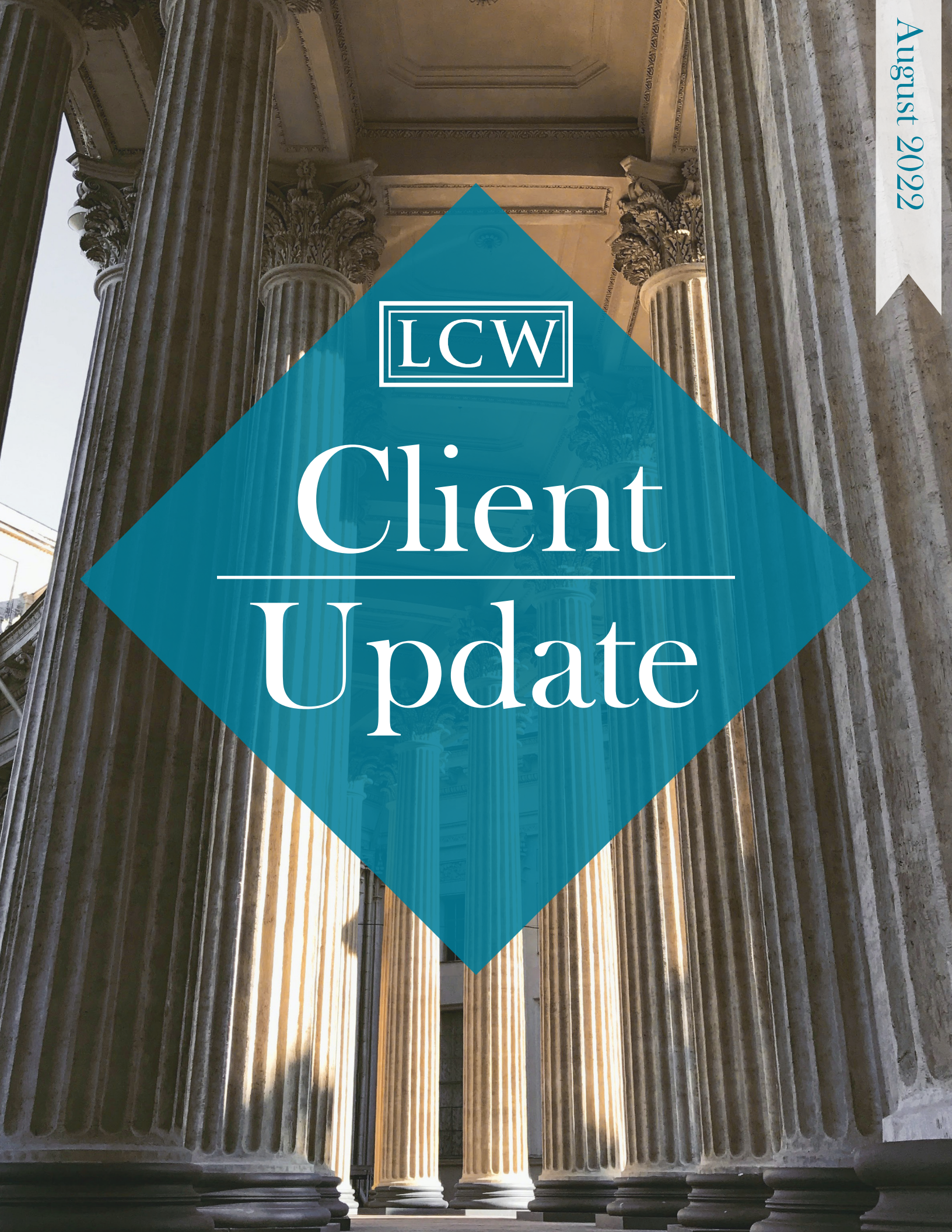

LCW

Client Update

August 2022

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FIRM VICTORIES

Arbitrator Denies Employee's Out-Of-Class Pay Grievance.

Los Angeles Partner **Adrianna Guzman** and Associate Attorney **Danny Ivanov** convinced an arbitrator to deny an employee's grievance. In 1991, the employee-grievant began working at a public agency as an intermediate typist clerk. In 2005, she was promoted to senior clerk. She alleged that upon her promotion she began performing duties associated with a higher-level classification, which entitled her to a monetary bonus for those additional and higher-level responsibilities.

In the grievance arbitration, the employee-grievant had the burden of proving that she was not only entitled to the bonus, but that she was entitled to the bonus from 2005 to present. At the hearing, LCW and our client established that the true difference between employee-grievant's position and the higher-level classification was computer coding of medical information. The employee-grievant admitted that she had never performed coding work for the employer. The employee-grievant also admitted that she was neither licensed nor certificated in software or computer coding.

The arbitrator denied the grievance, and our client prevailed.

Arbitrator Dismisses Union's Grievance As Untimely.

Senior Counsel **Stefanie Vaudreuil** in our San Diego office was able to show that a union filed its grievance after the applicable deadline had passed. The Memorandum of Understanding (MOU) between the union and the employer stated that the union must file a grievance within 30 calendar days that the union becomes aware, or should have been aware, of the circumstances giving rise to the grievance.

Here, the grievance was filed in May 2021. The grievance alleged that the employer had violated the terms of the MOU by not giving union-represented employees 2.5% salary increases pursuant to a "fairness agreement." Attorney Vaudreuil and our client were able to show that the union should have known of the salary increase for another bargaining unit when the employer approved that unit's MOU in January 2020. This MOU also was posted on the employer's website in March 2020. Further notices were posted in August 2020.

