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# PRIVATE EDUCATION MATTERS

News and developments in education law, employment law, and labor relations for California Independent and Private Schools and Colleges.

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## LCW NEWS



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# STUDENTS

## *TITLE IX*

### *Student Adequately Alleged Discrimination On The Basis Of Sex In Title IX Disciplinary Proceeding.*

John Doe, a Chinese national, was a teaching assistant pursuing his Ph.D. in chemistry and biochemistry at the University of California Los Angeles on a student visa. John Doe and Jane Roe met in class and began a long-term relationship. They planned to get married after Doe was scheduled to graduate in June 2017.

In February 2017, Doe learned that Roe cheated on him and Doe wanted to end the engagement. They agreed to meet on-campus after Doe taught his class on February 13, but Roe showed up unannounced at Doe's office on-campus before his class. At the time, Roe was not an active student enrolled at UCLA. Roe pounded on the door of the office and Doe, who was meeting with another graduate student at the time, refused to let Roe in. Roe attempted to block the doorway but Doe was eventually able to leave the office. Roe followed Doe and tried to prevent him from entering his classroom.

While Doe taught his class, Roe called the University police and reported that Doe assaulted her. University Police arrested Doe for misdemeanor domestic battery after his class was finished. Two months later, Roe filed a Title IX complaint with the University against Doe alleging multiple instances of misconduct dating back to 2014. Although she was no longer a student, Roe told the University that she still was and UCLA did not verify her status as a student. Roe also alleged she suffered a rib fracture from her encounter with Doe on February 13.

UCLA's Title IX Office charged Doe with violations of policies pertaining to dating violence, stalking, sexual harassment, sexual assault, terrorizing conduct, and conduct that threatens health or safety. The Dean of Students immediately suspended Doe on an interim basis, banned him from campus, and evicted him from student housing.

The University Title IX Office conducted an investigation and found that Doe was only responsible for the February 13 incident. The investigator found this incident violated policy provisions in the UC Policy for Sexual Violence and Sexual Harassment and the UCLA Student Conduct Code. The report found that Roe did not suffer bodily injury, but Doe placed Roe "in reasonable fear of serious bodily injury."

The Assistant Dean of Students accepted the report's findings and suspended Doe from UCLA for two years. Doe appealed the Dean's decision to the University's internal appeals body, which affirmed the Dean's decision and sanction of suspension. In February 13, 2018, Doe filed a petition for writ of mandamus against the Regents of the University of California in state court, challenging the

disciplinary proceedings and sanction. The court found in favor of Doe, but Doe had already lost his student visa status.

On December 6, 2019, Doe sued the Regents in federal court alleging the University violated Title IX, the Fourteenth Amendment of the U.S. Constitution, and state law. The trial court dismissed his claims but allowed Doe to amend his claims. Doe filed his amended complaint and only alleged violations of Title IX. The trial court dismissed his amended complaint. Doe appealed to the Ninth Circuit Court of Appeals. The only issue on appeal was whether there was a plausible inference that Doe was discriminated against on the basis of his sex during the course of the disciplinary proceedings based on the facts he alleged in his amended complaint.

The Ninth Circuit stated that Doe's amended complaint contained three categories of allegations: (1) allegations of external pressures, (2) allegations of an internal pattern and practice of bias, and (3) allegations of specific instances of bias in his case. The Ninth Circuit held that these allegations, when taken together, raise a plausible inference of discrimination on the basis of sex.

The amended complaint alleged that external pressures influenced how the University handled its sexual misconduct complaints at the time of Roe's complaint against Doe. The amended complaint pointed to (1) the April 2011 "Dear Colleague" letter from the Department of Education directing schools to take immediate action to eliminate sexual harassment; (2) a report by NPR about sexual assault victims which prompted the "Dear Colleague" letter; (3) a state audit of UCLA following student testimony about a lack of response to sexual harassment claims; (4) an April 29, 2014 guidance document from the Department of Education that stated that the due process rights of the respondent should not unnecessarily delay Title IX protections of the complainant; and (5) a 2014 White House report and 2014 Senate testimony by the then-Assistant of Secretary of Education warning schools that violating Title IX could result in loss of federal funding. The Ninth Circuit found that these external pressures when taken alongside Doe's other allegations in his complaint would affect how UCLA treated respondents in disciplinary proceedings on the basis of sex, even though they occurred in 2017.

The Ninth Circuit found that the amended complaint also alleged enough facts that demonstrate an internal pattern of gender-based decision-making against male respondents. The Ninth Circuit pointed to the allegation in the amended complaint that respondents in Title IX cases are overwhelmingly male and the University has never suspended a female for two years under the same types of facts that resulted in Doe's suspensions.

