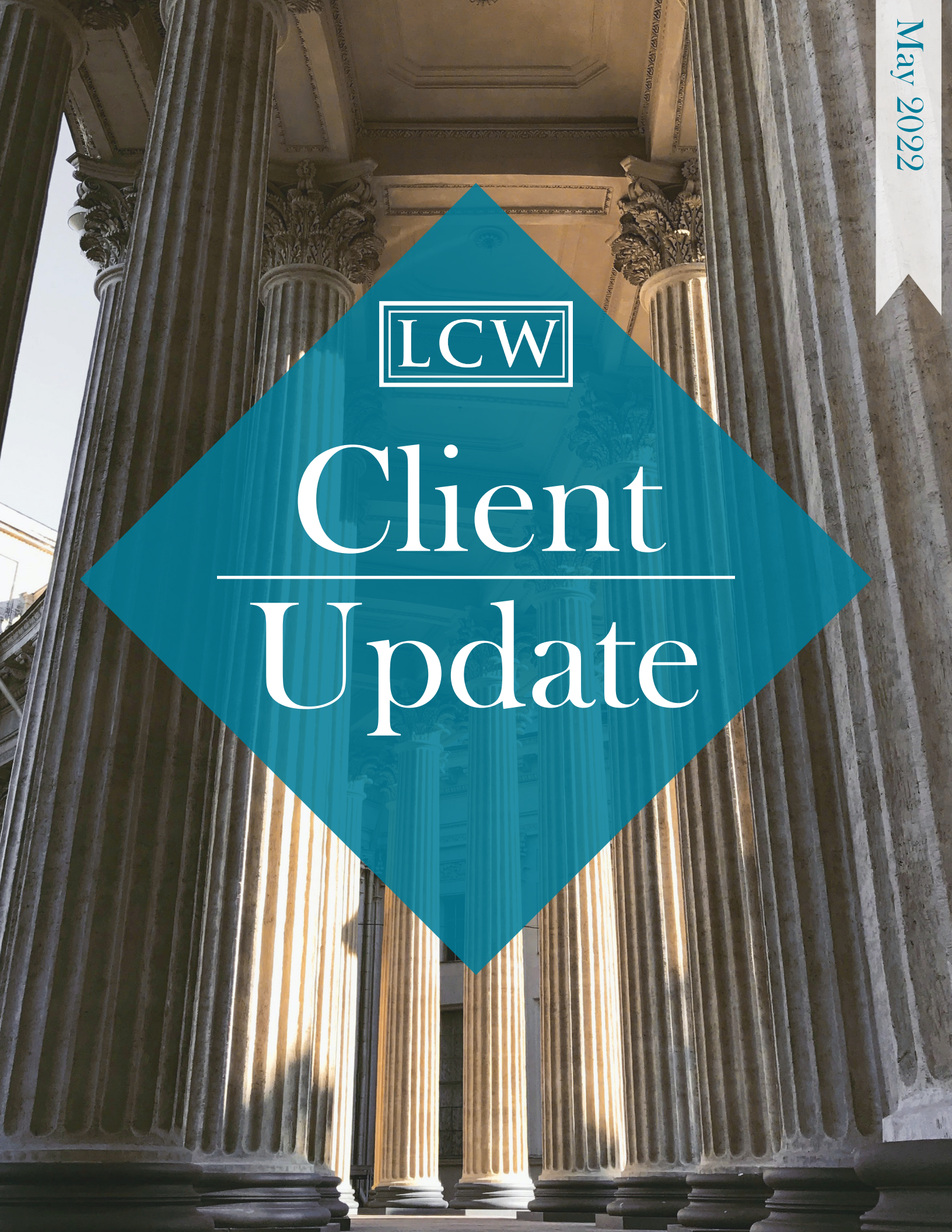

May 2022

LCW

Client Update

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Client Update is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in ***Client Update*** should not be acted on without professional advice. To contact us, please call 310.981.2000, 415.512.3000, 559.256.7800, 916.584.7000 or 619.481.5900 or e-mail info@lcwlegal.com.

FIRM VICTORIES

Superior Court Upholds Personnel Appeals Board's Decision To Terminate Police Officer.

LCW Managing Partner **Scott Tiedemann** and Senior Counsel **Stefanie Vaudreuil** convinced the superior court to uphold a city personnel appeals board's decision to terminate a police officer. Previously, LCW persuaded the city's personnel appeals board to uphold the termination of this officer for multiple offenses, including dishonesty, and making derogatory, discourteous, and profane remarks to a suspect who the officer had detained and arrested.

