

Emerging Legal Issues for Camp Directors

Association of Camps (ACA) Business
of Camps Seminar |
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Agenda

- Criminal Background Checks
- Mandated Reporting
- Marijuana related issues
- Discrimination and Harassment
- Wage and Hour laws
- Other Legal Updates

Criminal Background Checks

Criminal Background Checks: Generally

- Camps Are Required To Conduct Criminal Background Checks Of All Employees And Volunteers Before Those Employees Or Volunteers Are Permitted To Have Supervisory Or Disciplinary Power Over A Minor.
 - Penal Code § 11105.3
- All Counselors And Directors Also Required To Pass Criminal Background Checks Before Having Contact With Minors.
 - 17 Cal. Code. Regulations § 30751

Criminal Background Checks: Limitations

- California Law Prohibits Employers:
 - From Asking About An Arrest Or Detention That Did Not Result In A Conviction. (Labor Code § 432.7(a))
 - From Considering Convictions Any Non-Felony Conviction For Possession Of Marijuana That Is Older Than Two Years. (Labor Code § 432.8; New DFEH Regulations)
 - From Considering A Plea Or Conviction That Has Been Expunged, Judicially Dismissed Or Ordered Sealed, Pursuant To Labor Code § 432.7, Unless Otherwise Required By Law.

Criminal Background Checks: DFEH Regulations

- New Regulations, Effective Since July 1, 2017, Issued By The Department Of Fair Employment And Housing:
 - If An Employer’s Criminal Background Screening Policy Has An Adverse Impact On A Protected Class, Employer Must Show That Its Policy For Considering Criminal History Information Is Job-Related And Consistent With Business Necessity.
 - Employer Must Provide Candidate Notice Of The Disqualifying Conviction And Provide Him Or Her With A Reasonable Opportunity To Present Evidence That The Conviction Information Is Factually Inaccurate.

Criminal Background Checks: New Legislation

- AB 1008, Effective January 1, 2018, Referred To As The “Ban The Box Law”:
 - Does Not Apply To Most Camp Positions. This Law Exempts Any Position Where An Employer Is Required By Law To Conduct Criminal Background Checks For Employment Purposes Or To Restrict Employment Based On Criminal History.
- For Applicable Positions, This Law:
 - Prohibits Employers From Including On Any Application For Employment Any Question That Seeks The Disclosure Of An Applicant’s Conviction History Until That Applicant Has Received A Conditional Offer.
 - Requires An Individualized Assessment Where Conviction History Exists, As Well As The Opportunity For An Applicant To Respond To An Initial Determination Of An Employer To Deny Employment Based On Conviction History.

Criminal Background Checks: Local Ordinance

- New Ordinance in City of Los Angeles (Similar to AB 1008) Prohibits Employers from Requesting Information Regarding Convictions Until After Conditional Job Offer Is Made.
 - Also Does Not Apply To Most Camp Positions. Exempts Positions Where The Employer Is Required By Law To Conduct Criminal Background Checks.
 - *Los Angeles Municipal Code, Chapter XVIII, Article 9.*

Mandated Reporting

Who Is A Mandated Reporter?

- Camp Counselors
- Camp Directors
- Camp Administrators
- What About:
 - Volunteers?
 - No
 - Independent Contractors?
 - Maybe

Informing Employees of Reporting Duties

- Employers Must Make Employees Who Are Mandated Reporters Aware Of Their Obligations As A Mandated Reporter.
- Acknowledgement Form Is Required.
- Training Strongly Recommended.
 - But Lack Of Training Is No Excuse For A Failure To Report!

When Is a Mandated Reporter Required to Make a Report?

- When The Mandated Reporter, In His Or Her Professional Capacity Or Within The Course And Scope Of Employment, Reasonably Suspects Child Abuse Or Neglect.
 - There Is No Duty To Investigate Or Confirm Actual Abuse.
 - Child Abuse Includes Physical, Sexual, And Emotional Abuse, And Neglect.
 - Oral Report To CPS Must Be Made Immediately, And Written Report Within 36 Hours.

“Reasonable Suspicion”

Standard

- Objectively Reasonable, Based On Facts
- A Reasonable Person In A Like Position
- Drawing On Training And Experience
- Suspects Child Abuse Or Neglect

Reasonable Suspicion of Child Abuse

- A Mandated Report Should Be Made In All Of The Following Situations:
 - A Camper Under 18 Alleges That He/She Was Sexually Or Physically Assaulted By Another Camper.
 - A Camper Under 18 Alleges That He/She Was Sexually Or Physically Assaulted By A Camp Employee.
 - A Camper Under 18 Informs Anyone At The Camp That He/She Was Sexually Or Physically Assaulted By Anyone.