The arbitrator dismissed the entire grievance on grounds of timeliness and our client prevailed.

Arbitrator Denies An Employee's Grievance That He Performed Director Duties.

Los Angeles Partner **Adrianna Guzman** convinced an arbitrator to deny an employee's grievance. In 2017, an employee began working as a Senior Dentist. He reported to the Dental Director, a higher-level position. In 2019, the Dental Director retired, and the employee-grievant claimed that from that time on, he performed the duties of both a Dental Director and a Senior Dentist.

LCW and our client established that the employee-grievant was not entitled to relief under either theory. As an initial matter, the employee-grievant was not entitled to an out-of-class bonus because the agency had eliminated the Dental Director position after the Dental Director retired in 2019. As a result, the employee-grievant could not prove that he was performing the duties of a funded, but vacant position since the position no longer existed. In regards to the second theory, LCW and our client proved that the additional duties that the employee-grievant claimed

were simply duties that were already required of a Senior Dentist, or reasonably related to or encompassed by the Senior Dentist duties.

The arbitrator denied the grievance in its entirety, and our client prevailed.

Welcome To LCW!

We are thrilled to announce that Kim Robinson has joined LCW's management team as the Director of Human Resources!

Kim Robinson comes to us after serving as the Vice-President of Human Resources and Administration for Child360 (formerly LAUP), a non-profit organization. Prior to her time at Child360, Kim acted as the Manager of HR and Administration at a national law firm for 5 years and the HR Administrator for an international law firm for over 15 years, respectively.

"With her background in law and human resources, Kim is a leader in her field. We welcome her to the firm and look forward to her contributions," LCW Managing Partner J. Scott Tiedemann stated. "I have no doubt she will be a key player in shaping our employee's experience and upholding our LCW values."

Please join us in welcoming Kim to the firm!

County Defeats Whistleblower Claim That Employee Was Working Below Her Classification.

In 2016, after being released on probation from her position with Sacramento County, Cynthia Vatalaro sued the County for unlawful retaliation under Labor Code Section 1102.5. Vatalaro alleged that her discharge was retaliation against her for reporting that she was working below her service classification. The superior court granted summary judgment for the County. Vatalaro appealed. The California Court of Appeal affirmed the County's win and simultaneously clarified the precise standard for evaluating Labor Code Section 1102.5 claims.

Until recently, courts evaluated 1102.5 claims using a three-part framework. However, the California Supreme Court held that instead, courts are required to use the framework outlined in Labor Code Section 1102.6. Labor Code Section 1102.6 places the burden on the employee to establish that retaliation for the employee's protected activities was a contributing factor in a contested employment action. In other words, an employee must show a *prima facie* claim of retaliation under Labor Code Section 1102.5. Once the employee has made this showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the employment action for legitimate, independent reasons even if the employee had not engaged in protected activity.

Labor Code Section 1102.5 states that "An employer . . . shall not retaliate against an employee for disclosing information . . . to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance . . . if the employee *has reasonable cause to believe* that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation…." (emphasis added).

The Court of Appeal held that Vatalaro could not satisfy the "reasonable cause to believe" component of the prima facie case of retaliation because she admitted in a deposition that she did not have the belief that the content of her job description violated civil service rules.

In the initial phase of this litigation, both Vatalaro and the County interpreted that phrase to mean "reasonably believes." However, the Court of Appeal stated that this interpretation was incorrect and that the two phrases are not equivalent. Indeed, the Court of Appeal noted, a person may have reasonable cause to believe that something is true even if she does not in fact reasonably believe it to be true.

Having established this academic point, the Court of Appeal ended its analysis of this crucial phrase because it found that the trial court's decision could be upheld on another ground. The Court then moved on to the next component of the Labor Code Section 1102.6 framework; whether the employer can demonstrate that it would have taken the contested action for a legitimate, independent reason even had the employee not engaged in protected activity.

Here, the Court of Appeal held that the County had clearly established that it would have taken the action in question for legitimate reasons, even if Vatalaro had not complained she was doing low-level duties. In doing so, the Court relied heavily on the evidence that Vatalaro had been insubordinate, disrespectful, and dishonest. The Court of Appeal found that Vatalaro was unable to rebut any of the three charges and the County was entitled to summary judgment.

Vatalaro v. County of Sacramento, 79 Cal. App. 5th 367 (2022).

Note:

This case serves as an important reminder of the updated standard for whistleblowing claims. Not only must the correct standard be used, but whistleblowing cases may hinge on the difference between whether an employee "reasonably believes" she has blown the whistle or whether

she has "reasonable cause to believe" so. Employers now must satisfy the more demanding burden of showing that they would have taken the challenged employment action for a legitimate reason, instead of simply showing a legitimate reason for the action existed.

LCW

LABOR RELATIONS CERTIFICATION PROGRAM

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MEYERS-MILIAS -BROWN ACT

Court Of Appeal Finds PERB Skipped Initial Analysis Of Whether Measure P Had A Significant And Adverse Impact.

In 2016, the County of Sonoma (County)'s Board of Supervisors enacted an ordinance creating the County's Independent Office of Law Enforcement Review and Outreach (IOLERO) to provide independent review and audit of law enforcement policies and administrative investigations. Among other things, IOLERO could propose independent recommendations or determinations regarding administrative investigations into peace officer conduct.

