LCW

Client Update

February 2022

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FIRM VICTORY

LCW Wins Dismissal Of Terminated Peace Officer's Lawsuit.

LCW Associate Attorneys **Nathan Jackson** and **Lars Reed** successfully represented a city in a lawsuit that a former police officer brought.

In the spring of 2021, the city's police department launched an internal affairs investigation into the police officer's alleged misconduct. In April 2021, the district attorney's office filed criminal charges against the officer. The officer was represented by counsel both in the criminal proceeding and in the internal affairs investigation. Once the investigation and all pre-disciplinary processes were completed, the department terminated the officer, and the officer appealed.

The memorandum of understanding (MOU) between the city and the police union outlined the exclusive process for the officer to appeal his firing. The MOU contained a multi-step grievance procedure, and each step contained specific deadlines for the officer to request to advance his appeal. The officer's counsel missed the deadline to advance the appeal to arbitration by over a month. The city manager denied the officer's arbitration request on the grounds that the officer waived further appeal rights under the MOU.

The officer filed a lawsuit seeking declaratory relief from the trial court and an order for the city to arbitrate his termination appeal. The officer's counsel indicated that the failure to meet the MOU's deadlines was due in part to members of his family falling ill. He argued that his failure to timely request arbitration was due to excusable neglect. He further argued that relief was appropriate given the fundamental due process rights at stake.

LCW filed a demurrer on behalf of the city. One of the grounds for demurrer was that declaratory relief was not an available remedy for the officer because there was no dispute as to the MOU's language and the officer's rights under it. The court agreed. The officer had not shown the MOU language was ambiguous. The MOU stated that the failure to meet the timelines for advancing the grievance forfeited further grievance rights. The court also found the officer's counsel's failure to timely advance arbitration was not the result of excusable neglect, because the failure to meet a simple deadline was not an oversight that a reasonably prudent person would make. The officer sought leave to amend his lawsuit, and this request was denied. Based on the foregoing, the court sustained the city's demurrer without leave to amend, because the officer's claim arose from an MOU that is subject to only one reasonable interpretation.

Note:

A demurrer is a request for a court to dismiss a case because the case is not viable. A demurrer is a powerful tool that can save public agencies money by getting lawsuits dismissed at the pleading stage, without a trial or discovery. LCW attorneys can help public agencies identify legal deficiencies in a lawsuit that may make a case appropriate for demurrer.

POBR

City Properly Terminated Two Peace Officers Who Played Video Games Rather Than Respond To A Robbery, And Who Lied To Cover Up Their Neglect of Duty.

On April 15, 2017, Louis Lozano and Eric Mitchell, two police officers for the City of Los Angeles (City), were working as partners when they received a radio call for a robbery in progress at a mall near their location. Sergeant Jose Gomez, their patrol supervisor that day, later radioed their patrol unit and requested that they respond to the robbery to assist a captain. The officers did not respond to the Sergeant.

Later that evening, the Sergeant met with the two officers to ask if they had heard the call for backup regarding the robbery. The two officers said that they did not hear the call due to loud noise in their surrounding area. The Sergeant counseled them for not listening to the radio and advised them to move to a location where they could hear their radio in the future. The Sergeant then reviewed the digital in-car video system (DICVS) recording from the day, which showed that the officers did hear the radio communications about the robbery, but elected not to respond. The Department then initiated an investigation, which determined – based on the DICVS recording – that the officers chose to play "Pokémon Go" rather than respond to the radio. Although the officers claimed they were not playing the game while on duty, the investigation determined that they were not truthful.

Based on the investigation's findings, the Department charged the officers with multiple counts of misconduct, including failing to: respond to a robbery-in-progress call; respond over the radio when their unit was called; and handle an assigned radio call. The officers were also charged with playing "Pokémon Go" while on patrol, and making false or misleading statements during the personnel investigation.

A board of rights found the officers guilty on all but one count and unanimously recommended that they be fired. The Department's Chief of Police adopted the board's penalty recommendation and terminated them. The officers filed a petition for writ of administrative mandate challenging the City's decision to terminate their employment. The trial court denied the petition, and they appealed.

On appeal, the officers alleged the City unlawfully used the DICVS recording in their disciplinary proceeding because the recording captured their private conversations. They alleged the Department violated its Special Order No. 45, which states that the DICVS may not be used to monitor private conversations between employees. The Court of Appeal disagreed, noting that another Department guideline clarified that if a personal communication between employees is recorded on the DICVS, it will not be used to adjudicate a personnel complaint "unless there is evidence of criminal or egregious misconduct."

The officers also alleged that the use of the DICVS recording violated Penal Code Section 632, which prohibits intentional eavesdropping by means of any recording device without the consent of all parties. The Court of Appeal disagreed, finding that the officers failed to present any evidence as to who was responsible for turning on the DICVS recording.

