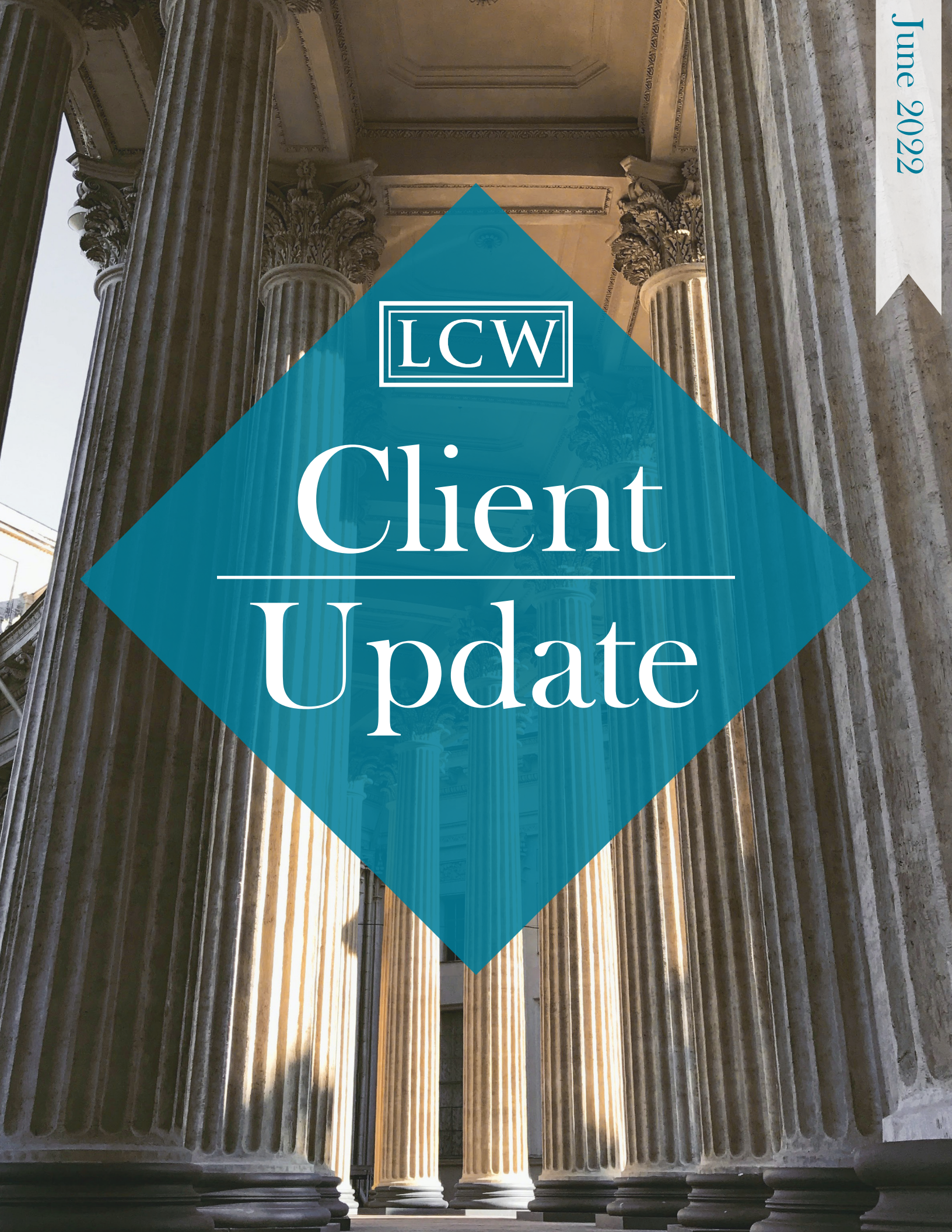

LCW

Client Update

June 2022

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DISABILITY

An Impairment Need Not Be Permanent Or Long-Term To Qualify As An ADA Disability.

In April 2018, Karen Shields, an employee at Credit One Bank in Nevada underwent intensive surgery of her right shoulder and arm. This surgery required a three-day hospitalization and an extended recovery period. For several months Shields was unable to fully use her right arm, shoulder, and hand, and could not lift, pull, push, type, write, tie her shoes, or use a hair dryer.