In 2020, the Board saw a need to expand IOLERO's powers and duties to enhance law enforcement transparency and accountability. The Board decided to introduce an initiative on the ballot, known as Measure P, for voters to consider during the November election. Measure P proposed numerous changes to IOLERO's enabling ordinance, including empowering IOLERO to independently investigate: whistleblower complaints; Sheriff's Office investigations into deaths of individuals in the Sheriff's custody; and incomplete or otherwise deficient investigations. Measure P also authorized IOLERO to issue subpoenas to compel the production of documents or the attendance and testimony of witnesses. Measure P maintained restrictions on IOLERO from deciding "policies, direct[ing] activities, or impos[ing] discipline on other County departments, officers and employees. It is significant that Measure P did not alter the part of the ordinance that required IOLERO and the Sheriff to collaborate to create protocols to "further define and specify the scope and process providing for IOLERO's receipt, review, processing, and audit of complaints and investigations in a mutually coordinated and cooperative manner."

On August 6, 2020, the Board passed a resolution to allow Measure P to be placed on the ballot. That same day, the Sonoma County Deputy Sheriffs Association (DSA) and Sonoma County Law Enforcement Association (SCLEA; collectively "Associations") learned of the scheduled vote on the measure and requested the County meet and confer regarding the measure's placement on the ballot. The County did not bargain with the Associations before placing Measure P on the ballot. The voters ultimately passed Measure P by a majority vote.

The Associations, representing officers and other employees working for the Sheriff, filed unfair practice charges against the County. They alleged that the County violated the MMBA by failing to: notify them about Measure P; and bargain over the decision to place the measure on the ballot or the effects of that decision. Informal attempts to resolve the dispute failed, and PERB reviewed the matter.

In its decision, PERB concluded that the County's decision to place certain amendments to Measure P on the ballot was subject to bargaining and that the amendments were subject to "effects" bargaining. As a remedy, PERB severed the subject amendments from Measure P, declaring them void and unenforceable as to those employees who the Associations represented. PERB also ordered the County not to enforce or apply those amendments to employees represented by the Associations, and to meet and confer with them before placing any matter on the ballot that affects employee discipline and/or other negotiable subjects. The County appealed to the California Court of Appeal.

On appeal, the County argued that PERB failed to make a preliminary assessment of whether the Board's decision to place Measure P on the ballot significantly and adversely affected the Associations' members' working conditions. They contended that this failure caused PERB to erroneously conclude that bargaining was necessary before first determining whether the Measure was a matter within the scope of representation under the MMBA. The Court of Appeal agreed with the County.

Both parties agreed that the decision to place Measure P on the ballot was a "fundamental managerial decision". In *Claremont Police Officers Assn. v. City of Claremont*, the California Supreme Court addressed "whether an employer's action implementing a fundamental decision" was subject to the bargaining requirement under the MMBA by establishing a three-prong test. Under the first prong, if the management action does not have a significant and adverse effect on wages, hours, or working conditions of the bargaining-unit employees, then there is no duty to meet and confer. Only if there is a significant and adverse effect should the second and third prongs be considered.

In this case, however, PERB conceded that it did not apply the *Claremont* test to determine whether Measure P had a significant and adverse effect on wages, hours, or working conditions. Given that there were no provisions of Measure P that on their face impacted wages, hours, or working conditions, the California Court of Appeal reasoned that PERB erroneously skipped the first prong of *Claremont* and failed to establish whether the matter was even within the scope of representation under the MMBA in the first place.

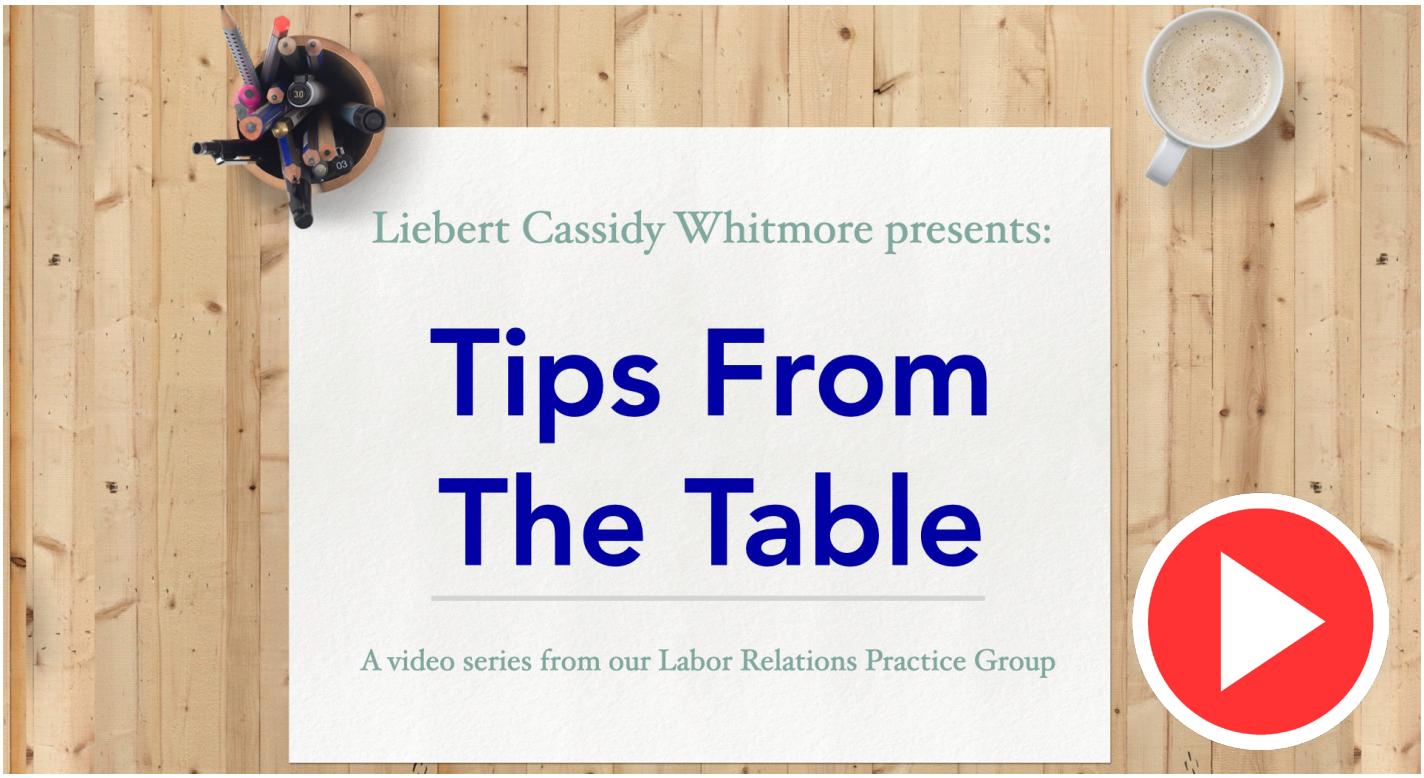
Regarding effects bargaining, the Court noted there was no dispute that Measure P's provisions involving IOLERO: directly accessing, reviewing, and publicly posting body-worn camera video footage; and being able to directly contact witnesses and subjects of investigations, had foreseeable effects that subjected them to the MMBA's effects bargaining requirements. The Court rejected the County's argument that PERB was conflating the firm decision date and the implementation date. The Court agreed with PERB that, in line with past precedent, the County was obligated to bargain those effects with the Associations before placing the Measure on the ballot, not just before implementing the subject amendments.