The officers also alleged the City denied them protections under the Public Safety Officers Procedural Bill of Rights Act (POBR) because Sergeant Gomez questioned them without affording them the opportunity to have a legal representative present. Again, the Court of Appeal disagreed, finding that the Sergeant's meeting with the officers was a routine contact between supervisor and subordinates. The Court noted that the Sergeant had no evidence when he met with the officers that they had heard and ignored the radio calls. Therefore, Sergeant Gomez did not violate the POBR by meeting with the officers without their representative.

For these reasons, the Court of Appeal affirmed judgment for the City and upheld the officers' terminations.

Lozano v. City of Los Angeles, 2022 WL 71705 (Cal. Ct. App. Jan. 7, 2022).

NOTE:

The Court of Appeal relied on the Department's unambiguous guidelines that vehicle recordings could be used in some circumstances for personnel investigations and discipline. LCW attorneys regularly assist agencies to ensure that any guidelines or policies align with applicable law.

California Supreme Court Confirms Employee-Friendly Test For Evaluating Whistleblower Retaliation Claims.

Wallen Lawson worked as a territory manager for PPG Architectural Finishes, Inc. (PPG) -- a paint and coatings manufacturer -- from 2015 until he was fired in 2017. PPG used two metrics to evaluate Lawson's work performance: 1) his ability to meet sales goals; and 2) his scores on "market walks" during which PPG managers shadowed Lawson as he did his work. While Lawson received the highest possible score on his first market walk, his scores thereafter took a nosedive. He also frequently missed his monthly sales targets. In Spring 2017, PPG placed Lawson on a performance improvement plan.

During this same time, Lawson alleged his direct supervisor began ordering him to intentionally mistint slow-selling PPG paint products so that PPG could avoid buying back what would otherwise be excess unsold product. Lawson did not agree with this mistinting order, and he filed two anonymous complaints with PPG's central ethics hotline. He also told his supervisor he refused to participate in mistinting. PPG investigated the issue and told the supervisor to discontinue the order. Yet, the supervisor continued to directly supervise Lawson and oversee his market walk evaluations. After Lawson failed to improve as outlined in his performance improvement plan, his supervisor recommended that he be fired. PPG then terminated Lawson's employment.

Lawson sued PPG. He alleged that PPG had fired him because he "blew the whistle" on his supervisor's mistinting order, in violation of Labor Code Section 1102.5. Section 1102.5 prohibits an employer from retaliating against an employee for disclosing information to a government agency or person with authority to investigate if the employee "has reasonable cause to believe" the information discloses a violation of a state or federal statute, rule, or regulation.

In considering PPG's motion for summary judgment, the district court applied the three-part burden-shifting framework the U.S. Supreme Court laid out in *McDonnell Douglas Corp. v. Green*. Under this framework, the employee must first establish a prima facie case of unlawful retaliation. Next, the employer must state a legitimate reason for taking the challenged adverse employment action. Finally, the burden shifts back to the employee to demonstrate that the employer's stated reason is actually a pretext for retaliation. The district court determined that Lawson could not satisfy the third step of this *McDonnell Douglas* test, and it entered judgment in favor of PPG on Lawson's whistleblower retaliation claim.

On appeal, Lawson argued that the district court was wrong to use the *McDonnell Douglas* framework. Instead, he contended that the court should have followed Labor Code Section 1102.6. Under Section 1102.6, Lawson only needed to show that his whistleblowing was a "contributing factor" in his dismissal. Section 1102.6 did not require Lawson to show that PPG's stated reason was pretextual. The Ninth Circuit asked the California Supreme Court to decide the issue.

The California Supreme Court clarified that Labor Code Section 1102.6, and not *McDonnell Douglas*, is the framework for litigating whistleblower claims under Labor Code Section 1102.5. After all, Labor Code Section 1102.6 describes the standards and burdens of proof for both parties in a Labor Code Section 1102.5 retaliation case. First, the employee must demonstrate "by a preponderance of the evidence" that the employee's protected whistleblowing was a "contributing factor" to an adverse employment action. Second, once the

RETALIATION

employee has made that showing, the employer has to prove by "clear and convincing evidence" that the alleged adverse employment action would have occurred for legitimate, independent reasons, even if the employee was not involved in protected whistleblowing activities.

The Court noted that other courts addressing burden-shifting frameworks similar to Section 1102.6 have found the *McDonnell Douglas* framework to be inapplicable. For instance, nearly all courts to address the issue have concluded that *McDonnell Douglas* does not apply to First Amendment retaliation claims, or to federal statutes that are similar to Labor Code Section 1102.6.

Finally, the Court found that there was no reason why Labor Code Section 1102.5 would require employees to prove that any of employer's proffered legitimate reasons were pretextual. This is because Section 1102.5 prohibits employers from considering the employee's protected whistleblowing as any "contributing factor" to an adverse employment action. Requiring an employee to also prove the falsity of any potentially legitimate reasons the employer may have had for an adverse employment action would be inconsistent with the Legislature's intent to encourage reporting of wrongdoing.

