LCW Liebert Cassidy Whitmore

Fire Watch

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

February 2018

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LCW NEWS

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.

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RETALIATION

Paid Administrative Leave May Constitute An Adverse Employment Action.

A California Court of Appeal allowed an employee's whistleblower retaliation claim to proceed, where the alleged adverse employment action was being placed on paid administrative leave.

The plaintiff in the case was a social worker for San Bernardino County Children and Family Services (CFS). CFS assigned the plaintiff to investigate the living conditions of four children in protective custody. The plaintiff obtained a police report and photographs of the family home, which suggested unsafe conditions and abuse. The deputy director of CFS instructed the plaintiff to withhold certain photos from the court handling the matter and disclose other photos that had been altered. The plaintiff also learned CFS had not provided a complete police report to the court.

Concerned, the plaintiff provided the deputy county counsel a copy of the photos she had obtained. Soon after, she was removed from the case and instructed not to discuss the case with the investigator that took it over. Around the same time, CFS fired another social worker involved in the case, allegedly for exaggerating the poor condition of the children's home, although his description was corroborated by another employee.

The plaintiff then filed a motion alleging CFS had perpetrated a fraud upon the court. Six days later, CFS placed the plaintiff on paid administrative leave, pending an investigation regarding the plaintiff's potential violation of CFS's confidentiality policy through her disclosures to the deputy county counsel and the court. After the plaintiff was on paid administrative leave for a couple of months, the County held two administrative review hearings regarding her alleged misconduct, and decided to fire her. The plaintiff resigned instead. She then sued the County, claiming violation of Labor Code section 1102.5, which prohibits retaliation against an employee for disclosing improper government activity.

The appellate court found that the paid administrative leave constituted an adverse employment action under the circumstances of the case, and denied the County's motion to strike the plaintiff's complaint.

Importantly, being placed on paid administrative leave does not always constitute an adverse employment action; instead, each case turns on its own facts. As the court noted:

"The impact of an employer's action in a particular case must be evaluated in context. ... [A]n adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of

whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claims."

Here, because the circumstances of the administrative leave included the County deciding to fire the plaintiff for her disclosure to the court and conducting two hearings regarding her alleged misconduct, the administrative leave, although paid, constituted an adverse employment action.

Whitehall v. County of San Bernardino (2017) 17 Cal.App.5th 352.

NOTE:

In evaluating whether paid administrative leave may constitute an adverse employment action, employers should give careful consideration to the circumstances under which the leave arises. A more in-depth discussion of the authorities governing paid administrative leave in California is available here: http://bit.ly/2CYGlJM.

DISCRIMINATION

Obesity May Be a Disability Under FEHA.

Ketryn Cornell was an obese woman who was fired from the Berkeley Tennis Club (Club), where she had worked for more than 15 years. Cornell sued the Club, claiming that her termination constituted disability discrimination on the basis of her obesity, and that a Club manager harassed her due to her disabled status.

Beginning in 1997, Cornell worked at the Club as a lifeguard and pool manager and received positive performance reviews, raises, and bonuses. In 2012, a new manager instituted a requirement that Club employees wear shirts bearing the Club logo. When Cornell said she needed a specially-ordered size, the manager allegedly mocked her, asked her about weight-loss surgery, and ultimately ordered her a shirt that was five sizes too small. The manager later denied Cornell's requests to work extra shifts, refused to consider her for promotions, and paid her less than a newly hired employee with the same duties.

In 2013, the Club terminated Cornell for allegedly secretly recording a Club board meeting regarding personnel issues. Managers suspected that Cornell planted a recording device while helping set up the meeting room. However, the Club did not fully investigate the matter prior to terminating Cornell.

Cornell sued the Club under the Fair Employment and Housing Act (FEHA), alleging disability discrimination and other claims. The trial court granted the Club's motion for summary judgment and dismissed Cornell's FEHA claims, holding that Cornell had failed to produce evidence that her obesity qualified as a disability. The Court of Appeal, however, reinstated Cornell's claims of disability discrimination and harassment.

A key issue before the Court of Appeal was whether Cornell could establish that her obesity was a disability within the meaning of FEHA. Under the FEHA, a physical disability is defined as any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that (1) affects one or more of several body systems, and (2) limits a major life activity. Affected body systems may include the neurological, organ, respiratory, musculoskeletal, skin, or digestive systems, among others. A condition limits a major life activity (such as physical, mental or social activities, or working) if the condition makes achievement of the activity difficult.

