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

"THE COMMUNICATOR"

2017 Fall Edition **Volume XII, Issue 1**

Inside this issue:

Welcome Message ACHRO/EEO President, Abe Ali

Aloha ACHRO/EEO Members!

It is a privilege and honor to make my third tour as President of the Association for Chief Human Resources and Equal Employment Officers. We have been an association since 1995 and our Human Resources and EEO programming has positively supported the professional growth of thousands of its members. As many of my colleagues will attest, we came into the CCD system with ACHRO/EEO already established as an independent association. There are only a few members left from the previous Chancellor's organized "Mega" conference format that incorporated all the associations for CEOs, Instruction, Students, Business, and HR/EEOs.

Today, the first generation of ACHRO/EEO Association "rookies" in the field are the "veterans" of the Association. Welcome to the ACHRO/EEO family and its tradition of providing exemplary professional development support now and future generations to come. With your support the continued growth to what the association provides its membership and fulfill the professional growth expectations our pioneers have bestowed upon us.

Goals for the President:

As your President, I have several ambitious projects to get done before I pass on the torch to my esteem friend and colleague Dr. Cindy Vyskocil, ACHRO/EEO Vice President. I would like to share these goals with you in no particular order of priority:

1. Expand Labor Relations Programming for mid to senior CHRO executives. I am very proud to announce the assistance and support Liebert, Cassidy, Witmore (LCW) has committed to develop curriculum and provide programming for a high level Labor Relations Institute. Our targeted audience is Chief Negotiators in District Human Resources departments who have served on negotiation teams. We seek to reinvigorate and sharpen our high level skills in effectively leading the Labor Relations programs at our respective districts.

2. Review, improve, and support our Human Resources Academy to ensure that participants continue to receive outstanding programming. As you may be aware Dr. David Bugay is no longer involved with the program and Laura Benson has stepped up to the plate to lead the Academy program. I am appreciative of Laura

(continued on page 2)

taking over the program in light of her starting a new work life as a Consultant for Andeleson, Atkinson, Loya, Rudd, and Romo (AALRR). My focus will be on the business administration of the program, ensuring adequate resources for the program, and promoting the program for our future CHROs.

3. Resurrection and revival of the Human Resources technicians workshop. As you maybe aware, School Legal Services of California and I had the pleasure of developing Human Resources Guidance Volumes I and II (621 pages). The written manual placed emphasis on providing an introduction to the CCD employment laws and practical Human Resources applications for entry level HR Specialists and Technicians. I am pleased to be collaborating with Randy Erickson of the Erickson Law Firm to develop a workshop presentation and new manual and guide for HR staff to use.

4. Establish Diversity Programming Chair that reports to the Executive Board of ACHRO/EEO. We are not properly serving the plethora of Diversity issues that directly impact or line of work. We are barely scratching the surface of EEO compliance programming. With Vice President Vyskocil taking the lead on this endeavor, we will bring a proposal to the association membership that will establish an Executive Board position dedicated to building up our Staff Diversity and EEO Compliance programming.

5. Restructure the current Executive Board composition, service terms, and election process. The current composition of the Executive Board has too many positions to serve in too little time. In addition to the Diversity/Compliance Program Chair mentioned in item 4, I will introduce the extension of service terms of the President and Vice President from one year to at least a two year term. With the term of office extended for the President and Vice President, I will propose an elimination of the Past President position from the Executive Board slate of Officers. I believe pairing down the Executive roles from three (3) to two (2) positions and increasing the term in office for both executive leadership positions will bring clarity and continuity to leading our association.

We also need to reexamine and explore changes in our election process as there is some confusion regarding regional representation, nominations for all Executive Board positions, and voting procedures.

Well, as I said to you previously, this is an ambitious goals agenda to attempt to get done in a short period of time. These five goals represent why I asked to be your President for a third time. Only the association membership and business affiliates can bring these goals to fruition. Let's get er done!

Abe Ali

ACHRO/EEO President

Update from our ACHRO/EEO Vice President Training Committee Chair, Dr. Cindy Vyskocil

First and foremost, I want to take the opportunity to thank ACHRO for electing me as your new Vice President. I am both humbled and grateful to have an opportunity to promote and forward efforts and initiatives that are important to the work we do. I am also excited to work closely with Abe Ali during this coming year to put forward a meaningful and memorable ACHRO conference in Garden Grove. Abe and I look forward to a very productive year ahead.

Dr. Cindy Vyskocil

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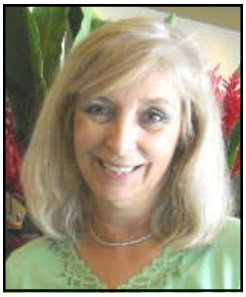

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- **Retirees**

  Connie Carlson, Associate Faculty/Flex Coordinator, College of the Redwoods
  Kristina Combs, Executive Director, HR & Labor Relations, Marin CCD
  Teresa Daigneault, HR Analyst, College of the Redwoods
  Patricia English, Vice President, HR, Santa Barbara CC
  Gene Little, Director of Diversity, Equity, Inclusion, Los Angeles CCD
  Sheri Wright, HR Director, MiraCosta College

- **Promotions/New Hires/Assignment Changes**

  Monica Banta, Benefits Specialist, Cuesta College
  Janeal Blue, HR Specialist, Cuesta College
  Timothy Bowker, HR Analyst, Cuesta College
  Karen Carr, Director, Diversity, EEO, and Title IX Programs, Santa Clarita CCD
  Christina Chung, Director, HR Operations, Santa Clarita CCD
  Jennifer Druley, HR Manager, Chabot-Las Positas CCD
  Sarah Famer, HR Assistant, Cuesta College
  Stephanie Federico, HR Analyst, Cuesta College
  Dr. Adriana Flores-Church, Vice President of HR, Cerritos College
  Monalisa Hasson, Ed.D., Vice President, HR, Santa Barbara City College
  Rian Medlin, Director, Recruitment and Employee Services, Santa Clarita CCD
  Jane Miyashiro, Vice President, HR, El Camino College
  Julianna Mosier, Vice Chancellor, HR, State Center CCD
  Isabel Mostafanejad, Health Benefits Officer, Napa Valley College
  Ana Patin, HR Tech for Compensation, Antelope Valley College
  Dr. Valyncia Raphael, Director of Diversity, Compliance, and Title IX Coordinator, Cerritos College
  Vicky Remp, HR Tech for Benefits, Antelope Valley College
  Hector Sanchez, Administrative Assistant, Napa Valley College
  Susan Slager, HR Director, Los Rios CCD
  Kimberly Smith, HR Technician-Employment Services, Napa Valley College
  Tina Wahlund, HR Manager, College of the Redwoods
  Stacy Zuniga, EEO/Diversity & Staff Development Manager, State Center CCD

- **Degrees/Certificates**

  Wendy Bates, College of the Redwoods, accepted into Capella's Industrial and Organizational Psychology Program, earning a PhD in Psychology in 2 years

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

Amazing how quickly the year flies by and before we know it, it is time again the for ACHRO conference. The opportunity to come together and meet new ACHRO members and refresh friendships with old ACHRO members is so vitally important to our growth as Human Resources professionals. Please make it your goal to meet someone who you haven't worked with or met before. Sit with a different group of people at meals and presentations. Branch out and see how they do HR at other districts. We can always learn something new!

As always ACHRO couldn't survive without your commitment to the organization. So please pay your dues (It will get you a discounted rate for the conference!) We receive mailers for other conferences and workshops that are at least double our conference fees so you know that we work hard to make this conference affordable for all (with presentations that relate to Community College Human Resources too.) And most important to our financial survival is our connection with our vendors. These are the same vendors that provide services to your district - stop by their table to chat, it is always nice to meet our vendors in person! The vendor support of our conference is vital to providing a conference that meets the needs of all ACHRO members. Now go forth and participate - enjoy the conference!

Thanks for everything you do Ruth!

Connie Carlson

ACHRO/EEO Secretary/Treasurer

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The Present and Future of Transgender Student Rights Under Title IX During the Trump Administration: Recent Developments and Signs of Things to Come

The rights and protections of transgender students are established in both state and federal law. In California, state law requires school districts to permit pupils to participate in sex-segregated programs and activities based on their gender identity regardless of their biological gender.[1] In the federal realm, the Obama Administration took several definitive steps to establish the rights of transgender students through Title IX of the Education Amendments of 1972 (Title IX), which prohibits sex discrimination by any educational institution that receives federal funds. However, pending federal court cases and actions by the Trump Administration have challenged the status of transgender rights in federal law. While school districts and colleges in California must still comply with state law, understanding the status of federal law can help California educators develop policies and procedures to address the complex issues involving transgender students.

Starting in 2014, the Obama Administration declared, through various guidance documents, that Title IX protected transgender students against discrimination and required education institutions to grant access to facilities and programs based on a person's gender identity regardless of biological gender.[2] This guidance led to several lawsuits from states and individuals which remained pending when the Trump Administration came into office.

On February 22, 2017, the Trump Administration changed the trajectory of Title IX and transgender students by releasing a "Dear Colleague Letter" (the "Trump DCL") reversing the Obama Administration's guidance with respect to transgender individuals. As soon as it was issued, the Trump DCL affected specific pending issues related to transgender student rights. Perhaps most importantly, the Supreme Court decided it would no longer hear the landmark transgender case initiated by a student, Gavin Grimm, challenging a school districts policy denying access to facilities based on gender identity.

While the Trump DCL represents a significant change in how the federal government will approach the rights of transgender students, it is important for all education institutions to understand the scope of the Trump Administration's actions and other factors that affect how transgender issues must be addressed. Specifically, these actions do not change state law which, in California, still requires education institutions to permit students to participate in sex-segregated programs and use facilities consistent with their gender identity, irrespective of their biological gender. Further, discrimination against transgender students still violates Title IX. To fully understand the effect of the Trump Administration's actions, and the possible future of transgender student rights, several other factors must be considered, as summarized here.

[1]See Education Codesection221.5(f)effectiveJanuary1, 2014through Assembly Bill 1266(AB 1266) known as the School Success and Opportunity Act.
[2]The Obama Administration released guidance documents in 2014,see *supra* note 3.