Lawson v. PPG Architectural Finishes, Inc., 2022 WL 244731 (Cal. Jan. 27, 2022).

Note:

Although Labor Code Section 1102.6 has specifically stated the framework for adjudicating Labor Code Section 1102.5 claims since 2004, California courts were not consistently applying Section 1102.6's employee-friendly test. Instead, some California Courts were ignoring Section 1102.6 and applying the more employer-friendly McDonnel Douglas *test.*

NEW TO THE FIRM!

Victoria M. Gomez Phillips is an Associate in the Los Angeles office where she advises clients on business and transactional matters, including legal and business risks concerning strategic partnerships, contracts, employment, operations, and company policies.

Madison Tanner is an Associate in the San Diego office where she advises clients on a variety of labor, employment and education matters.

Dana L. Burch is Senior Counsel in the San Francisco office where she is well versed in all phases of litigation including discovery, depositions, law and motion, settlement negotiations, trials, and appeals.

Tyler Shill is an Associate in the San Francisco office where he represents a variety of educational intuitions including school districts, county offices of education, community college districts, universities, and private schools—on labor and employment and education law matters.

FAIR EMPLOYMENT

Trial Court Was Wrong To Reduce Former Employee's Request For Attorney's Fees.

Renee Vines sued his former employer, O'Reilly Auto Enterprises (O'Reilly) for race and age-based discrimination, harassment, and retaliation in violation of the Fair Employment and Housing Act (FEHA). Vines, a 59-year-old Black man, contended his supervisor and others created false and misleading reviews of him, yelled at him, and denied his requests for training that younger, non-Black employees had received. Vines also claimed that although he repeatedly complained to O'Reilly's management regarding the harassment and discrimination, O'Reilly took no remedial action. Instead, he alleged the company began investigating him in order to find a reason to terminate his employment. At the investigator's recommendation, O'Reilly terminated Vines.

The trial court granted judgment for O'Reilly's on Vines' age harassment and age discrimination claims, finding that Vines had failed to present any evidence his age had anything to do with his termination or O'Reilly's alleged discrimination, harassment, or retaliation. However, Vines' race-based and retaliation claims proceeded to a jury trial. The jury then returned a verdict in favor of Vines for his retaliation claim, but against him on his race discrimination and harassment causes of action. The jury awarded Vines $70,200 in damages.

Following the jury trial, Vines moved the court for an award of $809,681.25 in attorneys' fees. Vines supported hismotion with multiple attorney declarations, billing records, and other exhibits. For example, one of Vines' attorneys responded to multiple rounds of written discovery, took more than 10 depositions in several states, and participated in a 10-day jury trial. O'Reilly argued that Vines was not the prevailing party for purposes of an award of attorneys' fees, but even if he was, his fee request should be denied or reduced because the amount of fees he requested was excessive given the nominal jury award and Vines' limited success. Vines had only prevailed on two of his six claims, and while the jury awarded just over $70,000 in damages, Vines had sought over $2.5 million. They also argued that Vines' claim for attorneys' fees included unreasonable billing entries and hourly rates. The trial court issued an order awarding Vines $129,540.44 in attorneys' fees. The trial court found that Vines' unsuccessful discrimination and harassment claims were not significantly related or intertwined with his successful retaliation claim so as to support his request for $809,681.25 in fees. Vines appealed.

Under the FEHA, a court has the discretion to award attorneys' fees and costs. In order to calculate an attorneys' fee award under the FEHA, courts generally use the well-established lodestar method, which is the product of the number of hours spent on the cases, times and applicable hourly rate. The court then has the discretion to increase or reduce the lodestar by applying a positive or negative "multiplier" based on a number of factors.

In California, the extent of an employee's success is a crucial factor in determining the amount of a prevailing party's attorneys' fees. When a prevailing party succeeds on only some claims, courts make a two-part inquiry: first, did the employee prevail on claims that were unrelated to the claims on which he succeeded? Second, did the employee achieve a level of success that makes the hours expended a satisfactory basis for making a fee award? If, however, a lawsuit consists of related claims, the attorneys' fee awarded for an employee who has obtained "substantial relief" should not be reduced merely for the reason the employee did not succeed on each contention raised.

AND HOUSING ACT

On appeal, Vines argued that the trial court erred when it found that his unsuccessful claims were not sufficiently related to his successful claims. He argued that the trial court failed to recognize that he had to prove the conduct underlying his discrimination and harassment claims in order to prove the reasonableness of his belief that the conduct was unlawful, as was required to succeed on his retaliation cause of action. The California Court of Appeal agreed. In order for Vines to prevail on his retaliation claim, he had to show that his beliefs that O'Reilly was discriminating and harassing him against him were reasonable.