First, in reinstating Cornell's discrimination claim, the Court of Appeal followed the California Supreme Court's decision in *Cassista v. Community Foods, Inc.*, a case which recognized that obesity can result from a physiological condition affecting a bodily system, and may limit a major life activity. The Court of Appeal agreed that under *Cassista*, an employee claiming a disability due to obesity must be able to produce evidence showing the obesity has some physiological, systemic basis. Cornell presented evidence from a physician who opined that her obesity was "more likely than not caused by a genetic condition affecting metabolism." The Club failed, in turn, to provide evidence disproving that Cornell's obesity had a physiological basis. Thus, the Club could not win summary judgment on Cornell's disability claims.

The Court of Appeal also concluded that the Club's failure to conduct a follow-up investigation of the recorder incident, and the manager's comments to Cornell, precluded summary judgment on Cornell's discrimination claims. The fact that

Cornell's managers did not fully question her about the recorder incident or perform a follow up investigation, raised a question for the jury on the issue of whether the Club management actually believed that Cornell planted the recorder. A jury could conclude that the recorder incident was a mere pretext for the Club's true discriminatory motive.

Second, the Court of Appeal reinstated Cornell's harassment claim because Cornell's evidence raised a question for a jury to decide: whether the alleged harassment was sufficiently severe or pervasive to constitute harassment. Claims of harassment are actionable under FEHA if an employee shows a "concerted pattern of harassment of a repeated, routine, or generalized nature" that would create a hostile work environment from the perspective of a reasonable person. Isolated, non-severe statements, even if offensive, generally do not support harassment claims. The Court of Appeal found that the manager's comments about Cornell's weight and eating habits, by themselves, were not extreme and were too isolated to be severe or pervasive. However, the manager had also reduced Cornell's hours, passed her over for internal job openings, and paid her lower wages than an employee performing the same duties. This combination of evidence precluded summary judgment in the Club's favor on Cornell's harassment claim.

Ketryn Cornell v. Berkeley Tennis Club (2017) 18 Cal. App.5th 908.

NOTE:

Consistent with this decision, employers should be sure to investigate employee complaints of disability discrimination, as well as employee requests for accommodation, based on obesity. Employers who fairly investigate allegations of prohibited conduct under the FEHA may be in a better position to defend themselves in a lawsuit.

HARASSMENT

Employer Had Obligation to Act When It Knew or Should Have Known That Drunken Trespasser Was Harassing Employees.

A hotel housekeeper asserted viable claims under the Fair Employment and Housing Act (FEHA) when she claimed that her employer failed to take reasonable steps to prevent a trespasser from sexually harassing and assaulting her.

Under the FEHA, an employer may be liable for sexual harassment committed by a non-employee. Liability may exist if the employer, or the employer's agents, knew or should have known of the non-employee's harassing conduct, and failed to take immediate and appropriate corrective action. To determine liability, a court will consider the extent of the employer's control over the non-employee, and any other legal responsibility over the non-employee. The FEHA also creates liability for failure to prevent harassment if an employee proves a claim of harassment, and also proves that the employer failed to take all reasonable steps necessary to prevent the harassment from occurring.

In this case, the employee, M.F., was working as a hotel housekeeper at Pacific Pearl Hotel. A man who was not an employee or guest of the hotel walked around various buildings within the hotel premises. A hotel manager saw the trespasser walking around drunk and with a beer in his hand. The manager later saw the trespasser around various areas on the hotel premises, including a hotel balcony, several floors of a hotel building and a hotel elevator. The manager did not ask the trespasser to leave or report the trespasser to authorities.

While on the premises, the trespasser approached two housekeepers and made sexual advances toward them. The second housekeeper reported the trespasser to housekeeping management. Various hotel managers and supervisors attempted to check hotel buildings to ensure the safety of the hotel's housekeepers. However, they did not check the floor of the building on which M.F. was working and did not attempt to locate her to ensure her safety. After he had been on the hotel premises for about an hour, the trespasser forced his way into the hotel room where M.F. was working and sexually assaulted her. No one from the hotel attempted to locate M.F. during this period. When M.F. phoned hotel housekeeping

after the trespasser had finally departed, M.F.'s call went unanswered. M.F. subsequently phoned law enforcement to come to her aid.

M.F. asserted that the facts she presented in her complaint were enough to state a FEHA claim against the hotel. The hotel asserted that it could not be liable because M.F. did not present sufficient facts to show that the hotel knew or should have known that the trespasser would sexually harass M.F. before the trespasser appeared at the hotel. However, as the Court noted, the hotel did become aware of the trespasser's harassing conduct once he was on the hotel premises, and certainly after he harassed other housekeeping employees. At that point, the Court found, the hotel had a legal obligation to take remedial measures to prevent the trespasser's harassment of M.F.