Finally, the Court concluded that PERB exceeded its authority through its remedial order declaring Measure P's provisions void and unenforceable as to the Associations' members. The Court remanded the matter to PERB to strike its remedial order and determine whether Measure P was within the scope of representation under the MMBA.

County of Sonoma v. Public Employment Relations Board (Sonoma County Deputy Sheriff's Association), 80 Cal.App.5th 167 (2022).

Note:

The Court rejected an additional argument from the County that PERB lacked remedial authority over peace officers. The Court concluded that Section 3511 outlining PERB's jurisdiction included peace officer Associations.



Legislative Support Staff Can Attend A Closed Session Only In Limited Circumstances.

California's Attorney General's Office recently authored a legal opinion pertaining to the Brown Act. The Brown Act is an open meeting law that generally requires the legislative bodies of local agencies to deliberate and take action in meetings that are open to the public. There are, however, exceptions to this public access requirement.

An agency can meet in "closed session", without the public attending or observing, in certain limited circumstances. One of those circumstances is if the agency wishes to meet with its attorney about pending litigation. Another exception is if the agency will be handling certain sensitive personnel matters.

Generally, only persons who have an "official or essential" role may attend a closed session. A person has an "official" role if they are authorized by a statute to attend the closed session. This means that members of the legislative body conducting the closed session can attend, as well as other individuals who are specifically identified in an exception that allows for a closed session meeting. Those without an "official" designation may only attend a closed session meeting if their presence is "essential" to the agency's ability to conduct closed session business.

This "essential" designation has been used sparingly in the past. For example, when evaluating an employee's disability retirement request, the disabled employee or their representative was deemed "essential" to the determination of the merits of the disability retirement application. However, an alternate board member who would soon be taking the place of an existing board member was not allowed to participate in closed session even though it would have fostered a seamless transition. Finally, a mayor was not allowed to attend closed session to instruct the city's negotiator on real estate matters even though his involvement would have been beneficial.

The public agency that requested this opinion indicated that its legislative staff would attend a closed session meeting to: (1) administer the meeting, (2) take notes, and (3) provide councilmembers with relevant information because staff "may have unique knowledge or information about a particular matter that could assist Councilmembers to better serve their constituency."

The Attorney General stated that because no statute provides for these staff members to fill these roles at closed sessions, they are not designated as "official". The Attorney General also opined that the staff members' presence was not "essential."

The Attorney General stated that most city councils in California do not allow legislative staffers to attend closed sessions, which indicates that councilmembers do not require the presence of individual staff members. The Attorney General also stated that because the legislative bodies themselves administer closed sessions, they do not need legislative staff to do so. The Brown Act authorizes the designation of a clerk to take notes of closed sessions, which means that legislative staff are not needed to perform that function. Moreover, the Attorney General said this last reason was not adequate, and more closely approximates the examples of the mayor and alternate councilmember who were denied attendance at closed session, as discussed above.

Because individual support staff are not allowed to attend closed sessions, they are also not allowed to receive information from the closed session. To allow otherwise, the Attorney General opined, would violate the general intent for closed session information to be kept confidential.

The Attorney General's opinion reminded agencies that two legislative bodies can meet in the same closed session if a statutory exception allowing a closed session applies to both bodies. This would be a fact- based inquiry but generally, so long as an aspiring closed session participant is either "official" or "essential", those participants may attend the closed session meeting.

Opinion No. 21-1102 of Rob Bonta, Attorney General.

Note:

This Opinion from the Attorney General is a good reminder for public agencies that participation in a closed session meeting under the Brown Act is very limited and restricted. Only individuals who are "official" or "essential" may attend closed sessions, and it is very difficult to satisfy the "essential" criteria.

LCW In The News

To view these articles and the most recent attorney-authored articles, please visit: **www.lcwlegal.com/news**.