Vines also argued that the trial court wrongly reduced fees for specific billing entries that O'Reilly had contended were unreasonable, such as reducing by two-thirds the amount of fees for the depositions of witnesses in Missouri, not awarding certain fees for travel, and reducing Vines' attorney's hourly rate from $525 to $425, among other things. The court concluded that Vines forfeited his challenge to those reductions by making those arguments too late. In any event, the court reversed the trial court's award and remanded the matter for further proceedings.

Vines v. O'Reilly Auto Enterprises, LLC, 2022 WL 189840 (Cal. Ct. App. Jan. 21, 2022).

Note:

Fee awards to prevailing employees in FEHA cases promote the important public policy in favor of eliminating discrimination in the workplace. This case demonstrates that even if an employee wins nominal damages, attorneys' fees can be substantial.

COVID-19

USSC Blocks Federal Vaccination Or Test Rule.

On September 9, 2021, President Biden announced a "new plan to require more Americans to be vaccinated." As part of that plan, the President said that the U.S. Secretary of Labor would issue an emergency rule to require all employers with at least 100 employees "to ensure their workforces are fully vaccinated or show a negative test at least once a week." Two months later, the Secretary of Labor issued the promised emergency standard. After the federal Occupational Safety and Health Administration (OSHA) published the standard on November 5, 2021, scores of parties – including states, businesses, trade groups and nonprofit organizations – filed petitions for review.

The consolidated cases made their way to the U.S. Supreme Court (USSC). Congress authorized OSHA to issue "emergency" regulations if OSHA determines that employees face grave danger from exposure to substances or agents determined to be toxic or physically harmful. Congress also gave OSHA the power to issue emergency standards as necessary to protect employees from such dangers. Despite that broad Congressional authority, the USSC's 6-3 majority decision held that the OSHA rule exceeded its authority. The majority held the rule was a "broad public health measure" rather than a "workplace safety standard." The USSC reinstated a stay of the OSHA vaccine or test rule.

Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022).

Note:

In California, it remains to be seen whether the Occupational Safety and Health Standards Board (OSHSB), which disseminates workplace safety standards for employers in California, will adopt similar vaccination/testing requirements. Until OSHSB takes such an action, most employers in California will have discretionary authority to decide whether to require their employees be vaccinated or tested for COVID-19. Employers may choose to mandate vaccinations for their employees, subject to their obligations to reasonably accommodate employees who are unable to be vaccinated due to disability or a sincerely held religious belief.

USSC Upholds Vaccination Mandate For Health Care Facilities.

In November 2021, the U.S Secretary of Health and Human Services announced that, in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff – unless exempt for medical or religious reasons – are vaccinated against COVID-19. A facility's failure to comply may lead to monetary penalties, denial of payment for new admissions, and ultimately termination of participation in the programs. The Secretary issued the rule after finding that vaccination of health care workers against COVID-19 was necessary for the "health and safety of individuals [for] whom care and services are furnished." The Secretary issued the rule as an interim final rule, rather than through the typical notice-and-comment procedures, after finding "good cause" that the rule should be effective immediately.

Shortly after the interim rule's announcement, two groups of states filed separate actions challenging the rule. After two district courts enjoined enforcement of the rule, the Government requested that the U.S. Supreme Court (USSC) lift the injunctions.

On appeal, the USSC lifted the injunctions. The USSC reasoned that the Secretary's rule fell within his authority to impose conditions on the receipt of Medicare and Medicaid funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." Because COVID-19 is a contagious and dangerous disease – especially for Medicare and Medicaid patients – the USSC found the rule fit squarely within the Secretary's power. In addition, the USSC noted that healthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions. The Secretary also routinely imposes conditions that relate to the qualifications of healthcare workers.

The USSC rejected the states' remaining contentions, finding that the interim rule was not arbitrary or capricious and that the interim rule did consider that it might cause staffing shortages in some areas. It also

found that the Secretary had valid justification to forgo notice and comment. Accordingly, the USSC upheld the vaccination mandate for employees in health care facilities.

Biden v. Missouri, 142 S. Ct. 647, 651 (2022).

Note:

In California, this decision should have minimal impact since the California Department of Public Health (CDPH) already requires that health care facilities ensure their workers are fully vaccinated against COVID-19.

Template COVID-19 Prevention Program (CPP) Updated December 2021

On December 16, 2021, the Occupational Safety and Health Standards Board (OSHSB) readopted an amended version of the Cal/OSHA COVID-19 Regulations (8 C.C.R. §§ 3205). The amendments will require that employers update their COVID-19 Prevention Programs (CPP) in order to protect the health and safety of the workplace in the manner that Cal/OSHA now requires.

The updated CPP template provides for each of the regulatory amendments in redline, so that employers understand the changes to the law, and provides commentary on the substantive amendments, so that employers better understand the implications of the regulatory changes and how those changes may affect their legal obligations and authority.