The Court further noted that once an employer is informed of sexual harassment, as the hotel was in this case, the employer must take immediate corrective action that is reasonably calculated to end the current harassment as well as deter future harassment. This means an employer may have to take temporary initial steps to address the situation while it determines whether the harassment complaint is justified, and then adopt permanent remedial steps to prevent future harassment. The Court therefore rejected the hotel's argument that it was relieved of its legal obligations to protect M.F. from harassment merely because the trespasser's initial harassing conduct was not directed toward her. The hotel knew of the trespasser's harassing conduct toward its employees, and it therefore had an obligation under the FEHA to take steps to protect potential future victims, including M.F.

M.F. v. Pacific Pearl Hotel Management LLC (2017) 16 Cal. App.5th 693.

NOTE:

Public employers need to protect employees from harassment that originates from members of the public or vendors who come onto the public employer's property. Whether an employer knows or should have known of a non-employee's sexually harassing conduct, or takes adequate measures to prevent future harassment depends on the facts of each case.

Supervisor in Harassment Litigation Must Prove Subordinate's Allegations Were "Frivolous" to Recover Defense Costs.

A California Court of Appeal confirmed that a supervisor, like an employer, is not entitled to recover attorney fees as a prevailing defendant in a harassment lawsuit, unless the supervisor proves the employee's claim was "frivolous, unreasonable, or without foundation." This standard is a difficult test to meet and the trial court judge has discretion to grant or deny a defendant's request for fees.

Elisa Lopez sued her employer, the City of Beverly Hills, and her supervisor, Gregory Routt, for harassment based on race and national origin, under the California Fair Employment and Housing Act (FEHA). The jury found in favor of the City and Routt. At the conclusion of the trial, Routt sought to recover attorney fees.

Routt argued that an individual defendant should not have to meet the same standard that applies to employers. However, the court rejected such a distinction, finding that the legislative history confirms that an individual defendant is subject to the same standard as an employer in recovering attorney fees under the FEHA..

Lopez v. Routt (2017) 17 Cal.App.5th 1006.

NOTE:

Even if an employee's claims are weak or specious, it may not be possible to prove they are also "frivolous."

MILITARY LEAVE

Pilot is Awarded Signing Bonus He Would Have Earned Had He Not Taken Military Leave.

The U.S. Court of Appeals for the Ninth Circuit confirmed that in determining entitlement to employment benefits upon an employee's return from military leave, it is necessary to consider the employee's career trajectory and what position the employee would have attained but for the leave.

The case involved claims brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The USERRA is a federal

statute designed to ensure employees are not adversely affected when taking leave to serve in the military. It guarantees that an individual who departs for military service is not denied any "benefit of employment" due to that service.

Dale Huhmann worked for Federal Express (FedEx) as a pilot. A pilot's pay grade is determined by the type of aircraft the pilot flies, and the pilot's role in flying the aircraft. Huhmann was selected to train as a first officer on an MD-11 aircraft, an assignment that would have qualified him for a higher pay grade. However, just before starting the training, he was called to active duty in the U.S. Air Force. He returned from active duty more than three years later.

While Huhmann was serving in the Air Force, FedEx issued a letter to the labor union representing him and other pilots. FedEx offered a signing bonus to employees upon ratification of a proposed collective bargaining agreement. The bonus would be paid to pilots employed on the day the CBA was signed, including pilots on military leave. A pilot's signing bonus would be determined in part by the class of aircraft on which he or she was a crew member. The signing bonus for a crew member on a 727 aircraft was $7,400, while the bonus for crew on an MD-11 aircraft was $17,700.

Upon Huhmann's return from military duty, FedEx paid him a $7,400 signing bonus, not the $17,700 bonus. Huhmann restarted his training to become a pilot on the MD-11. Although some pilots do not successfully complete the training program, Huhmann completed it and was approved to fly an MD-11.

Huhmann sued FedEx, claiming it violated the USERRA by denying him the $17,700 bonus he would have earned had he not taken the military leave and instead completed the MD-11 training prior to deployment.

The key question before the court was whether Huhmann was denied any "benefit of employment" under the USERRA due to his military service. An employee making such a claim is responsible for proving the military service status was a "substantial or motivating factor in the adverse employment action," which in this case was FedEx's decision to pay a lesser bonus amount. An employer can defend against a USERRA claim by showing that it would have made the decision at issue regardless of the employee's military service.

The trial court applied a two-step analysis to determine whether Huhmann was entitled to be paid the $17,700 bonus upon his return from service: the "escalator principle" and the "reasonable certainty" test.

First, as to the escalator principle, the court reasoned that under the USERRA, a member of the military should not be removed from the normal progress of his or her "career trajectory," but must be returned to the same position of employment in which he or she would have been employed if the employment had not been interrupted by military service.

