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ASSOCIATION OF CHIEF BUSINESS OFFICIALS (ACBO) SPRING CONFERENCE

Emerging from the COVID-19 Pandemic: What Campus May Look Like in the Fall and What Districts Should Do to Prepare

5/18/2021

PRESENTED BY:

Meredith Karasch & Alysha Stein-
Manes

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Polling: Important Question

Do you think pineapple belongs on pizza?

- a) Yes, it definitely! Adds a bit of sweet to the savory.
- b) No, why would you do that to pizza?
- c) I can take it or leave it.

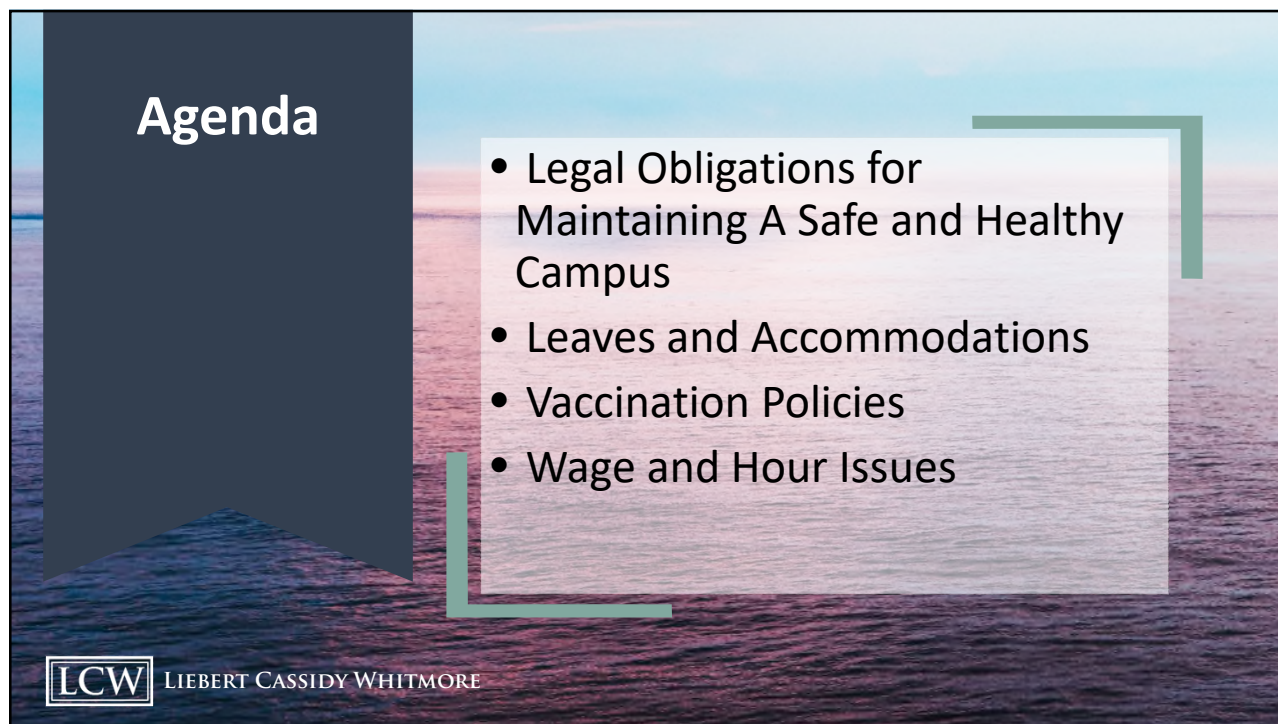


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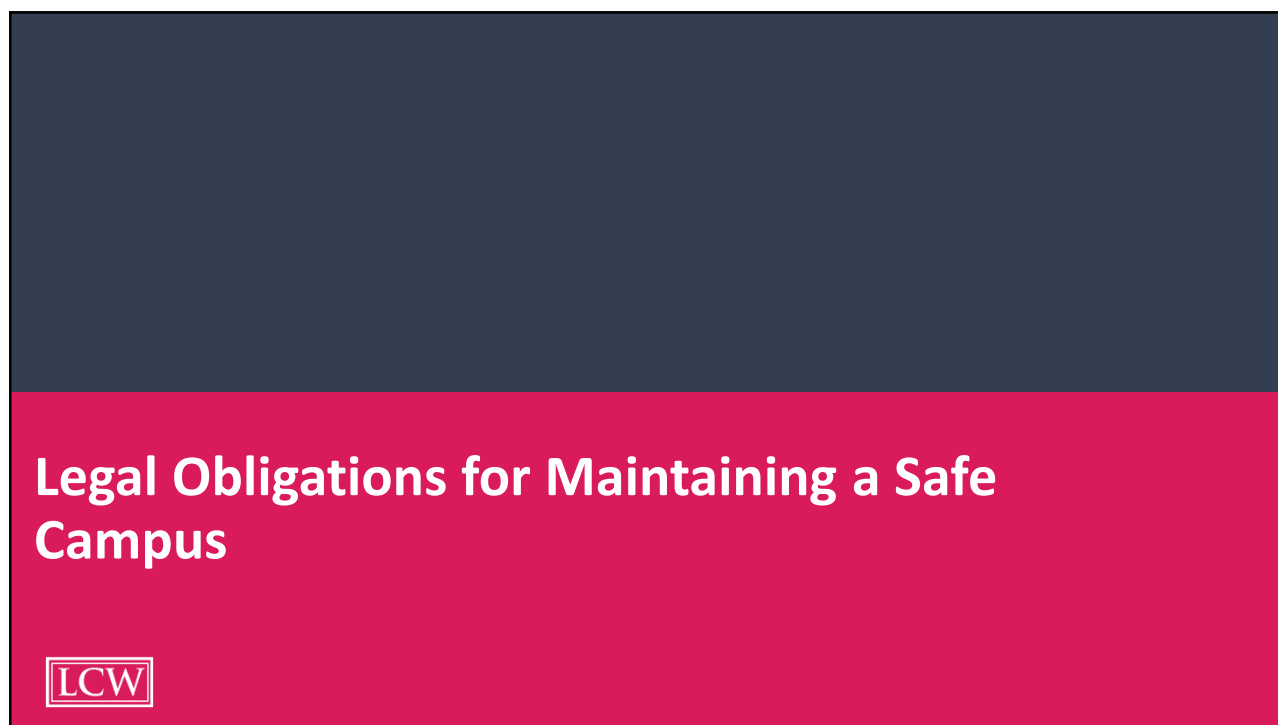
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Agenda

- Legal Obligations for Maintaining A Safe and Healthy Campus
- Leaves and Accommodations
- Vaccination Policies
- Wage and Hour Issues

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Legal Obligations for Maintaining a Safe Campus

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Polling Question: Can You Reopen?

- Governor and Local orders determine **when** district may reopen
- Chancellor's Office Guidance: <https://www.cccco.edu/-/media/CCCCO-Website/Files/Communications/COVID-19/report-of-the-safe-campus-reopening-workgroup.pdf?la=en&hash=0DB97AFA93FDFB0E5CFDF1F1277C8A3B3B3277A2>
- CDC Guidance for administrators: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-ihe-response.html>



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General Prevention and Safety Measures

- Cal/OSHA COVID-19 Prevention Plan (8 C.C.R § 3205)
 - Provide COVID-19 training
 - Provide testing to employees exposed to a COVID-19 case
 - Exclusion of COVID-19 cases
 - Return to work criteria
 - Maintain records and report to Cal/OSHA and the local health department
- <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html#prevention>



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Leaves and Accommodations



Available Leaves

- Leave Options
 - Supplemental Paid Sick Leave (Senate Bill 95)
 - Ed Code/CBA
 - FMLA/CFRA
 - OSHA isolation/quarantine leave
 - Administrative Leave and Negative Leave Accrual