The DA filed criminal charges against the officer for filing a false police report about the arrest and detention, but the officer was acquitted.

The officer then asked the superior court to reverse the personnel appeals board's decision that upheld his termination. However, both the notice of intent to terminate and notice of termination that officer received stated that any one of the several charges against the officer would support his termination. The court noted that if the weight of the evidence supported any one of the charges, then the court could only overturn the termination if that level of penalty was an abuse of the city's discretion. The court found that at least three of the disciplinary charges were indeed supported by the weight of the evidence, and that applying the penalty of termination was within the city's discretion.

Following oral argument, the court published its final order upholding the termination. The final order added additional grounds for upholding the termination that were based on points LCW raised at oral argument.

Note:

Not only did the officer's disciplinary notices state that each individual charge was sufficient to support termination, but the Chief persuasively testified as to this point. The court also heard LCW make this point in oral argument and included this point in its decision.

Court Upholds Lawfulness Of Governor's Order Extending POBR Statute Of Limitations During Pandemic.

LCW Partner **Geoff Sheldon** and Senior Counsel **Dave Urban** successfully advocated on behalf of the Los Angeles County Sheriff's Department for the lawfulness of the Governor's order, issued in the midst of the coronavirus pandemic, to extend the POBR's one-year statute of limitations. The California Department of Justice represented the Governor in the case. The Association of Los Angeles Deputy Sheriffs (ALADS) brought the case.

Under attack in the case was the Governor's March 2020 Executive Order N-40-20. Among other things, that Order provided that the one-year deadline, specified in Government Code section 3304(d), for completing investigations of alleged misconduct by public safety officers, was extended by 60 days. In enacting this Order, the Governor explained that, "under the provisions of [the California Emergency Services Act (CESA)] …, I find that strict compliance with various statutes and regulations specified in this order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic."

ALADS filed a writ petition in the superior court seeking an order that the Governor's action to toll the POBR statute of limitations for 60 days was unconstitutional. ALADS also sought to enjoin the Los Angeles County Sheriff's Department from relying on the Governor's Executive Order.

The court denied the union's petition. The Governor issued the Order pursuant to the CESA emergency powers. Because the Governor had issued a state of emergency, CESA offered the Governor broad discretion to issue orders necessary to carry out the purposes of the Act, including the extension of this POBR statute of limitations. As a result, all disciplinary actions that relied upon the extension remained.

Note:

We are proud that LCW was able to assist police and sheriff's departments throughout the state that had relied upon the extension of this POBR statute of limitations to pursue needed disciplinary actions.

NEW TO THE FIRM!

Nicholas (Nick) M. Grether is an associate in our Los Angeles office. Nick has devoted his legal career to providing labor and employment advice and representation to California's public employers. An experienced litigator, he has represented dozens of clients in arbitration, as well as in state and federal court, concerning alleged violations of employment laws.

Danny Ivanov is an associate in LCW's Los Angeles office where he provides representation and counsel to clients in all matters pertaining to labor and employment law. He also provides support in litigation claims for discrimination, harassment, retaliation, and other employment matters.

Ashley Sykora is an associate in our Los Angeles office where she advises clients on labor and employment law matters. She previously served as a law clerk at the California Office of the Attorney General.

Ariana Fil is an associate in LCW's San Francisco office where she advises clients on labor, employment and education law matters.

Hadara R. Stanton is experienced litigator based in LCW's San Francisco office. She has more than fifteen years of experience serving as a Deputy Attorney General in the California General's Office prior to joining LCW.

UPDATED MAY 2022: Template COVID-19 Prevention Program (CPP)

On April 21, 2022, the Occupational Safety and Health Standards Board ("OSHSB") amended and re-adopted the Cal/OSHA COVID-19 Emergency Temporary Standards ("ETS"). Many of the amendments are substantive in nature and require corresponding revisions to employers' COVID-19 Prevention Programs ("CPP").

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

- If you are a Premium Liebert Library member, you can view and download the CPP directly with your membership.
- If you are a Basic Liebert Library member, you can only view the CPP on the website.

Visit our Liebert Library website for more information.

Retirees Did Not Prove An Implied Contract For The County To Pay Retiree Health Premiums At The Same Rate As Current Employees.

In 1993, the Board of Supervisors of San Benito County contracted with the California Public Employee's Retirement System (CalPERS) to provide health insurance benefits to County employees and retirees through the Public Employees' Medical Hospital Care Act (PEMHCA). The Board executed this contract through a County resolution. This resolution required the County to pay retiree health insurance benefits at the same contribution rate it paid to active employees. However, nothing in the resolution prohibited the County from changing its contribution.

