ACHRO/EEO
Association of Chief Human Resource Officers / Equal Employment Officers

"THE COMMUNICATOR"

2016 Fall Edition **Volume XI, Issue 1**

Update from our ACHRO/EEO President, Laura Cyphers Benson

Inside this issue:

It is an honor to be the chair of such an amazing group of HR professionals. I have enjoyed working with many of you during this past year in various ways. So much is happening in our colleges and I find that each of us are influencing the faculty, staff and administration of our colleges on a daily basis. This past year, we have had many new CHRO's join the Community College system and are so refreshing in their approach and their enthusiasm to their colleges and to their profession. Welcome to ACHRO.

It is amazing how time flies and here we are starting a new academic year for our colleges. It is also the end of summer and that means our ACHRO Fall Training Institute is just around the corner. October 18-21, 2016, at the Hyatt Regency in Sacramento, promises to be the highlight of our year. We have developed a full schedule of amazing training topics with the best trainers in our system. I know that it is very hard to leave the office for any reason, but please make this a priority. It will provide you information that will help your college, your HR department and your own professional development. It will also provide you an opportunity to network with other HR professionals who share your passion for HR and who will also share similar war stories. It will also give many of us a chance to connect with our newer members. Please sign up for the conference at www.achroeeo.com.

This year we are saying good bye to several of our core members because they are able to retire or go on a long sabbatical. Congratulations to each of you. I know that they have made a difference in my career and many others. I also want to share that we are graduating 32 members of our 2016 HR Leadership Academy. I want you to know that it is the best thing that I do each year. To

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remember how exciting Human Resources is as a career and to help build our future HR Leadership.

I look forward to seeing you at the Fall Training Institute in October. If I miss you, please approach me and either hug me or shake my hand.

Sincerely,

Laura Cyphers Benson

ACHRO/EEO President

HR changes around our state. . .

- **Retirees/Sabbaticals**
  Linda Beam, Vice President, HR, El Camino CCD
  Diane Clerou, Vice Chancellor, HR, State Center CCD
  Shari Magnus, HR Coordinator, Confidential, Rio Hondo College

- **Temporary Promotions/Promotions/New Hires**
  Abe Ali, Vice President, HR, Mt. San Antonio College
  Vy Anderson, Senior HR Analyst, Ohlone College
  Wendy Bates, Chief HR/EEO Officer, College of the Redwoods
  Janeal Blue, HR Specialist, Cuesta College
  Timothy Bowker, HR Analyst, Cuesta College
  Taranjit Chahal, Employee Benefits Specialist, Yuba CCD
  Shawna Cohen, Manager, EEO and Compliance, Palomar College
  Evelyn Danko, HR Officer, EEO/Recruitment/Compliance, Yuba CCD
  Jennifer Druley, Senior HR Analyst, Ohlone College
  Gene Durand, AVP-Human Resources, Long Beach CCD
  Stephanie Federico, HR Analyst, Cuesta College
  Sarah Hopkins, Director, HR, Santa Rosa Junior College
  Cassandra Jackson, HR Manager, San Mateo County CCD
  Stephanie Jarrett, Manager, Training & Compliance, Santa Rosa Junior College
  Teri-Lyn Leonard, Director of HR/Benefits/Payroll, Cuesta College
  Annette Loria, Interim Vice Chancellor, HR, State Center CCD
  Angela Love, Office Coodinator/Executive Assistant, Yuba CCD
  Crystal McCutcheon, Manager, Employee/Employer Relations, Coast CCD
  Rebecca Morgan, Manager, Employee/Employer Relations, Orange Coast College
  Melissa Richerson, Vice President, HR & Labor Relations, Cuesta College
  Sussanah Sydney, Manager, Employment Equity, Santa Rose Junior College

- **Degrees/Certificates**
  Hilda Montanez, Cabrillo CC, obtained a PHR Certification
  Cristy Passman, J.D., Los Angeles CCD, earned an Ed.D.
  Valyncia Raphael, Cerritos College, earned a Ph.D., won dissertation of the year

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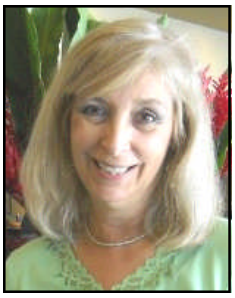

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Update from our ACHRO/EEO Secretary/Treasurer, Connie Carlson

Lots of new faces in ACHRO this year, we have seen many retirees and many new hires. Take time at the conference to get to know our new ACHRO members. Sit with people you don't know at meals and especially when you go to the workshops. Show everyone the "Human" side of Human Resources. ACHRO continues to provide an educational experience for all of us, network so you can share your knowledge with someone new.

ACHRO is a wonderful HR opportunity and part of this HR opportunity means being a dues paying member! Your dues help us to cover part of the expenses of putting on this event. Without members we would not exist, so if you haven't paid your annual dues yet, please do so now. Remember it gets you the discounted rate for attending the conference!

During the conference be sure to visit all the vendors – without their support our conference fees would be much higher. Every year we work to make this a reasonable conference expense so many can participate. Plus our vendors are providing information to us that can make our work better!

Enjoy the conference!

Connie Carlson

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U.S. Departments of Justice and Education Issue Significant Guidance Regarding Transgender Students in Schools

By Kim Overdyck

The U.S. Department of Justice (DOJ) and Department of Education (DOE) recently issued a "*Dear Colleague Letter*" and accompanying *Examples of Policies and Emerging Practices for Supporting Transgender Students* in response to the high volume of questions received regarding civil rights protections for transgender students. The letter does not add any requirements to current law, but it provides significant guidance on these issues. The guidance is summarized below:

"Dear Colleague Letter"

Title IX of the Education Amendments of 1972 (Title IX), and its implementing regulations, prohibits sex discrimination in educational programs and activities operated by recipients of federal financial assistance. The letter summarizes a school's Title IX obligations regarding transgender students and explains how the DOE and DOJ will evaluate a school's compliance with these obligations. The term "school" refers to recipients of federal financial assistance at all educational levels, including school districts, colleges, and universities. It excludes those schools controlled by a religious organization, to the extent that compliance would not be consistent with the organization's religious tenets.

The Title IX prohibition against sex discrimination includes discrimination based on a student's gender identity, including transgender status. To clarify what gender identity and transgender status mean, the letter provided the following terminology:

♦ "*Gender identity* refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth;

♦ *Sex assigned at birth* refers to the sex designation recorded on an infant's birth certificate should such a record be provided at birth;

♦ *Transgender* describes those individuals whose gender identity is different from the sex they were assigned at birth. A transgender male is someone who identifies as male but was assigned the sex of female at birth; a transgender female is someone who identifies as female but was assigned the sex of male at birth; and

♦ *Gender transition* refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time."

The DOE treats a student's gender identity as the student's sex for the purpose of Title IX. This means a school cannot treat a transgender student differently from other students of the same gender identity. According to the letter, this interpretation is consistent with courts' and other agencies' interpretation of federal laws prohibiting sex discrimination.

Title IX requires that when a student, or the student's parent or guardian, notifies the school administration that the student is asserting a gender identity different from what is on the school records, the

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school will begin treating the student consistent with the student's gender identity. Because transgender students are often unable to obtain identity documents reflecting their gender identity, requiring students to produce these documents, in order to treat them consistently with their gender identity, may violate Title IX when it has the effect of limiting or denying students equal access to educational programs or activities. The obligation to ensure nondiscrimination applies even in circumstances where other students, parents, or community members raise objections or concerns. The letter is clear that the desire to accommodate others' discomfort does not justify a policy that singles out and disadvantages a particular class of students.

In discussing Title IX compliance, the letter focuses on four areas summarized below:

1. Safe and Nondiscriminatory Environment

Schools have a responsibility to provide a safe and nondiscriminatory environment for all students, including transgender students. Harassment based on gender identity, transgender status, or gender transition is harassment based on sex. If this sex-based harassment creates a hostile environment, the school must take "prompt and effective steps to end the harassment, prevent its recurrence, and as appropriate, remedy its effects."

2. Identification Documents, Names, and Pronouns

Title IX requires a school to treat students consistent with their gender identity, even if there is a discrepancy between their educational records and identity documents regarding their sex. School staff and contractors are to use pronouns and names consistent with a transgender student's gender identity.

3. Sex-segregated Activities and Facilities

Restrooms and lockers; athletics; single-sex classes; single-sex schools; social fraternities and sororities; housing and overnight accommodations; and other sex-specific activities and rules are discussed. Under certain circumstances, Title IX's implementing regulations allow schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classrooms. However, the school must allow transgender students to participate in activities and have access to facilities consistent with the gender, with limited exceptions.

4. Privacy and Education Records

Nonconsensual disclosure of personally identifiable information, such as the student's birth name or sex assigned at birth, may harm and invade the privacy of transgender students and violate the Family Educational Rights and Privacy Act (FERPA). However, the "legitimate educational interest" exception still applies. As far as directory information is concerned, a school may not designate a student's sex, including transgender status, as directory information. Doing so could be harmful or an invasion of privacy. A school may receive a request to update a student's education records to make them consistent with their gender identity. Under FERPA, a school must consider the request of an eligible student or parent to amend an education record that is inaccurate, misleading, or in violation of the student's privacy rights. Under Title IX, a school must respond to a request to amend information relating to a student's transgender status consistent with its general practices for amending other students' records.