Shield's job duties required her to use her hands to feel and handle objects, reach with her hands and arms, and occasionally lift and move up to two pounds. Because of her surgery, she was unable to fulfill these requirements.

Shields requested a reasonable accommodation from Credit One under the Americans with Disabilities Act (ADA). Her doctor's note stated that her medical condition substantially limited her major life activities of "sleeping, lifting, writing, pushing, pulling [and] manual tasks." She received an eight-week unpaid leave as an accommodation. At the end of the eight weeks, Shields was still unable to work and submitted another doctor's note to request additional leave.

Shortly thereafter, Credit One told Shields her position was being eliminated and she was being terminated. Shields promptly filed a lawsuit seeking damages and back pay. The District Court dismissed the case, and Shields filed an appeal.

On appeal, the Ninth Circuit examined the reasons for the original dismissal. The District Court held that Shields had failed to establish that she had a disability because she could not show that she had an "impairment," nor prove a substantial limitation arising from that impairment. The District Court found that Shields did not have a substantial limitation because she couldn't show "any permanent or long term effects for her impairment."

The ADA defines "disability" as an impairment that fulfills any of the following three criteria: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

Shields had attempted to prove the first of the three options: that she had a physical impairment that substantially limited one or more major life activities. The Ninth Circuit overturned the District Court and held that Shields did provide enough facts to establish that she had a disability.

The Ninth Circuit broke down the definition of disability into three elements: "[1] a physical or mental impairment [2] that substantially limits [3] one or more major life activities." The original doctor's note that Shield submitted -- which detailed her inability to lift, pull, push, type, write, tie her shoes, or use a hair dryer -- adequately proved that she had a physical impairment.

Citing the U.S. Equal Employment Opportunity Commission's (EEOC's) regulations, the Ninth Circuit held that even a temporary injury like Shields', that impedes the performance of major life activities for several months, is sufficiently severe to qualify as "substantially limiting."

The Ninth Circuit held that the District Court placed too much emphasis on the duration or permanency of Shields' injury in assessing whether she had a disability. The duration of an impairment is only one factor to consider when determining whether an impairment is substantially limiting. There is no categorical rule excluding short-term impairments, which may be covered if they are sufficiently severe.

In sum, the Ninth Circuit held that, because Shields adequately described her injuries and inability to perform certain tasks, she had alleged enough facts to prove she had a disability.

Shields v. Credit One Bank, N.A., 32 F.4th 1218, 1221 (9th Cir. 2022).

Note:

Employers should err on the side of caution when considering whether an employee has a disability requiring an interactive process and a reasonable accommodation. If an employee will be unable to perform essential job functions for even a short amount of time, a careful analysis must occur. Although this case was decided under the ADA, the California Fair Employment and Housing Act's anti-disability discrimination provisions apply to some disabilities that are temporary. Also, under California's law, a person is disabled if their impairment makes the performance of major life activities difficult; California does not use the ADA's higher "substantially limits" standard.

Is your agency properly including the necessary forms of compensation in its regular rate of pay calculation? Do you know steps you can take now to ensure that you are calculating overtime consistent with the regular rate of pay? From reviewing MOUs to identifying "red flags" to determining whether you are paying in excess of the requirements of the FLSA, please join us for this one-hour webinar to learn about ways your agency can self-audit its regular rate compliance. This webinar will provide practical guidance to help you assess your regular rate compliance and to make adjustments if necessary to avoid a legal challenge.

Who Should Attend:
Supervisors, Managers, Department Heads, Human Resources Staff, Agency Negotiators, Finance/ Payroll and IT staff responsible for ensuring compliance with the FLSA.

Register here!

GOVERNMENTAL IMMUNITIES

A County's Registrar Of Voters Is Immune From Liability For Conveying Incorrect Information.

In August 2019, the Red Brennan Group (Group) approached the County of San Bernardino's registrar of voters for information about how many signatures would be required for the Group's initiative to qualify for the ballot in a future election. The registrar told the Group that they would need 26,183 signatures. In February 2020 the Group submitted their initiative with the required number of signatures, only to be told that the actual number of signatures required was only 8,110. The Group filed a lawsuit against the County claiming that the County breached its duty to provide the correct information to the Group, forcing the Group to spend more than $250,000 to obtain unnecessary signatures.