Second, the trial court applied the "reasonably certainty test" which asks two questions:

1. Whether, looking forward, it is reasonably certain that employees who complete training regularly advance in their career, and

2. Whether in hindsight, an employee did in fact advance, or would have probably advanced, if training or employment was not interrupted by military service.

Applying these standards, the Ninth Circuit affirmed the district court's finding that Huhmann was entitled to the $17,700 bonus applicable to MD-11 pilots. Under the first, forward-looking prong of the reasonable certainty test, the court found that while qualifying to pilot an MD-11 aircraft is challenging and some trainee pilots fail, trainees are provided multiple opportunities to pass exams. As to the second prong, Huhmann did in fact pass his training exams and begin working as an MD-11 pilot upon returning from military service.

Thus, the plain language of the USERRA prohibited FedEx from denying Huhmann the bonus to which he would have been entitled had he not taken leave to serve in the military.

Huhmann v. Federal Express (2017) 874 F.3d 1102.

NOTE:

Agencies should be aware that the California Military and Veterans Code (MVC) also governs the rights of public employees who take leave to serve in the military. The MVC and USERRA contain provisions relating to such issues as an employee's entitlement to health insurance, vacation, and sick leave benefits while on military leave; reemployment upon returning

from military service; and what obligation, if any, an employer has to pay an employee's salary while the employee is on leave to complete military service.

FAMILY AND MEDICAL ACT LEAVE

Sixth Circuit Grants Summary Judgment for City on Claims of Interference with FMLA Rights.

The U.S. Court of Appeals for the Sixth Circuit dismissed a City Manager's lawsuit alleging the City of Belding, Michigan terminated her in violation of her right to take leave under the federal Family and Medical Leave Act (FMLA). The Court found that the City Manager's evidence was inadequate to show she was terminated because she took FMLA leave, and that the City provided evidence of a legitimate, non-discriminatory reason for the termination, which the City Manager did not disprove.

Under the FMLA, eligible employees of a covered entity may take job-protected leave to attend to a serious health condition. The FMLA makes it unlawful for employers to interfere with an employee's attempt to exercise his or her rights under the FMLA.

In this case, City Manager Margaret Mullendore was an at-will employee hired under an employment contract that allowed the City Council to terminate her employment at any time, subject to certain conditions. Although the City had renewed Mullendore's contract several times, her work performance also drew criticism from several citizens. Some members of the City Council were also displeased with her leadership.

In late 2014, one City Council member announced his desire to terminate Mullendore's employment. Thereafter, in January 2015, Mullendore provided the City Council with a memorandum stating she would be undergoing a medical procedure and intended to take leave and then work from home for a period of time.

While Mullendore was on leave, the City Council passed a motion to terminate her employment. Mullendore sued, claiming the Council terminated her because she took FMLA leave. The City asserted that its desire to terminate Mullendore arose before she announced her surgery, and that the City Council made the decision to terminate her because it was dissatisfied with her work performance and found her to be a politically divisive manager.

An employee may only prevail on a claim of an employer's interference with FMLA rights if the employee proves five elements: the employee is eligible for FMLA leave; the employer is covered by the FMLA; the employee is entitled to take FMLA leave; the employee gave notice of his or her intent to take FMLA leave; and the employer denied the employee FMLA leave to which the employee was entitled. Even if the employee proves all five elements, an employer may defend against such a claim by providing a legitimate reason for its conduct, unrelated to the employee's request for leave. If the employer presents a legitimate reason for its decision, an employee must prove the employer's reason is pretextual.

The Court determined that, even if Mullendore's memorandum reasonably notified City Council of her desire to take FMLA leave, Mullendore failed to present evidence that raised an issue for the jury on the question of whether she was terminated because she requested FMLA leave.

Mullendore's evidence merely demonstrated that she was terminated while she was on leave, not that she was terminated because she requested FMLA leave. The Court stated: "At best, the evidence demonstrates that the members of the City Council terminated her when she was not at their meeting because it was personally or politically expedient to do so behind her back."

Thus, the Sixth Circuit affirmed the trial court's decision to grant summary judgment in favor of the City and dismiss Mullendore's FMLA interference claims.

Mullendore v. City of Belding (6th Cir. 2017) 872 F.3d 322.

NOTE:

This case demonstrates how important it is for an employer to promptly take action in response to an employee's poor performance, and, at very least, document performance issues.

LEGISLATIVE UPDATES

AB 579 – Creates Statewide Firefighter Pre-Apprentice Program.

AB 579 requires the Department of Industrial Relations' Division of Apprenticeship Standards and the California Firefighter Joint Apprenticeship Committee (CAL-JAC) to develop a statewide firefighter pre-apprenticeship program to recruit candidates from underrepresented groups. CAL-JAC will deliver the pilot classes for the program using existing facilities and training models. CAL-JAC will then provide the program model to fire protection agencies, which can then use the model to establish local pre-apprenticeship programs. AB 579 was an urgency bill that took effect on September 28, 2017.

