are several important exceptions to the requirement for written authorization. For example, medical information may be used in a lawsuit, arbitration, grievance, or other claim or challenge to which the employer and employee are parties and in which the employee has placed his or her medical history, mental or physical condition, or treatment at issue. In addition, medical information may be used exclusively for purposes of administering and maintaining employee benefit plans, including healthcare plans and plans providing short-term and long-term disability income, and workers' compensation. Accordingly, when an employee applies for disability retirement and CalPERS is administering disability benefits for the employee, an authorization may not be required under the CMIA. Nonetheless, agencies should seek consent with a written waiver and authorization for release of the medical records.

The Health Insurance Portability and Accountability Act (HIPAA) privacy rule applies to covered entities: health plans, health care clearinghouses or health care providers conducting certain health care transactions electronically. Also affected by HIPAA are hybrid entities whose business activities include both covered and non-covered functions and health plan sponsors.

CalPERS maintains that member consent and a HIPAA release are not required because it is not a covered agency. However, agencies should be careful not to unilaterally disclose medical records to CalPERS without first notifying the employee and obtaining written consent.

C. Duty to Re-Evaluate Retirees

CalPERS will require all contracting agencies to periodically re-evaluate retirees who are under the voluntary service retirement age of 50 years old. If an agency chooses not to re-evaluate, CalPERS can re-evaluate a retiree on its own.

Although CalPERS asks agencies to re-evaluate disability retirees, neither CalPERS nor the Government Code, requires the employer to hire back the retiree if he/she is found to no longer qualify for a disability retirement.

CalPERS Circular Letter 200-018-17 (Mar. 30, 2017)

NOTE:

A longer version of this article by San Diego Office Partner **Frances Rogers** *appeared on LCW's* **California Public Agency Labor & Employment Blog**. *The issues discussed here highlight only some of the portions of the CalPERS Circular Letter. Please consult with LCW attorneys to fully assess how this Letter may apply to your agency and to make an appropriate response to any CalPERS audit. As noted above, agencies should strongly consider adopting an agency policy that sets forth the procedures for the disability and industrial disability retirement determination process in light of the due process concerns related to the separation process and CalPERS' direction that such a policy is necessary. LCW can assist your agency with the preparation of this policy.*

FAIR LABOR STANDARDS ACT

The United States Supreme Court Allows the **Flores** *Decision to Stand, Which Means that Cash-in-Lieu Pay Must be Included in the FLSA Regular Rate of Pay.*

On May 15, 2017, the U.S. Supreme Court denied the City of San Gabriel's petition for review of *Flores v. City of San Gabriel*, a 2016 decision by the U.S. Court of Appeals for the Ninth Circuit that offered new interpretations of the Fair Labor Standards Act ("FLSA"). As a result of the denial, *Flores* remains the governing law in the eight states within the Ninth Circuit Court of Appeals, including California. The primary holding of *Flores* is that amounts paid to employees in lieu of health benefits must be included in employees' regular rate for purposes of calculating FLSA overtime.

How Did We Get Here?

In 2012, police officers working for the City of San Gabriel filed a lawsuit seeking to recover overtime pay under the FLSA. Both parties appealed the trial court's decision to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit's June 2, 2016 opinion is discussed below. In January 2017, the City filed a petition for writ of certiorari with the U.S. Supreme Court, asking the Supreme Court to review and overturn the *Flores* case. Two amicus curiae briefs supported the City's petition, including a brief from seven different public sector organizations. The Supreme Court's denial of the City's petition terminates the possibility of further judicial review.

A Review of the Three Main Holdings of the Flores *Case*

1. Cash in Lieu

The clearest mandate arising from the *Flores* case is that cash payments to employees for waiving health insurance, or for not using their entire health allowance ("cash-in-lieu"), must be included in the employees' FLSA "regular rate of pay," which is the hourly rate used to compensate non-exempt employees for FLSA overtime hours. The FLSA regular rate requirements apply to FLSA overtime hours, but not to other types of contractual overtime. Many labor agreements provide overtime more generously than required by the FLSA – such as treating paid leave time as hours worked, or paying overtime for working on holidays. The FLSA regular rate requirements do not apply to those "non-FLSA" contractual overtime hours.

