



FIRE WATCH

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

MAY 2018

INDEX

FBOR/Discipline.....	1
Wage and Hour.....	2
Retirement.....	3

LCW NEWS

LCW Webinar.....	4
Firm Activities.....	5

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

Los Angeles | Tel: 310.981.2000
 San Francisco | Tel: 415.512.3000
 Fresno | Tel: 559.256.7800
 San Diego | Tel: 619.481.5900
 Sacramento | Tel: 916.584.7000

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FBOR/DISCIPLINE

Modification of Timely Written Reprimand Did Not Violate One-Year Limitations Period for Discipline.

The California Court of Appeal reiterated that if a public agency employer provides timely notice of proposed discipline under the Public Safety Officers Bill of Rights Act (POBR), and then imposes a modified form of that discipline more than one year after becoming aware of the conduct at issue, the discipline is still timely under the POBR.

In *Squire v. County of Los Angeles*, the Los Angeles County Sheriff’s Department issued written reprimands to a sergeant and lieutenant within POBR’s one-year limitations period. Under the POBR, peace officers are entitled to various rights, including being notified of proposed punitive action within one year of the agency’s discovery of the underlying misconduct. The Firefighters Procedural Bill of Rights Act (FBOR) contains a similar one-year limitations period at Government Code section 3254, subdivision (d).

Here, the basis for the reprimands was failing to report a personal relationship between a supervisor and a subordinate officer, in violation of a Department policy on inappropriate conduct based on sex. Both employees grieved their reprimands pursuant to MOU procedures. Although the Department declined to revoke the reprimands, it corrected the policy referenced in the reprimands to one governing the duties of supervisors and managers. The Department then issued modified written reprimands containing the correction. Unlike the original reprimands, the modified versions were issued later than one year after Department’s discovery of the alleged misconduct.

The employees filed petitions for writ of mandate contending the final reprimands were issued outside the POBR’s one-year limitations period and should therefore be rescinded. The Court of Appeal disagreed, finding that the Department gave notice of the proposed discipline within the one-year window, as the initial reprimands – which had not been placed in the employees’ personnel files – functioned as notices of intended discipline. The Court then held that the final reprimands were not new discipline since neither the alleged misconduct nor the level of discipline had changed. Thus, the Court of Appeal denied the petitions, affirming the timeliness of the final reprimand under the POBR.

Squire v. County of Los Angeles (2018) 22 Cal.App.5th 16.

NOTE:

Interestingly, in holding that the final reprimands did not constitute new discipline, the Court of Appeal stated: “Most importantly, the ... reprimands did not increase or change

the level of discipline.” We note that if the conduct on which final discipline is based is referenced in the initial notice of proposed discipline, we do not believe the discipline would be considered untimely merely because the penalty was reduced after the one-year period expired.

WAGE AND HOUR

Reversing Ninth Circuit, U.S. Supreme Court Rules that FLSA Overtime Exemptions Should be Interpreted Fairly, Not Narrowly.

The U.S. Supreme Court recently rejected the Ninth Circuit’s approach of construing “narrowly” the overtime exemptions from the Fair Labor Standards Act (FLSA).

The plaintiffs in the case worked as “service advisors” at Encino Motorcars, a dealership that sold and serviced Mercedes-Benz vehicles. Their duties included greeting vehicle owners, noting customer concerns about the condition of their vehicles, evaluating repair and maintenance needs, suggesting services, writing up estimates, and communicating with customers while repair work was in progress.

The plaintiffs claimed that Encino Motorcars had improperly denied them overtime wages in violation of the FLSA. In general, the FLSA requires employers to pay overtime wages for hours worked above 40 hours in a seven-day work period, except to employees who are FLSA exempt. Encino Motors asserted that the service advisors were covered by the FLSA exemption for salespeople “primarily engaged in ... servicing automobiles.” The U.S. Court of Appeals for the Ninth Circuit disagreed, but was reversed by the high court, which held that the service advisors fit within the statutory exemption.

