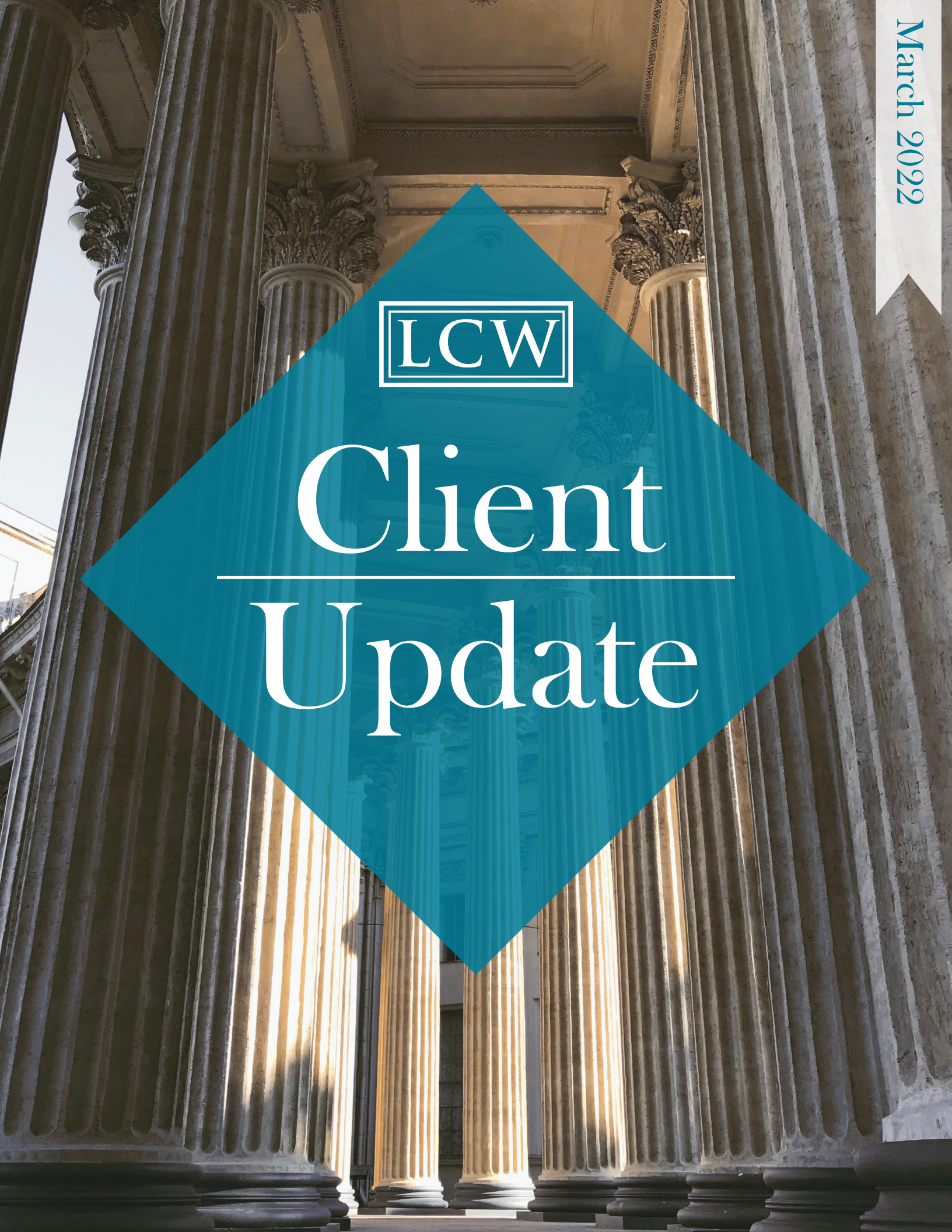

March 2022

LCW

Client Update

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POBR

At-Will Police Chief's Employment Agreement Gave Him A Right To An Evidentiary Administrative Appeal.