(Continued on page 7)

I. The Obama Administration's application of Title IX to transgender students

In summary, the Obama Administration established that Title IX applied to discrimination against transgender students through two "waves" of guidance documents. First, the Obama Administration issued two "Question and Answer" guidance documents discussing Title IX in 2014 (collectively, the "Obama 2014 Guidance").[3] Although the Obama 2014 Guidance did not explicitly require education institutions to grant access to facility and programs based on gender identity, it did indicate that Title IX protects transgender students from discrimination generally: "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation."

In 2016, the Obama Administration released the "second wave" of transgender guidance which explicitly stated that Title IX required access to facilities and programs based on gender identity regardless of biological identity (the "Obama 2016 Guidance")[4]. As succinctly summarized in the Obama 2016 Guidance "When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity."

The Obama Administration's interpretation of Title IX with respect to transgender students was met with legal challenges by states and individual school districts who argued Title IX dos not, and should not require institutions to open facilities and programs to students based on their gender identity. Both waves of Obama Guidance lead to court action which may still effect how transgender students must be treated.

II. The Gavin Grimm Case

In 2014, after the Obama 2014 Guidance, the rights of transgender students pursuant to Title IX came before the federal courts. In *G.G. v. Gloucester County School Board*, or the "Gavin Grimm Case", a school board adopted a policy requiring students to use facilities based on their biological gender and therefore, prohibited transgender students from using the facilities of their gender identity. Thus, a transgender student, Gavin Grimm, filed action in federal court claiming the policy violated Title IX. Specifically, Gavin Grimm focused on Obama 2014 Guidance to argue that denial of access to facilities based on gender identity violated Title IX. Gavin Grimm also claimed the board's policy violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by discriminating against transgender student based on their gender.

The District Court ruled in favor of the school district and dismissed Gavin Grimm's claim. In regards to Title IX, the District Court found that the federal laws related to Title IX allowed education institutions to limit bathroom access on the basis of sex. According to the District Court, any suggestion that Title IX requires school districts to grant access to facilities based on gender identity improperly created a new law without following the procedure required make new laws.

Gavin Grimm appealed the District Court's decision to the US Court of Appeals which overturned the District Court's decision. In summary, the Court of Appeals found that the Title IX regulations were

[3]The Obama 2014Guidance include: 1) The U.S. Department of Education Office for Civil Rights, Questions & Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (Dec. 1,2014); and 2) U.S. Department of Education Office for Civil Rights, Questions & Answers on Title IX and Sexual Violence (Apr.29,2014).

[4]The Obama 2016Guidance include: 1) The Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May13, 2016 and 2) The Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015.

(Continued on page 8)

ambiguous as to what is meant by "sex discrimination" because sex could refer to biological gender or gender identity. Thus, the Court of Appeals found that the Obama Administration had the right to interpret Title IX to protect against gender identity discrimination and require education institutions to allow transgender students to use facilities of their choice. Procedurally, the Court of Appeals remanded (returned) the Gavin Grimm case to the District Court to decide the matter based on its findings. Upon receiving the case, the District Court entered a preliminary injunction ordering the school board to allow Gavin Grimm to use the boy's bathroom, i.e. the bathroom of his gender identity until the case was decided.

The School Board then appealed the case to the Supreme Court. At first, the Supreme Court granted a stay allowing the School Board to follow its original policy of requiring bathroom use based on biological gender, to preserve the status quo until it decided whether to take the case. The Supreme Court then declared it would hear the Gavin Grimm Case.

However, after the Trump Administration issued the Trump DCL, as discussed in more detail below, the Supreme Court decided it would not hear the Gavin Grimm Case and instead sent the case back to the Court of Appeals to reconsider the case based on the Trump DCL.

While many were hoping the Supreme Court would hear the Gavin Grimm case and offer a definitive statement related to transgender protections under Title IX, its decision to send the Gavin Grim Case back to the Court of Appeals does not eliminate the case or its potential impact on transgender students and Title IX. The Court of Appeals will still consider the arguments and the losing party will likely appeal the decision again to the Supreme Court. The courts will consider the Trump DCL but may also consider other arguments such as the claim made by Gavin Grimm that denial of bathroom access constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by discriminating against transgender student based on their gender. Gavin Grimm will also likely argue that preventing transgender students from using facilities based on their gender identity constitutes sex discrimination which is prohibited by Title IX even throughout the Obama Guidance, as confirmed in the Trump DCL. Thus, the Gavin Grimm case may still effect how Title IX applies to transgender students.

A. The other Title IX cases addressing transgender are no longer pending

In addition to the Gavin Grimm case, several states filed cases in federal court to challenge the interpretationofTitleIXintheObama2016Guidance. First, a group of states, led by Texas (but not including California), filed an action in federal court arguing that the Obama Administration's application of Title IX to transgender students was improper. Shortly after the Texas Case was filed, another group of states, led by Nebraska (but again, not including California) filed another case in federal court making essentially the same arguments. In summary, the States echoed the argument suggested by the District Court in the Grimm Case, namely that requiring education institutions to allow facility access based on gender identity is a new law which must go through the legislative process and cannot be established through guidance issued by the President.

The Obama Administration defended its interpretation in both the cases which were still pending when the Trump Administration took over. In February of 2017, the Trump Administration withdrew the federal government from both cases and, as a result, both cases are being dismissed by the Federal Courts.

These court actions, along with the Trump DCL, indicates that the Federal Government will no longer require education institutions to provide access to facilities and program based on gender identity. However, the Gavin Grimm case may still effect how Title IX applies to transgender students. In the meantime, education institutions should adopt their policies based on the scope of the Trump DCL and applicable state law, as discussed below.

(Continued on Page 9)

III. The Trump DCL

On February 22, 2017, the Trump Administration took its first official action with respect to Title IX and transgender students with the release of the Trump DCL. In summary, the Trump DCL formally withdrew the Obama 2016 Guidance requiring education institutions to grant students the right to use facilities and programs based on their gender identity. The DCL references the argument that the language of Title IX does not explicitly mention transgender or gender identity and therefore, the Obama 2016 Guidance improperly creates new law without going through the required law making process.

The Trump DCL does not definitively establish the Trump Administration's position on transgender issues but instead states its decision was made "in order to further and more completely consider the legal issues involved." The Trump DCL also hints that the Federal Government will take the position that transgender rights should be handled locally by stating "there must be due regard for the primary role of the States and local school districts in establishing educational policy." Finally, the Trump DCL ends by confirming that it does not eliminate the Title IX protections from discrimination, bullying or harassment granted to all students including Lesbian Gay Bisexual and Transgender (LGBT) students. Thus the Trump DCL confirms that the Office for Civil rights will continue to hear all claims of discrimination and protect all students through the application of Title IX. Thus, as noted above, Gavin Grimm, and other students, may still argue that denial of access based on biological gender is sex discrimination under Title IX.

IV. The Effects of the DCL

The Trump DCL, which is relatively short at three (3) pages, does not definitively resolve the question of transgender rights. While it does suggest the Federal Government will no longer require education institutions to grant access to facilities and programs based on gender identity, transgender students are still protected from discrimination based on their gender identity. Education institutions should consider the following issues when deciding how to address transgender issues.

First, education institutions are still required to follow state law with respect to transgender students. In California, Education Code section 221.5(f) requires school districts to permit pupils to participate in sex-segregated programs and activities, including athletic teams and competitions, and use facilities consistent with their gender identity, irrespective of the gender listed on the pupil's records. Further, for post-secondary education institutions, California EducationCodesection66270prohibitsdiscriminationbasedongenderidentity. The Trump DCL does not change these state law requirements or any other local requirements nor does not prohibit education institutions from adopting policies that allow access to facilities or programs based on gender identity.

Secondly, as explicitly stated in the Trump DCL, Title IX's protections against sex discrimination remain in place, specifically with respect to transgender students. The DCL is limited to withdrawing the Obama Administration's declaration that Title IX requires institutions must allow access to sex-segregation facilities based on gender identity. Thus, education institutions must continue to take actions to eliminate and remedy discrimination against transgender students. Specifically, institutions must still protect against bullying, abuse, or harassment of transgender students or they could face action under Title IX. As part of this protection, all education institutions should make sure their communities understand transgender students are still protected from discrimination and California law still requires access based on gender identity.

(Continued on Page 10)

V. Recommendations

To comply with Title IX with respect to transgender students, education institutions must first look to state law and comply with any requirements regarding facility use or program participation. In California, state law clearly requires school districts to allow transgender students to use facilities and participate in programs based on gender identity through Education Code section 221.5(f). Even in states where local law does not establish transgender rights, education institutions should develop, maintain, and adjust processes to protect all students, including transgender students, from sex discrimination as required by Title IX which includes bullying and harassment prevention. Because the issue of transgender student rights is a hot topic, institutions should clarify to its staff and students the limited scope of the Trump DCL so all involved are aware of the continuing requirement to eliminate discrimination and comply with state and local law.

About the Authors

Stephen McLoughlin advises public and private agencies on a wide variety of transactional and litigation issues. He represents California community college districts, universities and school districts in education-related matters, providing advice and counsel concerning compliance with Title IX, transgender accommodations, First Amendment and other constitutional rights of students and employees and related federal and state

Marilou Mirkovich has represented employers in all aspects of labor relations and employment law. For the past 15 years, conducting, supervising, and evaluating investigations has comprised the central part of Ms. Mirkovich's practice, with a focus on discrimination, harassment, whistleblower allegations, Title IX sexual misconduct, Public Safety Officer and Fire-

Eve P. Fichtner represents school districts, county offices of education, community colleges and private employers for personnel matters, student issues and all forms of discrimination and harassment claims. Ms. Fichtner has certification and significant experience conducting prompt, thorough and effective workplace investigations and Title IX investigations. She also provides resolution- based services to clients, including workplace coaching for employees and supervisors, conflict resolution training and facilitated meetings.