(AB 579 adds Section 13159.15 to the Health and Safety Code.)

AB 1309 – Allows CalPERS to Assess Fees for Failing to Promptly Enroll Retired Annuitants and Report their Pay and Hours.

The Public Employees' Retirement Law allows a person receiving pension benefits from the California Public Employees Retirement System to work for an employer in the system provided certain conditions are met. AB 1309 allows CalPERS to assess a $200 fee per retired member per month when an employer:

Fails to enroll a retired annuitant in CalPERS' recordkeeping system within 30 days of hire or

Fails to report an annuitant's pay rate and hours worked within 30 days of the end of the pay period in which the annuitant worked.

The employer cannot pass the cost of any such fees on to the annuitant.

Employers who contract with CalPERS should review their employment procedures for annuitants to ensure that hiring, pay rate, and hours are promptly reported to CalPERS.

(AB 1309 amends Section 21220 of the Government Code.)

AB 450 – Prohibits Employers from Voluntarily Consenting to Inspections by Federal Immigration Agents.

AB 450 places significant limitations on an employer's ability to cooperate with federal immigration authorities and imposes fines for violating those limitations. The bill prohibits an employer from giving voluntary consent for an immigration enforcement agent to enter nonpublic areas of the workplace, except as required by federal law or a judicial warrant. AB 450 also prohibits an employer from giving voluntary consent for an immigration enforcement agent to access, review, or obtain employee records, except as required by federal law or a subpoena or court order.

AB 450 requires employers to post a notice to employees when federal immigration authorities have given notice of an inspection of I-9 Employment Eligibility Verification forms, and to provide the inspection notice to individual employees or their authorized representative upon request. The bill also requires the employer to provide an affected employee and the employee's authorized representative with the written results of the inspection and written notice of the employer's and the employee's resulting obligations. Finally, AB 450 prohibits an employer from re-verifying a current employee's employment eligibility at a time or in a manner not required by federal law.

AB 450's prohibitions may be enforced by the Labor Commissioner or the state Attorney General. A first violation subjects the employer to a fine of $2,000 to $5,000; the fine for a second violation is $5,000 to $10,000.

While AB 450 does not otherwise limit an employer's obligation to comply with mandatory actions taken by federal immigration authorities, it is part of the Legislature's recent trend to prohibit employers from voluntarily participating with federal immigration authorities or taking related actions that go beyond what is otherwise required under federal law.

(AB 450 adds Sections 7285.1 through 7285.3 to the Government Code, and Sections 90.2 and 1019.2 to the Labor Code.)

AB 168 – Prohibits an Employer from Seeking an Applicant's Salary History Information.

AB 168 is another effort by the California Legislature to address gender-based pay inequities. According to the bill's sponsors, females are more likely to have a lower starting salary in their first job than males, and also are more likely to take extended time off from work during their career. The pay inequity that results from these conditions is perpetuated, said the bill's sponsors, by basing hiring and compensation decisions on an applicant's prior salary.

To break this cycle, AB 168 prohibits an employer from seeking, either directly or indirectly, information about a job applicant's salary (including compensation and benefits) in prior employment. The employer cannot include such a question on a job application nor ask one in a job interview. Additionally, the employer may not ask the applicant's former employer, references, or a background investigator for the applicant's past salary history information.

AB 168 also makes it illegal for an employer to rely on an applicant's past salary history when deciding whether to hire the applicant. Specifically, the bill says that past compensation cannot be a factor in the hiring decision. Thus, even if past salary is not the determinative factor, the mere fact that it was considered makes the hiring decision illegal.

AB 168 includes two important exceptions:

An employer may seek and use salary history that is disclosable under state and federal public records laws. Thus, if the applicant formerly held a position with a federal, state, or local government employer whose salary is public record, the prospective employer may ask about and consider the applicant's salary history with the public employer.

If the applicant voluntarily provides compensation history, an employer may use that information to determine what salary to offer the applicant, but may not use it to decide whether to hire the applicant.

AB 168 also requires an employer to provide an applicant, "upon reasonable request," the pay scale for the position sought. And, unlike other Labor Code sections prohibiting certain inquiries of applicants, a violation of AB 168's prohibitions is not a misdemeanor.

Employers should review their employment applications and interview procedures to ensure they do not ask about or consider an applicant's salary history from prior private employment. Employers may also want to look at using alternative methods to determine the salary placement of new employees that do not include the use of prior salary history. Employers are advised to work their legal counsel to determine compliance with this new law.