For employers who pay employees significantly in excess of minimum FLSA overtime requirements, an inclusion of cash-in-lieu in the FLSA regular rate of pay may not result in additional FLSA overtime liability because of the various offsets against FLSA overtime liability that are available to those employers. This is particularly true for public safety employees for whom the employer has adopted a section 207(k) work period. For employers with high cash-in-lieu amounts or contractual overtime practices that more strictly follow the FLSA, implementing this aspect of the decision will likely result in higher overtime costs. Before making changes to a regular rate calculation because of *Flores* or other similar issues, employers should carefully evaluate whether inclusion of cash-in-lieu in the FLSA regular rate of pay will require them to pay more than their current contractual overtime obligations.

2. Bona Fide Plans

Per *Flores*, if the aggregated amount of cash-in-lieu an agency pays to employees is 40% or more of total plan payments (total plan payments means cash-in-lieu and other plan contributions), the employer's plan is not bona fide under the FLSA. This means the value of all plan payments must be included in the

FLSA regular rate of pay. There is no bright line rule as to a percentage that will ensure an employer's plan is bona fide. Indeed, the Ninth Circuit in *Flores* threw out the formerly-applicable 20% U.S. Department of Labor test but offered no guidance as to what the correct test should be. Accordingly, employers who offer cash-in-lieu should work with legal counsel to evaluate whether their plans are bona fide. If an employer's benefits plan is not bona fide, overtime costs will undoubtedly rise since the FLSA regular rate for non-exempt employees will increase.

3. Willfulness

According to *Flores*, an employer's violation of the FLSA is "willful" when the employer is "on notice of its FLSA requirements, yet [takes] no affirmative action to assure compliance with them." A willful violation subjects an employer to liability for three years of back pay (instead of two). This "willfulness" standard places a burden on employers who have any awareness of their FLSA obligations to be proactive in their FLSA compliance efforts. We recommend employers work with legal counsel to ensure sufficient active steps to achieve FLSA compliance are taken and – importantly - documented on a regular basis.

NOTE:

This summary was written by San Francisco Office Attorney **Lisa Charbonneau** *and first appeared on LCW's* **California Public Agency Labor & Employment Blog**. *LCW attorneys across the state are currently defending our clients against several* Flores*-related FLSA regular rate cases. We are also available to assist clients with regular rate compliance issues.*

DISCRIMINATION

Court Rules in Favor of Agency in Race Discrimination and Retaliation Case Filed by a Former Employee.

San Francisco partner **Suzanne Solomon** and associate **Juliana Kresse** obtained a complete summary judgment of all claims by a former employee of the California Public Utilities Commission who alleged that he was terminated from his employment because of his race and for alleged whistleblowing. The Court held that no reasonable jury could conclude that the employee had been terminated for anything other than his poor performance and misconduct, as consistently documented by the Commission.

The employee had worked for the Commission for seven years. During his employment, he had been repeatedly counseled about his conduct at work and the poor quality of his work product. The employee had refused to follow instructions, did not attend required meetings, attended meetings he was not invited to, did not complete his work, did generally poor quality work, and made false and threatening statements to co-workers. His performance did not improve despite the counseling and progressive discipline, and he was terminated. The court found that the employee did not provide sufficient evidence that he was performing satisfactorily. Equally important, he did not have evidence that he was treated less favorably than any employees of a different race who had engaged in similar conduct. The employee's claim alleging whistleblower retaliation also failed because even though he made one of his complaints approximately three months before his termination, the Commission had legitimate, non-retaliatory reasons for his termination, based on his conduct spanning a time period that began years before his alleged protected activity.

NOTE:

Summary judgment motions are one of the most powerful weapons in the defense litigation arsenal. If summary judgment is granted, the entire matter is dismissed and the plaintiff may be liable for costs in the lawsuit. In retaliation cases, summary judgments can be difficult to obtain when the employee's protected activity and the adverse employment action are close in time. However, documentation by the employer of its reasons for disciplining or terminating the employee will greatly improve the chances of obtaining summary judgment.

Federal Court Rules Pay Disparities Between Female and Male Co-workers may be Justified by Prior Salary alone under the U.S. Equal Pay Act.

Aileen Rizo worked as a math consultant with the Fresno County public schools. Rizo sued the County under the U.S. Equal Pay Act ("EPA"), and other laws, after discovering the County paid her male colleagues more for the same work.

Under the EPA, the employee must first prove that he or she is receiving different wages for equal work. The burden then shifts to the employer to show the disparity falls under one of following exceptions: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

When Rizo began working at the County, the County used Standard Operation Procedure 1440 (SOP 1440) to determine her starting salary. SOP 1440 was a salary schedule that consisted of levels, and "steps" within each level. The County set new employees' salaries within Level 1. To determine the appropriate step, the County considered Rizo's prior salary and added an additional 5%. That calculation resulted in a salary lower than the lowest step within Level 1, so the County started Rizo at the minimum Level 1, step 1 salary, and added a $600 stipend as credit for her master's degree.