- Partner **Geoff Sheldon** and Attorney **Paul Knothe** authored an insightful article titled "For The Record" in the May/June issue of *Sheriff & Deputy* that addresses SB16 and the laws surrounding The Freedom of Information Act. Agencies in California are strongly advised to work closely with their legal advisors to ensure they are complying with the public's right to information and officers' confidentiality rights as to not leave themselves open to liability for violations of those rights. Click here for access to the full article (Page 62-63).
- Attorney **Lisa S. Charbonneau**, who regularly advises public employers in California on wage and hour compliance, shared her thoughts on seasonal employment in "Summer Shines Spotlight On Seasonal Wage Exemption," which was published in the June 24th Employment Authority section of *Law360*. In the piece, Lisa addresses employment overtime exemption laws and how they affect seasonal employers. To read the full article, please click here (Law360 subscription required).
- Senior Counsel **Dave Urban** authored an article in *IPMA-HR* titled "High Court Ruling: Football Coach's Prayers Amount to Private Speech." Dave states, "This case not only involves free speech rights of a public school football coach to engage in prayer at games, but involves issues of establishment of religion and free speech as it applies in the entire public employment and education sector. The court's opinion squarely addresses the current framework for speech law as it applies to talking about religion in or around the workplace."
- Published in the Labor and Employment section of the *Daily Journal*, LCW Partner **James Oldendorph** and Attorney **Ashley Sykora** authored an insightful article titled "Game-changing Legislation Concerning Peace Officer Employment and Decertification." This article evaluates the new regulations surrounding SB 2 and its effects on Peace Officer employment by promoting transparency and accountability in misconduct by opening the doors to Peace Officer decertification.
- Featured on the home page of *The Recorder*, a Law.com publication, LCW attorney **Nathan Jackson** authored a well-grounded article entitled "California's Draft Regulations Addressing AI in Employment Thrusts Employers into Regulatory Wild West." This article sheds light on the use of artificial intelligence in hiring practices and the regulations being imposed to protect job seekers from algorithmic bias.
- Senior Counsel **Dave Urban** shared his thoughts on *Kennedy v. Bremerton*, along with other hot-button issues that have arisen in 2022 in *Law360*'s "4 Key Employment Rulings In First Half of 2022." He notes that "the ruling is directly applicable for public employers like counties, cities and schools where situations often arise in which employees engage in potentially problematic speech."
- Senior Counsel **Dave Urban** authored an Expert Analysis published by *Law360* which speaks on the *Kennedy v. Bremerton School District* ruling. Dave states that employee speech "on a matter of public concern that is outside official duties has First Amendment protection if the speech survives the applicable balancing test of interests, which courts test on a case-by-case basis."

NEW TO THE FIRM!

Troy M. Heisman, an associate in our San Francisco office, provides advice and counsel regarding a variety of employment law matters as an experienced investigator and litigator. Troy litigates in both state and federal court and has experience from pre-litigation through trial.

Aleena Hashmi, an associate in our Los Angeles office, is a skilled trial attorney who provides representation and counsel to clients in all litigation matters. Before joining LCW, Aleena gained legal expertise through her work at the Office of the Attorney General and the Los Angeles County District Attorney's Office, where she conducted preliminary hearings, jury trials, and authored appellate briefs.

John LaCrosse is an associate in LCW's San Diego office. As an experienced litigator, John assists clients with matter including labor and employment, governance, student discipline issues, and special education. He is also has experience in all aspects of the discovery process, including interviewing witnesses, and regularly conducts extensive and in-depth research.

Kiyoshi Din is an associate in our San Francisco office who provides representation and counsel to public agencies, educational institutions and non-profit organizations across the state. He is a litigator with experience in all aspects of the discovery process, including conducting pre-trial interviews and extensive in-depth research.

The CPRA Applies To Nongovernmental Entities Only In Very Limited Circumstances.

In April 2019, Lynne Bussey requested a variety of records from the Community Action Agency of Butte County (CAA). CAA is an organization dedicated to alleviating the effects of poverty. CAA declined to provide the records, stating that California law did not require the requested records to be maintained and that CAA was not subject to the California Public Records Act (CPRA). Bussey thereafter sued in superior court to compel CAA to give her the records. The superior court sided with Bussey and directed CAA to produce the records. CAA appealed.

The California Court of Appeal considered whether a nonprofit, nongovernmental entity like CAA was subject to the CPRA. The Court of Appeal developed a four-factor test to evaluate such entities and eventually held that CAA was not subject to the CPRA.

In making this determination, the Court of Appeal examined the reach of the CPRA. The CPRA expressly applies to cities, counties, school districts, municipal corporations, districts, political subdivisions, and, among other entities, "other local public agenc[ies]". Earlier versions of the CPRA also extended its reach to nonprofits. The Court of Appeal noted that the definition of local agency was changed in 1998 to only apply to nonprofits that are legislative bodies of a local agency. The definition was changed again in 2002 so as remove the reference to "nonprofit" and replace it with "entity" to ensure that for-profit entities that were still legislative bodies of local agencies would not be able to circumvent the CPRA.

The Court of Appeal concluded that these changes reflected a desire to include a very limited universe of local nongovernmental entities within the CPRA's coverage. The Court of Appeal held that "other local public agenc[ies]" would be limited to governmental entities. At the same time, the Court of Appeal acknowledged that a nonprofit entity may be a governmental entity and thus an "other local public agency" if the nonprofit operates as a local public entity.

The Court of Appeal developed a four-factor test to determine if a nonprofit entity is operating as a local public entity.