- If you are a Premium Liebert Library member, you can view and download the CPP directly with your membership.
- If you are a Basic Liebert Library member, you can only view the CPP as a PDF on the website.
- If you are a non-Liebert Library member, you can purchase the document here: https://www.lcwlegal.com/knowledge/template-covid-19-prevention-program-cpp-updated-december-2021/

If you purchase the CPP, it will be sent as a redlined Word document version so that you can see the edits made in Track Changes. This will also be the case for Premium Liebert Library members who choose the "Download Document" option.

WAGE & HOUR

Trial Court Properly Denied Class Certification For State Law Wage And Hour Lawsuit.

From approximately 2013 to 2016, Jason Cirrincione worked at American Scissor Lift, Inc (ASL) as a non-exempt, hourly employee. ASL rents heavy machinery equipment such a scissor lifts and machine booms. Cirrincione's primary duties included painting and assembling rental equipment. Cirrincione and other hourly employees were eligible for production bonuses each pay period based on the amount of equipment they prepared.

In April 2018, Cirrincione filed a class action complaint against ASL for various California wage and hour violations, including failure to pay overtime wages, failure to pay minimum wages, failure to provide meal and rest breaks, and failure to pay reimbursement expenses. Cirrincione purported to represent as many as 50 former and current employees of ASL. The claims challenged ASL's policy and/or practice of rounding work time, which allegedly resulted in the systematic underpayment of wages.

In October 2019, Cirrincione moved for class certification, seeking to certify multiple subclasses, including: a rounding subclass, two meal break subclasses, two rest break subclasses, a no reimbursement subclass, and a final wage subclass. After a hearing, the trial court issued an order denying the class certification motion because Cirrincione failed to establish the requirements necessary to proceed on a class basis.

With respect to the proposed rounding subclass, the trial court rejected Cirrincione's contention that an employer's practice of rounding work time without a uniform, written rounding policy violates California law. It also noted that ASL's rounding practice varied from location to location and from supervisor to supervisor. For similar reasons, the trial court determined the claims of the other subclasses were not appropriate for class treatment. Cirrincione appealed.

On appeal, Cirrincione contended that the trial court was wrong to conclude that his rounding claim was not suitable for class treatment because ASL had a practice of rounding employee time but no written rounding policy. The California Court of Appeal rejected Cirrincione's arguments, and stated that the trial court properly discussed the law governing the rounding claim. The court found the trial court properly rejected Cirrincione's unsupported assertion that an employer's practice of rounding employees' work time without a written policy violates California law. An employer in California is entitled to round its employees' work time if the rounding is done in a "fair and neutral" manner that does not result, over a period in time, in the failure to properly compensate employees for all the time they have actually worked. Under this standard, an employer's rounding policy or practice is "fair and neutral" if on average, it neither over- or under-pays. Thus, the court concluded that the trial court did not err in refusing to certify the proposed rounding subclass. The court also affirmed the trial court's decision as to the other subclasses.

Cirrincione v. Am. Scissor Lift, Inc., 73 Cal.App.5th 619 (2022).

Note:

This case involves California wage and hour claims that generally do not apply to public agencies. However, the Fair Labor Standards Act (FLSA) regulations (which do apply to public agencies) include similar language on the rounding issues. FLSA regulations allow employers to round time, as long as this rounding does not result in a failure to count as hours worked all the time employees have actually worked over a period of time.

DID YOU KNOW...?

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

- Effective February 19, 2022, California employers with 26 or more employees must provide each employee with up to 80 hours of 2022 COVID-19 Supplemental Paid Sick Leave. The new leave differs from the 2021 COVID-19 Supplemental Paid Sick Leave in that the 2022 leave also gives paid time off when a family member is getting a COVID vaccination or a family member has symptoms after receiving the vaccination. The 2022 leave differs from the 2021 leave in that it establishes two "up to 40 hour" categories of paid leave: one category for employees who test positive for COVID-19 or who are caring for a family member who tested positive; and a second category for a variety of other reasons including quarantine or isolation time. Like the 2021 leave, the 2022 leave is retroactive to January 1, 2022 and ends on September 30, 2022. Under the 2022 leave law, however, an employer cannot require an employee to first exhaust this new leave before giving the employee exclusion pay under the Cal-OSHA Emergency Temporary Standards.

- On January 1, 2022, California's minimum wage became $15/hour for employers with greater than 26 employees.

- AB 1033 expands the definition of "parent" under the California Family Rights Act (CFRA) to include a "parent-in-law." Accordingly, employees are eligible to take CFRA leave to care for parent-in-laws.

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LABOR RELATIONS

County Ordered To Bargain The Effects Of A Surveillance Technology Ordinance.

In November 2014, the County of Santa Clara's (County) Board of Supervisors (Board) began considering legislation that would ensure that the use of County-owned surveillance technology -- such as drone cameras, automated license plate readers, and GPS –- protected both community safety and individual privacy.