The Ninth Circuit also held that Doe sufficiently combined the allegations of external pressures and internal bias against males with the facts that are particular in his case. The Ninth Circuit pointed to the allegation that the UCLA Respondent Coordinator told Doe that no woman has ever fabricated allegations against an ex-boyfriend in a Title IX proceeding. The Ninth Circuit reasoned it is plausible to infer that the Coordinator's statement reflects broader gender assumptions within UCLA's Title IX office during its investigation against Doe. The amended complaint also alleges multiple procedural irregularities, including the University's failure to determine Roe's student status at the time of the February 13 incident and not discrediting Roe because she lied about fracturing a rib on February 13. The amended complaint also pointed to the state court's ruling in favor of Doe in the writ proceeding, where the court found that the evidence did not support the Regents' decision to suspend Doe.

Ultimately, the Ninth Circuit held that Doe sufficiently pled a Title IX claim against the Regents.

*Doe v. Regents of Univ. of California* (9th Cir. 2022) 23 F.4th 930.

***Note:***

*Title IX protections generally only apply to private K-12 schools, colleges, and universities if they accept certain types of federal financial assistance or participate in certain federal financial aid programs. However, private K-12 schools, colleges, and universities must still take appropriate disciplinary action in accordance with procedures that adhere to a standard of fundamental fairness. Fundamental fairness is defined as conduct that is neither arbitrary nor capricious, and to determine whether a disciplinary decision is fundamentally fair, courts look at whether the school had a process for imposing discipline, whether the school adhered to its adopted rules or processes and whether the evidence reviewed or considered under the disciplinary procedures supported the disciplinary decision.*

## *Title IX Liability Does Not Exist When University Does Not Have Control Over Context In Which Student-On-Student Harassment Occurred Off-Campus.*

Orlando Bradford was a football player at the University of Arizona. During the 2015-2016 school year, he assaulted two female students, Student A and Lida DeGroote. Student A told police that Bradford hit and choked her repeatedly and the University issued a no-contact order against Bradford in April 2016. Bradford then moved off-campus and lived with another football player. Student A also told the Title IX investigator that she believed Bradford was living with DeGroote. DeGroote did not offer any information about Bradford to university officials, but DeGroote's mother told a

university administrator that she was concerned about DeGroote's safety and referenced bruises on DeGroote's arm.

In February 2016, Bradford started dating MacKenzie Brown. In September 2016, Bradford physically assaulted Brown multiple times at his off-campus apartment, and Brown suffered significant injuries. Brown told her mother about the assault and her mother reported the abuse to the police. Bradford was then arrested. The next day, DeGroote's mother made an anonymous report to the police that Bradford abused her daughter. The University placed Bradford on an interim suspension after his arrest and the football coach removed him from the team. Bradford was expelled from the University a month after his arrest.

Brown sued the University, alleging it violated Title IX by failing to respond appropriately to reports that Bradford assaulted Student A and DeGroote. The trial court ruled in favor of the University because Brown did not offer any evidence that the University exercised control over the context of Brown's abuse. Brown appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit rejected Brown's theory that the University should be liable because it had control over the context in which Bradford previously assaulted two other students. The Ninth Circuit cited the U.S. Supreme Court decision, *Davis v. Monroe County Board of Education*, which set out two separate control requirements in order to find liability – the educational institution must have control over the harasser and control over the context of the harassment. The Ninth Circuit agreed with Brown that the University exercised substantial control over Bradford because he was a student at the University. However, the Ninth Circuit held that the University did not have substantial control over the context of Brown's assault, which occurred off-campus.

The Ninth Circuit explained that the control-over-context requirement arises from the limitation of Title IX, which addresses discrimination occurring only under an "education program or activity receiving Federal financial assistance." The limitation recognizes that just because a person who is subject to an educational institution's rules or authority engages in misconduct does not necessarily mean the misconduct occurs under the institution's education program. The Ninth Circuit reasoned that unlike other Title IX cases, Brown was not assaulted on school property or during a school-related activity, and Brown did not go to Bradford's apartment for a school-related purpose. Furthermore, the University did not have control over Bradford's off-campus apartment, unlike its on-campus housing.

Ultimately, the Ninth Circuit agreed with the trial court and held in favor of the University.

*Brown v. Arizona* (9th Cir. 2022) 23 F.4th 1173.

***Note:***

*Title IX protections generally only apply to private K-12 schools, colleges, and universities if they accept certain types of federal financial assistance or participate in certain federal financial aid programs. However, private K-12 schools, colleges, and universities owe a duty of care to protect their students from foreseeable harm. Harm is generally not foreseeable in situations where the school or college has no control. Therefore, it is essential that there is clarity around what is and is not a school related activity, program or location.*

## *FREE SPEECH*

### *Appeals Court Dismisses Student's Defamation Lawsuit Against Former High School For Statements And Actions By School Employees After Student's Dismissal From School For Serious Misconduct.*

St. Margaret's Episcopal School (School) is a private school that enrolls students in early childhood classes through 12th grade. Two female students at the School complained about Garrett Higgins, a high school student, to the then dean of female students, Jamie Bunch. One student said Higgins purposefully "nudged her breast" and made derogatory comments about Black people. The other student claimed Higgins said slurs to gay people. The assistant principal of high school, James Harris, and other school administrators met with Higgins. Higgins denied the incidents and Harris told him to change his behavior, not share details of the meeting with others, not attempt to discern who made the complaints, and to not engage in retaliation. Higgins agreed.