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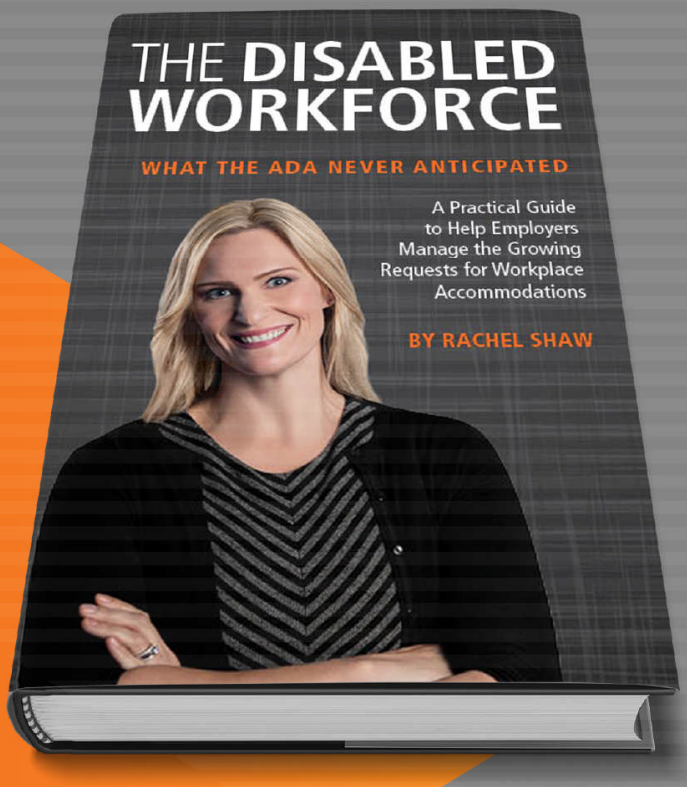

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CONDUCTING INVESTIGATIONS INVOLVING POLICE EMPLOYEES

By: The Titan Group, Professional Investigations #26242

Authors: Edward Saucerman, CEO, Shawn Hare, Senior Investigator and Joie Grimmett, JD, Senior Investigator

How many of your organizations employ police employees? What's the difference between peace officers and other police employees? Well, there are many. First, all peace officers employed by your police agencies are afforded the protections under the Peace Officers Procedural Bill of Rights Act, otherwise known and POBRA and POBR. These rights are identified in Government Code Sections 3300-3313. Dispatchers and other classified police employees are not entitled to POBRA.

When conducting investigations involving peace officers, we suggest using investigators and legal counsel familiar with all facets of the POBRA process. We suggest the investigators have an expertise in interviewing witnesses, securing evidence and interviewing peace officers, and most importantly complying with POBRA. It is not uncommon that the original complaint will expand after interviews and other types of misconduct may be discovered. Therefore, you will want to await any additional information from your investigator before providing the "Notice of Interview," as outlined in 3303, Subdivision (c). Since there is a statute of limitation of one (1) year regarding when the misconduct was discovered, and when you can bring about discipline, you will want to include the approximate date(s) of the misconduct in the allegation. By doing so, you will avoid lawsuits and penalties if the peace officer's attorney believe your Notice of Interview is vague and non-specific. At all costs, avoid fishing expeditions and vague notices. Any trained attorney who represents peace officers will object and ultimately bring about litigation if your organization decides to discipline the peace officer. These lawsuits come with a potential $25,000.00 penalty per violation and possibly having the discipline thrown out for procedural violations; therefore, accuracy and precision are key!

Recently, we had a situation wherein legal counsel wanted to bring in statements from a non-recorded skelly hearing and develop new allegations of misconduct. This act is in direct conflict with POBRA requirements. You simply may not do such a thing. Peace officers have the right to have all interviews recorded regarding statements they make during an interview wherein discipline is sought, Government Code Section 3303 (g). Then you must inform the peace officer the statements he or she will make can be used for disciplinary purposes and then allow them to dual record and have legal representation present. It should be noted, the subject peace officer is entitled to record their interviews with investigators and counsel, wherein there is an open investigation; however, peace officer witnesses may not record and not afforded the right to dual record.

Lastly, we encourage ALL persons who are part of the process involving peace officers to familiarize themselves with POBRA, and at minimum, enroll in an Internal Affairs Investigations course presented by law enforcement. Also, we recommend reading materials such as, the Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act, https://cper.berkeley.edu/shop/pocket-guide-to-the-public-safety-officers-procedural-bill-of-rights-act/.

LOZANO SMITH NEWS BRIEF

Employers Must Provide Information on Rights of Domestic Violence, Sexual Assault and Stalking Victims

Lozano Smith
ATTORNEYS AT LAW

July 2017
Number 39

California employers with 25 or more employees must now inform their employees in writing about the legal rights of domestic violence, sexual assault and stalking victims. Employers, including public agencies, must provide this information using the form prepared by the California Labor Commissioner or in a notice that is substantially similar to the Labor Commissioner's form in content and clarity. The form must be provided to new employees upon hire and to other employees upon request.

California law permits victims of domestic violence, sexual assault and stalking to take time off from work to seek court intervention to help ensure the health, safety or welfare of themselves or their children. Victims may also take time off to seek medical attention, to obtain psychological counseling and other support services or to participate in safety planning.

Victims must give employers reasonable advance notice of their intention to take time off, unless providing advance notice is not feasible. If a victim takes an unscheduled absence, his or her employer must not take any action if the victim, within a reasonable time, provides proof that the absence was covered under the law. Victims may also request reasonable safety accommodations at work, which employers must provide. Employers may not retaliate or discriminate against a victim for taking time off or requesting reasonable accommodations.

Assembly Bill (AB) 2337, which became effective January 1, 2017, introduced a new requirement that employers with 25 or more employees inform employees of these rights. Employers were excused from compliance with this requirement until the Labor Commissioner prepared an information form and posted it on its website. The Labor Commissioner recently published the form, entitled "Rights of Victims of Domestic Violence, Sexual Assault and Stalking," which is available here (English) and here (Spanish).

Violations of the laws governing victims' leave and accommodations can result in civil liability and, in some cases, criminal liability. If you have any questions regarding victims' leave and accommodations or other employment-related matters, please contact the authors of this Client News Brief or an attorney at one of our nine offices located statewide. You can also visit our website, follow us on Facebook or Twitter or download our Client News Brief App.

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As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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There are often times when, in order to make a clear record, or to support recollections, it could be helpful to record or tape a conversation.

Under California law, it is illegal to intentionally and without the consent of **all** parties to a "confidential conversation," either eavesdrop upon or record the conversation by means of any electronic amplifying or recording devise. Federal is more lax; however, it does not supplant the requirements under California law. A "confidential communication" includes "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto." It does not include communications made in a public gathering or other circumstance where one could expect to be overheard or recorded. It also does not include communications which evidence an actual crime or admission of an actual crime. Otherwise, the recording cannot be used for any purpose.

It does not matter what the topic of the conversation is, or whether the subject matter of the conversation is confidential. If the conversation takes place in a separate room, or under circumstances where the persons recorded might expect not to be overheard, the conversation is "confidential." The conversation is confidential even if all parties expect the content may later be conveyed to a third party.

Legal advice should be obtained if you have any question regarding whether a conversation is illegal, before recording it. Violation of this law can lead to civil monetary damages, statutory fines of $5,000 per recording, and even criminal prosecution. Claims for violation of this law may be brought by individuals, corporations, or public entities.

Also, the recording, in order to be prohibited, must be intentional. If, for example, someone was dictating notes for himself or herself, and a conversation in the same room accidently got recorded, it is not a violation of the law.

In order to avoid civil liability, statutory fines, and possible criminal prosecution, if a communication is being recorded, all parties must be aware of the fact. Placing the recording device on the table, and telling everyone, at the beginning of the communication, that you are recording the conversation would satisfy this requirement. However, if the recording device is turned on but cannot be seen, or if it can be seen, but not obviously turned on, or if there is nothing on the recording verifying that the parties all know they are being recorded, the taping is illegal.

If you have any questions or concerns, or if you wish to further discuss any of these issues, please feel free to contact our law firm.

This publication was prepared solely for informational purposes and should not be construed to be legal advice. If you would like further information on this matter, please contact our office.

Keenan & Associates

Can Performance Incentives Lead to Lower Drug Costs?

By LaShai Payne, Vice President, Keenan Pharmacy Services

Within the next five years, prescription drug expense will represent one-third of all health care spending. The question of how to determine the value of this treatment in relation to the expense and how that value will be measured seeks to be answered through clinical performance and outcomes-based criteria. The Affordable Care Act (ACA) included provisions to place greater emphasis on the linkage between clinical outcomes and reimbursement. Outcomes-based pricing arrangements are an element of public policy objectives for improving health care through performance-based models. Performance models are intended to create quality and cost improvements, align incentives and take advantage of technology and medical innovations. With outcomes-based pricing for pharmacy, the manufacturers and insurers share in the accountability for clinical outcomes associated with the drug therapy.

Clinical outcomes encompass various factors that include patient-physician and physician pharmacy communication, patient experience, treatment adherence and side effects management, all of which go along with effectively treating the condition. In order to calculate the basis for paying for the drug treatment in an outcomes-based model, these factors need to be translated into measureable results. A wider acceptance of outcomes-based pricing requires further collaboration between the manufacturers and payers to agree on evaluation metrics, develop the infrastructure needed to collect, share, and report on data, and a willingness to adopt new pricing models. The implementation of these arrangements has been slow in the United States, in part due to challenges in identifying, measuring and monitoring meaningful outcomes. Many payers and manufacturers agree access to the clinical data is a barrier. While they agree on the problem, there is not as much agreement on the solutions.

Payers typically manage their prescription drug costs through formulary management, benefit design, and network coverage. Pharmaceutical manufacturers depend on selling a high volume of their proprietary products during their term of patent protection, and work to promote the quality and effectiveness of their products to physicians. While payers resist paying for increasingly expensive new drugs, manufacturers insist they are providing better patient outcomes through their research and development. Payers also don't want to pay for drug treatment that does not work, and by implementing reimbursement approaches that pay for value, they are attempting to hold the manufacturers accountable for product performance. But integrating the demand for performance with real world results comes back to the problem of data access.