In early 2016, the Board's Finance and Government Operations Committee reviewed a proposed ordinance (Ordinance) that prohibited a County department from acquiring or operating new County-owned surveillance technology unless the department first gave the Board an impact report and a use policy, and received the Board's approval. The Ordinance made it a criminal misdemeanor to intentionally misuse County-owned surveillance technology: for a purpose prohibited in a Board-approved use policy; or in a way that did not comply with the Ordinance.

In February 2016, the Santa Clara County District Attorney Investigators' Association (Association) learned that the Board's Finance and Government Operations Committee would be considering the proposed Ordinance. The Association President attended the Committee meeting to object to two of the Ordinance's provisions. The Committee made no substantive changes, and recommended that the Board adopt the proposed Ordinance.

On May 6, 2016, the Association sent a written demand to the County to meet and confer over the proposed Ordinance and its effects on Association members. The Association's letter contended that the Ordinance "contemplates new and significant workplace restrictions and responsibilities" that would increase workload and potentially expose Association members to harm. The County's Labor Relations Director immediately responded to the Association's letter. The parties scheduled a meeting for May 17.

At the May 17 meeting with the County, the Association identified four concerns with the Ordinance: 1) the definition of "surveillance technology" was vague and broad; 2) the reporting requirements would increase workload, which could impact employee productivity; 3) the reporting requirements would compromise employee safety by giving the public advance notice of what surveillance technology is deployed and where; and 4) the criminal misdemeanor penalty criminalized workplace conduct and, when paired with the vague definition of surveillance technology, would create untenable working conditions.

The parties met again on May 27 to discuss these issues and the Association issued a number of proposals. The parties were not able to reach an agreement that resolved the Association's concerns that day. At the end of the meeting, the Association believed that the Labor Relations Director was going to speak with Board members and other individuals in the County to figure out how to address the Association's issues.

The Labor Relations Director brought the Association's concerns to the Board. The County did not inform the Association of any response, and neither party declared impasse.

On June 21, 2016, the Board adopted the proposed Ordinance without any changes, and it became effective one month later. The Association then filed an unfair practice charge against the County.

The Public Employment Relations Board's (PERB) Office of the General Counsel subsequently issued a complaint alleging that the County violated the Meyers-Milias-Brown Act when the Board adopted the Ordinance "without having negotiated with the Association to agreement or through completion of negotiations concerning the decision to implement the change in policy and/or the effects of the change in policy." An administrative law judge (ALJ) found that the County had no obligation to bargain over its decision to adopt the Ordinance but upheld the Association's effects bargaining claim.

The Association filed the following exceptions to the ALJ's decision: 1) the County had a duty to bargain over the definition of the term "surveillance technology" and over the provision establishing criminal misdemeanor liability for misuse of the technology; and 2) as a remedy for not bargaining over these terms, PERB should void the Ordinance in whole or in part.

PERB first concluded that the County was not required to bargain its decisions regarding the definition of the term "surveillance technology", or the criminal misdemeanor provision. PERB concluded that these provisions fell into a category of managerial decisions that directly affect employment, but also involve the employer's retained freedom to manage its affairs. PERB concluded that the benefits of bargaining the surveillance technology definition did not outweigh management's need for freedom to protect the public's privacy and safety. PERB held that the County was not required to bargain its decision regarding criminal misdemeanor liability because this part of the Ordinance applied a general criminal law to all persons and not just to County employees.

PERB noted that even when an employer has no obligation to bargain over a particular decision, it must still provide notice to employee associations and an opportunity to meet and confer over any reasonably foreseeable effects the decision may have on matters within the scope of representation. PERB found that the County indeed had an obligation to bargain the effects of these issues on the scope of Association members' employment. The Association put the County on notice that it wished to bargain over not just workload and safety, but also the consequences to employees found to have violated the Ordinance. The County had not responded to the Association's proposed alternatives. Thus, PERB found the County failed to bargain in good faith over consequences to employees for violating the Ordinance.

PERB directed the County to meet and confer over the effects of the Ordinance. It also ordered the County to cease and desist from enforcing the Ordinance against Association-represented employees until: 1) the parties reach an overall agreement on each of the specified effects; 2) the parties conclude their effects negotiations in a bona fide impasse; or 3) the Association fails to pursue effects negotiations in good faith.

County of Santa Clara, PERB Decision No. 2799-M (2021).

Note:

This decision outlines three distinct categories of managerial decisions. Decisions that only have an indirect and attenuated impact on the employment relationship such as advertising, product design, and financing are not mandatory subjects of bargaining. Decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls, are always mandatory subjects of bargaining. Finally, decisions that directly affect employment, such as eliminating jobs, but involve the employer's retained freedom to manage its affairs, may not be mandatory subjects of bargaining, but these are the closest cases.