Examples of Policies and Emerging Practices for Supporting Transgender Students

The accompanying *Examples of Policies and Emerging Practices for Supporting Transgender Students* provides practical examples to meet Title IX requirements and includes policies and procedures schools across the country are implementing to support transgender students. The common questions addressed in the document are student transitions; privacy, confidentiality and student records; activities and facilities; and terminology. California examples include Los Angeles Unified School District issuing policies on confirming a student's gender identity and ensuring transgender students have an opportunity to participate in athletics consistent with their gender. Another is El Rancho Unified School District issuing policies that provide students with the right to openly discuss and express their gender identity and guidelines for addressing

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issues related to gender and gender-non-conforming students.

California Law

It is important to note that California has had similar protections for a number of years. The Education Code prohibits public schools in California from discriminating on the basis of specific characteristics, including gender, gender identity, and gender expression. A student can participate in sex-segregated school programs and activities, including athletic teams and competition, and use facilities consistent with their gender identity, irrespective of the gender listed on the educational records.

How we can help

If your educational institution needs assistance, please contact one of our five offices state-wide. We can:

- Provide training
- Create and update your policies and procedures
- Investigate Title IX violations
- Assist in responding to Title IX complaints
- Provide advice and counsel on how to best ensure compliance.

If you have questions about this issue, please contact our Los Angeles, San Francisco, Fresno, San Diego, or Sacramento office.

To receive these Special Bulletins on the day they are released, please send your email address to info@lcwlegal.com.

Kim Overdyck, attorney in the Fresno office of Liebert Cassidy Whitmore, advisesclients in all matters pertaining to labor, employment, and education law. She can be reached at koverdyck@lcwlegal.com

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DO YOU KNOW CURRENT EMPLOYEE RIGHTS REGARDING BACKGROUND CHECKS?

By

Donald F. Averill, Ed.D.

The background check on employee candidates and even on existing employees for advancement are an important part of the employment process. Every public school district completes some form of background checking on candidates for employment. This can be done internally or through a third party investigator, and it will generally vary depending on the job assignment. You will have significantly different needs for a background on a custodian than for a public safety officer.

All search firms will usually perform a background check on candidates for employment at some point in the process. To protect the candidate, employee and the district, it is important to ensure that both the district and these firms are complying with the standards of the Federal Credit Reporting Act (FCRA) and the California Investigative Consumer Reporting Agencies Act (CA ICRA) in meeting required background checking requirements. These standards will also include requirements for the Equal Employment Opportunity Act, Civil Rights Commission and the State of California Civil Code.

While it is possible for local districts to do background checks without meeting FCRA requirements, you will still be required to meet other California statutes related to researching candidate and employee backgrounds. A third party must comply with the FCRA requirements so it is even more important that the employer know that they are subscribing to these standards. The FCRA requirements are enforced by the Federal Trade Commission (FTC) and are applied broadly to consumers, but also plays an important role for employers who use background checks and consumer reports as part of making hiring decisions.

There are ten steps to FCRA Compliance. Once you are ready to conduct a background and credit check on an applicant or employee it is important to follow FCRA-mandated steps to ensure compliance. Employers should also check relevant state laws as some states limit background checks to certain job types.

1. Provide written disclosure to applicant/employee.

Before performing a background check or submitting personal information to a Credit Reporting Agency (CRA), employers must notify the applicant/employee in writing with an explanation of the process. The applicant/employee must understand that the results of the background check will be used as one basis for hiring, promotion, or retention. Generally, the third party agency may assist in communicating these rights to the applicant during the hiring process.

2. Obtain authorization from applicant/employee.

After disclosing the intent to perform a background check, employers must obtain written authorization from their applicants/employees that acknowledges that the report may be used for employment decisions. If an employer wants consent to screen employees for the duration of the employment period, this must also be indicated in the authorization. This permission needs to be obtained before proceeding on background checks.

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3. Provide applicant (candidate?)/employee information to Credit Reporting Agency (CRA)

Once an employer has obtained written consent, information about the applicant/employee may be provided to the Credit Reporting Agency (CRA) for an extended credit check or to the search consulting firm for a standard background check.

Disclaimer: State laws may limit the right to request credit reports for certain positions. In California, this is important where credit checks are to be done because they can only be required for specific jobs that require some form of fiduciary responsibility. Most search firms will ask the district to secure these credit checks or will outsource the service to companies equipped to perform these types of checks.

4. Background check and background report.

After a third-party agency has received the request for a background check, the agency can begin collecting and preparing a background report. Background reports may include credit history, criminal history, civil judgments, and other personal information on public record. This includes review of social media. It is important to be aware of the accuracy of social media information and that it is being collected on the intended person. Many of the online services that profess to do these types of searches may not meet FCRA compliance requirements

5. Report is returned to employer and employee/applicant.

Once the background report is completed, a copy may be returned to the employer and if requested, to the employee applicant for review. In a review provided by the third party, access to the review by the employee applicant is becoming more prevalent to ensure that s/he can respond to negative information that may affect the hiring decision.

6. Employer review of background check.

An employer may be looking for issues that could turn up in a background check. Some employers will use credit history to evaluate candidates. If an employer determines that any information from the background report may adversely impact the employment decision, they must follow additional steps with the applicant to ensure compliance. If no adverse action follows the background check, an employer is successfully in compliance with FCRA.

7. Notification of adverse action to applicant/employee.

Examples of adverse action steps include: refusal to hire, failure to promote, or termination of an existing employee. If an employer decides to proceed with an adverse action based either in whole, or in part, on a background report, the applicant/employee must be notified in writing. The employee must also be provided with a copy of the background report as well as a copy of “A Summary of Your Rights under the Fair Credit Reporting Act.” (This process is sometimes called “Pre-Adverse Action” or “Preliminary Adverse Action” or “First Notice.”)

Unfortunately, once references and others, who are called about a candidate’s past performance and suitability for the position sought, come to understand that adverse information must be shared with the candidate, it becomes increasingly more difficult to gather pertinent information from respondents. Generally, adverse information will involve criminal action, or debt issues in credit reporting. However, the reluctance to provide information in evaluating work performance regarding leadership characteristics and outcomes as well as work place people skills can be limiting on the part of a background reporter.

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8. Opportunity to dispute information.

Employers must give applicants and employees ample time to review any disputed information and report any reactions to the employer. The FCRA recommends a waiting period of five business days before pursuing adverse action. Many states are pursuing legislation that limits the length of time that adverse information on an applicant and employee can be used. In California most infractions can only be applied for seven years preceding a hiring decision. There are exceptions but, this can limit the application of some findings in a background report and the candidate must be given the opportunity to refute the findings.

9. Re-investigation of disputed items.

If any items on the report are in dispute, a background screening company can re-investigate those items and provide an updated report to both employer and applicant/employee. This can extend the background research window beyond the normal two weeks that most districts provide in the selection process. This timeline can often be facilitated by limiting the background checks to the finalists, rather than also first level interviewees, being considered for hire.

10. Review and finalize employment decision.

If an employer has followed all steps in conducting a background check, then an adverse action can be completed. A final employment decision can be made and if that decision is adverse, the employer should send a notice of adverse action to the applicant/employee. This process is called “Final Adverse Action” and is completed after the applicant/employee has had their opportunity to respond.

Fortunately, in the educational employment community the point of finding negative or adverse findings on a candidate is probably less frequent than in other employment settings. More frequent issues that relate to workplace people skills and leadership performance that might be considered in an educational employment position do not fall under the rubric of the reporting requirements. However, when you are subscribing to FCRA compliance, the employee candidate still has a right to request the report. As a result, some care should be taken in how the report is written to ensure that it is factual and accurate and that your reporting does not create other problems for your respondents or districts paying for such services.

Donald F. Averill, Ed.D. is a Vice President for PPL Inc. an educational consulting and search firm serving the community colleges. Dr. Averill retired as the Chancellor of the San Bernardino Community College District and spent eight years of his career as a Chief Human Resources Officer at Glendale Community College District.

Some more of our 2016 Fall Institute Sponsors!!

Keenan & Associates

Questions on California's Family Leave Law?
By Tim Keenan, Senior Vice President, Community Colleges

California's jigsaw jumble of laws and regulations governing employment leave is, to say the least, complicated. Covering a wide range of circumstances – from illness to parental bonding, from jury duty to voting in elections – the Golden State has upwards of 17 kinds of employee leave. Some of it is paid leave, while other leaves guarantee job reinstatement for a certain period of time. If your community college is located in certain cities you may even be to provide more leave or paid leave than what is required by state or federal law. It's no wonder human resources people and employers have questions – lots of questions.