In so holding, the Supreme Court rejected the principle invoked by the Ninth Circuit that overtime exemptions under the FLSA should be construed narrowly. This principle of narrow construction in interpreting the FLSA exemptions essentially places a thumb on the scale in favor of employees. Finding that the FLSA provides no textual indication to support this approach, the high court ruled that the exemption should simply be given a “fair reading.”

Encino Motorcars, LLC v. Navarro, 138 S.Ct. 1134 (2018).

NOTE:

Although public sector employers generally do not employ vehicle service advisors, the reasoning in this case should still be encouraging for such employers, as it suggests that other FLSA exemptions – including those which public employers do rely upon – should also be given a fair reading rather than construed narrowly.

Prior Salary Not a Justification for Pay Disparity Between Genders.

The U.S. Court of Appeals for the Ninth Circuit held in *Rizo v. Yovino* that under the federal Equal Pay Act (EPA), employers cannot defend pay disparities between male and female employees by asserting that the disparity was caused by differences in prior salaries. This decision aligns the Ninth Circuit’s interpretation of the federal EPA with California’s Equal Pay Act.

Eileen Rizo was hired as a math consultant in 2009. According to her employer’s policy, a new employee’s salary was determined by adding five percent to the employee’s most recent salary, and placing the employee on the corresponding step of a salary schedule.

In 2012, Rizo learned that her male counterparts, i.e. other math consultants whose jobs involved substantially equal skills and responsibilities, had been hired at higher salary steps. She sued, claiming violations of the federal EPA, which prohibits discrimination in pay based on sex “for equal work [involving] equal skill, effort, and responsibility, and . . . performed under similar working conditions.”

Rizo’s employer argued that, although Rizo was paid less than her male colleagues for the same work, this discrepancy was based on Rizo’s prior salary and not on her gender. In making this argument, the employer relied on an exception within the federal EPA that permits a differential in compensation “based on any other factor other than sex.”

Reviewing the case en banc, the Ninth Circuit held that, under the federal EPA:

“any other factor other than sex’ is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability,

or prior job performance. It is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-existing 'endemic' sex-based wage disparities, would create an exception for basing new hires' salaries on those very disparities—disparities that Congress declared are not only related to sex but caused by sex. To accept the County's argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed."

The decision clarifies that employers will not be able to defend federal EPA pay disparity claims merely by asserting that the disparity is the result of employees' prior salaries.

Although this case introduces a new interpretation of the federal EPA within the Ninth Circuit, an equivalent California law that prohibits sex-based pay disparities for substantially similar work expressly states that "[p]rior salary shall not, by itself, justify any disparity in compensation." (See Cal. Labor Code § 1197.5.) Accordingly, such disparities, if based on salary history, may now expose California employers to liability under both state and federal law.

Rizo v. Yovino (9th Cir. 2018) 887 F.3d 453.

NOTE:

LCW's wage and hour attorneys are available to assist agencies in bringing their hiring and pay policies into compliance with state and federal equal pay standards, and agencies are encouraged to reach out for advice in this area. Additional discussion of the decision is available here: <https://www.calpublicagencylaboremploymentblog.com/wage-and-hour-2/not-so-fast-the-ninth-circuit-reverses-itself-and-rules-employers-cannot-consider-applicants-prior-salary-in-setting-rate-of-pay/>

RETIREMENT

Circular Letter Notifies Employers that CalPERS Will Begin Assessing Fees for Failure to Enroll and Report on Employment of Retired Members Starting in July 2018.

CalPERS Circular Letter 200-010-18, dated March 30, 2018, reminds employers of two new statutory penalties designed to enforce the restrictions on employing retired CalPERS annuitants. This Circular Letter notifies employers that CalPERS will begin to assess these penalties starting in July 2018.

Government Code section 21220 states that a person who has retired for service or disability through CalPERS cannot be employed in any capacity unless that person is reinstated from retirement or the employment without reinstatement is consistent with complex CalPERS rules.