Until 2014, the County's health insurance contributions for active employees were stated in the collectively bargained Memoranda of Understanding. The County's contributions covered the full premium cost (100%) of certain CalPERS' plans for "employee only" (individual) coverage.

In 2014, the Board adopted resolutions to decrease the County's contributions for active employees and retirees to amounts to less than the lowest cost CalPERS plan. As of January 1, 2015, employees and non-Medicare retirees had to start paying out-of-pocket for health insurance and no longer had the option to select a no-cost, County-paid individual plan. In December 2016, the Board voted to exit PEMCHA and began providing health insurance benefits as of 2017 under contract with the California State Association of Counties Excess Insurance Authority (CSAC-EIA).

Normandy Rose and Margaret Riopel, both County retirees, claimed that when they were hired, they were told that the County would cover 100% of the cost of an individual health insurance plan throughout employment and retirement. They sued the County for breaching an implied contract for the County to provide them a "100 percent paid individual plan." The retirees alleged that the County violated its contractual promise "when it failed to provide a contribution rate equal to an individual plan."

The trial court did find that the County had an implied contract with its employees promising that, in exchange for working at lower wages, upon retirement the County would pay their health benefits at the same rate as active employees. However, the trial court also found that the retirees' claim to fully-paid coverage "was based upon a misunderstanding" stemming from the fact that in 1993 the County did cover 100% of employee contributions.

The trial court made these findings based upon its interpretation of an analytical framework the California Supreme Court established in *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171. In *Retired Employees*, the Court considered whether a California county can form an implied contract with county employees that would confer a vested contractual right to lifetime retiree health benefits. The Supreme Court held that there is a legal presumption against the creation of a vested contractual right from a resolution or statutory scheme. But, that legal presumption could be overcome by the statutory language or circumstances accompanying the governing body's passage of the benefit that clearly expressed "a legislative intent to create private rights of a contractual nature enforceable against the [governmental body]." (*Retired Employees*, supra, 52 Cal.4th at p. 1187.) The intent to make a contract need not be express, but it must be "clear" based on "the statutory language or circumstances accompanying its passage."

The California Court of Appeal considered all evidence offered regarding the language of the County's resolution and the circumstances surrounding the passage of the resolution. This evidence included the relevant resolutions and related legislative record (including staff reports, meeting minutes, and

testimony which related to or described circumstances informing the Board's decisions), and the County's conduct in providing the health insurance benefits.

The Court of Appeal found that the resolutions and legislative record did not contain a clear and express intent to create an implied contract. The Court then considered the County's conduct over the 21 years at issue. The retirees contended that the County's conduct to contribute 100% of the cost of their insurance plans for so long, implied that the County intended to be contractually bound to do so indefinitely. The Court of Appeal disagreed, finding that the County's long-term conduct simply did not rise to the level of clear intent required, particularly because during that time the County was simply following PEMCHA's "equal contribution" requirements. The Court of Appeal overturned the trial court and held that the retirees had no contractually-vested right to receive the same health insurance premium contributions as the County provides its active, unrepresented employees.

Rose and Riopel v. County of San Benito, 2022 WL 1154621.

Note:

This case illustrates how the wording of a local agency's resolutions related to retirement benefits, may create implied contracts with the agency's employees. Unless the wording of the resolution or the circumstances surrounding the resolution clearly expresses an intent to create an implied contract, however, the law will presume that there is no implied contract.

The New Landscape: 2022 Peace Officer Employment

POST Certified!

May 25, 2022 | 8:30am - 12:30pm

Recent years, and 2021 in particular, have brought seismic changes to the law enforcement profession in California. Experienced public safety attorneys Scott Tiedemann and Paul Knothe will lead a thoughtful discussion of many laws, focusing on the practical steps that agencies can take to avoid fault lines in peace officer employment, from hiring to termination.

SB 2 dramatically expanded the role of the Commission on Peace Officer Standards and Training (POST) and introduced peace officer decertification to California.

SB 16 continued the trend toward transparency and away from Pitchess started by 2019's SB 1421, making several new categories of officer conduct public and imposing new recordkeeping requirements.

Other new laws change agencies obligations with regard to screening of new hires, rooting out "law enforcement gangs", reporting uses of force, acquiring and using military equipment, use of crowd control devices, and more. This seminar will arm your agency with the tools to adapt.