The next day, Higgins asked Bunch for details about the complainants. Higgins said he knew he was "'handsy' but not in a bad way." Bunch declined to share any information because the female students feared retaliation, and told Higgins to not touch girls or say inappropriate things to them.

Over the next few weeks, four more female students spoke to Bunch about plaintiff making inappropriate sexual gestures and touching them without their consent. Harris and St. Margaret's principal, Tony Jordan, met with Higgins and his parents. Higgins' parents did not believe the allegations, but Jordan said there would be serious consequences if there were additional credible complaints of sexual harassment.

Over the next few months, Bunch received more sexual harassment complaints from female students about Higgins. Eventually, the Head of School, William Moseley, determined Higgins should no longer be allowed on school campus. Mosely told Higgins' parents that Higgins could complete the school year remotely and would need prior permission to come to campus. Higgins' parents agreed.

Afterwards, security personnel posted a notice regarding Higgins on the wall of the School's security office. The notice stated that Higgins was no longer a student and if he was seen on campus, he should be escorted off and a supervisor should be notified. Although the security office is locked and not accessible to students, two female students ended up seeing the notice when taken to the office for fingerprinting.

Towards the end of the school year, Higgins' mother told Jordan that Higgins planned to be on campus to do some library research and hang out with his friends. Jordan responded and said Higgins cannot come to campus without advance permission and that Higgins would be dismissed from the School if he showed up to campus without such permission.

Less than one week later, Mosely saw Higgins walking toward the School's parking lot. Moseley reminded Higgins that he was not allowed on campus, and cautioned that it was the end of the school year and to not "mess things up."

Higgins finished his junior year and attended a different school for 12th grade. During his senior year, Higgins attended a St. Margaret's football game with his then girlfriend who was a student at the School. A School staff member approached Higgins' girlfriend and told her and her family that Higgins was not wanted on campus.

About a year after he left the School, Higgins sued the School and various School administrators, alleging defamation. He alleged that the School made the following defamatory statements: (1) the written notice posted in the School's security office; (2) Moseley's warning to Higgins a few weeks before the end of the school year; (3) an alleged statement by Bunch to students that Higgins was "gone for good"; (4) the statement by the School staff member at the football game. Higgins also alleged the sexual harassment accusations against him were defamatory.

The School filed a motion to strike the allegations under California's anti-SLAPP statute, which allows for the early dismissal of a case that thwarts constitutionally-protected speech. A court examines an anti-SLAPP motion in two parts: 1) whether a defendant has shown the challenged cause of action arises from protected activity; and 2) whether the plaintiff has demonstrated a probability of prevailing on the claim. Speech made in connection with a public issue falls within protected activity under the anti-SLAPP statute.

The trial court agreed with the School in part and disagreed in part, concluding that all the statements were not protected activity under the anti-SLAPP statute, except the statement by Bunch that Higgins was "gone for good." The trial court also held that plaintiff could not prevail on that claim. Both parties appealed to the Court of Appeal.

On appeal, the School argued that all the statements should have been protected because there were made in connection with an issue of public interest and Higgins failed to meet his burden of showing a probability of prevailing on his claims. Higgins argued that none of the statements are protected activity and even if they are, the trial court made a series of evidentiary errors which led to its erroneous conclusion that Higgins could not show the probability of prevailing on any of his claims.

The Court of Appeal agreed with the School. The Court of Appeal explained that protecting minors, including schoolchildren, from abuse, bullying, and harassment is an issue of public interest and therefore, falls within the anti-SLAPP statute's protections.

The Court of Appeal turned to the second part of the analysis - whether the plaintiff demonstrated a probability of prevailing, or in other words, the defamatory statements had a "natural tendency to injure the plaintiff" or actually caused him damages. The Court of Appeal held the statements alleged by Higgins were not slander (oral defamatory statements) or libel (written defamatory statements). Under Civil Code Section 46, oral statements have a natural tendency to injure if they: charge a person with a crime, state someone was indicted, convicted, or punished for a crime; state that a person has an "infectious, contagious, or loathsome disease"; injure a person with respect to their profession; or "impute on a person impotence or a want of chastity." The Court of Appeal held that none of the oral statements were remotely similar to any of these four categories.

The Court of Appeal similarly held that the one libelous statement - the memorandum by the security office - was not libel because on its face, the memo was innocent and Higgins did not establish that a third-person would understand the memo to be defamatory.

Ultimately, the Court of Appeal agreed with the School and ordered the trial court to grant the anti-SLAPP motion in its entirety.

*Higgins v. St. Margaret's Episcopal Sch.* (Cal. Ct. App., Dec. 21, 2021) 2021 WL 6050622 (unpublished).