The new penalties for failing to comply are located in Government Code section 21200. The first penalty is \$200 per month for failing to enroll, solely for CalPERS' administrative recordkeeping purposes, a retired member who is employed without reinstatement, in any capacity within 30 days of employment. The second penalty is \$200 per month for failing to report the pay rate and number of hours worked of any retired member who is employed without reinstatement within 30 days following the last day of the pay period in which the retired member worked. These penalties may not be passed on to the employee.

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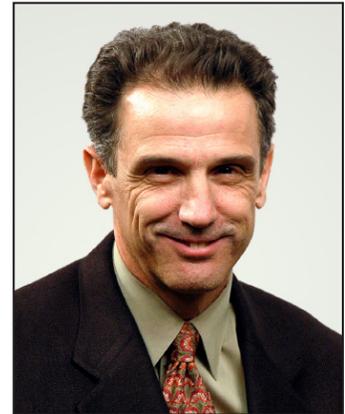
Please note: By adding your name to the e-mail distribution list, you will no longer receive a hard copy of **Fire Watch**. If you have any questions, call Morgan Favors at 310.981.2087.

LCW WEBINAR: FIREFIGHTER DISCIPLINE AND APPEAL RIGHTS: HOW TO COMPLY WITH THE BILL OF RIGHTS

Tuesday, June 26, 2018 | 10 AM - 11 AM

Presented by:

This Webinar will cover the administrative appeal requirements of the Firefighters Procedural Bill of Rights Act and provide guidance on how to structure department procedures to meet those requirements. In addition to practical tips for administering disciplinary appeal rights, the session will cover recommended policy and procedure language for adoption by public safety departments.



Richard Bolanos

Who Should Attend?

*Police Sergeants and Command Staff,
Human Resources Professionals,
and Risk Managers.*

Workshop Fee:

*Consortium Members: \$70
Non-Members: \$100*



Register Today:

www.lcwlegal.com/events-and-training/webinars-seminars



HOW TO AVOID CLAIMS OF DISABILITY DISCRIMINATION: THE ROAD TO REASONABLE ACCOMMODATION REGISTRATION IS NOW OPEN!

LCW is pleased to announce a comprehensive seminar for Public Sector personnel:

Wednesday, June 20, 2018 in South San Francisco

South San Francisco Conference Center

255 S Airport Blvd

South San Francisco, CA 94080

Agencies are faced with many challenges when presented with disabled employees in the workplace. This seminar will help employers navigate through the reasonable accommodation process and 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 clashes with other statutory schemes or 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 file for disability retirement.

Attendees will learn:

- Real case studies from litigation handled by 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

Intended Audience: This seminar is fitting for Human Resources Professionals, Risk Managers, Supervisors

Time: 9:00 a.m. to 12:00 p.m.

Pricing:

\$250 per person for Consortium Members

\$300 per person for Non-Consortium Members

*For more information regarding this seminar,
contact Alea Holmes at aholmes@lcwlegal.com or 415.512.3009 or visit
<http://www.lcwlegal.com/events-and-training>*

**LCW****POST-APPROVED
SEMINAR**

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special **group** pricing!

June 13-14, 2018
**FULLERTON COMMUNITY
CENTER**
FULLERTON, CA

CONDUCTING FAIR AND LEGALLY COMPLIANT INTERNAL AFFAIRS INVESTIGATIONS

Presented by: J. Scott Tiedemann & Geoffrey S. Sheldon

The IA Investigation is a key element in whether an agency will be successful in imposing discipline. This POST-approved two-day course will unlock the keys for solid practices, decision-making and strategy, including:

- All aspects of the POBR as it relates to investigations
- Common mistakes made during IA investigations
- Ensuring findings are in line with the discipline that is ultimately proposed
- Interactive exercises to illustrate effective interviewing techniques and pitfalls to avoid.