The County filed a demurrer to the lawsuit, alleging that the County owed no duty to the Group and that even if it did, the County could not be liable because of governmental immunity. The trial court denied the demurrer. The County filed a petition for writ of mandate with the California Court of Appeal. A writ of mandate is an order from a higher court to a lower court. In this instance, the County requested the Court of Appeal to order the trial court to grant the demurrer. The Court of Appeal ordered that the County's demurrer should be sustained, thus dismissing the Group's lawsuit.

In making this decision, the Court of Appeal first laid out the framework for governmental immunity.

Under the Government Claims Act (Government Code 810, et seq.), all governmental tort liability must be based on statute. Thus, in the absence of a constitutional requirement, public entities can be held liable for their actions only if a statute declares them to be liable. The Court of Appeal found that nothing in the law or the California Constitution made the County liable for incorrectly informing a proponent of a ballot initiative about the number of signatures required.

Next, the Court of Appeal noted that a public entity could be liable for failing to perform a mandatory duty. However, nothing in the law required the County to tell the proponents of a ballot initiative how many signatures were required before proponents submit a petition. Moreover, the County never rejected the petition for lack of sufficient signatures, but ultimately processed it.

Finally, even if the County had a mandatory duty to provide the proponent of a ballot initiative of the number of signatures required, the Court found that Government Code Sections 818.8 and 822.2 protect public entities and their employees from liability for making misrepresentations unless the employees are guilty of actual fraud, corruption, or malice.

The court noted that previous cases have held that when a public employee takes preliminary steps to ascertain information, and negligently obtains false information that is then represented to a member of the public, this is merely a negligent misrepresentation for which a public entity and its employees cannot be held liable.

Here, the Court of Appeal concluded that, because the County took preliminary steps to ascertain how many voters participated in a previous election, calculated the total based on that negligently acquired sum, and then conveyed the incorrect figure to the Group, the County and the registrar had immunity. The Court of Appeal then granted the writ of mandate and ordered the trial court to dismiss the Group's claim.

County of San Bernardino v. Superior Ct. & Red Brennan Group, 77 Cal.App.5th 1100 (2022).

Note:

This case illustrates the expansive protections to which all public entities and their employees are entitled. Public officials who are performing their duties faithfully, without fraud, corruption, or malice, can rely on the Government Claims Act to shield them from immunity.

County Is Immune From Common Law Claims.

The County of Santa Clara's health insurance plan allows for the County to send their plan members to the Doctors Medical Center of Modesto for medical services. The Center then bills the County for the services performed. The County only partially paid one such bill. The Center sued the County for the remaining balance, arguing a theory of *quantum meruit*. *Quantum meruit* is a common law theory under which the law implies a promise to pay for services performed where a contract does not establish the amount due. The County filed a demurrer seeking to dismiss the complaint.

The trial court denied this demurrer. The County then filed a petition for writ of mandate with the Court of Appeal. The Court of Appeal granted the petition and filed a writ of mandate directing the trial court to reverse its order, sustain the demurrer, and dismiss the Center's lawsuit.

The Court of Appeal decided in favor of the County because of the governmental immunity granted to public entities by the Government Claims Act. Under Government Code Section 815, a public entity is not liable for an injury which arises out of an act or omission of the public entity or a public employee or any other person.

There are exceptions to this immunity. Section 815.6 states that "Where a public entity is under a mandatory duty imposed by a [statute] that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury . . . caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." In other words, if a statute imposes a *mandatory* duty (as opposed to an optional or discretional duty) on the public entity, and the public entity fails to discharge that duty, the public entity may be liable for any resulting injury.

Because the Government Claims Act generally immunizes public entities from common law claims, and a *quantum meruit* theory is a common law claim, the Court of Appeal held that the County was immune. However, the Center argued the exception noted above applied.

The Center pointed out that a provision of the Health and Safety Code of California directs entities to reimburse hospitals for emergency services and care provided to its enrollees. This is a mandatory duty imposed by a statute, and thus could trigger the 815.6 exception. Under this law, however, the amount of reimbursement is discretionary because the public entity can determine the reasonable value of the services rendered. Because the County did in fact reimburse the Center for some amount, the County fulfilled its mandatory duty and simply exercised its discretion to determine the reasonable value of the services rendered. The Court held that the above exception does not apply and the County was immune.