***Note:***

*Anti-SLAPP motions are a powerful tool for the early dismissal of lawsuits involving issues of protected speech. Here, the alleged defamatory statements were protected under California's anti-SLAPP statute because they concerned an issue of public interest - the protection of minors against harassment and abuse. We would note that student disciplinary matters are typically student records that are protected by privacy rights in California. Schools should discuss or disseminate such information only as necessary.*

## *USC's Deferred Recruitment Policy Was Product Of Genuine Academic Judgment And Not Pretext For Viewpoint Discrimination.*

Kappa Alpha Theta Sorority at the University of Southern California (USC) and other Greek organizations and affinity groups are "recognized student organizations" (RSOs) at USC. Organizations with RSO status may, among other things, apply for university funding, reserve campus facilities for events, and use the university's name and trademarks. RSOs may limit their membership to students who "demonstrate support for the purpose of the organization" but must otherwise be open to the USC community. Greek organizations, however, are not required to accept all students who demonstrate support for their purpose. They select members through the "rush process," which involves a week of social events followed by a new member period when students who receive and accept offers of membership participate in additional social events culminating in their initiation.

USC's Academic Senate adopted resolutions endorsing a policy for deferred recruitment for Greek organizations in 1998 and 2015. The Academic Senate is the faculty governing body of the university and has no authority to enact university policy, but adopts resolutions that it forwards to university administrators for consideration. The Academic Senate noted in their resolutions that first-year students pledging Greek organizations miss class and come to class exhausted or intoxicated due to their pledging commitments. Faculty members of the Academic Senate stated in several meetings that the pledging experience had negative impacts on student well-being. The Academic Senate also noted that moving rush and pledging to the spring semester of first year gives more students to acclimate to university life.

The undergraduate student body adopted its own resolution that opposed deferred recruitment following the Academic Senate's 2015 resolution. Meanwhile, USC's Student Affairs Office began considering whether to implement a deferred recruitment policy. Dr. Carry, the then Senior Associate Vice Provost for Student Affairs helped draft numerous memorandum on negative impact of fall semester rush and pledging. Dr. Carry cited a 2015 study indicating two-thirds of on-campus sexual assaults at USC took place at a fraternity or sorority house and that twenty peer institutions had some form of deferred recruitment. Dr. Carry also analyzed the impact of deferred recruitment on the residential college program and students' mental and physical well-being.

In a letter to the USC community sent in September 2017, Dr. Carry announced that USC would be implementing a deferred recruitment policy after consultation from Greek organizations and other members of the USC community. The letter stated that allowing students one semester to acclimate to university academics and social life far outweigh the benefits of students who wish to participate in Greek life their first semester. Additionally, students who wanted to participate in Greek recruitment must complete 12 units and have a minimum GPA of 2.5, effective fall 2018. The Student Affairs Office continued to study the impact of deferred recruitment during the one-year period between Dr. Carry's letter and the policy's effective date.

In June 2018, several USC fraternities and one sorority sued USC alleging that the deferred recruitment policy violates Education Code Section 94367. That statute provides that "no private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution."

The Greek organizations also alleged that the deferred recruitment policy violated their First Amendment right to "associate freely with those they chose" and the policy discriminates against them because no other RSOs were subject to it. After much litigation, USC moved for summary judgment, arguing that the deferred recruitment policy was the product of genuine academic judgment. The Greek organizations argued that the policy discriminates based on viewpoint because it promotes USC's residential college program at the expense of Greek organizations.

The trial court agreed with USC. The Greek organizations appealed to the California Court of Appeal.

The Court of Appeal agreed with the trial court and held that USC's deferred recruitment policy is a product of a genuine academic judgment and the burden the policy places on the Greek organization's association rights is insufficiently serious to run afoul of Section 94367. The Court of Appeal explained that courts have

long recognized that universities' academic decisions are entitled to deference by the courts because of the specialized knowledge that informs universities' many academic decisions. The Court of Appeal explained that universities' educational autonomy is grounded in the First Amendment, and courts should respect their professional judgment. The Court of Appeal noted that academic decisions are not "confined to the classroom" but include a broad range of educational experiences and outcomes, such as extracurricular activities. Here, the deferred recruitment policy was based on academic concerns. The Court of Appeal noted that the policy itself required that students who want to rush Greek organizations must complete 12 academic units and have at least a 2.5 GPA. Additionally, the Academic Senate resolutions made formal findings regarding the impact of fall recruitment on students' grades and exposure to different extracurricular activities. Dr. Carry also noted the impact of fall recruitment of students' grades.

The Court of Appeal also held that the fact that other RSOs are not subject to the deferred recruitment policy does not mean there was viewpoint discrimination against Greek organizations. The Court noted that Greek organizations may freely reject anyone and have a unique recruitment and initiation process - which provides a further basis for treating Greek organizations differently than other RSOs and undermined plaintiffs' viewpoint discrimination argument.

The Court of Appeal also rejected plaintiffs' argument that Dr. Carry's characterization of Greek organizations as "threats" to USC's residential life program was viewpoint discrimination. The Court of Appeal found there was no evidence that plaintiffs were prohibited from discussing their values with first-semester students in a non-recruitment context. Additionally, plaintiffs' unrestricted freedom to interact with second-semester students further demonstrates that the deferred recruitment policy is unrelated to any viewpoint Greek organizations may hold.