(AB 168 adds Section 432.3 to the Labor Code.)

RETIREMENT

CalPERS Raises Compensation Caps for 2018.

CalPERS has updated compensation limits for employer and employee contributions.

The compensation limit for classic members for the 2018 calendar year is $275,000, up from $270,000 in 2017. The compensation limit for new members (those subject to the Public Employees' Pension Reform Act (PEPRA)) increases from $118,775 to $121,388 for Social Security participants, and from $142,530 to

$145,666 for Non-Social Security participants. Employees with membership dates prior to July 1, 1996 are not impacted by these limits.

When a classic or new member reaches the applicable compensation cap, contributions should no longer be reported. Thus, for a classic member who earns $280,000, in 2018, $5,000 should not be reported.

Public employers must continue to monitor whether employees meet or exceed the cap and must notify employees when the cap is reached. Employers must also continue to report an employee's compensation earned to CalPERS, even if the compensation exceeds the applicable cap.

NOTE:

Employers should notify all classic or PEPRA members who are subject to the compensation limit requirements of the changes to the CalPERS caps on earnable compensation. The full CalPERS Circular Letter is available here: https://www.calpers.ca.gov/docs/circular-letters/2018/200-001-18.pdf.

California Court of Appeal Opinion Injects Uncertainty as to "Vested Rights."

The Public Employee Pension Reform Act of 2013 (PEPRA) was enacted to address the significant, statewide underfunding of public pension systems. Among other things, PEPRA amended the pension systems governed by the County Employee's Retirement Law of 1937 (CERL) and expressly excluded several items from CERL's long-standing definition of "compensation earnable" for employees hired prior to PEPRA's effective date, i.e. "Legacy Members."

In response to these changes, labor organizations representing members of CERL systems sued to challenge the exclusion of pay items that were previously included as compensation earnable. They also alleged that Legacy Members had a constitutionally protected "vested right" to pension benefits as those benefits existed prior to the enactment of PEPRA, and that PEPRA unconstitutionally impaired that right.

On appeal, California's First District reviewed two issues: 1) whether retirement boards have discretion to include pay items in compensation earnable that are not listed in CERL's statutory categories; and 2) whether PEPRA in fact unconstitutionally impaired Legacy Members' vested pension rights.

First, the Court found that retirement boards do not possess discretion to include additional pay items in compensation earnable. The Court thus held that an item of compensation is only includable in a member's pensionable compensation if it falls within one of CERL's statutory compensation categories.

Second, the Court held that detrimental changes to the vested pension benefits of Legacy Members could only be justified by compelling evidence that the changes manifest a material relation to the successful operation of the pension system. The Court determined that this analysis must be done on an individualized basis and directed the trial court to conduct the required analysis for each of the retirement systems at issue.

In conducting its analysis of changes to vested pension benefits, the Court expressly declined to follow *Marin Assn. of Public Employees v. Marin County Employee's Retirement Assn.* That case held that public pension system members are not entitled to an immutable, unchanging pension benefit for the entirety of their employment, only to a "reasonable" pension. The *Marin* opinion further held that detrimental pension modifications need not always be accompanied by comparable new advantages to pensioners. The *Marin* opinion ultimately concluded that PEPRA's modifications to the CERL definition of compensation earnable for Legacy Members was "reasonable" and therefore did not impair their constitutionally protected vested rights.

The California Supreme Court previously granted review of *Marin*, but then placed that case in abeyance until this more recent case was decided. Until the Supreme Court weighs in, the two divergent Court of Appeal decisions stand.

Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn-- Cal.Rptr.3d --- [2018 WL 317045].

NOTE:

We will continue to monitor and provide any updates regarding the California Supreme Court's review. A full discussion of the Alameda County *decision and related developments in retirement law is available here:* https://www.calpublicagencylaboremploymentblog.com/pension/california-court-of-appeal-issues-a-contrary-decision-addressing-vested-rights-of-public-employees-in-the-aftermath-of-pepra-where-will-the-supreme-court-land/

VERDICTS AND SETTLEMENTS

Below are descriptions of a few recent verdicts and settlements in the public safety arena. We are providing this information to give readers an understanding of what employment litigation can cost public safety employers:

A jury in Southern California awarded a former police officer nearly $4.8 million in damages, finding the police department discriminated against the officer based on his dyslexia and attention-deficit/hyperactivity disorder.

A Southern California city agreed to pay approximately half a million dollars to a former police lieutenant who claimed she was denied a promotion on account of her race and gender.

Outside California, fire departments in Anchorage and Kansas City were found liable for approximately $780,000 and $350,000, respectively, in discrimination cases brought by firefighters; and a former firefighter alleging discrimination and harassment settled with the City of Tampa for $245,000.