WHERE? The Centre Lakewood, Maple Room
5000 Clark Ave, Lakewood, CA 90712
Complimentary parking outside

WHO SHOULD ATTEND? Police Chiefs, Captains, Lieutenants, Public Safety Human Resource Managers, Public Safety attorneys

POST? This course has been approved for 4 hours of POST credit. In order to receive credit, you must sign in with your name and POST ID.

MCLE? Liebert Cassidy Whitmore is an approved MCLE provider. Participating attorneys are eligible for 4 hours of MCLE. The person from your agency that registers for this event will receive the official set of MCLE forms. In order to receive your MCLE credit, you will need to complete and return these forms that will be available at the workshop.

CANCELLATION POLICY? Cancellations must be received by **May 18, 2022**, to receive a full refund, less a $25 administrative fee. No refunds will be given after that time. Participant substitutions are accepted any time prior to **May 24, 2022**.

QUESTIONS? Please email Kaela Arias at karias@lcwlegal.com or 310.981.2087

Register here!

RETALIATION

Employee's Performance Evaluations Proved That The Reasons For Terminating Him Were Pretextual.

Arnold Scheer was terminated from his position as Chief Administrative Officer (CAO) at the UCLA Department of Pathology and Laboratory Medicine in June 2016. Scheer had worked at the University since 2004.

Scheer sued the University. He alleged he was wrongfully terminated in retaliation for whistleblowing. Scheer stated that he observed violations of safety procedures and mismanagement that resulted in lost and mislabeled specimens. The University moved for summary judgment.

When an employee alleges retaliation or discrimination, courts apply the *McDonnell Douglas* burden-shifting framework to analyze the claim. Under the framework, the employee must first establish a *prima facie* case of unlawful discrimination or retaliation. Next, the employer must articulate a legitimate reason for taking the challenged adverse employment action. Finally, the burden shifts back to the employee to demonstrate that the employer's proffered legitimate reason is only a pretext for discrimination or retaliation.

The trial court held that under the *McDonnell Douglas* framework, Scheer had established a *prima facie* case of retaliation. The court also held that the University had articulated the following legitimate reasons for terminating Scheer in the Notice of Intent to Terminate (NOI): "poor performance and conduct", and specifically that he: 1) had an overly aggressive attitude concerning certain negotiations; 2) had a harsh and disruptive style at meetings; 3) had become increasingly ineffective as CAO; (4) lacked enthusiasm; and 5) was not an effective leader.

Therefore, the burden shifted back to Scheer to demonstrate that the University's proffered legitimate reasons were only a pretext for retaliation. Scheer argued that throughout his tenure at UCLA, he received accolades, positive feedback, promotions, and additional assignments and responsibilities from upper management. Each year he received a maximum merit increase in salary and near maximum incentive awards. Sheer argued: "*Indeed, the reviews and evaluations … clearly indicate that his work and performance were exemplary during that time frame*. Notably, [he] was consistently … given additional responsibilities and oversight until the date of his termination [emphasis added]."

The trial court found that despite these arguments, there was no triable issue of fact because the performance evaluations took the form of checklists relating to completion of individual tasks, rather than subjective evaluations of the quality of his work or his style and manner in completing those tasks. The trial court granted summary judgment for the University.

Scheer appealed. On appeal, the significant issue was whether Scheer had established that the claimed reason for his termination was a pretext. Scheer made the same arguments as he did at the trial court. The California Court of Appeal examined the NOI, and found the University's alleged reasons for Scheer's termination to be disputable.

First, despite the NOI stating that Scheer had become a problematic presence within the department, Scheer's direct supervisor disagreed with that characterization.

Second, the NOI claimed that, in 2015, the University had removed certain responsibilities from Scheer because of a past personal interaction. However, Scheer's declaration stated that he was never advised of this action and that Scheer's fiscal year 2015 objectives were centered towards those responsibilities, indicating that he still held them in 2015.

Third, the NOI criticized Scheer as being overly aggressive in negotiations on behalf of the University. In response, Scheer pointed to an email, which specifically congratulated him for achieving a good result for the University at the negotiating table.

Finally, the NOI criticized Scheer's involvement in the opening of a new lab in China, saying he never followed through on opening the lab. However, Scheer's performance evaluation specifically stated that he had achieved 100% of his goal of opening a "joint venture with CTI in Shanghai, China, and taking on new sites and testing."

In sum, the Court of Appeal agreed with Scheer's arguments, stating that "Scheer… showed that he unfailingly received excellent evaluations over a 12-year period, and no one ever advised him of any shortcomings or deficiencies".