Ultimately, the Court of Appeal agreed with the trial court and found in favor of USC.

*Omicron Chapter of Kappa Alpha Theta Sorority v. Univ. of S. California* (Cal. Ct. App. Jan. 25, 2022) 2022 WL 212339 (unpublished).

***Note:***

*The First Amendment protects against viewpoint-based discrimination by the government. Viewpoint discrimination is discrimination because of the speaker's specific ideology, opinion, or perspective. In this case, the plaintiffs were not challenging their constitutional free rights under the First Amendment because USC is not a government actor. Rather, the plaintiffs' claim arose because of Education Code 94367, a state law that prohibits private postsecondary colleges and universities from instituting a rule that subjects a student to disciplinary sanctions solely based on conduct that would be protected speech under the First Amendment.*

# EMPLOYEES

## *ARBITRATION*

### *New Federal Law Prohibits Arbitration For Predispute Sexual Assault And Sexual Harassment Claims.*

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (Act), which amends the Federal Arbitration Act (FAA). The Act prohibits mandatory pre-dispute arbitration agreements and class action waivers for claims of sexual harassment and sexual assault. The Act applies to future and existing arbitration agreements, but only "with respect to any dispute or claim that arises or accrues on or after" March 3, 2022. Individuals asserting such claims can now elect to bring the claims in court even if they had agreed to arbitrate such disputes before the claims arose. Additionally, the new law allows individuals to bring such claims via a class or collective action even if they previously waived those claims.

The Act also provides that a court, rather than an arbitrator, shall resolve disputes on whether a claim is a sexual assault or sexual harassment claim within the scope of the Act, even if the arbitration agreement specifically delegates that question to the arbitrator. This is a significant departure from typical practice, in which parties to delegate interpretation and applicability of arbitration agreements to an arbitrator.

***Note:***

*Private K-12 schools, colleges, and universities should consult with an LCW attorney about the impact of this new law on existing agreements and how to proceed with new arbitration agreements moving forward.*

## *SEX DISCRIMINATION*

### *District Court Found Religious School Liable For Sex Discrimination For Terminating Teacher After Learning He Intended To Marry Person Of The Same Sex.*

Lonnie Billard was employed as a substitute and full-time teacher with Charlotte Catholic High School (School), a school serving grades 9-12 in the Charlotte, North Carolina area. The School is part of a regional system of Catholic schools and is affiliated with the Roman Catholic Diocese of Charlotte. Billard began his employment at the School in 2000 as a substitute teacher, taught full time as an English teacher from 2001 until 2002, taught as a full time drama teacher from 2002 until 2012, and, after retiring, taught as a substitute teacher from 2012 until 2014. Billard did not teach religious classes. During his employment, Billard received positive work evaluations, won two teaching awards, and was the only teacher nominated for the Charlotte Catholic Teacher of the Year every year since the inception of the award.

Billard was married to a woman for about 24 years until their divorce in 2002. In 2002, he moved in with his partner, Richard Donham. Billard brought Donham to various School events over the years, Donham served as a substitute teacher at the School (including for Billard's classes), and Billard sometimes answered the phone at the couple's home when the School would call Donham to offer him substitute teaching assignments. However, it was disputed whether School administrators were aware that Billard and Donham were in a homosexual relationship any time prior to October 2014.

After same sex marriage became legal in North Carolina in 2014, Billard announced his engagement to Donham in an October 2014 Facebook post. Employees and parents associated with the School who were friends with Billard on Facebook saw the post, and news of Billard's engagement to Donham reached the School's chaplain and members of the administration. After discussions, the School decided that Billard could no longer serve as a substitute at the School because of his engagement to Donham. Thereafter, the School stopped offering Billard substitute teaching assignments.

After not hearing from the School for about two months, Billard contacted the School expressing his confusion as to why he had not been offered any substitute teaching assignments. The Assistant Principal told Billard that he could no longer work at the School because he "announced his intention to marry a person of the same sex."

Billard filed a lawsuit against the School alleging a violation of Title VII of the Civil Rights Act of 1964 (Title VII), which makes it illegal for an employer to fail or refuse to hire or discharge any person, or to discriminate against a person, with respect to their race, color, religion, sex, or national origin. The Supreme Court's landmark 2020 decision in Bostock v. Clayton County held that discrimination against someone for being homosexual constitutes discrimination based on sex under Title VII.

In response to Billard's claim, the School defended its decision not to offer Billard substitute teaching assignments by claiming protections under the Religious Freedom Restoration Act (RFRA), the First Amendment, the church autonomy doctrine, and Sections 702 and 703 exemptions under Title VII. The School stipulated away its ministerial exception defense.

The court first analyzed whether the School's termination of Billard was the result, at least in part, of impermissible sex discrimination under Title VII, and then analyzed each of the School's defenses.