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Overview of the Supplemental Paid Sick Leave Law

- Key provisions of Senate Bill (“SB”) 95 (Labor Code § 248.2)
 - Scope
 - Effective period
 - Retroactive to January 1, 2021
 - Employer obligations
 - Covered employers must provide qualified employees COVID-19 Supplemental Paid Sick Leave
 - Qualifying reasons for employees to receive paid sick leave
 - Seven (7) qualifying reasons for paid sick leave largely align with those for expanded EPSL
 - Employee benefits
 - Leaves
 - Compensation



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SPSL Interactions with Tax Credits and HEERF Fund

- Implications of SB 95 Obligations and their Interactions with ARPA Tax Credits
 - Two principle areas of divergence
 1. Different effective periods
 2. Non-coextensive qualifying reasons for employees to receive paid sick leave
- HEERF Fund Payments as a Backstop



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Polling Question: Accommodations

Who **MUST** the District Accommodate?

- a) Employees with child care problems due to COVID
- b) Employees who live with high risk people
- c) Employees who are at high risk
- d) Employees who are scared of returning to work
- e) All of the above



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Managing Accommodations Issues: What is a Reasonable Accommodation?

- What is a reasonable accommodation?
 - Any change or adjustment to a job or work environment that permits a qualified employee with a disability to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities
- Examples of COVID-19-related reasonable accommodations? Teleworking
 - Job restructuring
 - Part-time or modified work schedules
 - Reassignment to a vacant position
 - Making the workplace readily accessible and usable
- Employers do not have to provide accommodations that would cause an “undue hardship”
 - Fact-specific inquiry
 - Pandemic may affect what constitutes an undue hardship



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Considerations for Telework as an Accommodation

- Districts may allow employees to telework as an accommodation
 - It will be difficult to deny
- Districts that permit telework should:
 - Have a Telework Policy in place
 - Consider which employees can continue to telework
 - Have employees sign a Telework Agreement



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Managing Accommodations Issues: How Should an Employer Respond?

- Consider the basis of the employee's request for accommodation:
 - Health conditions identified by CDC
 - Other factors identified by CDC
 - Fear of return to work
 - Other individual's health condition or other factor identified by CDC
- Should likely engage in the interactive process even if employee's request is not based strictly on health condition
 - Policy decision
 - Risk reduction/management implications
- Consider reasonableness of accommodation
 - Teleworking may be more reasonable given employees' teleworking during shutdown



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Accommodating Students

- Students in high-risk categories
- Students living with a family member or other individual in a high-risk category
- Students who are scared to return to school



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Vaccination Policies



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Polling Question: To Mandate or Not to Mandate?

- Can the district mandate that employees or student get vaccinated?
- Should the district mandate that employees or students be vaccinated?
- Should the district track whether employees or students are vaccinated?



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Legal Issues and Laws Implicated – Overview of Federal and State Laws

- Constitutionality of government-mandated vaccinations
- Permissibility of employer-mandated vaccinations
 - Employer authority and employee entitlements
 - Americans with Disabilities Act (“ADA”)
 - Title VII of the Civil Rights Act of 1964 (“Title VII”)
 - Food, Drug & Cosmetic Act (“FD&C Act”)
 - Fair Employment and Housing Act (“FEHA”)
 - Confidentiality of Medical Information Act
 - Bargaining obligations (Education Employment Relations Act)



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Employer Authority and Obligations

- Obligation to provide for healthy and safe workplace
- Authority to require vaccinations
 - Job-relatedness and consistency with business necessity
 - Direct threat standard
 1. Duration of the risk;
 2. Nature and severity of the potential harm;
 3. Likelihood that potential harm will occur; and
 4. Imminence of the potential harm.
- Obligation to engage qualified employees in an accommodations process
- Authority to refuse requested accommodations that would either:
 1. Pose a threat to the health and safety of the employee or other employees; or
 2. Impose an undue hardship on the employer.