At the District Court, the County conceded that it was paying Rizo lower wages for equal work. The County argued, however, that the EPA permitted it to consider Rizo's prior salary as a "factor other than sex." The District Court rejected the County's argument, and held that a "factor other than sex" could not be prior salary. The County appealed the District Court's interpretation of the law.

The Ninth Circuit analyzed its previous opinion in *Kouba v. Allstate Insurance Co.* in which the Court held that a prior salary can be a "factor other than sex" if the employer: (1) shows it to be part of an overall business policy; and (2) uses prior salary reasonably in light of its stated business purposes.

The County offered four business reasons to support its use of Rizo's prior salary to set her current salary: (1) it was an objective factor; (2) adding 5% to starting salary induces employees to leave their jobs and come to the County; (3) using prior salary prevents favoritism; and (4) using prior salary prevents waste of taxpayer dollars. The district court had not evaluated those reasons under the *Kouba* factors, so the Ninth Circuit remanded to the district court to do so.

Rizo v. Yovino (9th Cir. 2017) 854 F.3d 1161.

NOTE:

This case concerned a claim under the U.S. EPA. California, however, has its own Fair Pay Act, which is much more employee-friendly. California's Fair Pay Act provides that prior salary history alone is not sufficient to justify a pay disparity between men and women who perform substantially similar work. (Cal. Labor Code § 1197.5(a)(3).) California's law contains

similar prohibitions against pay differentials between persons of different races or ethnicities.

(Cal. Labor Code § 1197.5(b).)

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Congratulations to our Sacramento Partner, Gage Dungy and his wife Andrea, on the arrival of their son, John Paul.

Congratulations to our Sacramento Partner, Jack Hughes and his wife Alyssa, on the arrival of their daughter, Annabelle Lee.

Congratulations to our Los Angeles Associate, Amit Katzir and his wife Nicol on the arrival of their son, Noam Tobias.

Congratulations to our Los Angeles Associate, Joshua Goodman and his wife Julia on the arrival of their son, Jacob.

We wish the families much happiness!

The ***Briefing Room*** is available via email. If you would like to be added to the email distribution list or If you know someone who would benefit from this publication, please visit www.lcwlegal.com/subscribe.aspx. **Please note:** By adding your name to the e-mail distribution list, you will no longer receive a hard copy of the ***Briefing Room***.
If you have any questions, call Jennifer Ye at 310.981.2000.

LCW LIEBERT CASSIDY WHITMORE

LCW SEMINAR: HOW TO AVOID CLAIMS OF DISABILITY DISCRIMINATION: THE ROAD TO REASONABLE ACCOMMODATION (WITH SPECIAL GUEST – STAFF COUNSEL IRINA TRASOVAN FROM DFEH)

LCW is pleased to offer this seminar presented by our attorney, Jennifer Rosner and Staff Counsel at DFEH, Irina Trasovan.

Agencies are faced with many challenges when presented with employees with disabilities in the workplace. Presented by a state-wide leading Liebert Cassidy Whitmore attorney in the areas of employee disability and discrimination and **Special Guest Staff Counsel from the Department of Fair Employment and Housing (DFEH)**, this seminar will help employers successfully navigate through the reasonable accommodation process and provide a framework to answer the difficult questions such as: What are an employer's responsibilities when it suspects a disability but the employee hasn't requested an accommodation? How far is an employer required to go to accommodate a disability, and what happens when that conflicts with other statutory schemes or possibly the rights of other employees? What are the employer's responsibilities when discipline and disability intersect?

This workshop will also provide key information on what you should do when the interactive process breaks down and whether you can separate an employee or must file for disability retirement.

Attendees will learn:

- Real case studies from litigation handled by the DFEH and LCW, including a discussion about what went right and what went wrong in those cases;
- Practical ways to avoid claims of disability discrimination, failure to accommodate, and failure to engage in the disability process;
- Tips to identify known and unknown disabilities;
- Triggers to know your duty to accommodate;
- Medical certifications you can require;
- Tactics to handle seemingly endless leaves; and
- Preventive strategies directly from DFEH.

We invite you to take this unique opportunity to get extensive insight and best practices from LCW and DFEH, and hope you'll join us!