CONSORTIUM CALL OF THE MONTH

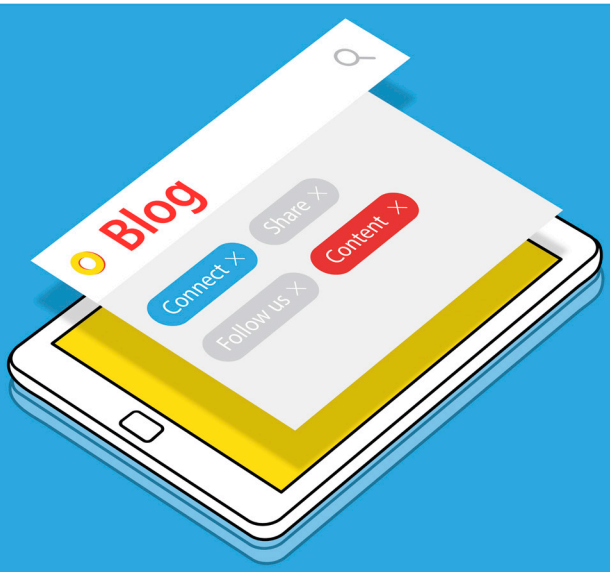
Members of Liebert Cassidy Whitmore's employment relations consortiums may speak directly to an LCW attorney free of charge regarding questions that are not related to ongoing legal matters that LCW is handling for the agency, or that do not require in-depth research, document review, or written opinions.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

A human resources manager contacted LCW to inquire whether an agency can consider salary history for a job applicant currently working in the public sector whose previous salary is publicly available.

Question:

Answer:

Labor Code Section 432.3(b) generally prohibits employers from seeking salary history information from a job applicant. This means that employers cannot ask about salary history on the application or at the job offer stage (or any stage of the application process). However, this law provides an exception for salary history that is public information pursuant state and federal laws, including the California Public Records Act or the federal Freedom of Information Act. (Labor Code Section 432.3(e).) Since public sector employee salaries are posted on line and/or are typically subject to disclosure, the agency could seek publicly available salary history information.



ON THE BLOG

Employee Use of CBD Products: Surveying the Legal Landscape For Employers After AB 45

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Governor Gavin Newsom signed Assembly Bill 45 (AB 45) into law on October 6, 2021. AB 45 is landmark legislation for the Cannabidiol (CBD) and hemp infused product industry in California. CBD and hemp infused products became widely available across the country following the federal government's adoption of the Agriculture Improvement Act of 2018. Recreational marijuana use has also been legal in California since 2016 after the Control, Regulate and Tax Adult Use of Marijuana Act became law. AB 45 extends these recent advances of the cannabis industry by formally authorizing the inclusion of CBD and hemp extracts or derivatives in dietary supplements, food, beverages, cosmetics, and other products sold in California.

What Does AB 45 Do?
AB 45 specifically allows the inclusion of CBD and hemp in a variety of products in California so long as their tetrahydrocannabinol (THC) concentration levels remain below 0.3%. This requirement aims to bring manufacturers and distributors of such products into compliance with existing California law under the Sherman Food, Drug, and Cosmetic Law, and federal statutory law, which is discussed in more detail below. AB 45 requires that any product sold or distributed in the state have documentation certifying that an independent laboratory confirmed the final form of the product does not exceed a THC concentration of 0.3%. (Health & Saf. Code, § 111925.2.) The bill also establishes a state regulatory scheme over such products and prohibits untrue health statements on product labels, among other things less relevant to the employment context.

Are All CBD Products Now "Legal" in California?
We have previously provided guidance, in a February 2020 Blog Post, on whether CBD products are legal. As was the case then, the short answer to this question is "strictly speaking, no; but it is complicated."

Uncertainty under Federal Regulators
The legal landscape at the federal level remains largely unchanged since our prior blog post. Federal law draws a sharp distinction between cannabis products based upon their THC concentration level. The federal government and executive agencies, such as the Drug Enforcement Agency (DEA), consider any cannabis product at or above 0.3% THC concentration to be marijuana. Marijuana is considered a Schedule 1 drug under the Controlled Substances Act. (21 U.S.C. § 812, subd. (c)(10).) Any product below the 0.3% THC concentration threshold is considered "industrial hemp," which is legal to produce.

Despite that distinction, the Food and Drug Administration (FDA) has signaled in non-binding guidance, "It is currently illegal to market CBD by adding it to a food or labeling it as a dietary supplement." As a result, the FDA does not currently regulate such products. In May of 2021, United States Senators Ron Wyden, Rand Paul, and Jeff Merkley introduced proposed legislation on this issue. The stated goal of the "Hemp Access and Consumer Safety Act" is to "ensure hemp-derived CBD products are regulated by the U.S. Food and Drug Administration ("FDA") like other legal products used in dietary supplements, foods and beverages" and to resolve the current "regulatory gray zone" that exists for these products. Until this or similar legislation is acted upon by Congress or until the FDA changes its course, the regulatory gray zone remains at the federal level.