The School argued that its decision to end Billard's employment with the School was not because he was gay, but was, instead, because by publically announcing his intention to marry a person of the same sex, he was engaging in "advocacy" against the Catholic Church's beliefs that marriage should be between a man and a woman and human sexual expression belongs to a husband and wife alone. The School contended that it would have fired a female or heterosexual employee for similarly advocating against the Catholic Church's beliefs. The School, however, conceded that if a straight teacher spoke positively about same-sex marriage, the teacher would have only received a reprimand and/or been asked to speak with a priest.

Billard countered that if he had been a female employee announcing her engagement to a man on Facebook, the School would not have characterized the action as "advocacy." Billard asserted that his engagement announcement was only considered advocacy because of his sexual orientation.

The court held that the evidence supported classic sexual discrimination in violation of Title VII because Billard's sex, as a male, was the "but-for" cause of the School's decision to fire him (i.e., "but-for" Billard's sex, the School would not have terminated him). The court agreed that Billard's engagement announcement was only considered advocacy against the Catholic Church's beliefs because of his sex, and a female employee announcing her engagement to a man would not have been considered "advocacy" and would have not resulted in her termination. The court further found that Billard received a harsher punishment for announcing

his engagement to same sex partner than he would have if he had been a straight person posting positive views of same-sex marriage in a social media post.

Having determined that the School's actions constituted sex discrimination under Title VII, the court analyzed each of the School's defenses. The School argued that it qualify for religious exemptions under Section 702(a) and 703(e) of Title VII, which exempt religious institutions from suits for religious discrimination. The court disagreed with the School, holding that Sections 702 and 703 do not permit race, sex, or national origin discrimination, but only to employment decisions based on religious preferences.

The Court also rejected the School's defense that the church autonomy doctrine provides broader protection than the ministerial exception, and that the ministerial exceptions is one application of the broader church autonomy doctrine. Rather, the church autonomy doctrine is narrow in the sense that it prevents courts from deciding purely spiritual or ecclesiastical questions. As a result, the ministerial exception was created to demarcate the line where a religious organization's First Amendment rights outweigh the government's interest in eradicating employment discrimination.

The court also held that that the ministerial exception likely cannot be waived, and analyzed whether Billard was a ministerial employee under the exception. The court found that Billard was primarily a substitute teacher of English and drama, which were purely secular subjects, and he was not required to be Catholic to be a substitute teacher. Additionally, the court found that Billard did not have to undergo religious training and did not hold himself to be a minister of the Church. Therefore, Billard was not a ministerial employee.

The court rejected the School's argument that it is exempt from Billard's sex discrimination claim under RFRA. RFRA does not apply to lawsuits between private parties; rather, the plain text of the statute applies to government action burdening a party's free exercise of religion. The court also rejected the School's argument that the First Amendment freedom of association protects its right to not affiliate with Billard. The court held that the First Amendment freedom of association does not allow a religious institution to circumvent the prohibition against employment discrimination under Title VII. Additionally, hiring paid employees is a commercial activity, and the freedom of expression does not apply in the employment context.

Based on the foregoing, the trial court held that the School is liable for sex discrimination under Title VII.

*Billard v. Charlotte Catholic High Sch.* (W.D.N.C. September 3, 2021) 2021 WL 4037431 (slip opinion).

***Note:***

*The defendant in this case attempted to argue many First Amendment defenses, including the ministerial exception. The ministerial exception prohibits Title VII claims and other employment discrimination laws relating to the employment relationship between religious organizations and their "ministers." The court held that the ministerial exception did not apply in this case because the plaintiff taught purely secular subjects and was not tasked with carrying out the mission of the Catholic Church. Therefore, the plaintiff was not a "minister" of the School.*

## CALIFORNIA LABOR CODE

### *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 unreasonably 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) 75 Cal.App.5th 346.

***Note:***

*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.*

## *WHISTLEBLOWER RETALIATION*

### *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 directive, 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 mistinting directive. 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 directive, 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 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) 12 Cal.5th 703.

***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.*

## *FAIR EMPLOYMENT & HOUSING ACT*

### *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 his motion 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 attorneys' fees for a prevailing party. 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.

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 against him and harassing 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) 74 Cal.App.5th 174.

***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, substantial attorneys' fees can awarded.*

## *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-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) 74 Cal.App.5th 908.

***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 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.*

## 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.

*National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration* (2022) 142 S.Ct. 661.

***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.*

## 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 as 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- nor 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.* (2022) 73 Cal.App.5th 619.