Who Should Attend?
Human Resources professionals, Risk Managers, Supervisors

Details:
Tuesday, July 11, 2017 | 9:00AM - 12:00PM
Fullerton Community Center | 340 W Commonwealth Ave, Fullerton, CA 92832

Pricing:
$250 per person for Consortium Members
$300 per person for Non-Consortium Members

REGISTER TODAY: WWW.LCWLEGAL.COM/EVENTS-AND-TRAINING/WEBINARS-SEMINARS

LCW Webinar: Successful Strategies for Tactics at the Table

Wednesday, August 2, 2017 | 10 AM - 11 AM

Unions utilize a number of tactics in labor negotiations to pressure employers. This webinar will examine common union tactics and provide responsive strategies for employers. For example, how should a bargaining team respond to the union having side conversations with members of the governing body? How can an agency productively deal with union threats of unfair practice charges and concerted activity? What is the appropriate response to rudeness and sarcasm at the table? What can an agency do to correct misinformation spread at or away from the bargaining table? These strategies, as well as strategies to help parties overcome gridlock, will be addressed in this one-hour webinar.

Presented by:

Donna Williamson

Who Should Attend? *Human Resources, Labor Relations professionals, Managers and Directors*
Workshop Fee: *Consortium Members: $70, Non-Members: $100*

Register Today: www.lcwlegal.com/events-and-training

LCW Liebert Cassidy Whitmore

TH ANNUAL PUBLIC SECTOR EMPLOYMENT LAW CONFERENCE

SAVE THE DATE:
February 26-28, 2018

Hyatt Regency Embarcadero
San Francisco, CA

We are excited to announce that the 20th LCW Conference will take place on February 26-28, 2018 in San Francisco, CA.

Please note that we are changing our format: the Conference will take place on Monday and Tuesday, followed by a Post-Conference workshop.

We hope to see you in February!

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

July 18 **"FLSA at the Collective Bargaining Table"and "Labor Negotiations from Beginning to End"**
North San Diego County ERC | Vista | Frances Rogers

Customized Training

July 7 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
County of Tulare | Visalia | Kimberly A. Horiuchi

July 11 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Town of Truckee | Jack Hughes

July 12,19 **"A Guide to Implementing Public Employee Discipline"**
Los Angeles County Department of Public Social Services | Norwalk | T. Oliver Yee

July 13 **"The Art of Writing the Performance Evaluation"**
City of Placentia | Christopher S. Frederick

July 17,18 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Bell | Laura Kalty

July 21 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Bell | T. Oliver Yee

July 21,28 **"Best Practices in Personnel Management"**
City of Sunnyvale | Suzanne Solomon

July 26 **"Best Practices in Personnel Management"**
Contra Costa Mosquito and Vector Control District | Concord | Suzanne Solomon

August 2 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Housing Authority of the County of San Bernardino | San Bernardino | T. Oliver Yee

August 14,15 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Lassen County | Susanville | Jack Hughes

August 15 **"Managing the Injured or Disabled Employee and Return to Work Options"**
ERMA | Tulare | Che I. Johnson

August 17 **"MOU's, Leaves and Accommodations"**
City of Santa Monica | Laura Kalty

August 18 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of La Habra | Lee T. Patajo

August 29 **"Legal Issues Regarding Hiring"**
City of Glendale | Mark Meyerhoff

Speaking Engagements

July 19 **"Interactive Process"**
International Public Management Association Central Coast Chapter (IPMA - CCC) Meeting | Fresno | Michael Youril

July 21 **"The New FEHC Regulations on "Consideration of Criminal History in Employment Decisions""**
County Personnel Administrators Association of California (CPAAC) Regional Meeting | Woodland | Gage C. Dungy

August 24 **"PERB Procedure"**
State Bar Labor & Employment Section | Webinar | Adrianna E. Guzman

Seminars/Webinars

Register Today: ***www.lcwlegal.com/events-and-training***

July 11 **"How to Avoid Claims of Disability Discrimination: The Road to Reasonable Accommodation With Special Guest - Staff Counsel Irina Trasovan from DFEH"**
Liebert Cassidy Whitmore Seminar | Fullerton | Jennifer Rosner & Irina Trasovan

August 2 **"Successful Strategies for Tactics at the Table"**
Liebert Cassidy Whitmore | Webinar | Donna Williamson

August 22 **"Leaves"**
Liebert Cassidy Whitmore | Webinar | Jennifer Rosner

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