In November 2016, Samuel Joseph became the chief of police for the City of Atwater (City). Joseph's employment agreement stated he could be removed as police chief for any reason. The agreement also said that if the City Manager removed Joseph as police chief for any reason other than willful misconduct in office or conviction of a crime of moral turpitude, Joseph would be given the option to either: return to his prior position of police lieutenant; or receive a severance.

On September 28, 2018, the City Manager issued a notice of intent to terminate Joseph for "willful and other misconduct," including violations of multiple sections of the California Penal Code and other mismanagement issues. The notice also described Joseph's right to appeal the termination decision in a non-evidentiary hearing with no right of cross-examination and the City was not required to carry the burden of proving the charges.

On October 4, 2018, Joseph's attorney notified the City that Joseph would appeal the proposed termination. The attorney objected to the appeal procedure outlined in the City's notice. Joseph's attorney claimed that Joseph was entitled to an evidentiary appeal in which the City had the burden of proving the charges and he had the right to cross-examination before a neutral hearing officer.

After further correspondence, Joseph and the City were unable to agree on the type of hearing required by the Peace Officers Procedural Bill of Rights Act (POBR). The City Manager then issued Joseph a final notice of termination on November 15, 2018.

Joseph filed a petition for writ of administrative mandate challenging the City's decision to terminate his employment. The trial court denied the petition, concluding that Joseph was an at-will employee under his employment agreement. The trial court further found that the City satisfied the statutory requirement of providing Joseph with an opportunity for administrative appeal as required under the POBR for at-will employees under Government Code Section 3304(c).

Joseph appealed, alleging the trial court wrongly considered him as an at-will employee for all purposes because his employment agreement gave him a right to return to the position of lieutenant if his termination was without cause. The Court of Appeal agreed, finding that the employment agreement unambiguously created a hybrid employment relationship between the City and Joseph. Although Joseph's employment as chief of police was at-will, his employment as a lieutenant could only be terminated for cause. The Court interpreted Joseph's contract to mean that City's right to terminate Joseph's employment as a lieutenant was limited to the specified reasons—that is, willful misconduct or conviction of a crime of moral turpitude—which necessitated Joseph receive certain procedural protections. The Court found that this contractual limitation on City's right to terminate Joseph's overall employment was more specific than the sentence stating Joseph was an at-will employee. Therefore, the Court found that the employment agreement gave Joseph the right to for-cause procedural protections if the City chose to terminate him for willful misconduct.

Joseph further alleged the City's decision to terminate his employment for willful misconduct deprived him of his right to employment as a lieutenant without affording him POBR procedural rights. Again, the Court of Appeal agreed. Because Joseph was also being

terminated from his for-cause position as a lieutenant, he was entitled to a full, evidentiary administrative appeal pursuant to Government Code Section 3304(b). Since the appellate record did not contain any rules and procedures for such an appeal, the Court of Appeal considered the scope of the required procedural protections for a for-cause peace officer.

The Court of Appeal held that an evidentiary POBR administrative appeal required: 1) an independent reexamination of the decision; 2) by a decisionmaker who was not involved in the initial determination; 3) the independent decision maker is to make factual findings to bridge the analytical gap between the evidence and the ultimate decision; 4) the hearing is treated as a de novo proceeding at which no facts are taken as established; and 5) the proponent of a particular fact bears the burden of establishing it; and 6) the hearing could not be closed to the public over an officer's objection.