***Note:***

*This case involves reaffirms longstanding precedent regarding time rounding under California wage and hour law.*

## DID YOU KNOW...?

Each month, LCW provides quick legal tidbits with valuable information on various topics important to private K-12 schools, colleges, and universities in California:

- On February 28, 2022, the California Department of Public Health (CDPH) updated its guidance concerning the use of face coverings, and will no longer require that face coverings be worn in K-12 schools and childcare facilities starting March 12, 2022. While as of March 12, 2022, the CDPH will no longer require that face coverings be worn in K-12 schools and childcare settings, the CDPH strongly recommends that individuals in these settings continue wear face coverings indoors. For more information, see the March 1, 2022, LCW Special Bulletin, Governor Issues Order Lifting the Mask Mandate for K012 Schools and Child Care Facilities starting March 12, 2022.
- On February 9, 2022, Governor Newsom signed a new COVID-19 Supplemental Paid Sick Leave (SPSL) bill into law that took effect on February 19, 2022. The law requires covered employers to provide SPSL to employees retroactive to January 1, 2022 and through September 30, 2022. For more information, see the February 10, 2022, LCW Special Bulletin, Governor Signs Law Reauthorizing COVID-19 Supplemental Paid Sick Leave.
- AB 1033 clarified that the definition of "parent" under the California Family Rights Act (CFRA) includes a "parent-in-law." Accordingly, employees are eligible to take CFRA leave to care for parent-in-laws.

## LCW BEST PRACTICES TIMELINE

Each month, LCW presents a monthly timeline of best practices for private and independent schools. The timeline runs from the fall semester through the end of summer break. LCW encourages schools to use the timeline as a guideline throughout the school year.

**JANUARY/FEBRUARY**

□ Review and revise/update annual employment contracts.

□ Conduct audits of current and vacant positions to determine whether positions are correctly designated as exempt/non-exempt under federal and state laws.

**FEBRUARY- EARLY MARCH**

□ Issue enrollment/tuition agreements for the following school year.

□ Review field trip forms and agreements for any spring/summer field trips.

□ Tax documents must be filed if School conducts raffles:

- Schools must require winners of prizes to complete a Form W-9 for all prizes $600 and above. The School must also complete Form W-2G and provide it to the recipient at the event. The School should provide the recipient of the prize copies B, C, and 2 of Form W-2G; the School retains the rest of the copies. The School must then submit Copy A of Form W2-G and Form 1096 to the IRS by February 28th of the year after the raffle prize is awarded.

□ Planning for Spring Fundraising Event

□ Summer Programs and Camps
- Consider whether summer programs or camps will be offered by the school and if so, identify the nature of the program and anticipated staffing and other requirements.
- Review, revise, and update summer program or camp enrollment agreements based on changes to the law and best practice recommendations.

**MARCH- END OF APRIL**

□ The budget for next school year should be approved by the Board.

□ Issue contracts to existing staff for the next school year.

□ Issue letters to current staff who the School is not inviting to come back the following year.

□ Assess vacancies in relation to enrollment.

□ Post job announcements and conduct recruiting
- Resumes should be carefully screened to ensure that applicant has necessary core skills and criminal, background and credit checks should be done, along with multiple reference checks.

□ Summer Program or Camp
- Advise staff of summer program/camp and opportunity to apply to work in the summer, and that hiring decisions will be made after final enrollment numbers are determined in the end of May.
- Distribute information on summer programs and camp to parents and set deadline for registration by end of April.
- Enter into Facilities Use Agreement for Summer Program and Camps, if not operating the program

□ Transportation Agreements
- Assess transportation needs for summer/next year
- Update/renew relevant contracts

**MAY**

□ Complete hiring of new employees for next school year.

□ Complete hiring for any summer programs.

□ If service agreements expire at the end of the school year, review service agreements to determine whether to change service providers (e.g., janitorial services, if applicable).
- Employees of a contracted entity are required to be fingerprinted pursuant to Education Code Section 33192, if they provide the following services:
  - School and classroom janitorial.
  - School site administrative.
  - School site grounds and landscape maintenance.
  - Pupil transportation.
  - School site food-related.
- A private school contracting with an entity for construction, reconstruction, rehabilitation, or repair of a school facilities where the employees of the entity will have contact, other than limited contact, with pupils, must ensure one of the following:
  - That there is a physical barrier at the worksite to limit contact with pupils.
  - That there is continual supervision and monitoring of all employees of that entity, which may include either:
    - Surveillance of employees of the entity by School personnel; or
    - Supervision by an employee of the entity who the Department of Justice has ascertained has not been convicted of a violent or serious felony, which may be done by fingerprinting pursuant to Education Code Section 33192. (See Education Code Section 33193).

If conducting end of school year fundraising:

□ Raffles:
- Qualified tax-exempt organizations, including nonprofit educational organizations, may conduct raffles under Penal Code Section 320.5.
- In order to comply with Penal Code Section 320.5, raffles must meet all of the following requirements:
  - Each ticket must be sold with a detachable coupon or stub, and both the ticket and its associated coupon must be marked with a unique and matching identifier.

- Winners of the prizes must be determined by draw from among the coupons or stubs. The draw must be conducted in California under the supervision of a natural person who is 18 years of age or older.

- At least 90 percent of the gross receipts generated from the sale of raffle tickets for any given draw must be used by to benefit the school or provide support for beneficial or charitable purposes.

□ Auctions:

- The school must charge sales or use tax on merchandise or goods donated by a donor who paid sales or use tax at time of purchase.
  - Donations of gift cards, gift certificates, services, or cash donations are not subject to sales tax since there is not an exchange of merchandise or goods.