AB 45 only complicates matters further. Due to the FDA's position on CBD products, the published THC concentrations of CBD and hemp infused products have widely been considered unreliable in the past. AB 45's requirement that all CBD or hemp

infused products contain less than 0.3% THC concentration—and that an independent laboratory verify that concentration level—aims to bring all such products into compliance with federal statutory law and existing state laws (such as the Sherman Food, Drug, and Cosmetic Law). California's requirements, however, now lie in tension with federal regulators like the FDA.

AB 45 passed as urgency legislation, meaning that it went into effect immediately upon signature by the Governor on October 6, 2021. As a result—in theory—all CBD and hemp infused products sold and distributed in California must comply with AB 45's requirements at this time and therefore comply with other relevant state laws. Nonetheless, a risk remains that such products currently sold in California do not yet comply with state law given the short time span since AB 45 went into effect.

Should Employees Avoid CBD Products if They Must Submit to Employer-Mandated Drug Testing?
The short answer to this question is, "it depends upon the type of test and who is administering it." For example, employees subject to Department of Transportation (DOT) drug testing should carefully weigh whether to use CBD or hemp infused products. DOT does not specifically test for CBD, but it issued a "CBD Notice" on February 18, 2020. The CBD Notice warns, "Since the use of CBD products could lead to a positive drug test result, Department of Transportation-regulated safety-sensitive employees should exercise caution when considering whether to use CBD products." The Notice continues, "CBD use is not a legitimate medical explanation for a laboratory-confirmed marijuana positive result."

Employers may receive inquiries from employees about whether using CBD or hemp infused products will generate a positive drug test. Employers are generally not obligated to advise their employees on whether a certain substance will register on an employer-required drug test. Employees bear the responsibility of passing employer-required drug tests as a condition of employment. If employers are inclined to provide any advice to their employees in this scenario, they should advise them to evaluate the reliability of the product's reported THC concentration, and, in certain situations, consult with their health care provider(s) prior to consumption. Employers should also advise employees if use of CBD or hemp infused products will violate employer policies irrespective of whether employees are drug tested.

What Other Issues Should Employers Consider Related to Employee CBD Product Use?

Employer Policies
First and foremost, employers should examine their current drug use policies to determine whether CBD and hemp infused products are covered by that policy's provisions. If they are, supervisors should be aware of what the policy states about CBD and hemp infused products. If they are not, employers should consider defining CBD and hemp infused product use and consider establishing rules relating to such use. We recommend that any employer consult with legal counsel should they wish to revise their current drug use policy to address these products.

The Disability Interactive Process
The second major area where the use of CBD and hemp infused products is likely to arise is processing disability accommodation requests. It is clear under California law that employers are *not* obligated to accommodate *marijuana* use and can take adverse employment actions against employees for such use, and for possession or consumption of marijuana at the workplace. (See, e.g., *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920; Health & Saf. Code, § 11362.45 (f).) The central holding of the Ross decision was that, despite the existence of the Compassionate Use Act, "[t]he FEHA does not require employers to accommodate the use of *illegal* drugs." (Id. at 926 [emphasis added].) The law is far hazier on whether an employer is obligated to accommodate an employee's off-duty use of CBD or hemp infused products as treatment for an underlying health condition. This is especially true considering the fact that AB 45 was drafted to ensure that all CBD and hemp infused products sold in California comply with other state laws and federal statutory law.

Under the Americans with Disabilities Act (ADA) and the Fair Employment and Housing Act (FEHA), employers are generally obligated to consider modifying employment policies as a potential reasonable accommodation for a disability. (See 42 U.S.C. §§ 12111, subd. (9)(b); 29 C.F.R. § 1630.2, subd. (o)(2)(ii).) However, one federal district court recently cast doubt on whether an employee's request to revise her employer's drug use policy to allow for CBD as treatment for a medical condition could support a failure to accommodate claim under the ADA. (See *Hamric v. City of Murfreesboro* (M.D. Tenn., Sept. 10, 2020, No. 3:18-CV-01239) 2020 WL 5424104, at *5.) Some states, such as Virginia, have passed legislation that expressly forbids employers from disciplining employees for lawful CBD use if the employee possesses documentation from a health care provider that states such use is part of the employee's treatment plan. However, even Virginia's law allows employers to take adverse action against employees that are impaired on the job from such use. Given the wide array of situations an accommodation request can arise in, employers should consult with legal counsel and tread thoughtfully when responding to an employee accommodation request involving CBD or hemp infused products as a potential treatment for a disability.

There are a number of unresolved legal issues surrounding the use of CBD and hemp infused products in California. Employers should continue to monitor this fast-moving legal space for further guidance.


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