The Court of Appeal concluded that the University's stated reasons in the NOI were untrue and were a pretext for retaliation. The Court therefore overturned the granting of summary judgment and remanded the case back to the trial court.

Scheer v. UC Regents, 76 Cal.App.5th 904 (2022).

Note:

This case is a cautionary tale for employers. Any adverse action an employer takes must be consistent with the documentation in the personnel file about the employee's performance. Employers must take the time to prepare accurate performance evaluations, regardless of the format of the evaluation.

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.

- LCW San Diego Associate Attorney Madison Tanner ran the Boston Marathon this month and finished the race in two hours and fifty-six minutes! This means that she ran one of the nation's hardest marathon courses at a pace of 6:45 per mile. Congratulations Madison!

- Under California law, overtime pay is required for hours worked over eight in a day, but California public agencies are generally exempt from this requirement. The U.S. Fair Labor Standards Act (which does apply to public agencies) provides an overtime threshold of 40 hours per week for most non-exempt employees.

- Local agencies that serve a substantial number of non-English-speaking people must employ a sufficient number of qualified bilingual persons in public contact positions or as interpreters to assist those in such positions, to ensure information and services are provided in the language of the non-English-speaking person. The local agency determines what constitutes a substantial number of non-English-speaking people and a sufficient number of qualified bilingual persons. (Government Code Section 7293.)

County Could Withhold Names Of Those Arrested Eleven Months Prior.

On February 15, 2021, Alisha Kinney asked the County of Kern for "the names of every individual arrested for DUI by the Kern County Sheriff's Department from March 1, 2020 through April 1, 2020." Kinney made this request pursuant to the California Public Records Act (CPRA).

The County responded by disclosing a report that documented the three DUI arrests the Kern County Sheriff's Department made during the timeframe Kinney specified. But, the County redacted the names of the three arrestees from the report. The report did list a case number, date and time of arrest, the offense, the offense statute, and the case status for each arrest.

Kinney asked the trial court to compel the County to produce the arrestee's names. The trial court declined and Kinney appealed. Kinney argued that she was entitled to the names of the arrested individuals because of Government Code 6254(f)(1), which states:

> "Notwithstanding any other provision of this subdivision, state and local law enforcement agencies *shall make public the following information*, . . . :
>
> (1) *The full name and occupation of every individual arrested by the agency*, ..." (emphasis added)

In response, the County argued that the holding in *County of Los Angeles v. Superior Court (Kusar)* (1993) 18 Cal.App.4th 588, allowed it to withhold records that do not pertain to contemporaneous police activity. The County relied on the following language from *Kusar*: "the records to be disclosed under section 6254, subdivision (f)(1) and (2), are limited to current information and records . . . which pertain to contemporaneous police activity." Implicit in the County's argument was that the 11-month old records Kinney wanted could not possibly pertain to "contemporaneous police activity."

The California Court of Appeal examined the rationale behind the *Kusar* holding and the legislative intent of Government Code Section 6254(f). The Court found that Section 6254(f) was designed to ensure that secret arrests of citizens and clandestine police activity were curtailed. The Court said the legislature wanted to allow public access to information about recent arrests to guarantee that individuals would not be detained in secret. It was for that reason that the *Kusar* case held that "records" under Section 6254(f) are "limited to current information and records of the matters described in the statute and which pertain to contemporaneous police activity."

The Court of Appeal concluded that, because the requested records were 11 months old, they were not current information nor did they pertain to contemporaneous activity. The arrestees' names were not disclosable under the CPRA and the Court rejected Kinney's appeal.

Kinney v. Superior Court of Kern County, et al, 2022 WL 1043448.

Note:

This case is a reminder to public agencies that, despite the broad language of the CPRA, some information can be withheld. The courts have interpreted Government Code Section 6254(f)(1) to allow agencies to withhold records that do not pertain to contemporaneous police activity. Each CPRA request must be analyzed to determine whether the requested records fit the contemporaneousness requirement.

Best Practices for Conducting Fair and Legally Compliant Internal Affairs Investigations

POST Certified!

June 21, 2022 | 9:00am - 4:00pm
AND
June 22, 2022 | 9:00am - 4:00pm

The Internal Affairs investigation is a key element in whether an agency will be successful in imposing discipline. What do decision makers, hearing lawyers and courts look for in an IA report? This two-day course will unlock the difference between an IA that supports discipline versus those that undermine it.

This **POST-approved** course provides a complete guide to conducting a fair and thorough internal affairs investigation that will create a defensible disciplinary action in the event of sustained findings. You will gain an understanding of the impact that good decision-making and strategy have on the agency's success in defending IAs and winning appeals.