  - Items withdrawn from a seller's inventory and donated directly to nonprofit schools located in California are not subject to use tax.
    - E.g., if a business donates items that it sells directly to the school for the auction, the school does not have to charge sales or use taxes. However, if a parent goes out and purchases items to donate to an auction (unless those items are gift certificates, gift cards, or services), the school will need to charge sales or use taxes on those items.

## CONSORTIUM CALL OF THE MONTH

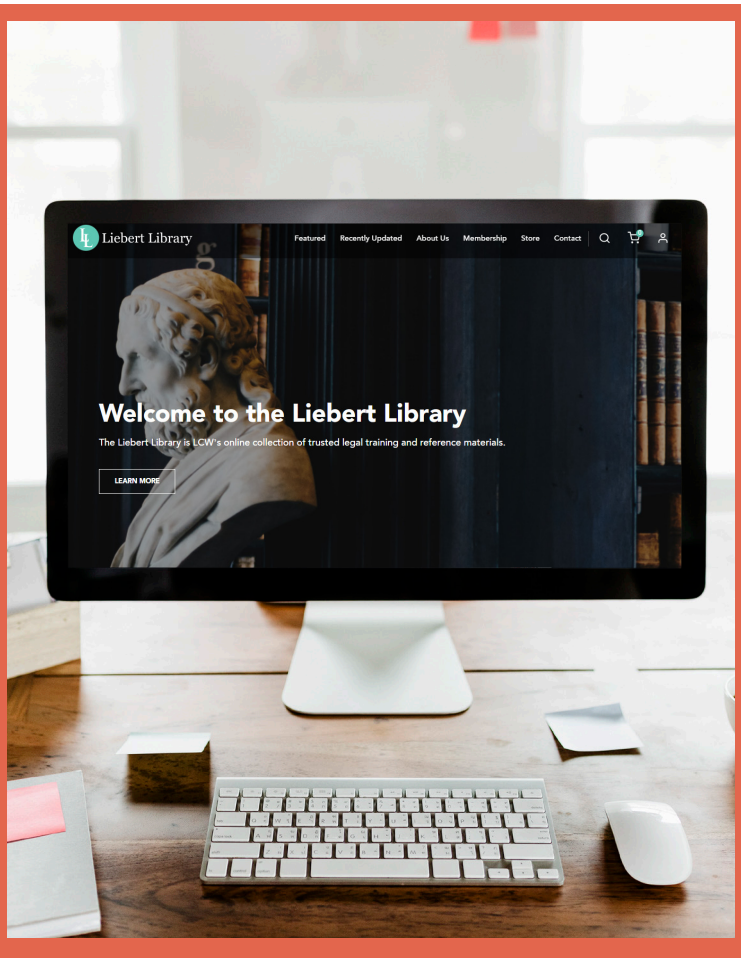
Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature Consortium Calls of the Month in our newsletter, describing one or more interesting calls and how the issues were resolved. All identifiable details will be changed or omitted.

**QUESTION**: An administrator of an independent school explained to LCW that an employee was approved for paid time off but tested positive for COVID-19 a day or two before the planned start of her PTO. The employee asked the school if they can now count the PTO time as Supplemental Paid Sick Leave (SPSL), even though they planned to take time off for personal reasons.

**ANSWER**: The LCW attorney recommended that the administrator approve the use of SPSL. The attorney explained that it is likely that whatever planned use of PTO the teacher had (e.g., a vacation) was halted because they tested positive for COVID-19. The requirements of the COVID-19 Paid Sick Leave law under SB 114 provide that employees are entitled to use of SPSL leave in the event that they test positive for COVID-19, and the prior approval of PTO should not impact the employee's eligibility for this leave.

The LCW attorney also explained that it is important to note that the Cal/OSHA Emergency Temporary Standards (ETS) require that employers provide employees with exclusion pay in the event they are exposed to COVID-19 in the workplace. The LCW attorney recommended that if the employee does not know where they were exposed to COVID-19, and they have been at work, the school should provide exclusion pay as the employer has the burden if challenged to establish that the exposure occurred outside of the workplace. When an employee is eligible for exclusion pay, the employer is not able to require that the employee use their SPSL leave as a condition of receiving exclusion pay.

# 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.*

MANAGEMENT TRAINING WORKSHOPS

## Firm Activities

**Consortium Training**

**Apr. 26** **"Handbook Policies"**
ACSI Consortium, BJE Consortium, CAIS Consortium & Golden State Independent School Consortium | Webinar | Stacy L. Velloff & Linda K. Adler

**May 10** **"Private School Office Hours"**
ACSI Consortium, BJE Consortium, CAIS Consortium & Golden State Independent School Consortium | Webinar | Michael Blacher & Grace Chan

**Customized Training**

**Mar. 30** **"Mandated Reporting"**
The College Preparatory School | Oakland | Grace Chan

**Apr. 18** **"Mandated Reporting and Boundaries"**
Sonoma Country Day School | Santa Rosa | Grace Chan

**May 8** **"Performance Evaluations"**
San Diego French American School | Webinar | Judith S. Islas



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