The time has come for answers. In the past year, legislation was passed to make the California Family Rights Act (CFRA) more consistent with the federal Family and Medical Leave Act (FMLA). Because of this, there was clearly a need to conduct a webinar to go over the new requirements. So we recently presented: California Family Leave Law: Are CFRA and FMLA Finally Playing in Unison? You can access the recorded webinar at www.keenan.com/webinars

Did we mention that people had questions about all these changes? During the webinar, we got more than 50 questions from the hundreds of attendees, and the questions we couldn't answer during the webinar, we addressed in a Q&A sheet you can download from the same web site.

While you're checking out the California Family Leave Law webinar, we invite you to explore the many other webinar topics available in our on-demand library from the Keenan Webinar Series.

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Recent Legislation Implementing Dual Enrollment Partnership Agreements

By Meredith Brown, Partner and Guy A. Bryant, Partner

Introduction

In January of this year, Assembly Bill (AB) 288 added section 76004 to the California Education Code, allowing community college districts and school districts to implement dual enrollment partnership agreements, called College and Career Access Pathways (CCAP) partnerships. This new statute, meant to help struggling and underrepresented students, reduces restrictions and removes fiscal penalties for offering dual enrollment courses.

Community college districts may decline to use CCAP agreements and simply maintain existing dual enrollment programs. However, to benefit from any element of AB 288 that is not allowable under non-CCAP law, a college district must adopt all of the legal requirements set forth in AB 288, including "filing with the State Chancellor's Office a CCAP Partnership Agreement and exemption of specified fees for qualified special parttime students." March 11, 2016 Legal Opinion from California Community Colleges Chancellor's Office, p. 3.

Types of Dual Enrollment Programs

"Dual Enrollment" (also known as "Concurrent Enrollment") programs allow students enrolled in a school district to also enroll part-time in community college classes. Courses can cover academics or career/technical training. Students earn college credit by passing the courses. The dual enrollment programs include:

- Early College High Schools are partnerships between high schools and community· colleges or universities that allow students to earn a high school diploma and up to two years of college credit in four years or less.

- Middle College High Schools (MCHS) are secondary schools located on community college campuses that offer challenging academic programs designed to serve high potential, high-risk students. The basic elements of an MCHS include: a curriculum that focuses on college and career preparation; a reduced adult-student ratio; flexible scheduling; and opportunities for experiential internships, work apprenticeships, and community service.

- Gateway to College programs are designed to serve students age 16 to 20 who have dropped out of high school or are significantly behind in credits and unlikely to graduate. Students in these programs can complete their high school diplomas while earning college credit.

Intent of Section 76004

The Legislature's primary goal in enacting Education Code section 76004 was to increase the likelihood that students will finish a postsecondary degree or credential. The preamble of AB 288 notes:

> (a) Research has shown that dual enrollment can be effective for a broad range of students;

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(b) Dual enrollment has historically targeted high-achieving students; however, it can also help students who struggle academically or who are at risk of dropping out.

(c) Allowing a greater and more varied segment of high school students to take community college courses could reduce the number of high school dropouts, increase the number of students who complete their college education, shorten the time to complete educational goals, and help prepare students for college-level courses.

(d) California should enable school districts and community college districts to create dual enrollment partnerships to support underachieving students, those from groups underrepresented in postsecondary education, those seeking advanced studies while in high school, and those seeking a career technical education credential or certificate.

(e) Dual enrollment partnerships could allow students to more easily and successfully transition to for-credit, college-level coursework leading to an associate degree, transfer to the University of California or the California State University, or to a program leading to a career technical education credential or certificate.

(f) The state should remove fiscal penalties and policy barriers that discourage dual enrollment opportunities, thereby saving both students and the state valuable time, money and scarce educational resource.

Education Code section 76004(a) permits the governing boards of community college districts and school districts to enter into CCAP partnerships "for the purpose of offering or expanding dual enrollment opportunities for students who may not already be college bound or who are underrepresented in higher education, with the goal of developing seamless pathways from high school to community college for career technical education or preparation for transfer, improving high school graduation rates, or helping high school pupils achieve college and career readiness." According to the Legal Opinion from the Chancellor's Office, "The definition of 'college bound' and 'underrepresented in higher education' may be locally defined by the district's governing board."

How Does AB 288 Change Dual Enrollment?

Under a CCAP partnership agreement:

- The community college district and school district may agree to share resources such as ADA and/or FTES funding or facilities for purposes such as tutoring and other student services, and general administrative costs associated with a CCAP program or a non-CCAP program.

- Students may receive dual credit at the K-12 and college levels.

- High school students may take up to 15 units per semester of community college courses, up from a previous limit of 11 units.

- Dual enrollment students pay no fees for courses or course materials. Section 76004(f). The school district pays for course materials under Education Code section 49011.

- Community college classes may be offered on high school campuses and limited to high school students during the regular school day. The community college may receive State apportionment funds for the closed course taught on the high school campus. Section 76004(o).

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- Dual enrollment students may be assigned a course registration priority equivalent to that of MCHS students. Section 76004(g).

Limitations of CCAPs

School district and community college partners must file a CCAP partnership agreement with the State Chancellor's Office and comply with these provisions, among others:

- Dual enrollment students in both CCAP and non-CCAP programs cannot exceed 10% of full-time equivalent students claimed statewide. Section 76004(w).

- CCAP partnership agreements apply only to public schools.

- College districts may not enter into partnerships with school districts outside their service areas. Section 76004(e).

- For non-CCAP programs, districts are permitted but not required to exempt nonresident special part-time students from all or part of the nonresident fee. Under CCAP, nonresident special part-time students are *required* to be exempted from nonresident tuition fees, among other delineated community college fees. Section 76004(p) and (q).

- Community college courses for high school students must not displace or reduce access for adults at the college. A community college course that is oversubscribed or has a waiting list may not be offered in the CCAP partnership. Section 76004(k).

- Double dipping is not allowed. A district may not take a state allowance or apportionment for an instructional activity for which the partnering district has been, or will be, paid an allowance or apportionment. Section 76004(r) and (s).

- Instructors must meet the minimum requirements for community college faculty in the subject discipline of the course being taught. Instructors may not teach a course on a high school campus if they have been convicted of a sex offense or controlled substance offense or if they have displaced or resulted in the termination of a high school teacher teaching the same course on that high school campus. Section 76004(h) and (i). Both partners must comply with local collective bargaining agreements and all state and federal reporting requirements regarding the qualifications of the instructor teaching a CCAP partnership course offered for high school credit. Section 76004(l).

Collective Bargaining Implications

The Educational Employment Relations Act (EERA) regulates collective bargaining in K- 12 and community college employment.

Under EERA, a duty to bargain arises when the school district or community college district seeks to make a change to terms or conditions of employment, or any issue affecting such terms, within the scope of representation. Such changes require notice to the affected bargaining units and an opportunity to demand to bargain. General publication of the governing board agenda does not satisfy the district's duty to give adequate notice.

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The scope of representation encompasses the subjects about which employers and their employees' exclusive representatives must meet and negotiate in good faith. The employer and exclusive representative must meet and negotiate about these mandatory subjects, but cannot require negotiation of *non-mandatory* subjects to a point of impasse. (See *Chula Vista City School District* (1990) PERB Dec. No. 834.)

Certain subjects trigger the duty to bargain because they affect wages, hours, or terms and conditions of employment. There is no exhaustive list of these subjects, though many are recognized in case law, including matters related to health and welfare benefits, leave, transfer and reassignment policies, procedures for evaluation of employees, and compensation.

School and community college districts should attempt to work collaboratively with classified and certificated bargaining units to identify negotiable working conditions that may be impacted by a dual enrollment agreement. The potential impacts of a dual enrollment agreement on working conditions should be discussed with legal counsel.

Conclusion

CCAPs can benefit at-risk and underrepresented students, other students, community colleges, public schools, and society. To take advantage of those benefits, school districts and community colleges must follow strict rules when drafting CCAP and nonCCAP agreements. The programs must comply with the statutory provisions for enrollment, instructors, the size of the program, and other restrictions.

LCW LIEBERT CASSIDY WHITMORE

The New FLSA Salary Basis Test Regulations Are Here! – Everything California Public Education Employers Need To Know

By Jolina A. Abrena and Gage Dungy

The U.S. Department of Labor ("DOL") recently issued new regulations modifying the weekly salary and annual compensation threshold levels for white collar exemptions to FLSA overtime requirements. ***These regulations become effective December 1, 2016.*** It is critical for public education employers to become familiar with these new regulations, among other reasons because misclassification of employees as being exempt from FLSA overtime requirements is a costly mistake.

Overview of the FLSA Salary Basis Test And Highly Compensated Employee Rules

Certain employees can be exempt from the FLSA's overtime requirements. The most common overtime exemptions under the FLSA are the so-called "white collar" overtime exemptions (executive, administrative, professional). To qualify for an executive, administrative or professional exemption, an employee must receive a minimum salary, be paid on a salary basis ("salary basis test"), and perform the appropriate duties ("duties test"). The last adjustment to the salary basis test placing it at its current weekly salary of $455/week ($23,660/ annually) was in 2004.