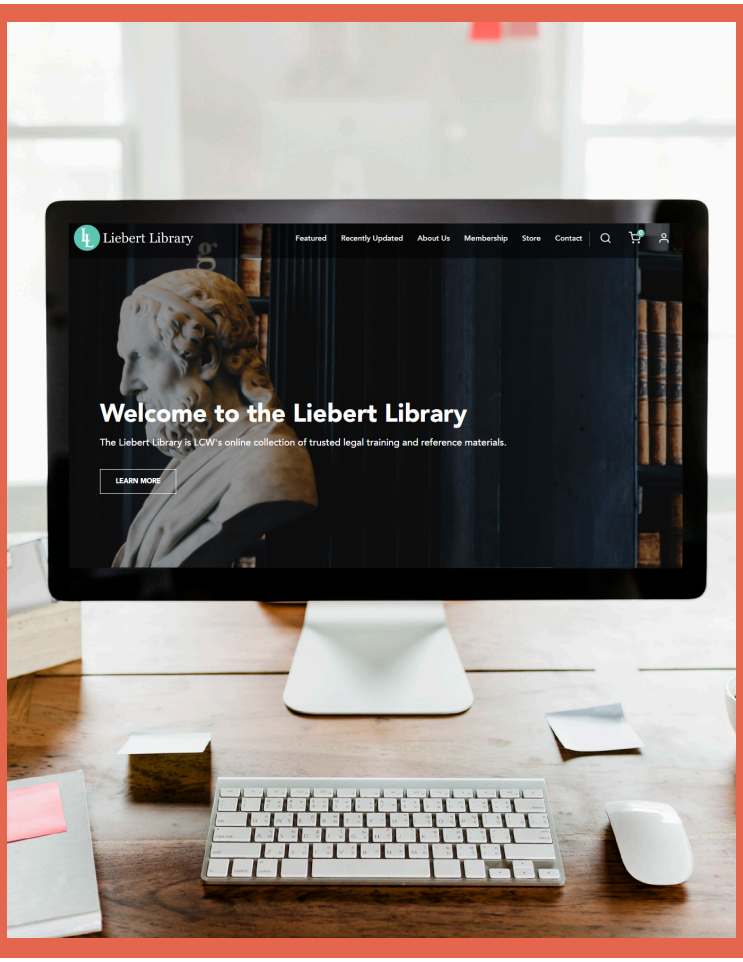
Based on the foregoing, the Court of Appeal reversed the trial court's order denying Joseph's petition for writ of mandate and directed the trial court to issue a writ of mandate directing the City to provide Joseph with an opportunity for an administrative appeal that complied with the minimum POBR procedural protections the Court outlined.

Joseph v. City of Atwater, 2022 WL 391821 (Cal. Ct. App. Feb. 9, 2022).

Note:

This case illustrates how critically important the terms of an employment agreement can be. Although the employment agreement stated that Joseph's employment as a police chief was at will, the Court found that the employment agreement gave Joseph the right to for-cause procedural protections if the City chose to terminate him for willful misconduct.

Introducing Our Newly Improved Liebert Library Website!



We are proud to announce the long rumored update to the Liebert Library is officially live! We have added many new features with the goal to improve the user experience:

Dynamic Search Ability:
Upgraded search ability allows users to locate the legal reference materials they are searching for quickly. The new filtering ability assists subscribers in easily distinguishing product categories. To begin searching click the hourglass logo on the top menu bar.

Ability to Add Sub Users:
The most requested feature has been the ability for Primary Account Holders to add more than one user to access their organization's subscription. We are excited to announce this feature has been added! Once Sub Users are created, they will receive an email notifying them an account has been created for them and prompt them to login. You can view and manage your Sub Users from the "Create Sub Users" page at any time.

Featured Resources Section:
A new section of the site where LCW showcases some of its most timely or topical legal reference materials! This frequently updated section can be accessed after logging in to the site and clicking "Featured" from the top menu bar.

Recently Updated Section:
Are you interested in seeing what materials have been updated most recently? We created a new page that lists the most recent materials in one place. This section is accessible after logging into the site and clicking "Recently Updated" from the top menu bar.

Register and begin exploring the Liebert Library site today!

If you have any questions about your subscription, the materials on the site, or if you are having difficult accessing your account, please email Library@lcwlegal.com.

FAIR EMPLOYMENT

Black Physician Proves State Agency Discriminated By Failing To Interview Her And By Revoking Her Credentials.