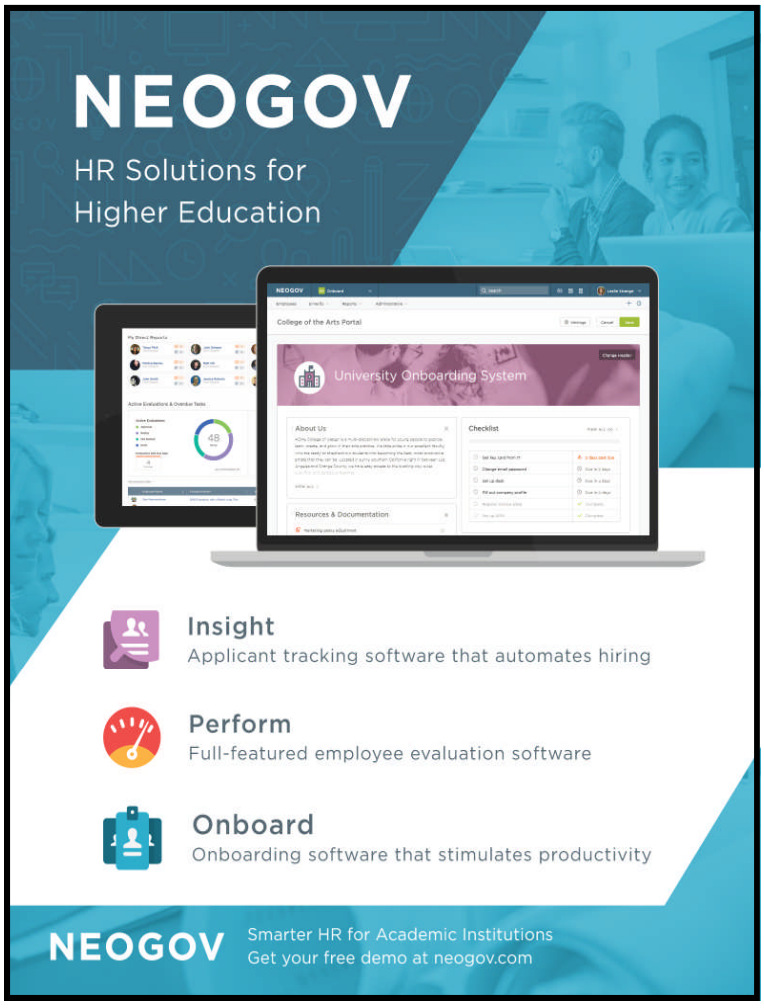
Pharmacy benefit managers (PBMs) are organizations that operate the prescription plans offered under health insurance. They play a critical role in facilitating outcomes-based pricing with their purchasing power and ability to control formulary tier placement. PBMs also help provide data infrastructure and effective ways to access clinical data based on actual utilization and intervention with medical practitioners. PBMs have the capability to create savings through clinical and utilization management programs and negotiating rebates with the manufacturers. As payers continue to ask their PBM to provide affordable and sustainable coverage, PBMs recognize the importance of

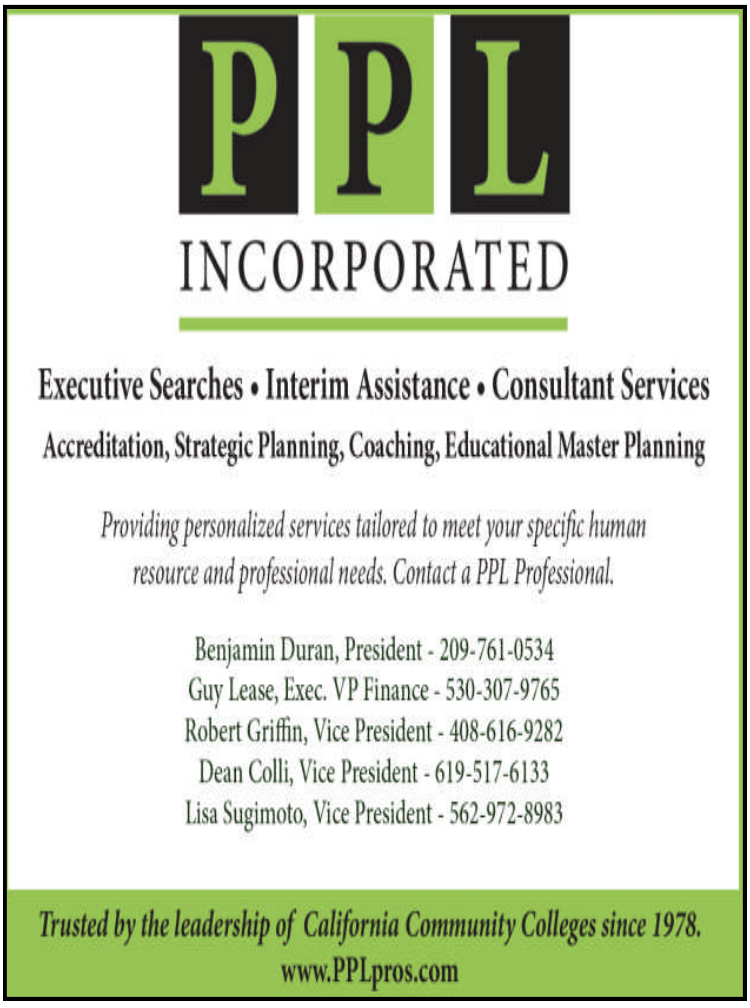
(continued on page 17)

aligning their manufacturer contracts around clinical and financial outcomes, and not just volume. By sharing the risk and paying for value as defined in the agreement, payers should be able to lower overall costs and preserve the clinical value of these drugs. Over the course of time, we would expect to see more outcome-based arrangements, and specifically in the specialty drug category.

Specialty drugs are a category of pharmaceutical products created using a biological, rather than chemical, process. They are complicated and expensive to manufacture. Administration of specialty drugs is also typically more complex, often requiring injection or intravenous infusion, instead of being self-administered by the patient. Most conventional prescriptions range in cost from a few cents to several hundreds of dollars. Specialty medications can cost thousands to hundreds of thousands of dollars per treatment. The number of specialty medications has grown substantially over the years, and specialty drugs are expected to account for fifty percent of total drug spend within three to five years.

With some of the newest specialty drugs lacking long-term clinical data, outcomes-based pricing contracts could be an important factor in controlling medical costs in the pharmacy category. It will require aligning significant resources from insurers, PBMs, manufacturers and health care providers. If successful, outcomes-based pricing models for the pharmacy benefit have the potential for moderating the cost of health care for consumers, with better decision-making processes for practitioners that improve quality for everyone.





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New Title IX Website Requirements: Making the Most of Your Updates

Dr. Cindy Vyskocil, Vice Chancellor of Human Resources
Sacha Moore, District Coordinator of Equity, Inclusion, and Compliance

On July 1, 2017, new Title IX website posting requirements went into effect for the California Community Colleges, along with all other public schools, private schools receiving federal funding, school districts, county offices of education, and charter schools in the state. The requirements come from SB 1375, which focuses on educational equity, sex equity in education, and federal Title IX notifications.

Requirements

Each of these institutions and agencies may comply with the new law by posting – in a "prominent and conspicuous location" on their websites – the following information:

1. The name and contact information, including phone number and email address, of the institution's Title IX coordinator
2. The rights of a pupil and the public and the responsibilities of the institution under Title IX, including web links to those rights and responsibilities here:
    a. California Department of Education Office for Equal Opportunity and Access
    b. United States Department of Education Office for Civil Rights
3. The list of rights from California Education Code Section 221.8
4. A description of how to file a complaint under Title IX, including
    a. an explanation of the statute of limitations within which a complaint must be filed after an alleged incident of discrimination has occurred, and how a complaint may be filed beyond the statute of limitations.
    b. an explanation of how the complaint will be investigated and how the complainant may further pursue the complaint, including, but not limited to, a link to this information on the site for the United States Department of Education Office for Civil Rights.
    c. alink to the United States Department of Education Office for Civil Rights complaints form, and the contact information for the office, including the phone number and email address for the office.

Helpful Links

Institutions looking to make these updates may find the following links useful:

1. California Department of Education Office of Equal Opportunity and Accesshttp://www.cde.ca.gov/re/di/eo/
2. United States Department of Education Office for Civil Rightshttps://www2.ed.gov/about/offices/list/ocr/index.html

(continued on page 19)

3. California Education Code Section 221.8http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=EDC&sectionNum=221.8

Title IX Updates in Practice: the CCCD Experience

In the Coast Community College District, the Office of Equity, Inclusion, and Compliance (OEIC), housed in District Human Resources, used the July 1 SB 1375 deadline as an opportunity to review the entirety of our District Title IX site, which can be accessed here: https://www.cccd.edu/employees/hr/title9/Pages/default.aspx

For examples of how we integrated the updates required by SB 1375, please view the following pages on our site:

- Home
- Policies and Procedures
- Reporting

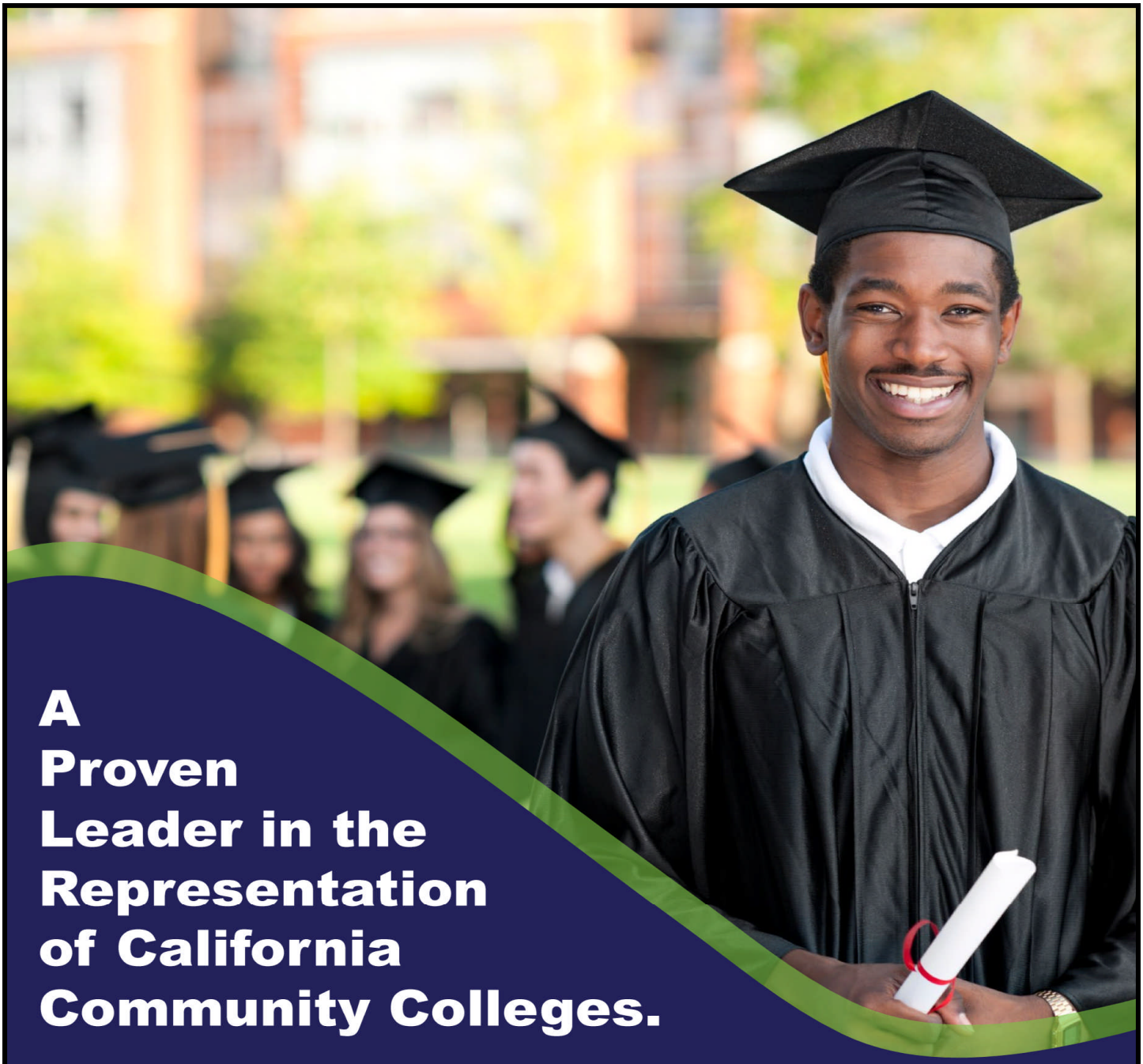
Along with including the newly required information, OEIC revisited the language on our site to ensure a trauma-informed tone and approach. We also added a series of new pages:

- Care and Support
- Staff and Faculty Resources
- Training, Education, and Prevention
- Transgender and LGBQ Resources

After updating our Title IX site, the District has also embarked on a review of our Administrative Procedure 5910: Sexual Misconduct.

For our District, the basic updates required by SB 1375 served as the impetus to perform a thorough reviewof our public messaging and operations, as well as robust, ongoing discussions about our Title IX-related processes.

We hope that your institution can benefit from the recent work we have completed on our site and that we can both save you time as you update and encourage you to review your messaging and resources in the process, too. If you have questions about our site or updates, please do not hesitate to contact Sacha Moore, District Coordinator of Equity, Inclusion, and Compliance, at smoore@gwc.cccd.edu.



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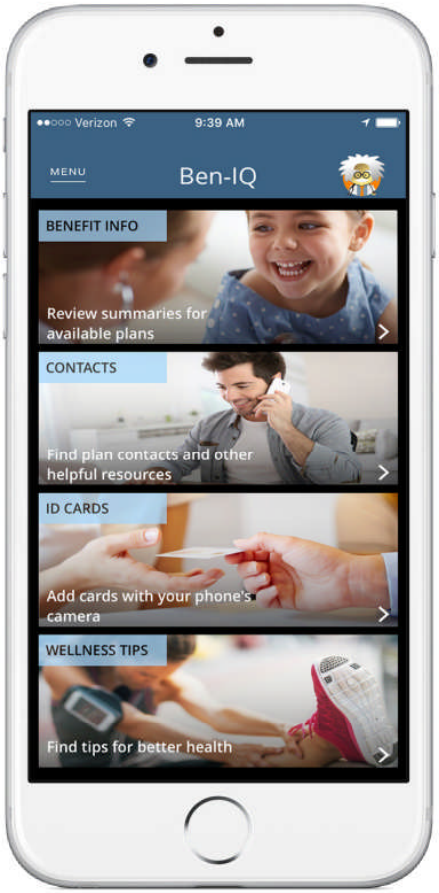

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You Have Received A Litigation Hold Notice-Now What?

Following a loss or an incident, a high percentage of plaintiff attorneys now issue a "litigation hold" demand requiring institutions to preserve evidence that may be related to a particular loss. For example, if a student is injured when a chair breaks/collapses, his attorney may serve a "litigation hold" requiring preservation of the broken chair, the original Purchase Order and paid invoice that secured the purchase of the chair, along with any district communications indicating prior concerns about the quality of the chair, which could include emails from the professor to an administrator and/or communications to the district's Procurement Department, or to the manufacturer, etc.

When served with a litigation hold, institutions must collect and preserve any and all information that may lead to discoverable information, including, but not limited to, equipment, materials, emails, voicemail messages, text messages, letters, and memos. Districts are not required to "re-create" documents that no longer exist, but they are required to "preserve" all existing documents at the time the hold is issued.

In a recent wrongful death case, the judge issued drastic sanctions against a district after they failed to produce all pertinent documents.

This can be difficult if the hold applies to information that spans numerous years, old records that have been sent to storage, involves multiple departments or various sites and may even span years of staffing changes. Issues include how best to inform faculty and staff of the requirements and how to collect and preserve the related materials/items.

Failure to comply with a request for a litigation hold subjects an institution to grave risks. There will be a presumption that information not turned over is being held back so as to "hide" evidence that is adverse to the entity. In a recent wrongful death case, the judge issued drastic sanctions against a district after they failed to produce all pertinent documents (this was learned when a school document was produced by a non-defendant and that same document was not produced by the district). The district argued the documents were located in various departments throughout the institution, among different employees, unbeknownst to management. The court ruled that the district intentionally withheld the document(s) to avoid liability and instructed the jury to conclude the same.

To avoid this presumption, it is recommended that the litigation hold request be communicated quickly to the various departments and staff affected, so that information or materials are not unknowingly destroyed. It is also advised to involve the institution's Information Technology (IT) Department on how best to gather and preserve any requested electronic data (i.e. emails or voicemail). Also, immediately gather all related documents and materials to one central location, label it with the name of the case, the purpose for holding it and a date that item will finally be able to be destroyed, so that it is available for any pending litigation need. Discuss the "destroy" date with the defense team, but in general, the items can be destroyed three (3) years following the conclusion of the litigation, or if no litigation occurs, then upon the expiration of the statute of limitations for filing legal action. If no records or materials exist, respond promptly with an attestation of "no records" to avoid later accusations that items were destroyed. If the litigation hold is related to a claim, be sure to discuss the litigation hold request with your defense team right away for additional guidance.

Article reprinted with permission from ASCIP Views – a member quarterly publication. Provided by attorney Stephan Birgel, Senior Director of Litigation Management for ASCIP (Alliance of Schools for Cooperative Insurance Programs).

Stephan has been a member of the State Bar of California since 1995 and has been with ASCIP since 2015. He has handled defense litigation as a senior attorney with clients including school districts and community colleges throughout Southern California involving a wide range of school and public entity employment and liability matters. Currently Stephan manages ASCIP's litigation activities.

Best Practices in Employee Assessment

Marianne Tonjes, Executive Director CODESP

Pre-employment tests can help improve the objectivity, fairness, and legal defensibility of a college's hiring process. To accomplish this goal, colleges should ensure that their employee selection procedures assess competencies that are directly related to their positions.

Information provided by the US Equal Employment Opportunity Commission's (EEOC) states that employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. To be valid, a test must be job-related and appropriate for the position. This can be determined through periodic job analysis and assistance from job experts.

While documentation provided by some test vendors can be helpful, the EEOC states employers are still responsible for ensuring that tests are valid for use at their organization under the Uniform Guidelines of Employee Selection Procedures. If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative test. To ensure that a test, or selection procedure remains predictive of success in a job, the EEOC states employers should remain aware of changes in job requirements and should update job descriptions or selection procedures accordingly.

The EEOC recommends that tests and selection procedures are not adopted without serious consideration by hiring managers who may have limited expertise on the employment testing process. The test can be an effective hiring tool, but no test should be implemented without an understanding of its effectiveness and limitations for the college, it's appropriateness for a specific job, and whether staff can administer and score the tests appropriately. Training hiring managers on how to select and use assessment tools is essential.

EEOC's web site athttps://www.eeoc.gov/laws/statutes/index.cfm

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Understanding Diversity at Your Institution

Diversity and equity are fundamental goals of higher education, and may be a strong focus at your specific institution. Understanding how diverse your student and faculty populations does more than just help you be EEO compliant, it helps you foster a culture of collaboration, innovation and opportunity.

So, this sounds great – but can it actually happen?

Yes! Understanding diversity at your institution can be as simple as using the tools and resources you may already have. There is a strong likelihood that you use an applicant tracking or talent management system, and this software can be your lifesaver. Here are five tips on how to get the most out of your software to understand diversity in your student and faculty populations:

1. **Capture the right data from the start.** A 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.** Electronically capture data directly from your applicants through fully customizable voluntary self-identification. Collecting EEO data, veteran status, and disability information in an easy-to-fill format ensures you get the data you need to stay compliant, and to also diversify and improve your applicant pools.

3. **Provide accurate, timely reporting.** Being able to run reports with your collected data is essential. 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 understand the current diversity status at any given point.

4. **Improve processes with data analyzation.** The ability to identify discrepancies in hiring processes is crucial to having a diverse faculty and student population. For example, if one specific department is hiring a disproportionate number of men vs. women, a software solution with analytical reporting capabilities could identify the pattern so that the hiring process can be modified to ensure more women are being considered for open positions.

5. **Post to multiple job boards.** In order to cultivate a diverse workforce, you need the ability to reach niche markets. Posting jobs to a vast array of job boards across the country gives you access to a diverse applicant pool with a wide range of talents and backgrounds.