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THREE LCW ATTORNEYS HONORED BY THE 2018 SOUTHERN CALIFORNIA SUPER LAWYERS

Geoffrey S. Sheldon, partner in the Los Angeles office, is receiving this honor for the second year in a row. Geoff is the Chair of the Firm's Public Safety Practice Group and also a member of the Litigation Practice Group's Executive Committee. He has successfully defended clients in numerous employment litigation and administrative hearings, making him one of LCW's top litigation experts.

This is the fifth time that **J. Scott Tiedemann** has been selected to this list. As the Managing Partner of LCW, Scott is a leading advocate and trusted advisor to public safety agencies across California. In addition, Scott represents a wide variety of government agencies in labor and employment matter.

Brian P. Walter, partner in the Los Angeles office, is receiving this honor for the twelfth time (ninth consecutive year). Brian represents clients in all aspects of employment and labor law and has handled class actions and collective actions in federal and state courts. He is also the Chair of the Firm's Litigation Practice Group, advises and counsels clients on FLSA issues, and is a popular presenter for LCW trainings.

Liebert Cassidy Whitmore congratulates them for being honored in their work!

LCW WEBINAR: HOT TOPICS IN NEGOTIATIONS 2018

Thursday February 22, 2018 | 10 AM - 11 AM

Presented by:

T. Oliver Yee

Negotiation season is underway in many public agencies and with this busy season comes several hot topics. Join us at this upcoming webinar where we will share core areas for review and discussion at the collective bargaining table. In addition to the common subjects of balancing affordability and cost containment against employees' desires for income improvement, we will look at areas of the MOU that prove to be most problematic with legal compliance and developing strategies and solutions to help you reach a deal. Getting prepared early is critical and developing a strategy and list of priorities can help your time at the table be more efficient and effective. Don't miss this overview of hot topics at the table this year!

Who Should Attend?
Human Resources and Labor Relations professionals, Managers and Directors.

Workshop Fee: *Consortium Members: $70, Non-Members: $100*

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

Firm Activities

Consortium Training

Feb. 14	**"A Guide to Implementing Public Employee Discipline"** and **"Introduction to the FLSA"** Central Coast ERC | Paso Robles | Che. I. Johnson
Feb. 15	**"Difficult Conversations"** and **"The Future is Now - Embracing Generational Diversity and Succession Planning"** Napa/Solano/Yolo ERC | Napa | Jack Hughes
Feb. 22	**"A Guide to Implementing Public Employee Discipline"** and **"Risk Management Skills for the Front Line Supervisor"** North State ERC | Red Bluff | Kristin D. Lindgren
Mar. 7	**"Maximizing Performance Through Evaluation, Documentation and Discipline"** Los Angeles County Human Resources | Los Angeles | Melanie L. Chaney
Mar. 7	**"Public Sector Employment Law Update"** Ventura/Santa Barbara ERC | Webinar | Richard S. Whitmore
Mar. 8	**"Workplace Bullying: A Growing Concern" and "Difficult Conversations"** Central Valley ERC | Hanford | Che I. Johnson
Mar. 8	**"Iron Fists or Kid Gloves: Retaliation in the Workplace" and "Navigating the Crossroads of Discipline and Disability Accomodation"** East Inland Empire ERC | Fontana | T. Oliver Yee & Kevin J. Chicas
Mar. 8	**"Introduction to the FLSA"** Gold Country ERC | Webinar and Nevada City | Gage C. Dungy
Mar. 14	**"The Art of Writing the Performance Evaluation"** and **"Inclusive Leadership"** Coachella Valley ERC | Indio | Kristi Recchia
Mar. 14	**"Introduction to the FLSA"** Gateway Public ERC | Santa Fe Springs | Jennifer Palagi
Mar. 14	**"Workplace Bullying: A Growing Concern"** and **"Issues and Challenges Regarding Drugs and Alcohol in the Workplace"** San Joaquin Valley ERC | Merced | Kimberly A. Horiuchi
Mar. 15	**"Moving Into the Future"** Bay Area ERC | Milpitas and Webinar | Erin Kunze
Mar. 15	**"The Art of Writing the Performance Evaluation"** San Mateo County ERC | Foster City | Heather R. Coffman
Mar. 20	**"Difficult Conversations"** and **"Inclusive Leadership"** North San Diego County ERC | Vista | Kristi Recchia
Mar. 22	**"Workers' Compensation: Managing Employee Injuries, Disability and Occupational Safety"** West Inland Empire ERC | Diamond Bar | Jeremiah Heisler
Mar. 28	**"Maximizing Supervisory Skills for the First Line Supervisor"** Sonoma/Marin ERC | Rohnert Park | Kelly Tuffo