For more information, or to register, visit:

**WWW.LCWLEGAL.COM/
EVENTS-AND-TRAINING/WEBINARS-SEMINARS**





*Developing Positive Partnerships
and Leadership Excellence
for Labor Relations Professionals*

The Liebert Cassidy Whitmore Labor Relations Certification Program[®] is designed for labor relations and human resources professionals who work in public sector agencies. It is designed for both those new to the field as well as experienced practitioners seeking to hone their skills. These workshops combine educational training with experiential learning methods ensuring that knowledge and skill development are enhanced. Participants may take one or all of the Certification programs, in any order. Take all of the classes to earn your certificate!

Next Class:

Trends & Topics at the Table!

July 12, 2018 | Fullerton, CA

What is happening in that room? This workshop puts you into the negotiation session environment and focuses on tips from our time at the table. Trending topics, union tactics, creative problem solving, and techniques to tackle various contract provisions will be shared and demonstrated.

Register Now! <https://www.lcwlegal.com/events-and-training/labor-relations-certification-program/trends-and-topics-at-the-table>

LEARN MORE AT WWW.LCWLEGAL.COM/LRCP

LCW WEBINAR: LIFE AFTER RETIREMENT – HIRING RETIRED ANNUITANTS AND AVOIDING VIOLATIONS



Wednesday, June 27, 2018 | 10 AM - 11 AM

CalPERS agencies need to be familiar with the rules governing the employment of retired annuitants and the risk associated with reinstatement when post-retirement employment violates the law. In an area where the costs of reinstatement can be catastrophic, and where the rules governing retired annuitant employment are not always clear, it is important for agencies to be familiar with the legal framework, ever-changing administrative interpretations, and heavy risks associated with employing retired annuitants.

Topics covered in the webinar will include: The laws governing post-retirement work, the common retired annuitant exceptions, common mistakes agencies make when hiring or retaining retired annuitants, hiring retired annuitants as independent contractors, hiring retired annuitants through a third party, and the consequences and liability for reinstatement from retirement.

Who Should Attend?

Human Resources Professionals, Risk Managers, Supervisors, and Managers

Workshop Fee:

Consortium Members: \$70, Non-Members: \$100

Presented by:



[T. Oliver Yee](#)



[Michael Youril](#)



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MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

- June 5 **“Maximizing Performance Through Evaluation, Documentation and Discipline”**
San Mateo County ERC | Brisbane | Joy J. Chen
- June 7 **“Inclusive Leadership”**
Los Angeles County Human Resources | Los Angeles | Kristi Recchia
- June 21 “**Leaves, Leaves and More Leaves” and “Issues and Challenges Regarding Drugs and Alcohol in the Workplace”**
Monterey Bay ERC | Santa Cruz | Kimberly A. Horiuchi
- June 21 **“Employees and Driving” and “Labor Code 101 for Public Agencies”**
Orange County Consortium | Buena Park | Mark Meyerhoff & Paul D. Knothe

Customized Training

- June 1 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Millbrae | Joy J. Chen
- June 1,4 **“Writing Investigations”**
Probation Training Center | Pico Rivera | Los Angeles County Probation
- June 4 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
ERMA | Cathedral City | Christopher S. Frederick
- June 5 **“Preventing Workplace Harassment, Discrimination and Retaliation and Ethics in Public Service”**
City of Atherton | Erin Kunze
- June 5,27,29 **“Handling Grievances”**
Probation Training Center | Pico Rivera | Los Angeles County Probation
- June 5 **“Costing Labor Contracts”**
City of Long Beach | Kristi Recchia
- June 6 **“Performance Management”**
City of Gardena | Kristi Recchia
- June 6 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Santa Maria | Che I. Johnson
- June 6 **“The Brown Act and Ethics and Grievance Procedures”**
County of Imperial | El Centro | Stefanie K. Vaudreuil
- June 7 **“Preventing Workplace Harassment, Discrimination and Retaliation and Maximizing Performance Through Evaluation, Documentation, and Discipline”**
City of Fairfield | Gage C. Dungy
- June 7 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Los Angeles | Laura Kalty
- June 12 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
Merced County Association of Governments | Merced | Che I. Johnson