The Center's final hope for recovery was predicated upon an implied contract theory. Because the Government Claims Act does not affect liability based on contract, this was a promising avenue for the Center. However, the Court of Appeal found that the Center's claim of an implied contract was unfounded because its claim truly derived from a breach of a non-contractual duty, that is, the duty under the Health and Safety Code and other regulations to reimburse hospitals for the reasonable value of services performed.

The Court of Appeal granted the petition and filed a writ of mandate directing the trial court to reverse its order, sustain the demurrer, and dismiss the Center's lawsuit.

County of Santa Clara v. Superior Ct., 77 Cal.App.5th 1018 (2022).

Note:

This case further illustrates the expansive protections afforded to public entities via the Government Claims Act. Common law claims and tort claims are generally barred by the Act, while contractual claims are not.

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? Citrus Heights Community Center, South Flex A Room
6300 Fountain Square Dr, Citrus Heights, CA 95621

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 Andy Baldenegro at abaldenegro@lcwlegal.com or 310.981.2320.

CONTRACTS

A Contract Was Void Because It Exceeded A Public Agency's Authority.

Central Coast Development Company owned a parcel of land in the City of Pismo Beach. The Company wished to construct a variety of residences on the land and applied to the City for a permit. The City granted the permit. The City and the Company then went to the San Luis Obispo Local Agency Formation Commission (LAFCO) and filed an application to annex the property.

This application contained an indemnification clause dictating that in the event of legal action related to the application, the City and Company would indemnify, or pay back, LAFCO's legal fees and costs.

LAFCO denied the application and the City and Company sued. LAFCO prevailed and requested more than $400,000 in attorneys' fees. The City and Company refused to pay and a variety of litigation ensued, with each party attempting to recover attorneys' fees and costs from the other. Eventually, the Court of Appeal determined that the original indemnification agreement was not valid because LAFCO lacked authority to require indemnification.

However, at the same time, the City and Company attempted to sue LAFCO for their attorneys' fees under a different theory based on Civil Code Section 1717. The trial court granted the suit and awarded fees. LAFCO promptly appealed, contending that Civil Code Section 1717 did not apply to the original contract and the original contract was also invalid. The Court of Appeal sided with LAFCO and held that a public agency contract that exceeds the agency's statutory powers is void and will not support a fee award pursuant to Civil Code Section 1717.

In making this determination, the Court of Appeal stated that, if a public agency is not authorized to make an agreement, the agreement is void and the public agency may neither enforce nor be liable on the contract. It had been previously determined that the original indemnification agreement was invalid and therefore, LAFCO, the public agency, was not authorized to make the agreement.

The Court of Appeal held that because it is beyond LAFCO's powers to bind itself or an applicant to the attorneys' fee agreement at issue, Section 1717 cannot apply.

San Luis Obispo Local Agency Formation Comm'n v. Cent. Coast Dev. Co., 78 Cal.App.5th 363 (2022).

Note:

Public entities should take care to not promise or demand anything in a contract that is outside their power.

PLEASE NOTE: We will not have a newsletter for the month of July and will resume in August.

LCW

LABOR RELATIONS CERTIFICATION PROGRAM

The LCW Labor Relations Certification Program is designed for labor relations and human resources professionals who work in public sector agencies. It is designed for both those new to the field as well as experienced practitioners seeking to hone their skills. Participants may take one or all of the classes, in any order. Take all of the classes to earn your certificate and receive 6 hours of HRCI credit per course!

Benefits of Certification to the Participant:

- Increase knowledge in all areas of Labor Relations
- Increase your value to your agency
- Increase respect and recognition in the field
- Increase opportunity for upward mobility
- Increase marketability and ability to compete in the job market
- Increase professional credibility

Benefits of Certification to the Agency:

- Increase the level of competency of the individual
- Encourage and improve job performance
- Acknowledge an individual who has developed a high level of professionalism
- Use as an aid for retention and recruitment

Join our upcoming HRCI Certified -
Labor Relations Certification Program Workshops:

1. June 16 & 23, 2022 - Bargaining Over Benefits
2. July 21 & July 28, 2022 - Communication Counts!
3. August 18 & 25, 2022 - The Rules of Engagement: Issues, Impacts & Impasse

The use of this official seal confirms that this Activity has met HR Certification Institute's® (HRCI®) criteria for recertification credit pre-approval.

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PUBLIC RECORDS

FOIA Requires Public Agencies To Prove The Adequacy Of Their Search For Records Beyond Material Doubt.