At that time, the FLSA regulations were also amended to add in a new "highly compensated" employees overtime exemption for employees that make at least $100,000 annually, have a primary duty performing office or non-manual work, and customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.

Under the FLSA, full-time faculty, part-time faculty, and teaching assistants are exempt from overtime requirements as teachers because the definition of teaching is quite broad and there is no salary basis test for the teacher exemption. (29 C.F.R. sec. 541.303, Teachers)

The FLSA also contains a separate salary test for academic employees whose primary duties are administrative functions relating to academic instruction or training (as opposed to general business operations of the school). Common examples of those positions at schools are a Dean, a Director of Student Success and Equity, and a Director of Admissions and Records. The FLSA salary requirement is the *lower* of: $455/week, or the minimum entrance salary for full-time teachers at the school.

What Are The New Key Provisions?

1. The weekly salary threshold level is more than doubled from $455 per week ($23,660 annually) to **$913 per week ($47,476 annually)**;
2. The total compensation needed to exempt highly compensated employees is increased from $100,000 annually to **$134,004 annually**;
3. There is now a mechanism that automatically updates these salary and compensation levels every three years, beginning January 1, 2020; and
4. Employers are now able to use nondiscretionary bonuses and incentive payments made on a quarterly or more frequent basis to satisfy up to 10 percent of the new threshold salary level of $913.

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(U.S. Department of Labor, Wage and Hour Division, Fact Sheet)

However, the new FLSA regulations do not make any changes to the FLSA duties tests, which in general also must be satisfied for an employee to qualify for the FLSA overtime exemptions.

Below is a comparison of the current and new FLSA Salary Basis Test:

	2004 FLSA regulation (can be found here)	**NEW 2016 FLSA regulation—effective December 1, 2016 (can be found here)**
Minimum Weekly Salary	At least $455 per week (or $23,660 annually)	At least $913 per week (or $47,476 annually)
Minimum Annual Compensation for Highly Compensated Employees	At least $100,000 annually	At least $l34,004 annually
Automatic updating mechanism	None	Salary and compensation levels will be automatically updated every three years, beginning on January 1, 2020.
Inclusion of Nondiscretionary bonuses and incentive payments	Permits nondiscretionary bonuses and incentive payments (including commissions) to count toward the total annual compensation requirements for highly compensated employees	In addition to the existing rules for highly compensated employees, payments of nondiscretionary bonuses and incentive payments that are made on a quarterly or more frequent basis; can also go towards 10 percent of the required salary level amount of $913/week; and the employer may make a “catch-up” payment each quarter.

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Next Steps for Public Employers To Prepare For The New Regulations

Given that the new salary basis test threshold of $913 per week and highly compensated employee threshold of $134,004 annually will go into effect on December 1, 2016, public education employers should audit all exempt job positions to determine which job positions are affected by these new salary basis test regulations.

As noted above, full-time faculty, part-time faculty, and teaching assistants engaged in a teaching capacity should not be affected by these changes to the FLSA salary basis test, as they are exempt from the salary basis test under the teacher exemption.

For those exempt academic employees whose primary duties are administrative functions relating to academic instruction or training, the new FLSA salary requirement is the ***lower*** of:

- $913/week, or
- The minimum entrance salary for full-time teachers at the school.

To determine if these employees may be exempt, a school should first examine its entrance salary for full-time teachers. If that salary is less than $913/week, then the minimum salary for academic employees will be that entrance salary amount. If that salary is greater than $913 per week, then the minimum salary for administrative academic employees will be $913 per week.

Overtime exempt employees other than teachers or those in administrative functions relating to academic instruction or training – such as exempt, classified employees – will be subject to the new salary basis test of $913 per week or the highly compensated employees exemption of $134,004 annually depending on what duties test the employee qualifies for.

For those exempt job positions that are below or close to being below these new salary levels, employers should evaluate one of the two following options:

1. Increase the salary for the exempt job position to meet or exceed the new salary levels to maintain the overtime exemption; **or**
2. Convert the affected exempt job position to nonexempt status that would qualify for overtime.

If an affected job position is to remain exempt, the employer should increase the salary to a level at or higher than the new salary levels that will go into effect on December 1, 2016. Keep in mind that the effective date for these new salary levels – December 1, 2016 – is a Thursday. Therefore, to the extent that the relevant 7-day FLSA workweek for an affected exempt employee begins prior to that (e.g., Sunday), the employer should implement the increased salary level at the beginning of that workweek.

If an affected position will be converted to nonexempt status, the employer should carefully examine the impacts of this decision and look to take the following steps:

- Provide advance notice to the affected employee about the change in status;
- Provide training on timekeeping and overtime policies and procedures to affected employees and their supervisors to ensure compliance with any new overtime obligations; and
- Implement any necessary changes to the payroll system regarding the new nonexempt classification and determine what additional compensation received by the employee needs to be incorporated into the FLSA regular rate of pay for overtime calculations.

A new nonexempt employee must accurately report work hours and comply with the agency's overtime policies and procedures. This is critical because the FLSA imposes an affirmative obligation on employers to keep accurate time records, and requires prompt payment of wages, including overtime. Late payment of overtime and improper calculations of overtime pay are also common and costly mistakes for employers. Without accurate time and payroll records, the employer may face liability for liquidated damages (twice the amount of compensation due) in the event that an employee files an FLSA lawsuit alleging overtime claims or liability for back wages.

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To the extent that affected exempt positions involve represented employees, any such actions taken to change wages, hours, and working conditions may also trigger an agency's obligation to meet and confer with the pertinent employee organization over the decision or effects and impacts of such decision. Employers should consult with their legal counsel or labor relations professionals regarding the impact of any meet and confer obligations.

Even when a public education employer does not have any exempt employees affected by these new salary basis test regulations, it may also be prudent to assess whether current exempt positions perform the appropriate duties to satisfy the executive, administrative, or professional exemptions. For example, a school or district can assess whether an "Analyst" position performs work directly related to the operations of the department and actually exercises discretion and independent judgment with respect to matters of significance in order to meet the duties test for the administrative exemption. (29 C.F.R. sec. 541.200(a)(2-3).) An audit of exempt positions is also beneficial because an employer may be liable for unpaid compensation and liquidated damages going back up to three years for a willful violation of the FLSA in misclassifying an employee as overtime exempt. (29 U.S.C. sec. 255.)

LCW's wage and hour attorneys routinely conduct FLSA audits and provide wage and hour advice and counsel to our public education clients. We are available to advise agencies on the impact of these new FLSA salary basis test regulations. If you have any questions about this issue, please contact our Los Angeles, San Francisco, Fresno, San Diego, or Sacramento office.

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1. **Capture Mandatory Questions Efficiently**

   A robust software solution helps you keep accurate records and reduces the risk of losing information due to a paper filing – or a recycling – mistake. Tracking relevant applicant and job data, and capturing and storing data collected from mandatory questions is necessary.

2. **Ensure Completed Voluntary Identification Forms**
   Data collection can be simplified by electronically capturing data directly from your applicants through fully customizable voluntary self-identification forms. Collecting EEO data, veteran status, and disability information in an easy-to-fill format ensures you get the data you need to not only stay compliant, but to diversify and improve your applicant pools.

3. **Provide Accurate, Timely Reporting**
   Being able to run reports with your collected data is essential for staying EEO compliant. Software solutions with robust reporting capabilities can provide audit reporting, Affirmative Action summaries and details, and allow you to generate reports automatically on a schedule to ensure you stay up-to-date with compliance.

4. **Improve Processes with Data Analyzation**
   The ability to identify discrepancies in hiring processes is crucial to staying compliant. For example, if one specific department is hiring a disproportionate amount of men vs. women, a software solution with analytical reporting capabilities would identify the pattern so that the hiring process could be modified to ensure more women are being considered for open positions.

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Four Reasons Why Investigatory Interviews Should be Recorded

By: Investigator J. Grimmett, J.D. and Qualified Manager E. Saucerman
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The genesis of this article came about during a recent training exercise that my colleagues and I attended. During the training, a well-respected investigation firm divulged that they did not record their interviews. Further, the firm encouraged all the investigators in attendance not to record their interviews in order to respect the confidentiality of the investigation. My colleagues and I sat there stunned for several minutes before one of us finally asked why they would do such a thing.

In the course of the conversation, three things became clear. First, investigators were not all clear on the legality of using recordings to memorialize interviews. Second, investigators were not all clear on why recording interviews are more appropriate than relying on notes taken during an interview. Third,it was clear that investigators were not working on the very basic skill set necessary to be effective in this line of work, communication. There is no reason why an investigator should not be able to communicate and insist that recording of investigatory interviews is standard protocol and not negotiable.This article will discuss why it is imperative that all investigators record every interview when possible.

The Legality of Recording Interviews

Before I discuss the reasons why investigators should record interviews, I think it's important to explain why it is legal to record interviews, and to dispel some common misconceptions regarding Penal Code section 632.