Dr. Vickie Mabry-Height is a Black physician who was 52-years-old in May 2008. In February 2008, she applied for a physician/surgeon position at Chuckawalla Valley State Prison (CVSP) in Blythe, California. After the Department of Corrections and Rehabilitation (Department) confirmed she met the minimum qualifications and she passed the examination, the Department notified her that she would be placed on an eligibility list. Mabry-Height initially withdrew her application, but about two months later, she reconsidered her decision and informed the Department that she wanted to be considered for an interview again.

Although the Department had already filled the position at CVSP in Blythe, the Department decided to interview Mabry-Height and others in May 2008 in an attempt to fill vacant positions in another region. After informing Mabry-Height of the situation, the medical director persuaded her to continue with the interview. The medical director would have offered Mabry-Height a position in the other region; however, she was not willing to relocate.

In June 2008, Mabry-Height started working for a third-party provider that contracts with the Department to provide needed medical personnel to correctional institutions. Mabry-Height then worked various shifts at Centinela State Prison (CSP) between June and October 2008. During this time, Mabry-Height submitted a second application for employment with the Department, again seeking a physician/surgeon position. She indicated she was willing to work at CVSP, CSP, or the California Rehabilitation Center (CRC).

After submitting her second application, Mabry-Height inquired with the CVSP facility. A doctor informed her that there was an open position and that the Department was beginning to schedule interviews. However, no one at the Department contacted Mabry-Height to schedule an interview. Four days later, the Department hired Dr. James Veltmeyer, a Hispanic male between 21 and 39 years of age, to fill a physician/surgeon position at that facility. According to the Department's documentation, Veltmeyer interviewed for the position on March 2008 and did not submit his employment application until more than two weeks after the interview.

On July 29, 2008, the Department interviewed for another open physician/surgeon position at CVSP. Dr. Mabry-Height was not invited to participate. For this position, the Department hired Dr. Patricia James, a white woman between 40 and 69 years of age. James' qualifications were comparable to Mabry-Height's.

In August 2008, Mabry-Height told the health care manager at CSP she was interested in a position there. Mabry-Height then spent more than an hour in the cafeteria working on her application during one of her regular shifts. The health care manager informed her this area was "off grounds" because it was not within the medical provider area. Mabry-Height also deducted the time she spent working on her application from her timesheet. However, the health care manager mentioned this when the credentialing unit inquired about Mabry-Height's suitability for future employment. The health care manager also indicated that Mabry-Height's "levels of enthusiasm, confidence, and cooperative behavior were not always as consistently high as other registry physicians."

Around this time, Dr. Ko, an Asian male, was hired for a physician/surgeon position at CSP. Again, Mabry-Height was not invited to interview. One month later, Mabry-

AND HOUSING ACT

Height learned that the credentialing unit would be revoking her credentials; she was told not to report for any future shifts.

Mabry-Height then filed a complaint with the State Personnel Board (Board). After the Board determined that Mabry-Height failed to establish unlawful discrimination, she filed a writ of administrative mandamus in superior court to challenge the Board's decision. That court granted the petition and directed the Board to set aside its decision and reconsider the matter.

Upon reconsideration, the Board again determined that Mabry-Height failed to establish discrimination as to the position she interviewed for in May 2008. This time, however, the Board determined that the Department failed to give any legitimate, nondiscriminatory reasons for its decision not to interview her for positions at CVSP in July and August 2008 or at CSP in August 2008. In addition, the Board determined the Department's vague and inconsistent reasons for revoking her credentialing failed to show that its decision was taken for a legitimate, non-discriminatory reason.

Next, the Department filed a writ petition seeking to set aside the Board's decision on reconsideration. The trial court denied the petition, and the Department appealed.