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Creating an Effective Early Retirement Incentive Program as a Human Resource & Fiscal Tool

When done right, a well-crafted early retirement incentive can be a win-win approach for community college districts and their employees. It can help reward long-term employees while efficiently and humanely achieving fiscal savings, mitigating layoffs, addressing declining enrollment, creating promotion opportunities, and restructuring departments. Below are some recommendations to maximize the success of an incentive program for community college districts:

1. Carefully Consider a Plan Design That Will Help Your District Meet Its Objectives

It is crucial to design a plan that will allow you to meet the objectives you are seeking. Should you target the incentive for a specific employee group or offer it to all employees? What benefit level should you provide? Should there be one or two window periods? Offer it at the end-of-the-year or at mid-year? The answers to these questions are different at every district depending on your goals. Implementing a one-size-fits-all program will not allow you to tailor your plan to your district's needs.

2. Remember the 75/25 Requirement (FON) and the 50%

Rule The 75/25 Requirement (the Faculty Obligation Number) and the 50% Rule are very important considerations for every community college district to consider before offering a plan. Will the plan adversely impact these numbers if you hire too many Adjunct Faculty or if too many Faculty Members participate, thereby decreasing the compensation related to the classroom? Creative plan designs can often be used to mitigate this impact.

3. Involve Your Collective Bargaining Units to Get Buy-In on the Program

It is very important to get buy-in from your collective bargaining units so they are fully supportive of the program and process. The determination to bargain all or some aspects of the plan is between you and your labor attorneys; however, ignoring your units during the process can have negative consequences. The more the bargaining units support the plan, the more confidence the employees will have in it and the more employees will sign-up as a result.

4. Conduct a Proper Analysis to Determine Whether the Incentive Will

Work One of the biggest mistakes districts make is failing to properly analyze the projected savings/costs of an incentive over time, thereby implementing a program that does not truly save dollars in the long-term. Poorly analyzed incentive programs can give them a bad reputation and often end up being reported unfavorably in local media. Make sure that a comprehensive analysis is conducted that takes into account costs such as pension, retiree health care, current natural attrition, future loss of natural attrition, and the incentive itself. The feasibility of offering an incentive should also be analyzed based on different benefit levels, eligibility criteria, workforce demographics, and realistic replacement salaries for projected retirees.

5. A Successful Plan Should Generate Significantly More Retirements than Natural Attrition

An early retirement incentive only works, and creates savings, if a district offers enough of a benefit to significantly accelerate natural retirement attrition. This means that if your district has on average 10 retirements a year and an incentive causes 25 to retire, the savings are generated only from the additional 15 who retire. The 10 who would have retired anyway are considered "natural attrition" and must be considered a cost, not a savings, in your analysis. Consider what your district's natural attrition has been on average going back five years or more and do not make the mistake of offering too little of a benefit.

(continued on page 27)

6. Cost Savings are Created by Substantial Salary Differentials

Early retirement incentives in community college districts generally target near-retirement employees that are clustered at higher salary levels and protected by seniority. Fiscal savings are achieved by replacing these retiring or resigning employees with those lower on the salary scale, by temporarily or permanently not replacing some positions and/or for Faculty replacing with Adjunct Faculty for a period of time. The salary differentials, particularly the large differentials common for Faculty, make the savings happen. Narrow salary differentials (like those for Management and Classified) often do not create enough savings to merit implementation of an incentive. Creative replacement for these groups such as cutting positions or holding positions open for a period of time are typically necessary.

PARS is proud to have worked with California Community College Districts on Early Retirement Incentive Plans for over 30 years and a long-time partner with ACHRO-EEO. PARS also offers the Pension Rate Stabilization Program in partnership with Community College League of California, the OPEB (Retiree Healthcare) Prefunding Trust and Alternative to Social Security Programs. We look forward to seeing you at the ACHRO-EEO Conference in Garden Grove in October.


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COMMUNITY COLLEGE HUMAN RESOURCES FROM A FORMER LEADERS PERSPECTIVE

Donald F. Averill, Owner Emeritus
PPL Inc.

This coming January, I will celebrate my eightieth birthdays and fifty-seven years of serving some level of education. It is time to explore other opportunities and spend time with my bride, also of fifty-seven years. My status with PPL Inc has changed to Owner Emeritus and I will be taking on the task of maintaining the company database and providing a few consulting services to the company. Lisa Sugimoto has joined PPL as a new owner and will be serving our clients in the future.

As I withdraw from the community college scene and particularly my interaction over the years with the human resources field, I thought I would reflect on a few observations about our growing field. Human resource management has evolved tremendously over the years, but particularly in the last thirty years.

When I entered the field of education in 1960 as a secondary teacher, education in California did not know the term collective bargaining. Human Resources existed in the K-12 and in a few community colleges particularly where the districts were part of the merit system for classified employees.

I started my career in the community colleges in 1977 serving the Coast Community College District as a Vice Chancellor. In 1985, I moved to Glendale College and it was while I was at Glendale that I started my work in human resources. At that time, Glendale College was a “Merit System” district for its classified employees and the administrative structure for the certificated employees was spread among several certificated administrators. Much to my surprise I found that this model existed in many districts and particularly the small districts.

Glendale CCD faced a challenge when its merit system director, after an accreditation visit in which she was highly criticized, had the Merit System Board notify the Superintendent she could not provide services to the certificated employees. My Superintendent asked me to take on the administration of certificated staff and that was my start in human resources. The classified staff later challenged the status of the Merit System and selected to withdraw from the system. I ended up charged with the task of running the election that passed with a 78 percent vote. At this time, I became the Chief Human Resources administrator for both classified and certificated employees.

Fortunately, the human resources network, particularly in the southern section was very active and very supportive of new members. I was able to fall back on the support of folks like Patricia Molica, John Renley, Ed Bush and other members of the Southern 30’s Information Exchange. Over the next few years I grew with those members and took on leadership in Southern 30’s and as the Vice President of the ACCCA Human Resources Commission. By necessity, I had to learn the system inside and out and this began the effort to focus on the needs of human resources leadership and development on the state level.

Following the major changes in education management brought about by the Gann Initiative of 1978 and AB 1725 in 1989, all the administrative ranks were finding a need to collaborate and provide an active role at the state level. When the Chancellor of the Community College System established the Consultation Council those of us at the human resources level found ourselves outside looking in. When we attempted to get admission to that body, we found that we had no professional association to align with the other administrative professional groups.

Several of us took the action to develop the first human resources professional association and we were able to finally give ourselves a place at the table. This is the group that finally became ACHRO/EEO.

(continued on page 31)

In the early days, most of the community colleges had human resources reporting as part of administrative services and,as today, the scope of those working under the CalSTRS and the CalPERS retirement systems was all over the board. We still had several districts that had not entered collective bargaining with their employees and were operating under the Winton Act of "Meet and Confer." These operations have now evolved into a complicated structure with the human resources office providing leadership for the employment structure of the districts. The next major political action came under Grey Davis when the State of California was made a closed shop union structure for all public employees. This and the expansion of diversity concerns, equal employment oversight and changes in collective bargaining have made the field much more complicated and one in which an old vocational administrator may not have been able to survive.

My career took a new twist in 1996 when I became the Superintendent/President of Palo Verde College. Over the years there have only been a hand-full of human resources administrators that have been able to make the transition into the CEO Ranks. A few years later I became the Chancellor of the San Bernardino CCD where I ended my career in public education. I retired from public education in 2008.

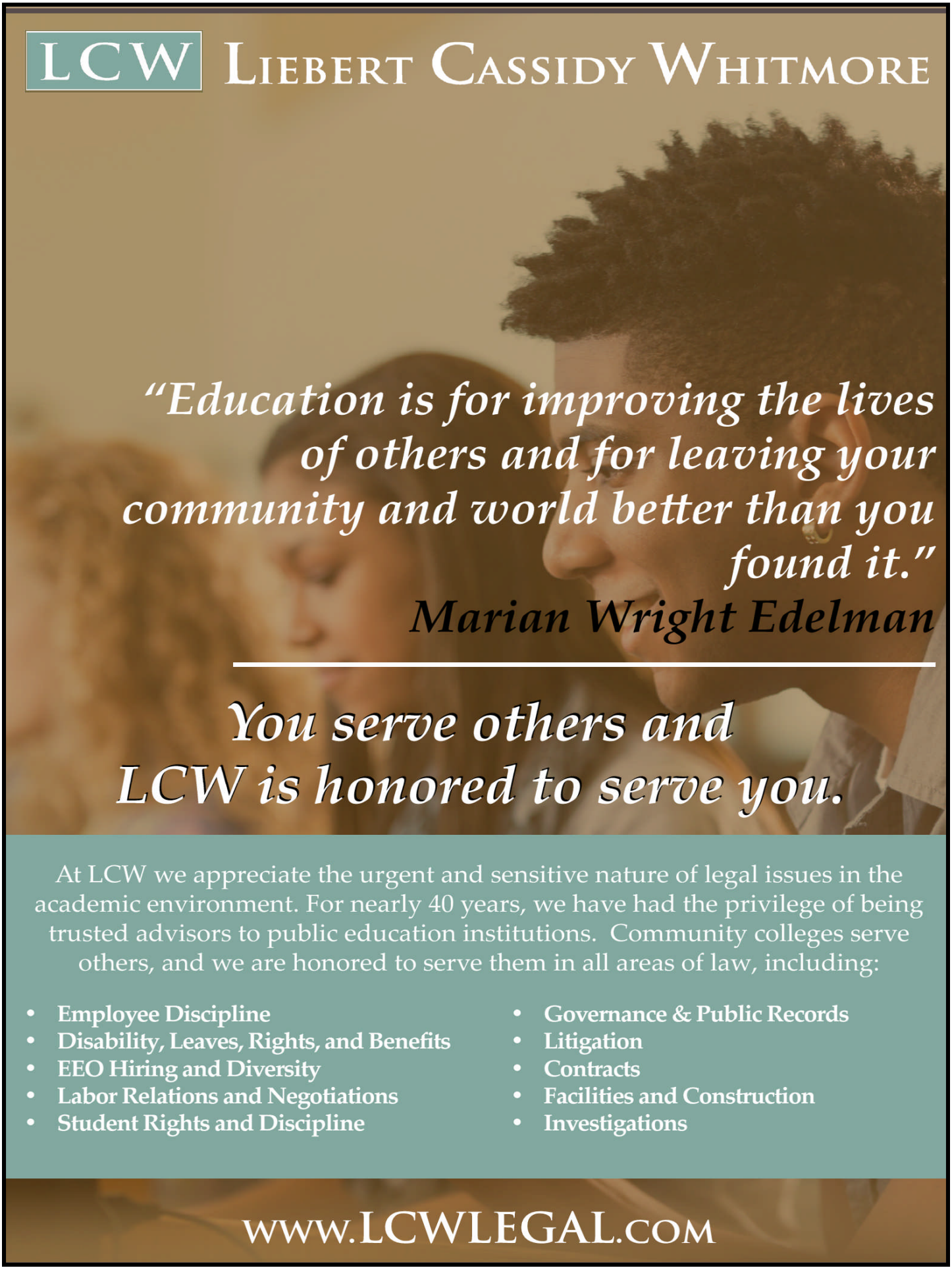
A short time later the PPL Team invited me to become an owner at PPL and asked me to assist in building its southern California business. PPL originally was a temporary employment company that placed executive management team members into interim employment. They became a search firm in the 1990's and when I joined them they were starting to build their educational consulting services. I became President of the Company from 2012 until 2016. During my term with PPL, the community colleges had to address pension reform, challenges to retirement status of some members in management positions considered to be classified management positions, and the beginning of the retirements of the "baby boomers."