Penal Code 632

Penal Code section 632 provides that any "person" who intentionally and without the consent of all parties to a confidential communication mechanically records the "confidential communication" is subject to a fine (not exceeding $2,500) and imprisonment (not exceeding one year). A "person" includes legal entities, as well as individuals acting or purporting to act on behalf of any government or federal, state, or local subdivision. A "confidential communication" includes any communication carried on in circumstances that reasonably indicates that any party to the communication desires it to be confined to the parties thereto, but does not include communications made in public gatherings, public proceedings, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. If a person unlawfully records a confidential communication, not only may the person be found criminally liable, but the recording cannot be used in any judicial, administrative, legislative, or other proceeding.

Confidentiality

The most common misconception regarding recorded interviews is that an investigatory interview constitutes a confidential communication that fits within the definition of Penal Code 632. It does not, and here's why. Penal Code 632, only prohibits a party from secretly or surreptitiously recording a conversation. This issue has historically problematic for investigators due to union representatives and interview subject's misinformation regarding the law and it's application. However, the beauty in the resolution to this problem is its simplicity. An investigator simply has to set his/her recording device on the table in front of the subject of the interview, before you begin the interview, say these magic words, "Please be advised that this interview will be recorded." Simple.

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The Reasonable Expectation of Privacy

Some investigators are erroneously swayed by the argument that an employee must give their permission in order for an investigator to record an investigatory interview. This is blatantly false because an organization has legitimate business reason for recording investigatory interviews in order to accurately memorialize the statements. More importantly, neither an employee nor a complainant has a reasonable expectation of privacy in the communications made to an investigator. Due to the fact-finding nature of the investigatory process, it should be obvious that the communication will be divulged to a third party. This is due to the fact that the comments stated will ultimately be revealed in the investigator's report and because the investigator's role is to articulate findings derived from the statements made during the interview process. Therefore, it should be patently obvious that a subject in an interview does not have a reasonable expectation of privacy in the communication to an investigator and their consent to record is not required.

Why Should Investigators Record Interviews

There are four compelling reasons why investigators should always record investigatory interviews. Recording promotes accountability on the part of the investigator, efficiency, transparency, and it is the most accurate method in memorializing a statement.

Accountability

Recording interviews promotes accountability. This is because recording interviews ensures that the investigator fairly did their job. In the event that an investigation is later scrutinized in a legal proceeding or an investigator is accused of misconduct, a recording provides tangible evidence that can be used to show all the investigator's methods during the questioning process. More importantly, this evidence is not open to interpretation as it is literally word for word, exactly what was said.

Efficiency

Recording interviews allows for a more efficient process. There's no risk that an investigator has to stop a subject or a witness of an investigatory interview from speaking, so they can write something down. This provides a more natural flow of conversation between the parties. Further, recording the interview allows the investigator to spend more time looking at the subject of the interview to assess credibility, rather than frantically trying to type or jot down notes. Lastly, the process of recording eliminates the need for second investigator. Sending two investigators may be a matter of preference for some firms and that's perfectly fine; however, sending two investigators will no longer be a necessity.

Transparency

As discussed above, recording interviews allows either the employer or a decision-maker in a legal or administrative process to hear the exact statements made during an investigatory interview. This is important for your current central issue at hand and for possible latent issues relating to the controversy. For example, my firm handled a case where an employee was suspected of misusing a company credit card to buy automotive items. The employee was allowed usage of the credit card to purchase auto parts for the district only. Allegedly, the employee dutifully purchased district items; however, he also siphoned a large portion of auto items for himself. During the interview, the employee made commentary that several other district employee supervisors were aware of the situation, and did nothing to stop the unauthorized credit card use. It was later revealed that one supervisor went so far as to allow the subject employee to work on the supervisor's personal vehicle using auto parts wrongfully obtained by the subject employee.

Having this interview recorded, allowed the Human Resource Director to hear the exact statements said, and allowed him to accurately assess the gravity of misconduct throughout the department. More importantly, the original interview was the inception of several later investigations of other employees.

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Accuracy

The most important reason for recording interviews is accuracy. Simply taking notes during an interview is risky because there is the possibility that something may be missed. I've heard several different methods used by note-taking investigators to defend the accuracy of note taking. For example, one firm shared that they always send two investigators on every case to ensure they have at least one investigator solely responsible for notes. However, this method is not well reasoned because it places a higher financial burden on the client, and it still does not eliminate the likelihood that the investigators may have missed something.

The fact of the matter is this, however a firm decides to take notes during an investigation there is a risk that cannot be dispelled that something was missed. Recording an interview ensures that every detail during the interview is captured by a reliable source and is available for later review.

Final Thoughts

Control your own interviews. Do not let your interviewees control your investigation. Go in that interview room armed with a script and your recorder ready to go with the proper introduction. Be the investigator that is accurate, efficient, transparent, accountable, and more importantly, knowledgeable. The purpose of this article was to examine why you should record interviews, after review of the aforementioned facts, the more appropriate question is why wouldn't you record your interviews?

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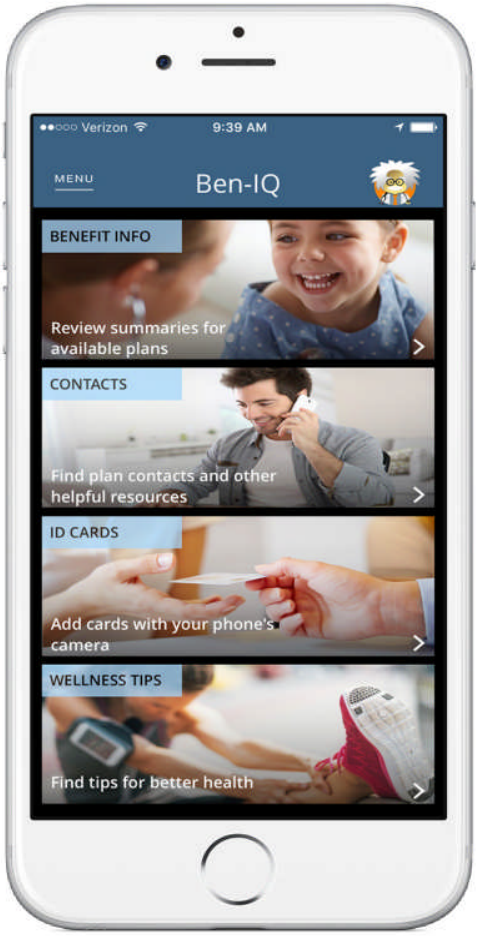

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Best Practices for Conducting Investigations

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There are many situations in which community college districts are tasked with investigating complaints. These complaints may involve employee misconduct, uniform complaint procedures ("UCP") and sexual harassment, or student matters, to name a few. While different types of investigations will have their own nuances, there are many practices that are essential for all investigations. Since an effective investigation can prevent costly litigation and liability, following the best practices described below can help ensure your investigation protocol measures up.

1. Determine What Policies and Procedures Apply

The first step to a legally compliant investigation is to determine which policies and procedures apply. These policies and procedures serve as the roadmap for the entire investigation. Procedures and timelines will differ depending on the type of complaint or issue involved. Examples of possible applicable policies and procedures may include: Board policies and administrative regulations on complaints against employees, sexual harassment or student discipline, Williams Act complaint procedures, UCP; state and/or federal laws such as Title 5 and Title IX; and collective bargaining agreements. Once you have determined the correct policy or procedure, start by breaking it down into individual steps with deadlines. Then you're ready to decide who will handle the investigation.

2. Choose The Right Investigator

Next, you need to decide whether the investigation can be appropriately conducted by an internal investigator or should be referred to an outside investigator or attorney. Many complaints can be appropriately handled by properly trained district staff or administrators. However, if there is any potential for bias of an internal investigation, for example if the case involves a high level employee of the district, outside investigators should be considered. Additionally, for complaints involving numerous or complex legal issues, an attorney may be advisable. A recent California Court of Appeals case confirmed that a factual investigation conducted by an attorney under certain circumstances is protected by attorney-client privilege. (City of Petaluma v. Superior Court (June 8, 2016, A145437) __ Cal.App.4th__ [2016 Cal.App. LEXIS 532].)

If a community college district chooses to conduct an internal investigation, consider whether the internal investigator has specific training and experience in conducting investigations, knowledge of district policies, relationship to the accused and the complainant, and time and workload constraints.

3. Special Considerations

The investigator should also determine whether there are any special considerations that may affect the investigation. Examples of potential considerations may include the sex of the interviewer if a sensitive matter is involved, potential claims of retaliation in the investigation process, whether or not witnesses are represented by union or other legal counsel, whether the investigation involves allegations of criminal misconduct, and whether the investigation will run parallel to any law enforcement investigations.

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4. Identify The Specific Allegations And Consider How To Document The Investigation

Before beginning the investigation, the investigator should clearly identify the specific allegations that he or she is investigating. Often, complaints are unfocused or rambling, so this step is crucial. It will serve as an outline for the interviews, help identify potential sources of information, and define the scope of the investigation. Additionally, the investigator should consider how to document the investigation, including whether or not to use audio or video recordings or to obtain signed declarations or affidavits from witnesses. Community college districts should consult legal counsel about what may or may not be subject to disclosure under the Public Records Act.