The California Court of Appeal noted that California has adopted a three-stage burden-shifting test for discrimination claims under the Fair Employment and Housing Act. First, the employee must establish a prima facie case of discrimination. If the employee does so, a presumption of discrimination arises. Second, the burden then shifts to the employer to rebut the presumption by producing evidence that it took the action for legitimate, nondiscriminatory reasons. If the employer does so, the presumption of discrimination disappears. Third, the employee can attack the employer's reasons for acting as pretext for discrimination, or can offer any other evidence of discriminatory motive. Evidence of dishonest reasons, for example, may show unlawful bias. If the case includes evidence of both discriminatory and nondiscriminatory motives, the employee must prove discrimination was a "substantial factor" in the employment decision.

On appeal, the Department argued that Mabry-Height was required to show by a preponderance of the evidence that discrimination was a "substantial motivating factor" in the adverse employment decisions. While the court agreed that this burden exists, it disagreed with the Department as to how this inquiry fits into the analysis. The court concluded that this burden only applies to the third stage of the analysis, if the presumption of discrimination has dropped out of the case.

In addition, the court concluded there was no abuse of discretion when the Board concluded the Department did not satisfy its stage-two burden of producing substantial evidence of legitimate, nondiscriminatory reasons for the challenged conduct. Indeed, the court noted that the Department failed to present any evidence explaining why Mabry-Height was not interviewed for the positions that Veltmeyer, James, and Ko filled. Further, the Department could not meet its burden as to its decision to revoke Mabry-Height's credentialing. The reasons the Department provided at the time to Dr. Mabry-Height were later contradicted by the testimony offered at the hearing. No one from the credentialing unit testified that as to the actual reasons for revoking her credentialing.

For these reasons, the court affirmed the Board's second decision.

Dep't of Corr. & Rehab. v. State Pers. Bd., 2022 WL 354657 (Cal. Ct. App. Feb. 7, 2022).

Note:

This case shows that an employer's decisions must be supported by legitimate, non-discriminatory reasons. Before deciding not to interview a qualified candidate and before deciding to revoke a credential, for example, the employer or agency should document all of the legitimate reasons for its decision in an attorney-client memorandum or in consultation with an attorney. If the reasons for a decision are vague or conflicting, then the employer should reconsider.

DID YOU KNOW?

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

- On February 28, 2022, the California Department of Public Health (CDPH) issued updated COVID-19 guidance about the use of face coverings in indoor public settings. The new guidance took effect on March 1, 2022, except that it does not apply within any local jurisdiction that has more restrictive requirements. Under the new guidance, the requirement that unvaccinated persons wear a mask in indoor public settings is now only a strong recommendation that all persons, regardless of vaccine status, continue indoor masking.

- On February 9, 2022, Governor Newsom signed Senate Bill (SB) 114 into law. The law reauthorizes COVID-19 Supplemental Paid Sick Leave (SPSL). The new law is Labor Code section 248.6, and provides paid leave entitlements to employees who are unable to work or telework due to a number of qualifying reasons related to COVID-19. The law became effective on February 19, 2022 and requires covered employers of 26 or more employees to provide SPSL to qualifying employees retroactive to January 1, 2022 and through September 30, 2022.

- Employers have a management right to mandate vaccinations, but must negotiate any bargainable effects of that decision with employee organizations upon request. In *Regents of the University of California* (2021) PERB Decision No. 2783-H, PERB held that the University's decision to require that employees be vaccinated for influenza was outside the scope of representation, and that the University was therefore not obligated to bargain the decision with affected employee organizations prior to its adoption. While PERB concluded that the University was still obligated to bargain the effects of the decision, PERB's holding that the decision itself was not negotiable removes a major obstacle preventing public employers from adopting vaccination requirements for their employees.

App Developer's "At-Will" Offer Letter Did Not Defeat Employee's Labor Code Section 970 Lawsuit.