- Jun. 13,14 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
Town of Truckee | Jack Hughes
- Jun. 15 **“Keenan SWAAC Training: Performance Management”**
Keenan | Torrance | Pilar Morin
- Jun. 15 **“Freedom of Speech and Right to Privacy”**
Labor Relation Information System - LRIS | Las Vegas | Mark Meyerhoff
- Jun. 18 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Torrance | Christopher S. Frederick
- Jun. 19 **“Performance Evaluation”**
City of Gardena | Kristi Recchia
- Jun. 19 **“12 Steps To Avoiding Liability”**
City of Rialto | James E. Oldendorph
- Jun. 19,26 **“Key Legal Principles for Public Safety Managers - POST Management Course”**
Peace Officer Standards and Training - POST | San Diego | Frances Rogers
- Jun. 20 **“Risk Management Skills for Front Line Supervisor”**
ERMA | Rancho Cucamonga | Christopher S. Frederick
- Jun. 20,21
25,27 **“Embracing Diversity”**
Los Angeles County Employees Retirement Association - LACERA | Pasadena | Lee T. Patajo
- Jun. 26,28 **“Embracing Diversity”**
Los Angeles County Employees Retirement Association - LACERA | Pasadena | Christopher S. Frederick
- Jun. 27 **“Unconscious Bias and Micro Aggressions”**
City of Rancho Cucamonga | Rancho Cucamonga | Kristi Recchia
- Jun. 28 **“Case Study for Managing Illnesses or Injuries”**
City of Los Angeles | Jennifer Rosner
- Jun. 28 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Torrance | James E. Oldendorph
- Jul. 10 **“Progressive Discipline”**
City of Gardena | Kristi Recchia
- Jul. 12,25 **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Walnut Creek | Jack Hughes
- Jul. 19 **“File That! Best Practices for Documents and Record Management”**
City of Concord | Heather R. Coffman
- Jul. 24 **“Labor Relations 101”**
City of Gardena | Kristi Recchia

Speaking Engagements

- Jul. 11 **“Bullying, A Hostile Workplace, and Sexual Harassment”**
International Public Management Association Central California Chapter (IMPA-CCC) Meeting | Merced | Che I. Johnson

Seminars/Webinars

- Jun. 13,14 **“Best Practices for Conducting Fair and Legally Compliant Internal Affairs Investigations**
Liebert Cassidy Whitmore | Fullerton | Geoffrey S. Sheldon & J. Scott Tiedemann

- Jun. 20 **“How to Avoid Claims of Disability Discrimination: The Road to Reasonable Accommodation”**
Liebert Cassidy Whitmore | South San Francisco | Jennifer Rosner
- Jun. 26 **“Firefighter Discipline and Appeal Rights: How to Comply with the Bill of Rights”**
Liebert Cassidy Whitmore | Webinar | Richard Bolanos
- Jun. 27 **“Life After Retirement - Hiring Retired Annuitants and Avoiding Violations”**
Liebert Cassidy Whitmore | Webinar | Frances Rogers & Michael Youril
- Jun. 28 **“The Negotiable Aspects of Organizational Restructuring and Day-to-Day Labor Relations”**
Liebert Cassidy Whitmore | Webinar | Jack Hughes
- Jun. 12 **“Trends & Topics at the Table!”**
Liebert Cassidy Whitmore | Fullerton | Kristi Recchia & Frances Rogers
- Jun. 19 **“Payroll Processing & Regular Rate of Pay Seminar”**
Liebert Cassidy Whitmore Seminar | | Brian P. Walter & Jennifer Palagi
- Jun. 24 **“Closing the Wage Gap: California and Federal Equal and Fair Pay Laws”**
Liebert Cassidy Whitmore | Webinar | T. Oliver Yee

LCW LIEBERT CASSIDY WHITMORE

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

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