New Case: Mandated Reporting

- “Sexting” Between Minors Not Protected From Mandated Reporting Requirements.
 - *Mathews v. Harris* (2017) 7 Cal.App.5th 334.

Harassment/Discrimination

Sources of Law

- Title VII of the 1964 Civil Rights Act
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- California Fair Employment and Housing Act
- Unruh Civil Rights Act
- IRS Form 557
- Your Camp's Policy against Harassment, Discrimination and Retaliation

Protected Classifications

- Sex/Gender (incl. gender identity, gender expression, transgender)
- Race/National Origin/Color
- Disability/Medical Condition
- Genetic Information/Characteristics
- Religious Creed
- Marital Status
- Military and Veteran Status
- Age
- Sexual Orientation
- Opposition to Harassment
- Association/Perception

Protected Classifications: Transgender Issues

- New Regulations Effective as of July 1, 2017 Expand Protections for Employees on Basis of Gender Identity and Expression.
 - <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/FinalTextRegTransgenderIdExpression.pdf>.

Two Types of Harassment

- Quid Pro Quo
 - Job Benefits Promised
 - Explicit Or Implicit
 - In Exchange For Sexual Favors Or Denied If Sexual Favors Are Not Given
- Hostile Work Environment
 - Verbal, Visual Or Physical Conduct
 - Based On Protected Classification
 - Objectively And Subjectively Offensive (Unwelcome)
 - Severe **Or** Pervasive
 - Unreasonably Interferes With Work

New Cases: Hostile Work Environment

- Unwelcome Hugs for Female Employee Could Create a Hostile Environment Where Behavior Was Pervasive.
 - *Zetwick v. County of Yolo* (2017) 850 F.3d 436.

New Cases: Sex Discrimination

- Termination of Pregnant Employee Is an Adverse Action Despite Being Rescinded Later.
 - *Shultz v. Congregation Shearith Israel* 2017 WL 3427130.

Supervisor's Duty to Respond

- Report Observed/Overheard Conduct
- Forward Complaints/Issues To Camp Director Or Management Promptly, Including:
 - Third-party Complaints
 - Verbal Complaints
 - Rumors

Remember:

The Word “*Harassment*” Need Not Be Used To Trigger A Supervisor’s Duty To Act

Harassment/Discrimination Policies

- April 2016 – DFEH Issues New Regulations On Requirements For Workplace Harassment Policies: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/CAamendedFEHAregsEmployers20160401Final.pdf>
- May 2017 - DFEH Issues Administrative Guidance On Workplace Harassment Policies: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide.pdf>

New Cases: Harassment Investigations

- School Might Have Acted Arbitrarily or Capriciously Where It Did Not Investigate Allegations of Bullying and Harassment.
 - *Diperna v. Chicago School of Professional Psychology* (2016) 222 F.Supp.3d 716.

New Cases: Investigations

- Statement by Board that Investigation Was Independent Was Subjective Opinion and Not Appropriate Basis for Defamation Claim.
 - *Charney v. Standard General, L.P.* (2017)
10 Cal.App.5th 149.

New Case: Ministerial Exception

- Ministerial Exception Bars Disability Discrimination Claim of Religious School Teacher.
 - *Grussgott v. Milwaukee Jewish Day School, Inc.*, (2017) WL 2345573.

New Case: Ministerial Exception

- Catholic School Principal Deemed a Minister Despite Being a Lay Employee.
 - *Fratello v. Archdiocese of New York and St. Anthony's School*, (2017) 863 F.3d 190.

New Case: First Amendment

- Supreme Court Rules that Religious School Cannot be Excluded from State Grant Program Based Solely on Religious Status.
 - *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) 137 S.Ct. 2012.

Grooming and Dress Code Policies

- Must Be Applied In A Non-discriminatory Manner.
- Transgender Employees Must Be Permitted To Dress Consistent With Their Gender Identity.
- Must Accommodate Religious Dress Unless They Impose An Undue Hardship.
 - What About Tattoos And Piercings?