The first factor inquires as to whether the nonprofit entity performs a core government function. Here, the Court of Appeal decided that poverty alleviation is "not a core government function that cannot be delegated to the private sector." The first factor weighed against CAA's inclusion in CPRA coverage.

The second factor reviews the extent to which the government funds the nonprofit's activities. The Court of Appeal found that because public funding amounted to $3.5 million of the CAA's $5.6 million annual total expenses, most of CAA's funding was attributable to public sources. Therefore, the second factor weighed in favor of CAA's inclusion in CPRA coverage.

The third factor evaluates the extent to which the government is involved in the nonprofit's day-to-day activities. Here, the Court of Appeal found that nothing in the record indicated the government was involved in the day-to-day activities of CAA. The Court could not make a determination of this factor's weight.

Finally, the fourth factor asks whether the nonprofit entity was created by the government. Here, private individuals incorporated CAA. But, Bussey showed that the CAA website acknowledged it was created by the Board of Supervisors of Butte County. The Court of Appeal could not make a determination of this factor.

The Court of Appeal stated that because only one of the four factors in this matter weighed in favor of including the CAA in the CPRA statutory scheme, the CAA is not a governmental entity and is therefore excluded from coverage by the CPRA.

Community Action Agency of Butte County v. Superior Ct. of Butte County, 79 Cal. App. 5th 221 (2022).

Note:

This case conveys a new, important, four-factor test that nonprofits can use to evaluate whether they are subject

PUBLIC RECORDS ACT

to the CPRA. This case also serves as a reminder for public agencies to carefully evaluate these four factors before creating a nonprofit entity. An evaluation of these four factors will allow a public agency to either avoid or ensure CPRA coverage.

The Government Must Use A Variety Of Terms To Search For Records For A FOIA Request.

Inter-Cooperative Exchange (ICE) is a cooperative of fishers who harvest and deliver crab off the coast of Alaska. In 2005, as part of a program designed to allocate crab resources among the harvesters and coastal communities, an arbitrator developed a price formula to guide the price of crab. In 2014, Alaska increased the minimum wage, which raised the question of whether this increase should be included in the price formula. A member of a U.S. Government Regional Council tasked with making this decision, Glen Merrill, advocated for including this extra cost. He was unsuccessful.

ICE thereafter filed a Freedom of Information Act (FOIA) request, a federal governmental document public access law upon which California's Public Records Act is modeled. The request sought information behind Merrill's and the government's actions, including records related to "crab arbitration system standards" and "the Alaska state minimum wage increase". The government produced 146 records along with a search log that showed that the government had searched Merrill's emails, network and desktop using three search terms: "binding arbitration", "arbitration", and "crab". Merrill also submitted a declaration stating that he did not own a government cellphone but had searched his personal cellphone with the three terms and had found no responsive records.

ICE was unsatisfied with this response and filed suit to compel the government to conduct a more thorough search and produce further records. The Ninth Circuit Court of Appeals reviewed this suit and held that the search terms used were not reasonably calculated to uncover all documents relevant to ICE's request.

The critical inquiry was whether the government's selection of the three search terms was reasonably calculated to uncover all responsive documents. The Ninth Circuit explained that the test for making this determination was one of reasonableness, while keeping in mind that "FOIA requests are not a game of Battleship", and also that requestors are not entitled to a "perfect" search.

The Ninth Circuit compared the government's search here to two previous cases, in which the government had used a variety of keywords which included common misspellings and alternate spellings. The Ninth Circuit concluded that the government's search was inadequate for three reasons.

First, the terms did not cover the part of the FOIA request that was related to the Alaska minimum wage. Second, the search terms did not encompass the broad request for records relating to crab arbitration. Third, the terms did not account for related variants and shorthand terms. Thus, the government was unable to meet its burden of showing the adequacy of their search beyond a material doubt.

The Ninth Circuit also determined that aside from the inadequate search terms, allowing Merrill to personally search his personal cellphone by looking for or listening to keywords was indeed reasonable. Aside from the inadequacy of the chosen search terms, the fact that the government showed that Merrill did not use his personal cell phone for government business and that he searched his text messages, Facebook account, WhatsApp account, and voicemails for records was enough to convince the Ninth Circuit that the search of Merrill's cell phone was "reasonably calculated to uncover all relevant documents."

Inter-Coop. Exch. v. United States Dep't of Com., 36 F.4th 905, 913 (9th Cir. 2022).

Note:

This case illustrates just how important it is for public agencies to provide a detailed accounting of the search they undertake in response to CPRA or FOIA requests. Adequate search terms should always be chosen, and a diligent search should always be conducted.

BENEFITS CORNER

Important Reminder: Agencies Must Amend Section 125 Plans To Reflect Adopted COVID-19 Changes by the December 31, 2022 Deadline.

Public agencies who established flexible changes or extensions for employer-sponsored health coverage, health flexible spending accounts (health FSAs), or dependent care assistance programs (DCAPs) in response to COVID-19 in 2021, must ensure they affirmatively amend their Section 125 plan documents to reflect the changes by December 31, 2022. Agencies should start preparing these amendments now in order to adopt them by the strict deadline.

In 2021, employers were allowed to adopt flexible options to permit employees to make mid-year election changes to their health coverage, health FSAs, and DCAPs; adopt carryovers and increase carryover amounts; extend grace periods; spend down health FSA funds; increase a dependent's maximum age for DCAP fund coverage; and increase the maximum DCAP contribution. While the flexible changes were optional, any employer who took advantage of the flexible changes in 2021 is required to adopt a written plan amendment to reflect these changes. The amendments must be adopted by December 31, 2022 in order for them to apply retroactively to 2021.