Our company and the professional associations of ACCCA and ACHRO all were dealing with impact of these challenges and PPL was proud to be a part of that action. PPL is more focused on the search business in California and our consulting services are expanding, as interim work has diminished. However, interim work is an important aspect of the employment needs all community colleges.

I will be continuing to do writing in the field and press to seek some parity for retirees working under the CalPERS and CalSTRS retirement systems. There is a need to provide parity in earning limits between the two retirement systems and attention will continue to be needed to address changes in retirement requirements that may impact retirees. PPL has maintained a vanguard over retirement needs and provides a communications base for retirees in the company webpage.

ACHRO has also grown in its services to the growing needs for staff development, information exchange, and other services and this has enabled the community college human resource managers to gain access to support and opportunity to be heard as an important member of the community college administrative organization. My heart is out to all of you that work in this field and continually work to improve the support we give to the employees, administration, and students of community colleges.

While I will be fading into the shadows from day-to-day exposure, I will want to stay in touch and have the opportunity to address human resources issues particularly as they impact our retirement community.



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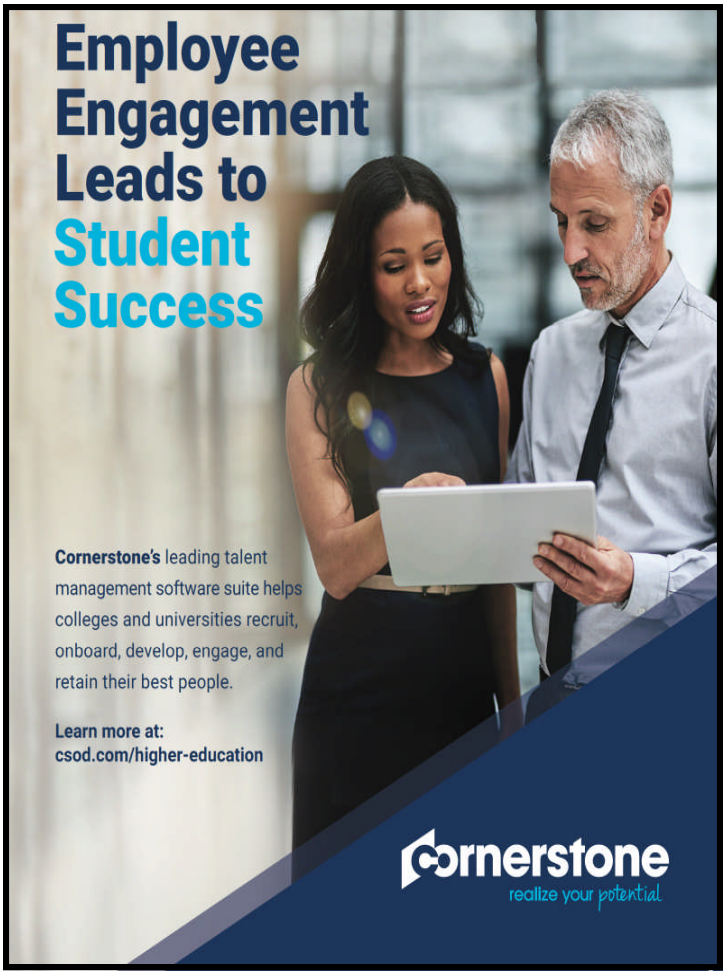

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Using Analytics Effectively to Save on Recruitment Advertising

by Michael Ang, JobElephant

Applicant Tracking Systems (ATS), have been developed to streamline the recruitment process and provide recruitment managers with powerful insights to maximize recruitment efficiency. To help achieve this, recruitment managers often include a question on the application asking the applicant where he/she heard about the job, and then provide a limited list of options for the applicant to choose from, such as the following:

1. How did you hear about this employment opportunity?
   - UNC Charlotte Website
   - The Placement Exchange (TPE)
   - StudentAffairs.com
   - Another Website (please list in box below)
   - Personal Referral
   - Other (please list in box below)

While well intentioned, this method of tracking is often highly inaccurate. A study described in an industry white paper by Jake Firth reported ATS Sourcing Data to be 83% Inaccurate. (1) http://www.interbiznet.com/ern/archives/ATS_Sourcing_Whitepaper.pdf Why?

The biggest reason is because questions such as these are based on self-report, which can be subject to a great deal of bias and inaccuracy. For example, applicants may select the option they think the employer most wants to hear, such as the employer's website. In this case, if there is a sufficient amount of inaccurate data supporting the employer's website as the source of the majority of applicants, the recruitment manager may erroneously believe that advertising externally is unnecessary. Furthermore, job seekers often search more than one site and may simply not remember which one led them to the job posting in question.

In addition to the pitfalls of self-report, providing a limited set of answers to choose from may lead to inaccurate data because the options provided are often not exhaustive. For example, search engines (such as Google) and aggregators (such as Indeed) drive the majority of the applicants to any given job board, however they may not be listed as options, as in the example above. In addition, job boards cross-post to multiple domains, email blasts, and social media pages to pique the applicant's interest, but again, as in the example above, they may not be listed as options. In an attempt to overcome this a text box may be included to allow the applicant to enter a source not listed as an option; however, the applicant may leave it blank or may enter an incorrect source.

To optimize media planning and budgeting decisions, the most effective practice is to track applicant media usage objectively and anonymously. JobElephant's AppTrkr.com is one such solution as it creates a unique, short URL specific to the media source. For example, a job seeker finds the job on HigherEdJobs.com and clicks to apply. A click is recorded, crediting the media source. Clicks are the primary advertising unit of the internet. It allows for an objective, more accurate return on investment (ROI) analysis based upon Cost Per Click, rather than relying on subjective data provided by the applicant.

Below is a sample report from AppTrkr.com which compares the number of views (candidates read/view the posting on a site) to the number of candidates that click to apply. Some sites have more clicks than views because they are redistributing the job to other social media sources (e.g. Indeed, Twitter) with minimal information (as opposed to the full listing) and a direct link to the employer's ATS for the applicant to apply.

(continued on page 37)

Using objective data such as this in combination with the cost of advertising allows recruitment managers to easily calculate the ROI and accurately inform their media planning and budgeting decisions to maximize the effectiveness and efficiency of their recruitment strategy.