5. Timely Notices

As quickly as possible after the commencement of the investigation, notification letters should be sent to the complainant, the accused, and any potential witnesses. The complainant should be notified that his or her complaint is being investigated and given information regarding the procedures. The complainant should also be reassured regarding protections against retaliation if the allegations include discrimination or harassment based on being a member of a protected class. The accused should be notified that the complaint has been lodged against him or her, and reminded that he or she may not retaliate in any way against the complainant. The accused may also need to be appropriately notified of administrative leave pending the investigation. All recipients must be given appropriate admonishments about the need for confidentiality and protection from retaliation for participating in the investigation.

6. Collect and Review All Relevant Documents

All relevant documents and records should be collected and reviewed prior to beginning the interviews, if possible. Such documents may include: complaints, police reports, personnel files, collective bargaining agreements, board policies, written communications (including emails), statements from witnesses, site files, logs, handwritten notes, social media, and phone records, where available. Each witness should be asked if they have relevant documents such as emails or print-outs of text messages relevant to the complaint.

7. Prepare Necessary Admonitions

Before conducting the interviews, the investigator should prepare form admonitions to provide the witnesses, as needed. This may include may include, Lybarger/Spielbauer warnings (for the accused if s/he may exercise the right to remain silent), Banner admonition (for the accused to assure that they are able to communicate freely with their union), confidentiality admonishments, and statements regarding protection against retaliation.

8. Conduct Thorough and Objective Interviews

When conducting the interviews, the investigator should generally begin with the complainant first, to ensure that all details about the allegations are known and the scope of the investigation is clear. The complainant will likely identify potential witnesses to interview. It is usually helpful to interview the accused last, so that the investigator can get his or her response to the statements of the complainant and other witnesses. The accused should also be asked for names of potential witnesses. The order of interviews may need to be changed depending on the nature of the investigation. Prior to concluding the interviews, the investigator should do any necessary follow up interviews to ensure that the investigation is complete. If, during the course of the investigation, additional issues or allegations come up, the investigator should consider whether the issues can appropriately be included within the same investigation, or whether the issues require separate investigation.

The investigator should ensure he or she is able to complete the investigation free from any biases. Interview questions should be neutral. The investigator should not express opinions on the outcome while the investigation is ongoing. If at any point the investigator feels he or she cannot continue the investigation objectively,

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a new investigator should be brought in or the matter should be referred to an outside investigator or legal counsel.

9. Complete A Thorough Report

The investigator should make every attempt to prioritize the completion of the final report promptly after concluding the interviews. Timelines required by Board Policy or other procedure should be adhered to, except in exceptional circumstances. All documents relied upon and any affidavits or witness statements should be included with the final report. While it may be difficult, the investigator should make a reasoned and informed effort to reach a conclusion regarding each disputed material fact. It is often helpful to have an Executive Summary of the report to highlight the key allegations and findings.

10. Send Completion Notices

Once the investigation is complete, the district will need to inform both the complainant and the accused regarding the outcome of the investigation. Typically, the complaint policy or procedure will spell out what information should be shared with which parties. It is recommended to consult with legal counsel regarding what documents and information to provide and whether names need to be redacted from documents. Additionally, both the complainant and the accused should be notified of any appeal rights and procedures.

Conclusion

No two investigations will ever be alike, but the above best practices will put you on the road to performing a thorough and complete investigation. As in any potentially litigious situation, districts should work closely with their own legal counsel, even when conducting an internal investigation, to ensure that all legal requirements are met.


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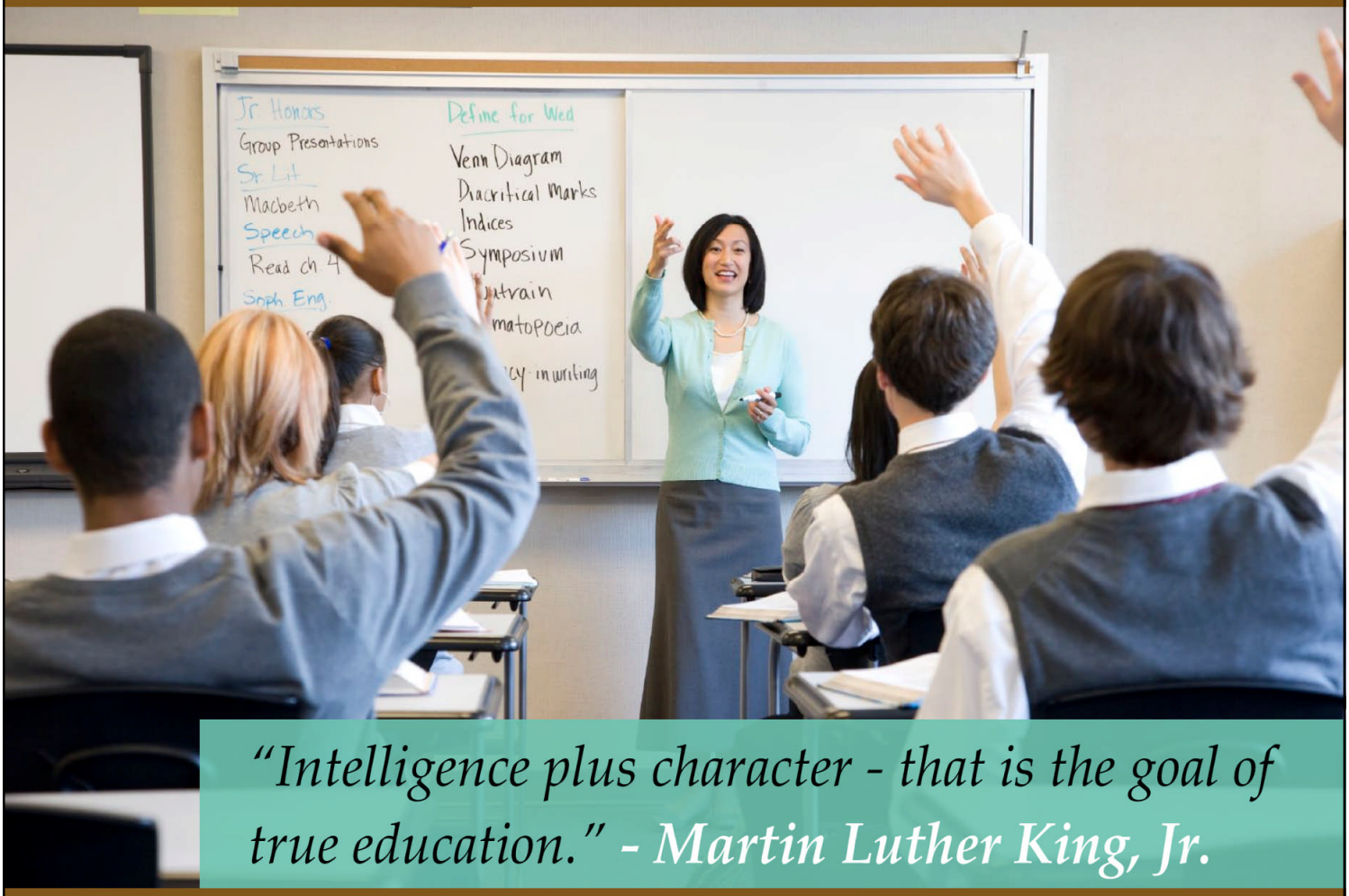

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PERB Clarifies Employer's Obligation to Respond to Union Requests for Information in a Timely Manner

K-12 schools and community colleges engaged in collective bargaining must provide relevant information to the union upon request without an unreasonable delay. In *Petaluma City Elementary School District* (2016) PERB Decision No. 248, PERB provided guidance as to when an employer's slow response may lead to an unfair practice charge.

By way of background, in collective bargaining negotiations, the union is entitled to all information that is necessary and relevant to discharge its representational duty. This means that the union is entitled to information it needs "to understand and intelligently discuss the issues raised in bargaining." Once relevant information has been requested, the employer must either supply the information or timely and adequately explain its reasons for not complying with the request. Any failure or any unreasonable delay to provide such information is a per se violation of the duty to negotiate in good faith and may support an independent allegation of surface bargaining.

In *Petaluma*, the union requested information pertaining to the cost of step and column increases for certificated employees. Without explanation, the district did not provide the information until six weeks later and the union filed an unfair practice charge alleging bad faith bargaining. PERB held that under the circumstances of the case, the union stated a prima facie case for failure to provide information. Crucial to its decision was that at the time, the district did not state that the requested information was unavailable or that its production would be unduly burdensome, costly, or time-consuming. Rather, the district defended its action by attempting to argue that the union was not impacted or prejudiced by this six week delay, noting that no meetings occurred during the six weeks it took for the district to respond.