In July 2018, Kevin White and Smule, Inc. discussed the possibility of White working for the company. Smule, Inc. (Smule) develops and markets consumer applications with a specialty in music social applications. Smule told White it had significant problems with its development process, it was not operating efficiently, and it lacked an experienced project manager. Smule wanted White to restructure the company's project management operations and develop a functional project management team that would enable Smule to grow its business. Smule hoped White could: identify major deficiencies and start bringing in competent personnel within 30 days; complete a reorganization in one to two years; and develop training protocols and manuals over the next couple of years. Smule indicated that if While could successfully reorganize the project management operations, the need for White's skills would continue to evolve and his role would expand. White requested a director title. Smule agreed to a title of "lead project manager" and indicated it would revisit the title in one year. White said he was only interested in a secure, long-term position, and Smule said that was exactly what they were offering.

White alleged that Smule's representations led him to conclude his job was long term. White then resigned from his employment in Washington and moved his family to the Bay Area. White signed an employment offer that stated: "Smule maintains an employment-at-will relationship with its employees. This means that both you and Smule retain the right to terminate this employment relationship at any time and for any reason. . . This offer letter constitutes our complete offer package. Any promises or representations, either oral or written, which are not contained in this letter are not valid and are not binding on Smule."

Five months after White began work and only two weeks after he submitted an improvement plan, Smule terminated him on the grounds that his job was being eliminated.

White sued Smule, alleging the company violated California Labor Code Section 970. White alleged that Smule knew its statements to him were false. White alleged Smule merely wanted "to experiment with [him] and to determine what immediate recommendations he would make." Labor Code Section 970 prohibits employers from inducing employees to relocate and accept employment with knowingly false representations regarding the kind, character, or existence of work, or the length of work. The trial court entered judgment in Smule's favor finding that as an at-will employee, White unreasonable relied on any representations to the contrary. White appealed.

To win a Section 970 claim, the employee must prove: 1) the employer made representations about the kind or character of work, or how long the work would last; 2) the employer's representations were not true; 3) the employer knew when it made the representations that they were not true; 4) the employer intended that the employee rely on the representations; 5) the employee reasonably relied on the representations and changed his or her residence for the purpose of working for the employer; 6) the employee was harmed; and 7) the employee's reliance on the employer's representations was a substantial factor in causing his or her harm.

The trial court granted Smule's motion for summary judgment. The California Court of Appeal reversed. The court concluded that an at-will acknowledgement does not, as a matter of law, defeat a Section 970 claim. Even with an at-will provision, an employee can establish that a reasonable reliance on an employer's promises regarding the kind, character, or existence of work the employee was hired to perform. Because Smule failed to produce evidence that White unjustifiably relied on its statements, it was not entitled to judgment.

Further, the court determined that Smule was not entitled to keep its trial court victory on the grounds that White failed to establish either a knowingly false representation, or actual reliance, in White's opposition to Smule's motion for summary judgment. Smule did not show that White did not possess, and could not reasonably obtain, evidence that Smule made promises with no intent to perform. While White may have lacked personal knowledge of the intent at issue, that did

not conclusively establish that he could not prove such intent. Instead, all of the evidence in the record established that a reasonable trier of fact could infer that Smule never intended to employ someone in the lead project manager position, and wanted nothing more from White than a consultation or improvement plan on how Smule could enhance its operations.

The court also found that Smule could not prove White lacked actual reliance on its representations because the parties did not have adequate opportunity to address that argument in the trial court.

The court found there was a triable issue of fact regarding whether Smule violated Section 970, and reversed the trial court ruling.

White v. Smule, Inc., 2022 WL 503811 (Cal. Ct. App. Jan. 27, 2022).

Note:

Generally speaking, most Labor Code sections do not apply to public entities. However, this case demonstrates that it is a bad idea to make promises about long-term employment to an applicant, regardless of whether an applicant later receives an offer of "at-will" employment.

LABOR RELATIONS

Trial Court Properly Dismissed Lawsuit Local Government Officials Filed Against PERB.