Events & Training

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IRS Issues Guidance On What Qualifies As "Medical Care" For Reimbursement Under A Health FSA.

The IRS issued Information Letter 2022-0005 providing guidance about what qualifies as "medical care" that can be reimbursed under a health flexible spending account (health FSA) or health savings account (HSA). Since the expenses permitted to be reimbursed by health FSAs and HSAs have changed over time, the IRS guidance provides welcome clarification on how to determine what expenses may be reimbursed.

Section 213(a) of the Internal Revenue Code allows tax deductions for expenses paid for medical care that have not been paid for by insurance. Section 213(d)(1)(a) defines "medical care" as amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. The Treasury Regulations limit deductions to expenses paid primarily for the prevention or alleviation of a physical or mental defect or illness. Taxpayers are prohibited from deducting personal, family or living expenses as "medical care" if they do not fall within Section 213's definition.

In IRS Information Letter 2022-0005, the IRS was asked whether health and wellness coaching for alleviation or prevention of a disease or chronic health risk qualified as "medical care." While the IRS did not answer that specific question, the IRS provided guidance that taxpayers should use objective factors to determine whether an expense that is typically personal in nature was incurred for medical care. The factors may include:

- The taxpayer's motive or purpose for making the expenditure;
- A physician's diagnosis of a medical condition and recommendation of the item as treatment or mitigation;
- The relationship between the treatment and the illness;
- The treatment's effectiveness;
- The proximity in time to the onset or recurrence of a disease;
- Whether the costs are incurred for diagnosing, treating, mitigating, preventing, or alleviation of the taxpayer's disease;
- Whether the costs are merely beneficial to the taxpayer's general health such that they might be considered the taxpayer's personal expense; and
- Whether the taxpayer would not have incurred the expense but for the taxpayer's medical condition.

The IRS' guidance will help employers and third party administrators determine what expenses are reimbursable as "medical care" for employer-offered health FSAs and HSAs. For more information, the IRS Information Letter 2022-0005 can be found here: https://www.irs.gov/pub/irs-wd/22-0005.pdf.

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.

- Cal/OSHA may adopt permanent COVID-19 regulations, which would replace the current Emergency Temporary Standards. The regulatory board next meets on August 18, 2022 to decide.

- The California Supreme Court has definitively ruled that the statute of limitations for filing a PERB charge under the Meyers-Milias-Brown Act (MMBA) is six months. *Coachella Valley Mosquito & Vector Control District v. California Public Employment Relations Board* (2005) 35 Cal. 4th 1072, 1091. The MMBA does not expressly state a statute of limitations for filing a PERB charge, but the Supreme Court concluded that the six-month limitations period in Government Code Section 3541.5, a provision of the Educational Employment Relations Act, also applies to unfair practice charges filed with the PERB under the MMBA.

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 the Equal Employment Opportunity Commission (EEOC) updated its guidance on July 2022 regarding how certain COVID-19 policies and practices interact with the Americans with Disabilities Act. Do I need to remove my agency's mandatory vaccination policy?

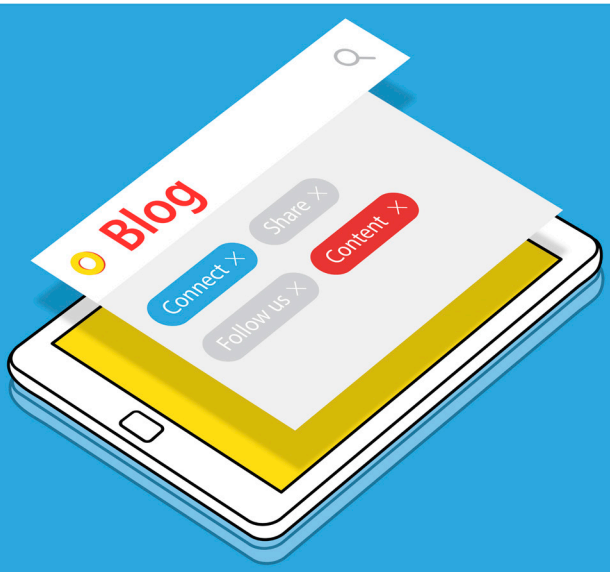
Question:

Answer:

No. So long as employers engage in the interactive process with any employee who requests an accommodation as to a universally applicable workplace standard -- in this case, a mandatory COVID-19 vaccination policy -- such policies are still permissible.

The EEOC simply clarified that employers may implement these policies if the policy satisfies the "job related and consistent with a business necessity" standard as applied to that employee. This clarifies ambiguity in the prior guidance, which suggested that the policy must satisfy the standard when applied to all employees. Employers may require compliance with a COVID-19 vaccination requirement so long as the requirement is consistent with business necessity. This will require a case-by-case analysis as to whether the requirements are appropriate for each position covered by the requirement. If a particular employee cannot meet such a COVID-19 vaccination requirement because of a disability, the employer must be able to demonstrate that the employee's continued performance of their job duties would pose a "direct threat" to the health or safety of the employee or others.

For a complete overview of the updated EEOC guidance, please consult this Special Bulletin.



ON THE BLOG

Policies Every Agency Should Have In Their Personnel Rules

By: Madison Tanner

Updating personnel rules is an endless task. Laws are constantly changing, and agencies are experiencing significant operational changes now more than ever. The responsibility of ensuring that all personnel rules are up to date and reflect both the legal requirements and the operational requirements is time-consuming and daunting. However, auditing personnel rules is one of the most valuable ways for agencies to avoid liability. You may be asking yourself: "where do I even start?" There is no simple answer – most policies are important and valuable – but a good starting point is to make sure your agency's personnel rules and policies at least include those required by law.