This 2-day seminar will encompass legal aspects of a properly conducted IA Seminar, including topics such as:

- Overview of the Peace Officers' Bill of Rights (POBR) and consequences of violations for your agency
- Best practices in initiating and organizing the IA investigation
- How to obtain documents and other evidence
- Interview techniques and transcript recommendations, plus pitfalls to avoid
- Identifying common mistakes during IA investigations and solutions
- Current and emerging legal trends in public safety allegations and discipline

Register here!

WHERE? City of Tustin Community Center at the Market Place
(located behind Rubio's Coastal Grill & across California Pizza Kitchen)
2961 El Camino Real, Tustin, CA 92782

WHO SHOULD ATTEND? Personnel assigned to an agency's professional standards unit, most notably investigators, and the supervisors, managers, risk management and human resources professionals that manage or oversee public safety personnel investigations.

POST? This course has been approved for 12 hours of POST credit. In order to receive credit,
you must sign in with your name and POST ID on both days of the workshop.

MCLE? Liebert Cassidy Whitmore is an approved MCLE provider. Participating attorneys are eligible for 12 hours of MCLE.

CANCELLATION POLICY? Cancellations must be received by June 14, 2022, to receive a full refund, less a $25 administrative fee. No refunds will be given after that time. Participant substitutions are accepted any time prior to June 20, 2022.

QUESTIONS? Please email Kaela Arias at karias@lcwlegal.com or 310.981.2087

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.

I understand that Cal/OSHA just updated the Emergency Temporary Standards (ETS), which in turn impact my agency's COVID-19 Prevention Plan. What are the new obligations for excluding employees, who contract COVID-19, from the workplace?

Question:

Answer:

You are correct, Cal/OSHA readopted and amended the ETS on April 21, 2022. Now, employees who contract COVID-19 are subject to one of two criteria, depending on whether their symptoms are resolving (improving) or not.

For an employee who never developed symptoms or whose symptoms are resolving, the amended ETS require that the employee satisfy the following criteria to return to work:

1. Five days have passed from the date that symptoms began or, if no symptoms developed, from the date of the first positive COVID-19 test, and at least 24 hours have passed since the employee's fever, if any, has resolved without the use of fever reducing medications; and
2. Either (a) the employee produces a negative COVID-19 test from a specimen collected no earlier than the fifth day following the first positive test, or (b) the employees has waited 10 days from the first presentation of COVID-19 symptoms or, if the employee did not develop symptoms, from the date of the first positive COVID-19 test.

For an employee whose symptoms are not resolving, the amended ETS require that the employee satisfy the following criteria to return to work:

1. At least 24 hours have passed since a fever has resolved without the use of fever reducing medications; and
2. Either (a) the employee's symptoms are resolving, or (b) the employee has waited 10 days from the first presentation of COVID-19 symptoms.

SPOTLIGHT ARTICLE

Leadership That Bolsters Employee Retention Requires Promptly Investigation Reports of Incivility

Written By:
Shelline Bennett, Morin Jacob & Leighton Henderson



This article was originally published in the May issue of HR News.

In 2013, the Harvard Business Review posited that rudeness in the workplace was "rampant" and "on the rise." Now, two years into the COVID-19 pandemic and in the midst of widespread political polarization, the workplace of 2013 seems downright quaint in comparison.

People have always disagreed about politics, but for the most part, a person's politics were considered part of their personal life, and there was a clear line between personal life and work life. The COVID-19 pandemic blurred that line. Suddenly, millions of people were working from home, attending meetings in their bedrooms, and virtually meeting their colleague's pets. It relaxed barriers, which had some benefits. Formerly intimidating supervisors became relatable when their young children interrupted meetings. Coworkers bonded over the loneliness of pandemic life. However, the blurring of lines between personal life and work life created other problems, such as the (incorrect) ideas that decorum in the workplace is outdated, and that any joke you tell your friends is now appropriate for your colleagues.

To put it mildly, COVID-19 and the mitigation measures used to combat it have become politically divisive. As employers have grappled with whether or how to implement mask and vaccine mandates, disputes over those policies have spread into the workplace and led to disagreements among supervisors and coworkers, refusals to wear masks, and various forms of COVID-19-related misconduct, such as submitting forged vaccine cards.

It is no surprise that this rise of incivility and COVID-related conflicts in the workplace has coincided with a rise in resignations. The U.S. Bureau of Labor Statistics reported that an unprecedented 4.5 million people quit their jobs in November 2021. Called the "Great Resignation," some of the causes identified by social scientists and reporters are a tragic but perhaps unavoidable result in our pandemic world, such as lack of childcare and economic instability. However, many employees have resigned because they can no longer tolerate their "toxic" working environments – a reason that is both preventable and fixable by an employer.