Marijuana Laws and Issues

Camps Can Still Prohibit Marijuana Use

- Camps Can Still Prohibit Campers From Possessing And/Or Using Marijuana At Camp Or At Camp Sponsored Events.
- Even After Prop 64, It Is Still Illegal To:
 - Possess/Use Marijuana If Under Age 21.
 - Smoke Marijuana Within 1000 Feet Of A School, Youth Center, Or Daycare Center If Children Are Present.
 - Smoke/Use Marijuana On School, Youth Center, Or Daycare Center Grounds While Children Are Present.
- Camps Can Still Enforce Policies Against Marijuana Use On Camp By Its Employees.

Drug Testing Employees for Marijuana

- Can A Camp Require An Employee To Take A Drug Test? Yes, Where:
 - There Is Reasonable Suspicion That The Employee Is Under The Influence In The Workplace; And/Or
 - The Employee Holds A “Safety Sensitive” Position.
- Can A Camp Require Pre-employment Drug Screenings For Applicants?
 - There Must Be A Substantial And Important Need.

Marijuana Testing: Challenges

Enforcement Challenges

- Many Factors Impact Whether Someone Tests Positive For Marijuana, Including:
 - The Person's Individual Metabolism
 - Frequency Of Use
 - Amount Of Use
 - Type Of Test (Urine, Blood, Hair)
- Many Tests Cannot Determine *When* A Person Consumed Marijuana.

Camps Likely Cannot Prohibit Employees From Using Marijuana Off Duty

- Privacy Concerns
- Camps Should Generally Avoid Regulation Of Legal Off Duty Conduct Unless Detrimental Impact To The Camp Or Its Mission.

Wage and Hour Laws

Wage and Hour: New FLSA Salary Basis Test

- New FLSA “Salary Basis” Test Struck Down By Court:
 - Salary Basis Was Set To Rise To **\$913/Week (\$47,476/Year)** On A Regular Basis.
 - Current DOL Not In Support Of Obama-era Rule And Wants To Start From Scratch.
 - DOL May Now Seek To Increase Current Standard But To A Lower Amount Than Obama’s DOL Proposed.
 - CA Salary Basis Threshold (**\$43,680**) Still Higher Than Federal.

Wage and Hour

- California Minimum Wage Increased To \$10.50 On January 1, 2017; \$11 Per Hour On January 1, 2018, And An Additional \$1 Per Year Until It Reaches \$15 An Hour On January 1, 2022.
- Exception For Employers With 25 Or Fewer Employees.
- Local Minimum Wage May Be Higher.

Wage and Hour

- Meal and Rest Breaks:
 - Non-exempt Employees Are Entitled To An Unpaid 30 Minute Meal Break After 5 Hours Worked. Meal Must Begin No Later Than The Start Of The 6th Hour Of Employee's Shift. For 10 Hour Or Longer Shifts, A Second 30 Minute Meal Break Must Be Provided.
 - Non-exempt Employees Are Entitled To A Paid Ten Minute Rest Period For Every Four Hours They Work. If Shift Is Less Than 3.5 Hours, A Rest Break Is Not Required.
 - Employees Must Be Relieved Of All Duties For Meal And Rest Periods.
 - Employees Are Entitled To One Additional Hour Of Pay For Missed Meal Or Rest Periods.

Wage And Hour

- Landmark Case on Mandated Rest Breaks Holds Employees May Not Be On-Call During Rest Breaks.
 - *Augustus v. ABM Security Services*, (2016) 385 P.3d. 823.

Wage And Hour

- California Supreme Court Clarifies That Entitlement to One Day of Rest Every Seven Days Is Calculated on a Workweek Basis.
 - *Mendoza v. Nordstrom, Inc.*, (2017) 2 Cal.5th1074.

Seasonal Establishment Exemption

- Provides An Exemption From The FLSA's Minimum Wage And Overtime Provisions For Employees Of Amusement Or Recreational Establishments, Organized Camps, Or Religious Or Non-profit Educational Conference Centers If Either:
 - The Establishment Does Not Operate For More Than Seven Months In Any Calendar Year, Or
 - During The Preceding Calendar Year, The Establishment's Average Receipts For Any Six Months Were Not More Than 1/3rd Of Its Average Receipts For The Other Six Months Of The Year.

CA Exemption for Camp Counselors

- Student Employees, Camp Counselors And Program Counselors Are Exempt From California Minimum Wage And Overtime Requirements So Long As They Are Paid A Weekly Salary Of At Least 85% Of The Minimum Wage For A 40-hour Week.