Your focus should be on adopting and clearly establishing legally-mandated policies and standards. It is critical to make sure these policies remain up to date on a yearly basis in order to remain compliant with new laws and regulations from California legislators, California and federal courts, and rule-making administrative bodies. Below is a list of the most important policies that must be included in your agency's personnel rules to ensure legal compliance

1. **Equal Employment Opportunity**

   Every agency should have an equal opportunity policy that makes a strong and clear statement against all forms of illegal discrimination. This policy should cover both applicants and existing employees and list the protected classifications established by California law. Protected classifications include race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age (40 and over), sexual orientation, or military and veteran status or any other basis protected by law.[1]

2. **Anti-Discrimination, Harassment, and Retaliation**
   In addition to the general equal employment opportunity policy, agencies should have a policy that clearly defines protected classes, what constitutes harassment, discrimination, and retaliation and how the agency addresses claims of harassment, discrimination, and retaliation. Specifically, state law requires that harassment prevention policies set forth: (1) the illegality of sexual harassment; (2) the definition of sexual harassment; (3) a description of sexual harassment; (4) the internal complaint procedure; (5) legal remedies available through the Department of Fair Housing and Employment ("DFEH") and how to contact DFEH; and (6) the legal protections from retaliation provided under California law.[2] Each of the enumerated items above must be clearly outlined in the agency's personnel rules.

3. **Reasonable Accommodations**
   Public agencies have an affirmative duty to provide applicants and employees who are disabled with reasonable accommodations. Employers must engage in a timely, good faith, interactive process in order to determine what accommodation(s) must be made for the employee to perform his or her essential job functions. Further, an employer must determine if an accommodation can be made without causing an undue burden to the employer or presenting a direct threat to the health and safety of others.

1 Gov. Code §12940, subd. (a).
2 Cal Code Regs., tit. 2, § 11023.

Your agency's reasonable accommodation policy should outline the procedure for requesting and receiving an accommodation. Specifically, it should cover: (1) how to make a request; (2) what documentation may be requested; (3) fitness for duty exams; (4) the interactive process; and (5) that determinations will be made on a case-by-case basis. This section should also include a process of resolving requests for religious accommodations.

4. Leaves

Numerous leave policies should be included in agencies' personnel rules. Leaves include both legally required and operationally required leaves. The leaves section should include: (1) vacation time accrual if provided, and the procedures for taking the time off; (2) the agency's designated holidays; and (3) any other leave time the agency grants employees. The below are leave policies required by law.

a. Federal Family Medical Leave Act ("FMLA") and California Family Rights Act ("CFRA")

The FMLA and CFRA both provide rights to employees to take leave to care for family members. Your policy must include the definitions as provided in each Act and note the differences where they exist. Employers are required to inform employees of when they are qualified to take this type of leave and how much leave may be taken. This policy will need to be highly detailed to inform employees of their rights under both FMLA and CFRA.

b. Pregnancy Disability Leave ("PDL")

Employers are obligated to provide leave for pregnant employees. PDL is separate and distinct from the need to take a leave of absence as part of a reasonable accommodation and has different qualifications than leave under FMLA and CFRA. At a minimum, employers are required to provide four (4) months of leave for pregnant employees. This policy should cover the amount of leave permitted, whether employees will be paid during the leaves, notification requirements, and the process for reinstatement after the conclusion of the leave.

c. Sick Leave

Sick leave is required under two California laws: the Healthy Workplace Healthy Family Act of 2014 and the Kin Care Law. While these laws are separate and distinct, they overlap in important ways. Your agency's sick leave policy should cover both of these required sick leave laws.

California's Healthy Workplace Healthy Family Act of 2014 requires employers to provide paid sick leave. It entitles an employee who has worked at least thirty (30) days in twelve (12) months with an employer in California to accrue sick leave. Employees are permitted to use sick leave to attend to their own illness and the illness of other family members.

California's 2001 Kin Care law requires those employers who already provide paid sick leave to expand the permissible use of that sick leave, so that employees can use up to half of accrued and available annual sick leave entitlement to attend to the illness of the following family members: child, parent, spouse, or registered domestic partner. Kin Care leave can also be used to attend to issues related to domestic violence. Sick leave policies must accurately cover requirements under both laws and reflect any additional sick leave benefits employers may provide.

5. Overtime and Compensatory Time

It is critical to provide a policy that (i) defines overtime in a manner consistent with the Fair Labor Standards Act ("FLSA") and (ii) requires non-exempt employees to obtain pre-approval from their supervisor prior to working overtime. This policy will lay out the obligations of employees when it comes to overtime work. Agencies should also clearly define what work is compensable for overtime calculations. The FLSA only requires that actual hours worked be counted, but some employers will count additional hours. Employees should be able readily to determine what their obligations are when working overtime and what will be counted towards compensable time.

Conclusion

The above is not an exhaustive list of legally required policies and only provides a brief overview of the critical components of each policy. Nevertheless, it should serve as a starting point and guidepost in considering whether your agency's personnel rules are missing any critical policies. Most agencies will have these policies, but many policies are outdated or incomplete. Because the aforementioned policies are required by law, it is critical to ensure they are kept up to date on an annual basis. While regular audits of personnel rules may be time-consuming and cumbersome, it is an effective way that an agency can reduce its exposure with respect to employee claims.

Check here to see if your policies reflect the most recent legal updates.

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