Most employers are aware they have a legal responsibility to investigate allegations of harassment or discrimination. What they may not realize is that prompt, thorough, and fair investigations into all types of misconduct allegations increase employee morale and reduce turnover. Some companies, especially those focused on creating a "fun" culture, may shy away from investigating complaints out of concern that it will make employees uncomfortable. In one sense, they are not wrong -- no one wants to be involved in an investigation. Subjects are apprehensive and witnesses want to stay out of it. However, that is a good reason to investigate as quickly as possible; it is not a good reason to forego the investigation altogether. The consequences of foregoing the investigation are too high.

Failing to investigate after receiving notice of potential misconduct sends the message that the company does not take complaints seriously. The employee who submitted the complaint may feel like they have no choice but to find another job, file a lawsuit, or do both. If they remain at the company, they likely will not feel listened to or valued, which can lead to low morale, poor performance, and increased absenteeism.

While all employee complaints should be taken seriously, the spectrum of the seriousness of employee allegations is extremely broad, ranging from minor to criminal. Minor allegations, like one employee making a rude comment, can often be investigated by a human resources professional on the day of the allegation. The HR professional can separately question the employees who were involved or may have heard the alleged comment, and draw a conclusion based on the collected testimony.

More serious allegations, like complaints of harassment or theft, will take longer to thoroughly investigate, as the investigator will need to collect and review all relevant evidence, whether in the form of testimony, emails/documents, or video footage.

Employers should consider retaining an outside investigator for claims that are sensitive in nature, as employees might feel more comfortable sharing personal information with someone they will not continually see in the hallways or lunchroom.

One company recently received an investigation report conducted by an outside female investigator, in which the investigator found that a male employee had aggressively grabbed another employee by the arm, pushed her forcefully resulting in her tripping and falling to the ground, all while calling her foul, racist names. An executive employee struggled with the investigation report findings because when the employee first reported this conduct to him, she did not mention falling and did not describe all the racist words. The executive did not understand how the employee could be vague with him but provide clear details to the investigator. The answer was that a subordinate employee, especially one who had experienced a traumatic event, likely did not feel comfortable providing distressing personal details to her boss. The investigator also had experience interviewing trauma victims and knew she needed to give the employee time and space to talk about the event, instead of pressing for details.

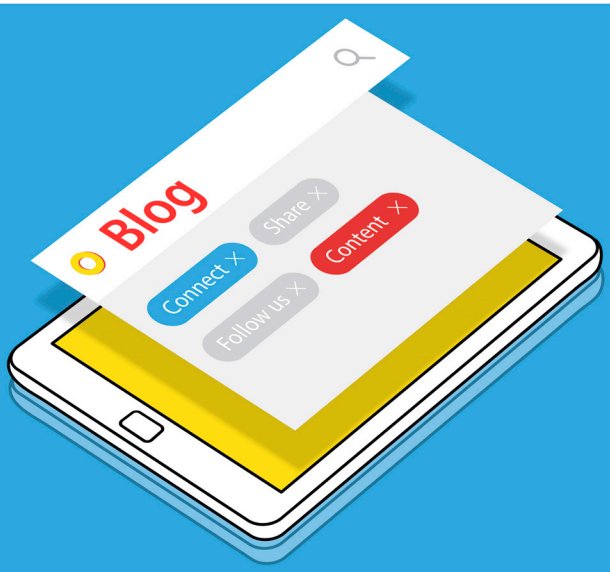
In addition to sensitive claims, employers should consider retaining an outside investigator for complicated claims, like time card fraud, which can require forensic analysis of time records.

Once an investigation has been conducted, whether in-house or by an outside investigator, the employer must decide whether discipline is necessary. Consistent discipline among employees is key, and is easier to administer when the company has clear rules of conduct and disciplinary policies in place. Given the blurring of lines between work and personal lives, the policies requiring respect between colleagues should cover any off-duty conduct. This does not mean that employers should become overly involved in their employees' personal lives, only that behavior like bullying or harassment that occurs between colleagues at a restaurant or over social media will inevitably affect the workplace, and must be addressed.

While we cannot predict when the Great Resignation will end, a company in the habit of promptly investigating complaints and consistently enforcing its civility policies will reap the reward of increased employee morale and decreased turnover.