Exceptions to the Exemptions for Camp Counselors

- Camp Counselors Are Exempt From The Daily Overtime Provisions Contained In Industrial Welfare Commission Wage Order 5 Provided They Do Not Work More Than 54 Hours And More Than 6 Days In A Workweek.
- In Case Of An Emergency, Organized Camp Counselors May Be Employed More Than 54 Hours Or 6 Days In A Workweek, Provided That They Are Compensated At Not Less Than 1.5 Times The Employee's Regular Rate Of Pay For All Hours Worked In Excess Of 54 Hours And 6 Days In The Workweek.

Other Recent Cases and Legislation

Parental Leave

- SB 63, the “New Parent Leave Act,” Expands CFRA Rights As Follows:
 - Employers With Less Than 50 But At Least 20 Employees Must Provide The Following Parental Leave For Employees With More Than 12 Months Of Service (And At Least 1250 Hours Of Service) With Employer:
 - To Take Up To 12 Weeks Of Leave To Bond With A New Child Within One Year Of The Child’s Birth, Adoption, Or Foster Care Placement.
 - Requires The DFEH To Implement A Parental Leave Mediation Program.

Background Checks/Applications

- AB 168, Effective January 1, 2018:
 - Adds Labor Code Section 432.3.
 - Prohibits An Employer From Seeking Salary History Information From Applicants Or Relying On The Salary History Information Of An Applicant For Employment As A Factor In Determining Whether To Offer An Applicant Employment Or What Salary To Offer An Applicant.
 - Expressly Authorizes Employers To Consider Salary History That An Applicant Discloses Voluntarily And Without Prompting.
 - Upon Reasonable Request, Employers Must Provide The Pay Scale For A Position To An Applicant For Employment.

Immigration Worksite Enforcement

- AB 450, Prohibits An Employer From Providing Voluntary Consent To An Immigration Enforcement Agent To:
 - Enter Nonpublic Areas Of The Worksite, Unless The Agent Has A Judicial Warrant, Subject To A Specified Exception; And
 - Access, Review, Or Obtain The Employer’s Employee Records Without A Subpoena Or Court Order, Subject To A Specified Exception.
- This Law Also Requires Employers To:
 - Provide Current Employees With Notices Of An Immigration Agency’s Inspection Of I-9 Employment Eligibility Verification Forms Or Other Employment Records Within 72 Hours Of Receiving The Federal Notice Of Inspection—Using A Template Created By The Labor Commissioner.
 - Prohibits Employers From Re-verifying Employment Eligibility Of A Current Employee When Not Required By Law.

Reasonable Accommodation

- Accommodations Made for Other Employees Provide Guidance as to What is Reasonable.
 - *Atkins v. City of Los Angeles*, (2017)
Cal.App.5th 696.

Defamation

- Corporation Seeing to Unmask Anonymous Internet Posters in Libel Case Must Show Prima Facie Case of Defamation.
 - *ZL Technologies v. Doe* (2017) 13 Cal.App.5th 603.

Waivers/Liability

- Court Rules Multimillion Dollar Verdict Against School Due to Field Trip Injury Not Unreasonable.
 - *Munn v. Hotchkiss School* (2017) 326 Conn. 540.

Waivers/Liability

- Waivers Did Not Protect School Where Issue of Gross Negligence Was Raised.
 - *Feleccia v. Lackawanna College* (2017) 156 A.3d 1200.

Arbitration Agreements

- No Agreement to Arbitrate Where Employee Refused to Sign and Stated in Writing That She Would Not Enter Agreement.
 - *Rightnour v. Tiffany and Company* (2017) WL 878448.

Arbitration Agreements

- Supreme Court to Resolve Issue Regarding Class Action Waivers.
- Case Will Be Heard in 2017 Term (Consolidation of Three Cases).
 - *National Labor Relations Board v. Murphy Oil USA* (2015) 808 F.3d 1013; *Epic Systems Corp. v. Lewis* (2016) 823 F.3d 1147; and *Ernst & Young LLP v. Morris* (2016) 834 F.3d 975.

Credit Card Surcharges

- Supreme Court Rules Law Prohibiting Business from Advertising Higher Price for Credit Card Interferes with Free Speech.
 - *Expressions Hair Design v. Schneiderman* (2017) 137 S.Ct. 1144.

Attorney-Client Privilege/PR

- Communications Between Attorney, Client, and PR firm Might Not Be Protected by Privilege.
 - *Behunin v. Superior Court*, (2017) 9 Cal.App.5th 833.

Questions?

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