A group of elected local government officials -- including members of some California city councils, school boards, and special purpose districts-- filed a complaint against the Public Employment Relations Board (PERB). The complaint made a pre-enforcement challenge to California Government Code Section 3550. Section 3550 states in part: "[a] public employer shall not deter or discourage public employees . . . from becoming or remaining members of an employee organization." The elected officials alleged that as part of their duties, they often engage directly in labor-management discussions, comment publicly on bargaining proposals, or take positions on the terms of a proposed collective bargaining agreement. However, they claimed that after the enactment of Section 3550 in 2017, they have refrained from speaking about issues relating to public unions. While the elected officials did not contend that the PERB had taken any enforcement action against them or their agencies, they alleged that if they were to speak out, their agencies would face threats of unfair labor charges.

As a result, the officials sued PERB alleging that Section 3550 violates their First Amendment rights. The U.S. district court dismissed the case finding, among other things, that the elected officials could not bring the action because Section 3550 applies only to "public employers," and not to individual elected officials. The elected officials appealed.

On appeal, the Ninth Circuit panel concluded that the district court was right to dismiss the case. First, the panel noted that Section 3550 does not regulate the officials' individual speech. The panel also noted that any restrictions the statute does impose on their ability to speak on behalf of the public employers they represent did not injure their constitutionally-protected individual interests. The panel held that the officials had not shown that they had a well-founded fear that PERB would impute their statements in their individual capacities to their public employers, or that they incurred an injury sufficient enough to allow them to pursue the issue.

Second, the panel held that the officials failed to show that the district court erred in determining that any amendment to their complaint would be futile. The officials were not able to provide any additional details they would add to their lawsuit if given the opportunity to do so.

For these and other reasons, the panel remanded the case to the district court to enter judgment dismissing the case without prejudice.

Barke v. Banks, 25 F.4th 714 (9th Cir. 2022).

Note:

The court explained that Government Code Section 3550 was "part of a broader legislative package designed to address the impact of Janus v. American Federation of State, County, & Municipal Employees, Council 31, *138 S. Ct. 2448 (2018)." In* Janus, *the Supreme Court held that the First Amendment barred "States and public-sector unions" from "extract[ing] agency fees from nonconsenting employees." The 2018 amendment added the language prohibiting a public employer from deterring or discouraging public employees "from authorizing dues or fee deductions to an employee organization," presumably to minimize the financial impact of the Janus decision on public-sector unions.*

CONSORTIUM CALL OF THE MONTH

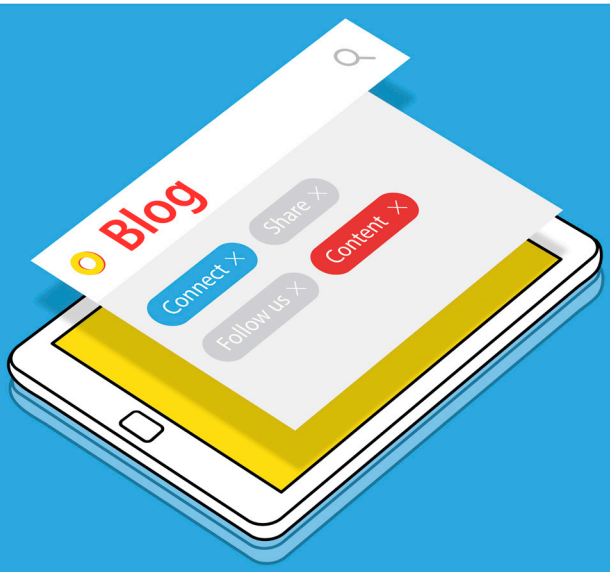
Members of Liebert Cassidy Whitmore's employment relations consortiums may speak directly to an LCW attorney free of charge regarding questions that are not related to ongoing legal matters that LCW is handling for the agency, or that do not require in-depth research, document review, or written opinions. 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 ask whether an agency's volunteers are covered under worker's compensation.

Question:

Answer:

The attorney advised that public agency volunteers are not employees for purposes of workers' compensation unless the agency's governing board has adopted a resolution to extend workers' compensation benefits to them. (Labor Code Section 3363.5.) In order to qualify for workers' compensation benefits under this law, the volunteers must perform services without pay, but can receive meals, lodging, and reimbursement of expenses.