Shelline Bennett and Morin Jacob are Co-Managing Partners of Liebert Cassidy Whitmore's Investigations Practice. They have conducted hundreds of investigations for employers throughout California, ranging from large statewide employers, to mid-size, and smaller local employers. They can be reached at sbennett@lcwlegal.com or mjacob@lcwlegal.com.

Leighton Henderson is an Associate with LCW's investigations practice. She can be reached at ldavis@lcwlegal.com.



ON THE BLOG

Practical Considerations for Public Records Act Requests

By: Daniel Seitz

The California Public Records Act ("CPRA") strikes a balance between the need for privacy in certain records and the people's interest in transparent government. The reality of the balance is that it may – and often does – weigh heavily upon agencies that must respond to CPRA requests. This blog post discusses several topics related to CPRA requests, including the requirements of the Act, record retention policies, identifying records that are subject to disclosure, and challenges related to redactions. By understanding these topics ahead of time, agencies will be better equipped to respond successfully to CPRA requests.

General Requirements

The CPRA (Gov. Code § 6250, et seq.) applies to state and local agencies. It defines "public records" broadly to include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. There are certain, limited exceptions (discussed below). However, the broad category of items potentially subject to disclosure shows the Act's inclination toward transparency.

Agencies have 10 days to determine whether any part of a request seeks records that are disclosable, and the agency must promptly give written notice of the determination to the requesting party. Agencies may extend the deadline by up to 14 days in "unusual circumstances," which may include situations where the records are difficult to access, especially voluminous, or not available in a producible format. The deadline only applies to giving notice of the determination – not to providing the records themselves. Nevertheless, any responsive records must be provided "promptly," and the Act prohibits agencies from delaying or obstructing the inspection or copying of public records. Requesting parties, however, do not have free reign under the Act. A records request must reasonably describe an identifiable record or records. Requests that do not reasonably describe the records sought may be subject to objection or denial, although agencies should only do so in good faith. Agencies may also charge fees to cover the costs of duplication or applicable statutory fees.

Responsive Materials and Record Retention Policies

"Record Retention Policy" is a commonly accepted misnomer for policies that dictate when and how agencies dispose of old records. Timing can become a critical issue in CPRA requests, because agencies typically dispose of old records on an ongoing basis. If an agency receives a record request, it has an obligation to provide any responsive records to the requesting party. This obligation includes preserving responsive records from disposal. Accordingly, public agencies should implement a system that flags potentially responsive records before they are lost. It is especially important for larger agencies to have a system in place, because the employee who receives the CPRA request may not belong to the same department or unit that disposes of records according to the record retention policy.

Subject to Disclosure? Exemptions, Confidentiality, and Privilege

Part of assembling responsive records is winnowing out any records that are not subject to disclosure. The CPRA describes over a dozen categories of exempted records. The categories range from records of testing materials used in licensing or employment exams, to certain geological or geophysical data, to preliminary drafts, notes, or memoranda that are not retained in the normal course of business. Notably, the Act exempts from disclosure personnel, medical, or similar files if the disclosure would constitute an unwarranted invasion of personal privacy.

In addition to the Act, state or federal law may exempt a record from disclosure. Attorney-client privileged communications, attorney work product, deliberative process communications, and records subject to the official information privilege are not subject to disclosure. To an extent, peace officer personnel records are also protected from disclosure – although state law has identified several categories of peace officer records that are subject to disclosure. Whether a particular record falls within an exempted category can form a significant part of the review. The review process takes time, but it is necessary to ensure that responsive information is produced and exempted information is withheld.

Logistical Impact of Redactions

A record that contains non-disclosable information may still be subject to production. Agencies have a duty to redact or remove non-responsive portions of an otherwise-responsive record where the responsive portions may be reasonably separated. Redaction means increased time and cost. It requires additional levels of review to ensure that sensitive information is properly removed but responsive information is preserved.

Because the Act defines the term, "writing" broadly to include mediums like photographs, audio recordings, or video footage, redaction may require specialized services to handle alternative formats. For example, consider a video that contains both responsive information and protected information. The video would potentially need to be reviewed once to identify any responsive material, once to apply redactions, and once more to ensure that the sensitive information has been removed and the responsive information is still present.

Redaction shows the importance of managing the expectations of the requesting party. Many requestors quickly grow impatient. They do not always understand the efforts that go into assembling and preparing records for a CPRA response. Requestors may also react negatively to the redactions themselves if a requestor believes that responsive information has been removed. Agencies should understand these possibilities and consider ways to address them. Cooperation between the agency and the requesting party helps fulfill the goals of the CPRA and may prevent future disputes.

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