In the spring of 2018, a transgender woman named Roxsana Hernandez entered the United States seeking asylum. Hernandez died while being moved between various facilities under the control of the U.S. Immigration & Customs Enforcement (ICE).

The Transgender Law Center (TLC), acting on behalf of Hernandez's family and estate, filed two Freedom of Information Act (FOIA) requests seeking government records about Hernandez's detention and death. The first FOIA request was directed to ICE and the second was directed to the Department of Homeland Security (DHS).

Months later, having received no records from ICE or DHS, TLC filed a lawsuit seeking to force ICE and DHS to conduct adequate searches for the requested records and release them. The lawsuit prompted the agencies to begin disclosing records. However, the agencies also redacted numerous documents and claimed that others were exempt altogether. The agencies filed for summary judgment, arguing that their production was complete and "adequate". The District Court granted summary judgment and dismissed TLC's claim. TLC appealed the dismissal to the Ninth Circuit Court of Appeals.

The Ninth Circuit considered whether: ICE and DHS's search and production was "adequate"; the agencies' privilege log (aka Vaughn index) was sufficient; and the agencies' invocation of the deliberative process privilege was justified.

The Ninth Circuit held that the agencies' search for documents was not adequate. An adequate search is one that is reasonably calculated to uncover all relevant documents. The public entity conducting the search must prove its search meets this standard beyond a material doubt.

TLC had pointed to various email accounts that it believed should have been searched and included in the document production. The agencies did not provide evidence they had searched those accounts. Instead, the agencies indicated that TLC had no way of proving whether they had searched because redactions of email addresses already produced meant that the email accounts may have already been searched. The Ninth Circuit found this insufficient, because the search was not diligent. The agencies did not appropriately respond to "positive indications of overlooked materials" and did not fulfill their duty to follow "obvious leads."

When withholding documents from a records request in a FOIA litigation, the withholding agency generally must provide a privilege log called a Vaughn index. This index lists the documents withheld, the basis for the withholding (generally a codified exemption or privilege), and a brief explanation of why the withheld document is subject to the exemption or privilege. The Ninth Circuit requires agencies that withhold documents to provide as much of an explanation as possible without thwarting the exemption's purpose. The withholder must also provide enough information so that the requester can "intelligently advocate release of the withheld documents" and so that the court can "intelligently judge the contest". The Ninth Circuit noted that many of the explanations offered by DHS and ICE were conclusory or boilerplate and thus held that the Vaughn index was insufficient.

Finally, the Ninth Circuit also dealt with the deliberative process privilege. This privilege allows a document to be withheld from a FOIA production if the document is "predecisional" (made before the decision at issue was made or before the adoption of agency policy) and "deliberative" (related to the process by which policies are formulated). (Note that this calculus also applies to California Public Records Act requests.)