Customized Training

Feb. 14	**"Preventing Workplace Harassment, Discrimination and Retaliation"** ERMA | Santa Fe Springs | Danny Y. Yoo
Feb. 15,22	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Irvine | Christopher S. Frederick
Feb. 15	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Rialto | Danny Y. Yoo
Feb. 15	**"The Disability Interactive Process"** County of Tulare | Visalia | Shelline Bennett
Feb. 20	**"Building the Best Management Skills Toolbox"** City of Beverly Hills | Kristi Recchia
Feb. 21	**"Difficult Conversations and Maximizing Performance Through Evaluation, Documentation and Discipline"** City of Riverside | Danny Y. Yoo
Feb. 21	**"Managing the Injured or Disabled Employee and Return to Work Options"** ERMA | Lemoore | Che I. Johnson
Feb. 21	**"Preventing Workplace Harassment, Discrimination and Retaliation"** West Basin Municipal Water District | Carson | T. Oliver Yee
Feb. 27	**"Maximizing Supervisory Skills for the First Line Supervisor"** City of Riverside | Lee T. Patajo
Mar. 1,8,9,15,22	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Irvine | Christopher S. Frederick
Mar. 2	**"Ethics in Public Service"** County of San Luis Obispo | San Luis Obispo | Laura Kalty
Mar. 6	**"Preventing Workplace Harassment, Discrimination and Retaliation"** City of Stockton | Kristin D. Lindgren
Mar. 7	**"Preventing Workplace Harassment, Discrimination and Retaliation and Mandated Reporting"** East Bay Regional Park District | Castro Valley | Erin Kunze
Mar. 13	**"Motivation, Influence & Accountability in the Public Sector"** City of Beverly Hills | Kristi Recchia
Mar. 15	**"MOU's, Leaves and Accommodations"** City of Santa Monica | Laura Kalty
Mar. 15	**"Must-Have Employment Policies and Guide to Making an Offer of Employment and Guide to Lawful Termination and The Disability Interactive Process"** CSRMA | Oakland | Lisa S. Charbonneau
Mar. 21	**"Progressive Discipline"** Mono County | AM workshop - Mammoth Lakes & PM workshop - Bridgeport | Gage C. Dungy

Mar. 22 **"Introduction to Public Service"**
City of Stockton | Gage C. Dungy

Mar. 28 **"Preventing Workplace Harassment, Discrimination and Retaliation and File That! Best Practices for Document Record Management"**
City of Riverside | Christopher S. Frederick

Mar. 29 **"Performance Management: Evaluation, Documentation and Discipline"**
ERMA | West Hollywood | Jennifer Rosner

Mar. 30 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
ERMA | Farmersville | Kimberly A. Horiuchi

Speaking Engagement

Feb. 15 **"Ethics AB1234 Compliance Training"**
California Special Districts Association (CSDA) District Network Meeting | Vista | Frances Rogers

Feb. 15 **"Meet and Confer Obligation"**
Southern California Public Relations Council (SCPLRC) Annual Conference | Lakewood | Peter J. Brown

Feb. 21 **"Annual Employment Law Update: Recent Cases and Trends"**
CSDA Webinar | Webinar | Gage C. Dungy

Feb. 22 **"Elimination of Bias in the Legal Profession"**
City Attorney's Association of Los Angeles County (CAALAC) | El Segundo | Elizabeth Tom Arce

Mar. 1 **"Legal Update"**
County Counsels Association (CCA) | Oakland | Morin I. Jacob

Mar. 15 **"Sexual Harassment and AB 1661"**
League of California Cities Los Angeles Division | Cerritos | Jennifer Rosner

Mar. 15 **"Preparing for Your Next Arbitration- The Who's, When's, Why's, and How's"**
Northern California Chapter International Public Management Association Annual Conference | Rohnert Park | Richard Bolanos

Mar. 21 **"Critical Legal Update on Labor and Employment Laws Impacting Police Personnel"**
California Police Chiefs Association (CPCA) Annual Conference | Long Beach | TBD

Mar. 23 **"Elimination of Bias in the Legal Profession"**
City Attorney's Association of San Diego (CAASD) | Palm Springs | Jennifer Rosner

Seminars/Webinars

Feb. 22 **"Hot Topics in Negotiations for 2018"**
Liebert Cassidy Whitmore | Webinar | T. Oliver Yee

Feb. 26-27 "**LCW Annual Conference"**
San Francisco

Feb. 28 **"Communication Counts!"**
LCW Annual Conference | San Francisco | Peter J. Brown & Kristi Recchia

Mar. 22 **"Costing Labor Contracts"**
Liebert Cassidy Whitmore | Central Valley | Peter J. Brown & Kristi Recchia

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