PERB rejected this argument and noted that the union does not need to show that it was harmed or prejudiced by a delay in providing information. Instead, PERB found that it is the district's responsibility to affirmatively and diligently communicate the reasons for its refusal or delay in providing such information. Accordingly, PERB held that in the absence of any contemporaneous explanation by the district for its delay in providing relevant and necessary information, the only issue is whether the six weeks constituted unreasonable delay under the circumstances.

Petaluma should emphasize to employers the importance to respond to information requests in a timely fashion. When a request seems burdensome or time consuming but requires a response, employers should not wait until the response is ready before communicating with the union. Instead, employers should indicate in writing at its earliest opportunity that it intends to respond in good faith, but that the gathering and production of documents and information may take some time. If possible, the employer should also give an estimated timeline for its expected response and production. This communication will avoid allegations of bad faith bargaining and may contribute to a better relationship with the union.

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How Do STRS and PERS Cost Increases Impact HR?

Pension contribution rates are on the rise for the foreseeable future and that will have significant ramifications for Human Resources Departments and labor relations at community colleges. Both STRS and PERS employer contribution rates are projected to significantly increase through the 2020-2021 fiscal year:

FISCAL YEAR	STRS	PERS
2014-2015	8.25%	11.77%
2015-2016	10.73%	11.85%
2016-2017	12.58%	13.89%
2017-2018	14.43%	15.50%
2018-2019	16.28%	17.10%
2019-2020	18.13%	18.60%
2020-2021	19.10%	19.80%

These increases will clearly raise labor costs and if not proactively addressed, strain budgets — making it difficult to provide for staff and services integral to college and district operations. When STRS contribution rate increases were mandated in June 2014 with the passage of Assembly Bill 1469 (Bonta), the retirement system was granted authority to continue rate increases even past 2021.

This is a long term concern for community college districts as their employees' retirement systems continue to be underfunded. STRS ended the 2015-16 fiscal year June 30 with a 1.4% net investment return and PERS reported a 0.61% net investment return, lower than the 2.4% earned the previous year. A 2015 report showed that both systems were still considerably underfunded: PERS by $62 billion and STRS by $74 billion.

Both the Governor and the Chancellor's office have recommended that districts start addressing these issues now; with the Chancellor's office suggesting the use of one time funds to assist in addressing long term retirement cost obligations. Additional measures are clearly needed as the funding burden

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falls most heavily on employers with 63% of the responsibility, employees with 10% and the state with 27% under the new law.

In addition to rate increases, other complications have arrived. Community college districts for the first time this year must report on their financial statements the large debt or "unfunded liability" of the two statewide retirement systems. This is the first time that boards, business officers and HR directors will see this GASB 68 required number. Some critics have cited the new disclosed pension debt and rate increases as a hidden, long term drain on services – one that is only now coming to light. These pension rate increases, combined with healthcare and other benefit cost increases, will be an issue at the bargaining table and impact salary and benefit talks.

This last fiscal year, community college districts and other public agencies began a trend of setting aside funds to anticipate and save for these long term retirement benefit cost increases. Some are setting aside funds in a reserve account for use later. The most significant development in prefunding rate increases is the irrevocable trust or "pension rate stabilization" concept. Colleges, school districts, cities, counties and special districts across California are contributing funds to an irrevocable trust specifically dedicated for future STRS and PERS costs. These trusts are similar to OPEB trusts which are dedicated to prefunding retiree healthcare. PARS and the Community College League of California pioneered a multiple employer trust vehicle based on this concept in order to give community college districts salient options for addressing these future costs. The result, after a first-of-its-kind approval from the IRS, is the **PARS/CCLC Pension Rate Stabilization Program (PRSP) Section 115 Trust.**

PRSP provides an alternative to setting aside reserve funds alone, which are subject to investing restrictions and lower rates of investment return. Instead, PRSP allows participating districts to securely set aside and safeguard funds (prefund), to offset rate increases through 2021 and beyond.

Participating districts maintain local control over assets held in the trust, can determine the appropriate goals and risk tolerance level for the investments and can diversify investments in order to achieve a potentially greater rate of return.

This allows community college leadership to make the most of the funds they set aside for their pension obligations, smooth the impact of these large contribution rate increases, create a rainy day source of funds for ongoing pension costs and ultimately, show good stewardship of their fiduciary responsibilities to provide for long term employee benefit obligations.

At the upcoming ACHRO Fall Institute, the Community College League, School Services of California, ACCCA and PARS will make a pension-related presentation to help HR professionals better understand the short and long term STRS/PERS cost trends and their impact on negotiations, salaries and benefits.

To learn more about this increasingly complicated and pressing topic, join us on October 20, 2016 from 1:45-3:15pm.

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For more information on the PARS/CCLC PRSP, please contact Maureen Toal at PARS: 800.540.6369 ext. 135, 949.436.0420 (c), mtoal@pars.org or Elaine Reodica at CCLC: 951.850.0650 (c), ereodica@ccleague.org.

About PARS

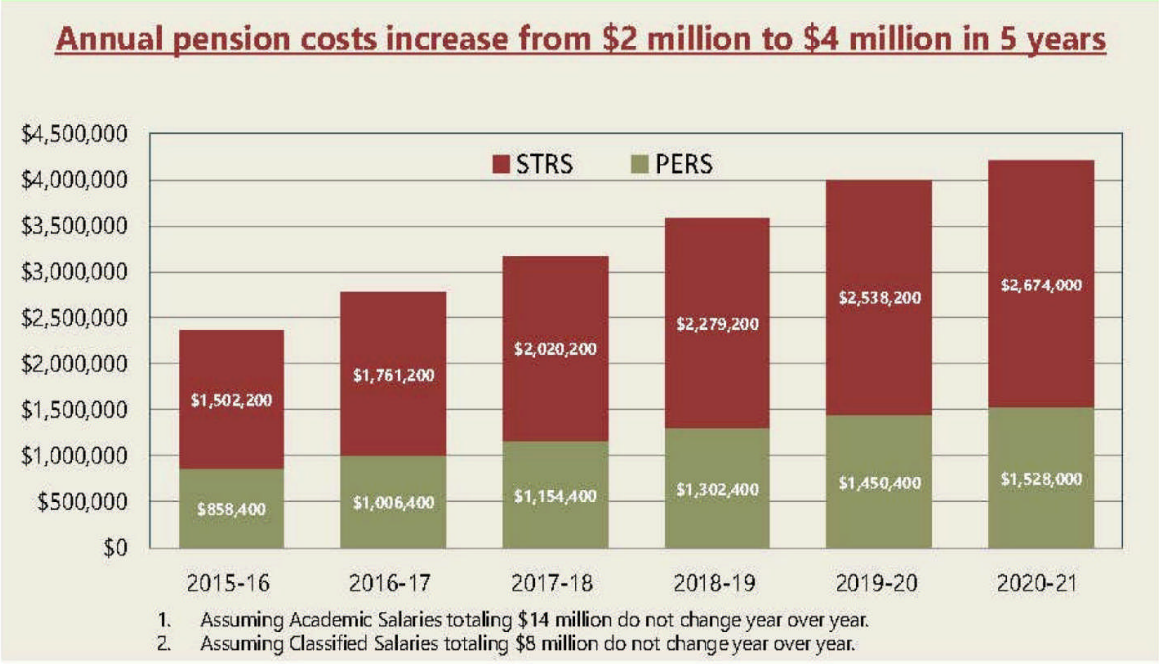
For over 30 years, PARS has designed and administered custom and turn-key retirement plan and trust solutions exclusively for public agencies. The California-based company is a leading provider of retirement programs for community college districts and is one of the largest private providers of multiple-employer Section 115 trusts in the nation.

In addition to pension, PARS offers the following retirement services:

- *The PARS OPEB Prefunding Trust – a unique IRS-approved, GASB-compliant vehicle for prefunding OPEB obligations.*
- *The PARS Supplementary Retirement Plan (SRP) – also known as the PARS separation or retirement incentive, this program offers your district a constructive tool to reduce labor costs, restructure your workforce, avoid layoffs and retain skilled employees.*
- *The PARS Alternative Retirement System (ARS) – save 79% or more while offering employees pre-tax contributions and more take-home pay with this OBRA-90 compliant alternative to Social Security for part-time, seasonal and temporary employees.*
- *PARS Supplemental Defined Contribution Plans (SDC) – locally design and implement an ongoing plan to supplement your existing plans.*

What do these STRS/PERS increases mean for community college districts?