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Employee Entitlements

- Employees are entitled to refuse vaccination
 - There are three (3) statutory bases upon which employees may refuse vaccination:
 1. Qualified disability under the ADA/FEHA
 2. Sincerely held religious belief under Title VII/FEHA
 3. Objection to administration of emergency use vaccine under the FD&C Act
- Employees are *not* entitled an accommodation if such accommodation would either:
 1. Pose a threat to the health and safety of the employee or other employees; or
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Accommodations/Exemptions from Vaccination

- Determining an employee's qualification for accommodation
 - Employer may request supporting information
 - Certification regarding employee's disability from health care provider under the ADA
 - Supporting information regarding employee's religiosity under Title VII
 - No additional information required under the FD&C Act
- Determining the reasonableness of accommodation requested
 - Engage employee in an individualized process to understand limitations and requested accommodation(s)
 - Accommodation must be reasonable
 - Must *not* present undue hardship to employer
 - Must *not* pose threat to health and safety of employee, other employees or the workplace
- Accommodations for employees who exercise rights under the FD&C Act



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Bargaining Obligations

- Obligation to bargain subjects that affect the term and conditions of employment
 - Mandatory subjects include those related to employee health and safety
 - COVID-19 vaccination requirements are very likely a mandatory subject
 - Vaccination requirements implicate the health and safety of both:
 - The employees who are subject to vaccination; and
 - Those employees who may not be subject to vaccination, but who work at the employer's workplace
- Limited exceptions to bargaining obligations are untested
 - Matters outside the scope of representation
 - Emergency exception likely inapplicable



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Wage and Hour Issues



Controlling Wage and Hour Costs

- Wage and hour claims:
 - Fair Labor Standards Act (“FLSA”)
 - Education code
- District must pay for all work it knew or had reason to know of
 - Actual knowledge
 - Constructive knowledge



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Effectively Managing Employee Costs: Underpayment of Teleworking Employees

Strategies to control costs and reduce the risk of wage and hour claims

- Establish timekeeping and reporting policy
- Establish overtime policy
- Establish written record and enforce expectations



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Underpayment of Classified Employees Returning to Work

A district that requires temperature testing and symptom screening for employees prior to or after entering the workplace likely must compensate employees for time spent being tested.

- Temperature testing is a medical test
- Temperature testing is done on the premises at the district's direction



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Residency Requirements vs. Job Standards

- Constitutional considerations
 - Federal Constitution guarantees right to travel
 - Equal protection clause
 - Privileges & immunities clause of Article IV, § 2
 - 5th Amendment due process
 - Makes residency requirements suspect
 - Standard court will use to review = strict scrutiny
 - Compelling governmental interest
 - Narrowly tailored
- Distinguish residency requirements from job standards
 - Proximity to work
 - Face-to-face/on-campus duties or expectations of the position



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Presumption Against Extraterritoriality

Presumption that state employment laws do not apply outside of California unless clearly expressed or reasonably implied by the language or purpose of the statute.

Sarviss v. Gen. Dynamic Info. Tech., Inc. (C.D. Cal. 2009) 633 F.Supp.2d 883.



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Considerations for Out-of-State Work

- Employment laws, e.g. Fair Employment and House Act (FEHA) protections
 - Primary factors to consider:
 - Where the work was performed
 - Where the “injury” occurred
- Taxes
- Workers’ compensation
 - Labor Code §§ 5305, 3600.5
- Language of employment contract (if any) or CBA



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Reimbursable Expenses for Teleworking Employees

- District must reimburse employees for necessary expenses
- Education Code § 87032 requires reimbursement for “actual and necessary expenses”:
 - Incurred in the course of performing services for the district
 - Whether within or outside the district
 - Under the direction of the governing board



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Thank You!

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