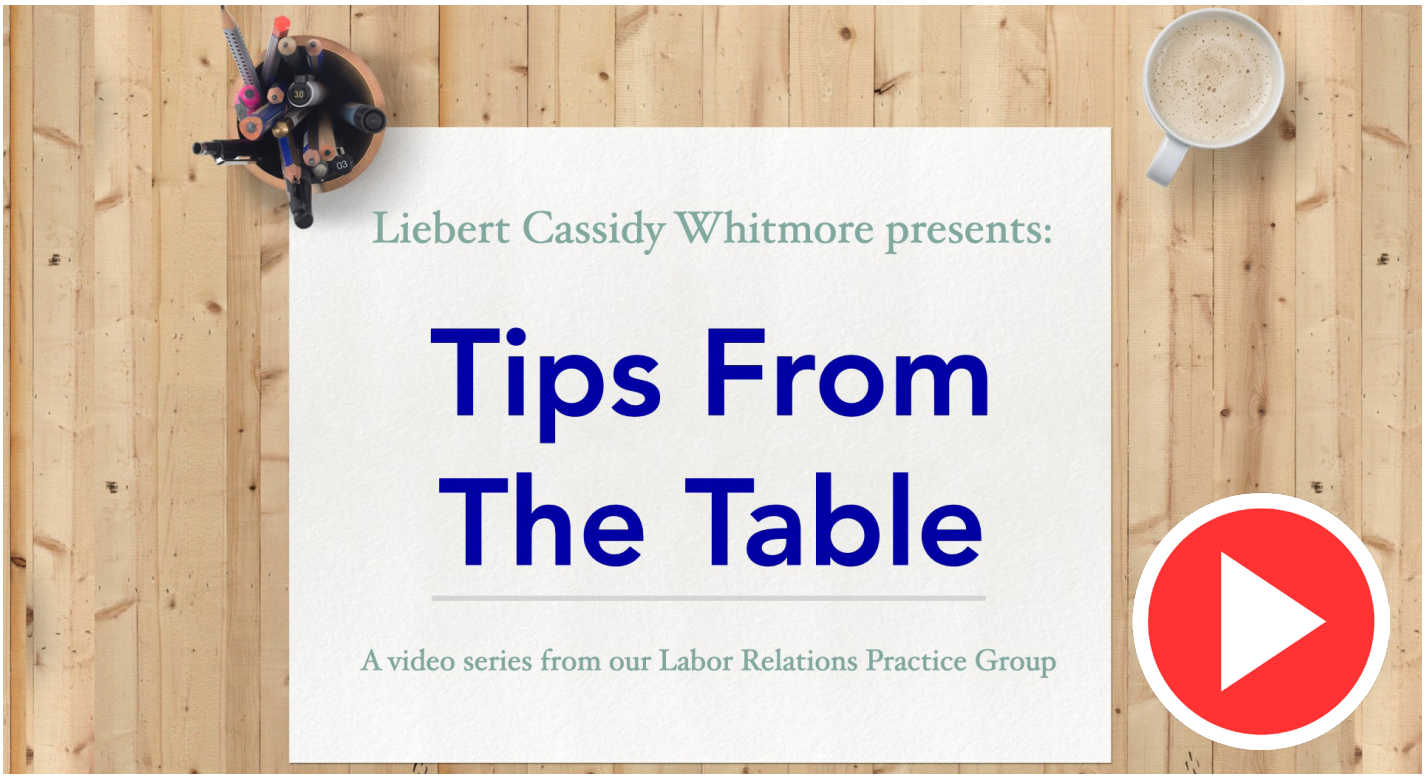
ICE and DHS withheld documents that they had simply labeled as drafts, citing the deliberative process privilege. Because the "draft" designation contained no references to any decision to which the document pertains,

that designation did not suffice to withhold a document under the deliberative process privilege. Simply labeling a document as a draft, without connecting it to a deliberation that took place or a decision that was made, is insufficient to protect the document from disclosure via the deliberative process privilege.

Transgender L. Ctr. v. Immigr. & Customs Enf't, 33 F.4th 1186 (9th Cir. 2022).

Note:

This case deals with the FOIA. The California Public Records Act (CPRA) is modeled directly on the FOIA, and judicial decisions interpreting the FOIA may be helpful for CPRA issues. This case serves as a reminder for public agencies to conduct thorough searches for requested documents and only withhold documents, or redact only those portions of documents, which squarely fit within a particular exemption from disclosure.



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 Managing Partner J. Scott Tiedemann was recently interviewed on KFBK News Radio Sacramento 93.1 FM to discuss recruitment challenges facing California law enforcement agencies.
- SB 278 requires local agencies to pay CalPERS the full cost of any overpayments made to the retiree on the disallowed compensation and pay a 20% penalty of the amount calculated as a lump sum.
- California Family Rights leave is now available to employees at public agencies with fewer than 50 employees, so long as the agency has at least 5 employees.
- The California Supreme Court has held that Section 6253.9(b)(2) of the California Public Records Act does not provide a basis for charging requesters for the costs of redacting government records kept in an electronic format, including digital video footage.

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.

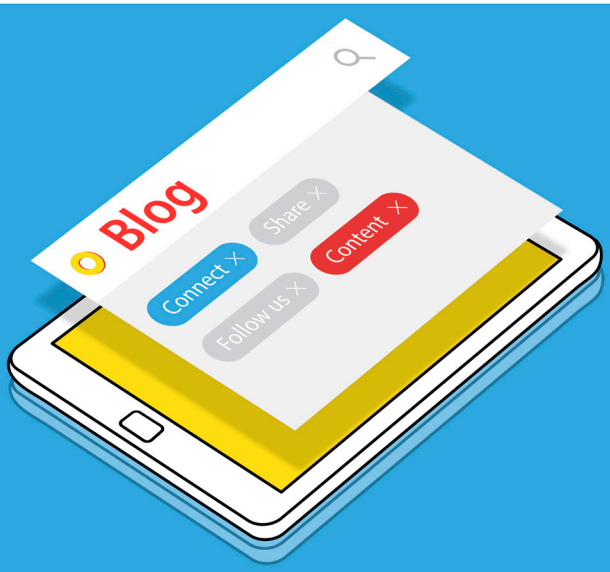
Question:

We have an employee who has generally received positive performance reviews for his ten-year tenure here. Recently, there have been some interpersonal issues between this employee and his colleagues, as well as some missed deadlines and other minor performance issues.

His yearly performance evaluation is coming up, and we have received an indication that it is likely that he will be moving to another agency next year. In anticipation of this, his manager is inclined to skate over the recent performance and interpersonal issues to have an easier review and not impede this employee's ability to obtain employment at the new agency. Is this a good idea?

Answer:

A best practice for performance evaluations is to be as complete and forthcoming as possible, especially when it comes to documenting performance deficiencies. There is no guarantee that this employee will take another job in the next year. If the new trend in this employee's performance becomes more severe, the agency will need to take adverse action against this employee. Also, it will be difficult for the agency to defend against a discrimination or retaliation lawsuit without proper documentation of prior performance issues. Therefore, the recent performance issues and interpersonal issues should be in the performance evaluation despite the employee's potential resignation.



ON THE BLOG

Smith Receives a Reprieve as the Supreme Court Turns its Attention to Questions of Compelled Speech

By: I. Emanuela Tala

In June 2021, the Supreme Court declined an invitation to overturn *Employment Division, Department of Human Resources of Oregon v. Smith*, its seminal 1990 case holding that a facially neutral and generally applicable law survives a challenge under the Free Exercise Clause if it is rationally related to a legitimate government interest. However, the Court left the door open for future challenges, with five justices expressing either an outright willingness to overturn Smith or, at a minimum, to give serious consideration to doing so.

Just three months thereafter, another challenge to Smith came through that open door. On September 24, 2021, a Petition for a Writ of Certiorari was filed in connection with 303 Creative LLC, et al. v. Elenis, et al, with the Petitioners – a limited liability company and its owner – framing the questions presented for the Court's consideration as follows:

1. Whether applying a public-accommodation law to compel an artist to speak or stay silent, contrary to the artist's sincerely held religious beliefs, violates the Free Speech or Free Exercise Clauses of the First Amendment.

2. Whether a public-accommodation law that authorizes secular but not religious exemptions is generally applicable under Smith, and if so, whether this Court should overrule Smith.

On February 22, 2022, the Court granted the writ petition and, along with it, an apparent reprieve for Smith – at least for now. In granting the writ petition, the Court limited the question presented to "Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." However, although the Court's question is limited, its ruling may not be.

The underlying case arose because a graphic and website design company intends to (but does not yet) offer wedding website services. The company also intends to refuse to create websites celebrating same-sex marriages, regardless of whether the request for such a website comes from a same-sex couple or a heterosexual individual (such as a friend or a wedding planner) associated with the couple. It also intends

to publish a statement regarding the religious motivations behind that refusal. The company and its owner filed a lawsuit prior to offering wedding website services, claiming that they did not want to violate Colorado's Anti-Discrimination Act by their intended conduct once such services become available.

The Tenth Circuit Court of Appeals held, among other things, that while Colorado's Anti-Discrimination Act does compel speech (i.e., the creation of websites for both same- and opposite-sex couples), the Act also satisfies "strict scrutiny" review, and therefore survives a First Amendment challenge, despite the First Amendment's general prohibition on compelled speech. Based on the question presented as limited, the Supreme Court appears poised to revisit this prong of the Tenth Circuit's decision and through its answer, potentially further increase the burden a public agency must meet to survive "strict scrutiny" review in this type of situation.

If the Supreme Court rules in favor of the petitioner, public agencies could face an increased amount of lawsuits challenging policies on the basis of compelled speech. Employers are strongly encouraged to consult with counsel in connection with complicated questions involving the First Amendment's free speech and free exercise clauses.

For more information, visit our blog.

Events & Training

For more information on some of our upcoming events and trainings, click on the icons below:

Consortium

Seminars

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