ON THE BLOG

Government-Hosted Social Media – How To Avoid First Amendment Claims

By: David Urban

This post appeared in April 2018. It has been reviewed and is up to date.

Social media and the First Amendment is a fascinating and quickly-developing area of the law. All types of business organizations have a social media presence, for example, a Twitter page or Facebook account, and often on their own websites invite the public to comment. The same is true for news sources, from the most well-established like *The New York Times* and *Los Angeles Times*, to personal blogs and very small media outlets. Often public comments provide content that is just as interesting and informative as what the owner of the site originally publishes. Indeed, the owners may have a hand in this, because (unless their terms of service provide otherwise) they are free to pick and choose comments without concern about legal claims of censorship. The First Amendment does not apply to private organizations, only to the government, and these private organizations are free to curate comments on their sites.

Many public agencies, including law enforcement, cities, counties, and educational institutions, themselves host social media sites for the benefit of the community, and encourage the public to post comments. The First Amendment, however, does apply to these government agencies, and curating or censoring comments can, in some circumstances, lead to claims of First Amendment violations and expensive lawsuits. For example, in 2012, the Honolulu Police Department faced a legal challenge to its decision to remove two local residents' comments from its Department Facebook page. The residents argued that the Police Department had created a public forum in its maintenance of the Facebook page, and that removal of their posts constituted unconstitutional censorship. The Department's guidelines described the page as "a forum open to the public," yet the Department allegedly removed the residents' posts simply because they were critical of the Department. The case eventually settled with a payment by the Department of attorneys' fees, and an agreement to revise its social media policies.

How can agencies honor their obligations under the First Amendment yet avoid having to serve inadvertently as the message board for certain types of content? There are a number of ways.

First, and primarily, the agency can put into place a policy, carefully vetted by legal counsel, that sets forth what comments are authorized and what are not. For example, the policy can specify that obscene, defamatory, and other similar types of comments are not permitted. The policy can also specify that comments have to relate to the matter originally posted. In general, the policy however, must satisfy the "forum analysis" standards of free speech law, a primary requirement of which is that the policy operate in a "viewpoint-neutral" way. This means that the agency in almost all circumstances cannot suppress one view on a topic yet allow comments favoring the opposing view. In addition, the agency must be able to justify its restrictions on certain types of comments in a way that will satisfy forum analysis requirements.

Second, in theory, an agency can take an alternative approach that rests on the "government speech" doctrine. In this approach, the agency would pick and choose only a few public comments to publish, and argue that its decision-making process constituted the expression of the agency itself. This approach has support in U.S. Supreme Court cases from other contexts, such as from *Pleasant Grove City v. Summum*, in which the Court found that a city's selection of which monuments to place in a public park constituted government speech, so that its decision not to select a particular monument was not censorship but the choice of the agency itself not to express itself in that way. The approach has not been extensively tested by case law covering California, and will likely depend on the facts and circumstances of a particular case. It is best to consult with counsel before implementing.

Third, although it does not help as a proactive approach, there is a particular litigation defense articulated by commentators to lawsuits against public agencies for censoring social media. Some commentators have taken the position that speech on an agency-hosted platform is, in fact, not subject to the First Amendment, because the actual site itself belongs to a private entity. In the case of a Facebook or Twitter page, the actual platform in cyberspace belongs to those organizations. This theoretical defense, however, has so far not received significant support in case law.

Indeed, the most prominent case in this area, *Trump v. Knight Institute* from March 2020, provides a holding that squarely favors constitutional free speech protections for the public. In *Knight*, the Second Circuit Court of Appeals, which encompasses New York, held that Donald Trump, during his Presidency, violated the First Amendment by blocking some of his critics from access to his Twitter account. The Court found that the public comment part of the account constituted a public forum in cyberspace, to which First Amendment free speech principles did apply. The Court did not accept the argument that the decision to block content in that case constituted government speech.

We will keep readers informed of further developments in this important area of law.

For more information, visit our blog here!

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