Example 1 – District A



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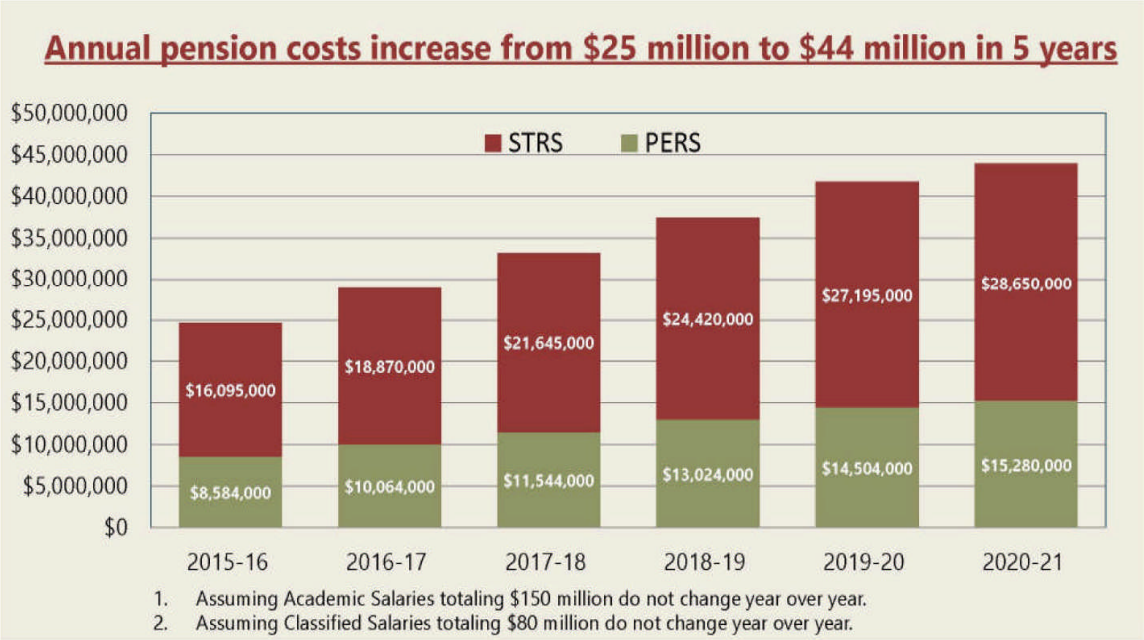
Example 2 – District B



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IRS Releases Proposed Regulations Regarding the Affordable Care Act's Calculation of Coverage Affordability for Employers Offering Opt-Out Payments

By Heather DeBlanc and Shardé C. Thomas

The Internal Revenue Service (IRS) recently released proposed regulations implementing some of the rules previously announced in IRS Notice 2015-87. The proposed regulations will apply for taxable years beginning after December 31, 2016.

Among other topics, Notice 2015-87 introduced a rule that employers offering opt-out payments (also known as "cash-in-lieu") must add the cash amounts to each employee's premium contribution when calculating coverage affordability for the Affordable Care Act's ("ACA") employer mandate.

Notice 2015-87 distinguished between "unconditional" and "conditional" opt-out arrangements. Unconditional opt-out arrangements are those in which the opt-out payments are conditioned solely on an employee declining the employer-sponsored coverage (i.e. an employee declines coverage and gets cash). Conditional opt-out arrangements are those in which the opt-out payments are conditioned on an employee declining coverage and satisfying some other meaningful requirement related to the provision of health care, such as a requirement to provide proof of coverage by a spouse's employer (i.e. an employee declines coverage, but to get the cash he/she must provide proof of alternative group health coverage).

The proposed regulations clarify that employer contributions to a Section 125 Plan that may be used by an employee to purchase minimum essential coverage are not opt-out payments subject to these rules. However, an employer offering cash-in-lieu under a Section 125 Plan still may face affordability issues under the employer mandate. For more information on this, see our prior article at: http://www.lcwlegal.com/IRS-Releases-Further-Guidance-on-Application-of-the.

The most notable employer impact created by these proposed regulations is a new requirement that if an employer offers cash-in-lieu, the offer must be made under an "eligible opt-out arrangement" to avoid increasing an employee's premium contribution by the cash amount when the employer calculates affordability for the employer mandate.

Determining Affordability with an Unconditional Opt-Out Arrangement

For employers offering unconditional opt-out payments, the proposed regulations adopt the rule that an employee's required premium contribution includes the amount the employee could receive if he or she had declined coverage. In other words, the cash an employee could receive for declining coverage will be added to the employee's premium toward the lowest cost plan when the employer runs the affordability calculation. The proposed regulations analogized the scenario to a salary reduction and reasoned that, in both situations, an employee must forego a specified amount of cash compensation to enroll in coverage. Therefore, the opt-out payment effectively increases the employee's required contribution.

For example, XYZ offers employees the lowest cost health plan at a total premium of $400 per month. Employees must contribute $80 toward the premium if they enroll in coverage. However, employees who opt-out of coverage get $350 per month. The IRS will consider this to be an unconditional opt-out arrangement because the employee automatically gets cash for opting out without having to satisfy any additional condition. When XYZ calculates affordability, the employee contribution toward the lowest health plan will be $430

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($350 + $80), thereby making the coverage unaffordable. XYZ will have exposure to potential penalties for offering unaffordable coverage under the ACA's employer mandate.

Determining Affordability with an Eligible Opt-Out Arrangement

Notice 2015-87 stated that employers with a conditional opt-out arrangement were not required to add the cash opt-out amount to the employee's premium contribution when calculating affordability. According to this Notice, it appeared that an employer who required employees to provide proof of alternative group health coverage in order to receive cash-in-lieu would not have to add the cash amounts to the affordability determination.

However, the new proposed regulations state that only an arrangement that qualifies as an "eligible opt-out arrangement" will escape the requirement that the cash be added to the employee's premium contribution. An "eligible opt-out arrangement" means an arrangement that requires the following:

1. The employee must provide ***proof of minimum essential coverage ("MEC") through another source (other than coverage in the individual market, whether or not obtained through Covered California)***. This requirement includes government sponsored programs such as most Medicaid coverage, Medicare part A, CHIP, and most TRICARE coverage;

2. The proof of coverage must show that the employee ***and all individuals in the employees expected tax family have (or will have) the required minimum essential coverage***. An employees expected tax family includes all individuals for whom the employee reasonably expects to claim a personal ex emption deduction for the taxable year(s) that cover the employer's plan year to which the opt-out arrangement applies;

3. The employee must provide ***reasonable evidence of the MEC*** for the applicable period. Reasonable evidence may include an ***attestation by the employee***;

4. The arrangement must provide that the evidence/attestation be provided ***every plan year***;

5. The evidence/attestation must be provided ***no earlier than a reasonable time before coverage starts***(e.g. open enrollment). The arrangement can also require the evidence/attestation to be pro vided after the plan year starts; and

6. The ***arrangement must provide the opt-out payment cannot be made (and the employer must not in fact make payment) if the employer knows that the employee or family member doesn't have the alternative coverage***.

If these conditions are met, the opt-out arrangement is an "eligible opt-out arrangement," meaning that the amount of the opt-out payment is excluded from the employee's required premium contribution for the affordability calculation. Employers who wish to maintain cash-in-lieu arrangements outside of a Section 125 Plan should start revising the terms of the arrangement to meet the "eligible opt-out arrangement" definition.

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Eligible Opt-Out Arrangement Rules Continue to Apply if Alternative Coverage Terminates before End of Plan Year

In some cases, an employee's or a member of the employee's expected tax family's alternative coverage may terminate before the end of the employer's plan year. The proposed regulations provide that, in such cases, an employer may continue to exclude the amount of the opt-out payment from the affordability determination for the remainder of the plan year as long as the reasonable evidence rule is satisfied.

Opt-Out Payments under Collective Bargaining Agreements Get Some Relief

The proposed regulations adopt the general transition relief provided in Notice 2015-87. All employers are not required to increase the amount of the employee's contribution by the opt-out amount until the January 1, 2017 plan year, as long as the employer maintained the arrangement prior to December 16, 2015.

Employers with collective bargaining agreements (CBA) now have additional relief. Employers are not required to increase the amount of an employee's required premium contribution by opt-out payments that do not qualify under an eligible opt-out arrangement, until ***the later of***: (1) the beginning of the first plan year that begins following the expiration of the CBA in effect before December 16, 2015 (disregarding any extensions on or after December 16, 2015), or (2) the applicability date of the regulations. The proposed regulations clarified that there will not be a permanent exception for opt-out arrangements provided under CBAs.

Individual Mandate & Exchange Rules

The proposed regulations also contain information regarding the Individual Mandate and exchange coverage. Some of the ways in which the proposed regulations will impact individuals are as follows:

- Until the IRS issues final regulations, individuals may treat their employer's opt-out payments under any opt-out arrangement as increasing their required premium contribution for purposes of the individual mandate and to determine subsidy eligibility.

- When an individual declines to enroll in employer-sponsored coverage for a plan year and his/her employer fails to offer the opportunity to enroll in future plan years, the exchange will treat him/her as ineligible for employer-sponsored coverage during those future plan years. The individual could receive a subsidy and trigger employer penalties.

Employers who offer cash-in-lieu should also be aware that cash payments made to employees in lieu of health benefits must be included in the regular rate for overtime purposes under the FLSA. For more information, see: http://www.lcwlegal.com/files/144107_June%202016%20-%20Flores.pdf.

We previously detailed IRS Notice 2015-87 in the Client Update. The article can be found at: http://www.lcwlegal.com/IRS-Releases-Further-Guidance-on-Application-of-the.

The complete text of the proposed regulations can be accessed at:
https://www.federalregister.gov/articles/2016/07/08/2016-15940/premium-tax-credit.

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