Publication	Job Title	Views	Clicks
ScienceCareers.org	Instructor of Chemistry, Physics, or Engineering	0	110
ChronicleVitae.com	Instructor of Chemistry, Physics, or Engineering	132	44
CommunityColleges.AcademicKeys.com	Instructor of Chemistry, Physics, or Engineering	0	14
AIP.org	Instructor of Chemistry, Physics, or Engineering	655	107
IEEE.org	Instructor of Chemistry, Physics, or Engineering	21	3
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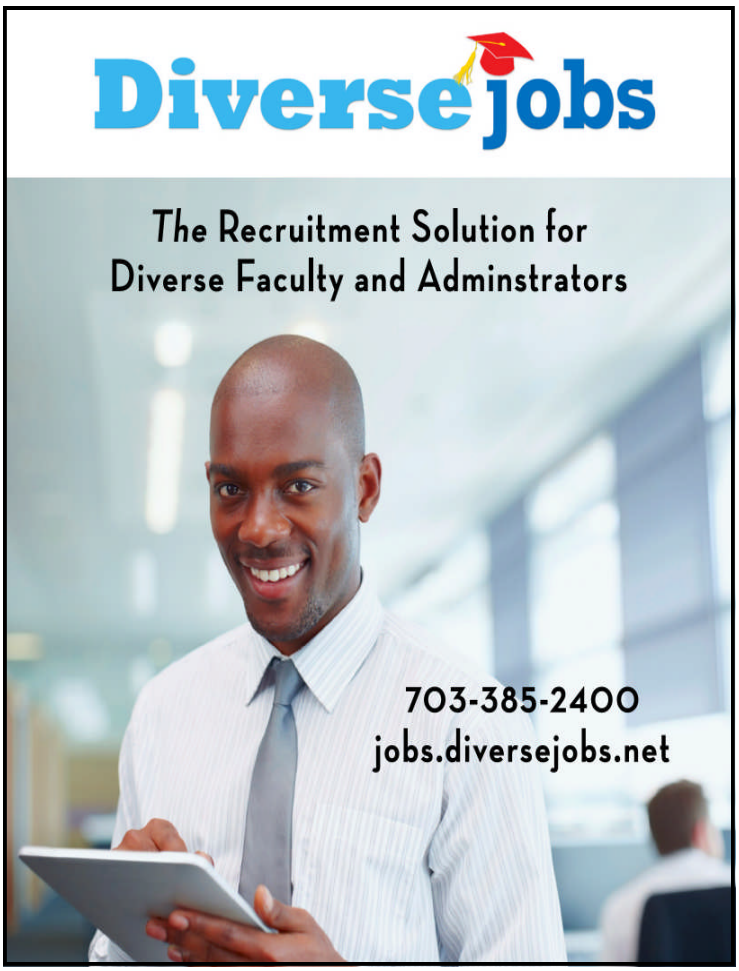
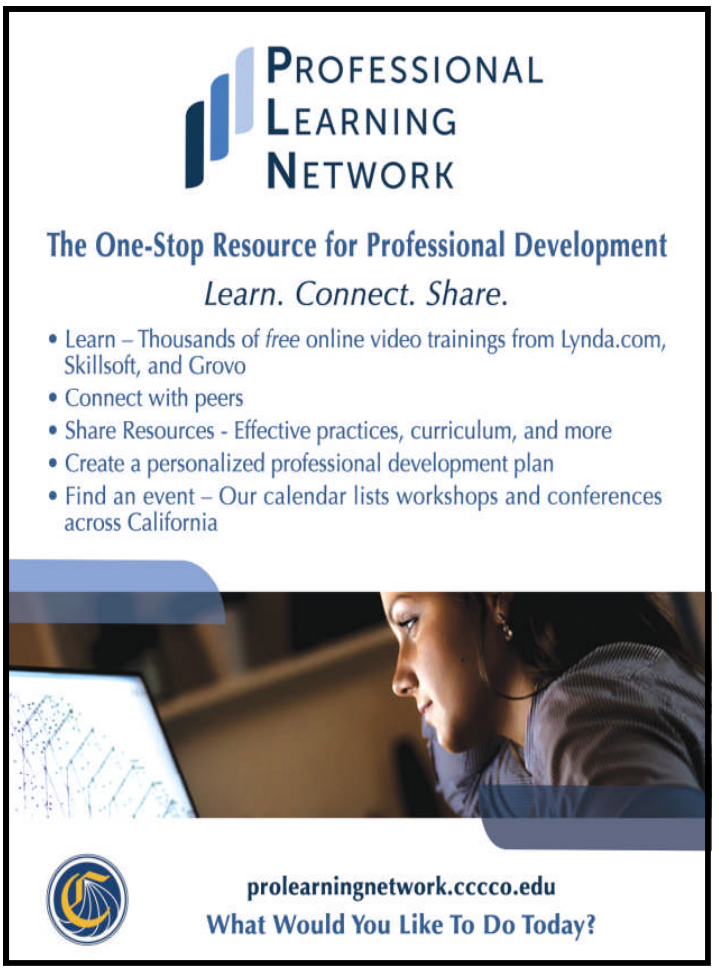
EngineeringInHigherEd.com	Instructor of Chemistry, Physics, or Engineering	3	35
DiversityinSTEM.com	Instructor of Chemistry, Physics, or Engineering	4	22
ChicanosAndNativeAmericansinScience.com	Instructor of Chemistry, Physics, or Engineering	155	38
BlackChemistJobs.com	Instructor of Chemistry, Physics, or Engineering	2	6





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CalPERS Announces New Disability Retirement Mandates and Local Agency Audits

By Eileen O'Hare-Anderson

Just when you thought that you mastered the cumbersome and confusing process of disability retirement, the California Public Employees' Retirement System (CalPERS) has recently published a Circular Letter with new and additional mandates.

CalPERS has now underscored the importance of the mandates described in the Letter by announcing that it will be auditing the industrial disability retirement (IDR) process for 60 contracting agencies. It is our understanding that the scope of the audit will include requesting medical records to assess the validity of IDR claims and seeking disclosure of safety officer personnel records to ensure legal compliance. In addition, CalPERS indicates it will audit whether local agencies who granted IDR to members younger than 50 are re-evaluating whether those members are still eligible for IDR.

While local agencies are likely familiar with some of the requirements described in the Letter, we highlight here those stated requirements that are new or little known to local agencies. In addition, although many local agencies do not have a formal agency policy that sets forth the procedures for their disability and industrial disability retirement determinations process, agencies should strongly consider adopting such a policy in light of the due process concerns related to the separation process and CalPERS' direction that such a policy is necessary.

Duty to Provide Relevant Personnel and Medical Records

According to CalPERS an employer must forward all relevant personnel documents and medical records to CalPERS, and obtain CalPERS' determination that the member is eligible to apply for disability retirement before an employer starts the process of a disability determination in any of the following circumstances:

- Disciplinary process underway prior to the member's separation from employment.
- The member was terminated for cause.
- The member resigned in lieu of termination.
- The member signed an agreement to waive his or her reinstatement right as part of a legal settlement (i.e., Employment Reinstatement Waiver).
- The member has been convicted of or is being investigated for a work-related felony.

Evidence of Continuous Disability

A qualifying disability must be permanent or "extended and uncertain." CalPERS indicates that "extended and uncertain" means the disability will last at least 12 consecutive months from the date of the application. In the past, CalPERS used an unofficial six-month measurement.

CalPERS will require medical records of the members' physical or mental incapacity to perform the duties of their position, from one year before their last day of physical work to the present, in order to establish a continuous disability. There must be medical evidence from the last day of physical work to the present, with no gaps in the medical treatment of more than six months.

Confirmation of a Permanent and Stationary Date for Industrial Disability Retirement

If an industrial disability retirement was preceded by a workers' compensation claim wherein there was a dispute concerning the date on which the member became permanent and stationary, the employer or member must now make a "Petition for Finding of Fact" before the Workers' Compensation Appeals Board (WCAB). The WCAB must certify the date on which the member's condition became permanent and stationary. This date then becomes the effective date of the member's retirement.

(continued on page 39)

The problem will inevitably arise, however, that members who otherwise qualify for an industrial disability retirement may be denied an IDR if the member has not been found permanent and stationary by the qualified or agreed-upon medical examiner. In some cases, a member's workers' compensation case may go on for years. This means employers may find themselves providing advanced disability pension payments for much greater periods of time.

Duty to Re-Evaluate Disability Retirees

The Circular Letter also requires that a contracting agency conducts regular re-evaluations of determinations for disability retirees who are under voluntary service retirement age. The purpose "is to verify whether the recipient remains physically or mentally disabled from the position which they disability retired for the condition(s) that they were approved for."

How This Affects Your Agency

A. Disclosure of Peace Officer Personnel Records

CalPERS has and will continue to demand the disclosure of peace officer personnel records to determine a member's eligibility for disability retirement if the officer was terminated or discipline is pending. But Penal Code section 832.7 establishes that peace officer personnel records (or information obtained therefrom) are confidential and may not be disclosed in any criminal or civil proceeding without the peace officers written consent or a *Pitchess* motion (the discovery procedure required to access peace officer personnel records). Thus, there is a potential conflict between CalPERS' right to these records under the Government Code and the prescribed discovery procedures required under *Pitchess*.

Agencies should avoid unilaterally disclosing peace officer records without first notifying the officer concerning the request and obtaining his or her consent/waiver in writing. If the officer decides not to provide consent to disclosure, the agency should consult with legal counsel.

B. Disclosure of Medical Records

Under California's Confidentiality of Medical Information Act (CMIA), an employer is generally prohibited from using, disclosing, or knowingly permitting its employees or agents to use or disclose medical information pertaining to an employee unless the employer first obtains written authorization from the employee. There are several important exceptions to the requirement for written authorization. For example, medical information may be used in a lawsuit, arbitration, grievance, or other claim or challenge to which the employer and employee are parties and in which the employee has placed in issue his or her medical history, mental or physical condition, or treatment. In addition, medical information may be used exclusively for purposes of administering and maintaining employee benefit plans, including healthcare plans and plans providing short-term and long-term disability income, and workers' compensation. Accordingly, when an employee applies for disability retirement and CalPERS is administering disability benefits for the employee, an authorization may not be required under the CMIA. Nonetheless, agencies should seek consent with a written waiver and authorization for release of the medical records.

The Health Insurance Portability and Accountability Act (HIPAA) privacy rule applies to covered entities: health plans, health care clearinghouses or health care providers conducting certain health care transactions electronically. Also affected by HIPAA are hybrid entities whose business activities include both covered and non-covered functions and health plan sponsors.

CalPERS maintains that member consent and a HIPAA release are not required because it is not a covered agency. However, agencies should be careful not to unilaterally disclose medical records to CalPERS without first notifying the employee and obtaining written consent.

C. Duty to Re-Evaluate Retirees

CalPERS will require all contracting agencies to periodically re-evaluate retirees who are under the volyuntary service retirement age of 50 years old. If an agency chooses not to re-evaluate, CalPERS can re-evaluate a retiree on its own.

(continued on page 40)

Although CalPERS asks agencies to re-evaluate disability retirees, neither CalPERS nor the Government Code requires the employer to hire back the retiree if he/she is found to no longer qualify for a disability retirement.

Districts should note the issues discussed here highlight only some of the portions of the CalPERS Circular Letter. Please consult with legal counsel to fully assess how this Letter may apply to your district and to make an appropriate response to any CalPERS audit. As noted above, districts should strongly consider adopting an agency policy that sets forth the procedures for the disability and industrial disability retirement determination process in light of the due process concerns related to the separation process and CalPERS' direction that such a policy is necessary.

Eileen O'Hare-Anderson is a Partner in the Fresno office of Liebert Cassidy Whitmore and has an extensive background serving community college districts. She represents and advises districts in a general counsel role, in all phases of education-related matters, including general business issues. Eileen can be reached at eanderson@lcwlegal.com.

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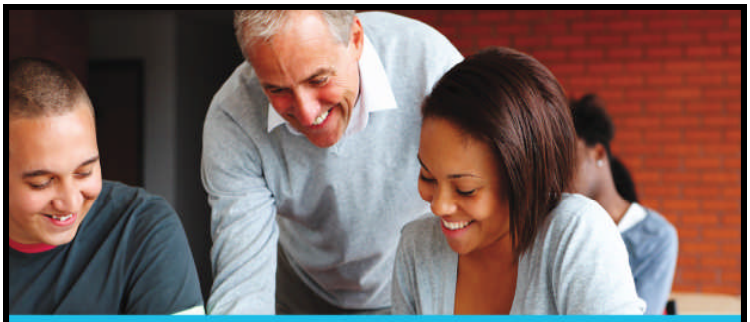

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