

Going Outside the Classified Service: Short-Term Employees, Substitutes and Professional Experts

Bay Area CCD ERC | January 12, 2024

Presented By: Meredith Karasch & Gabriella Kamran

LCW

Going Outside the Classified Service: Short-Term Employees, Substitutes and Professional Experts

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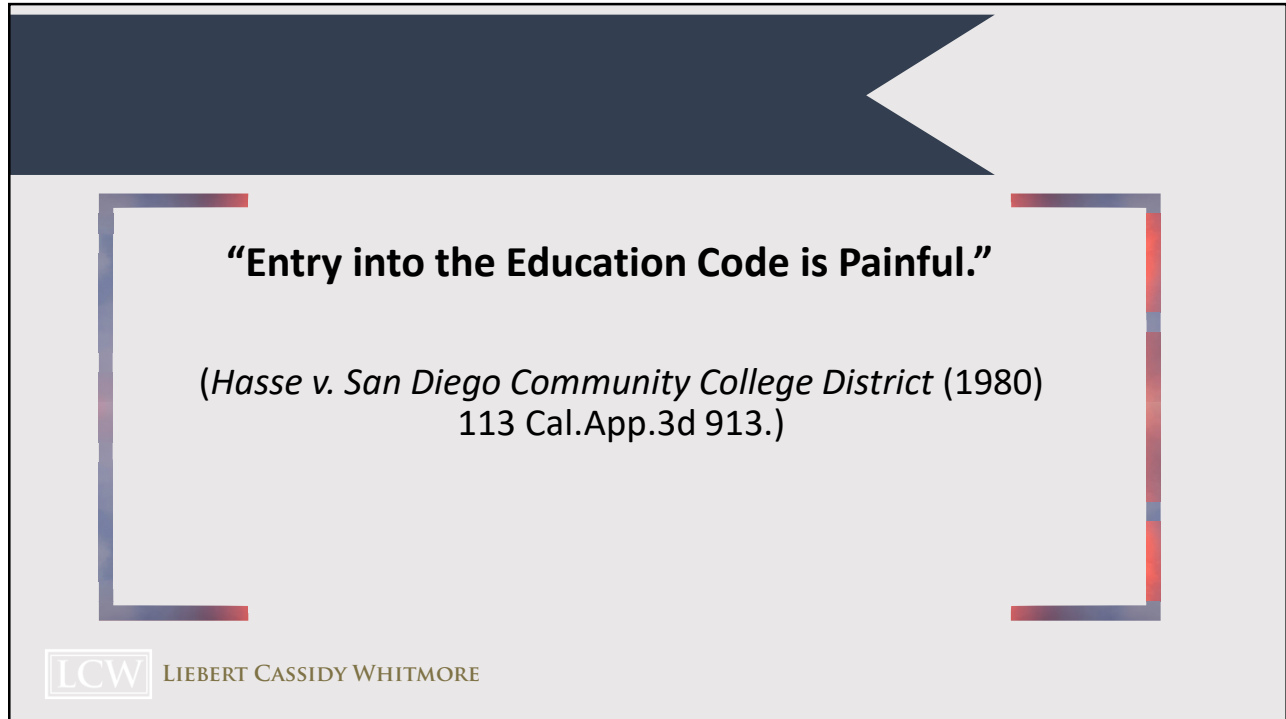
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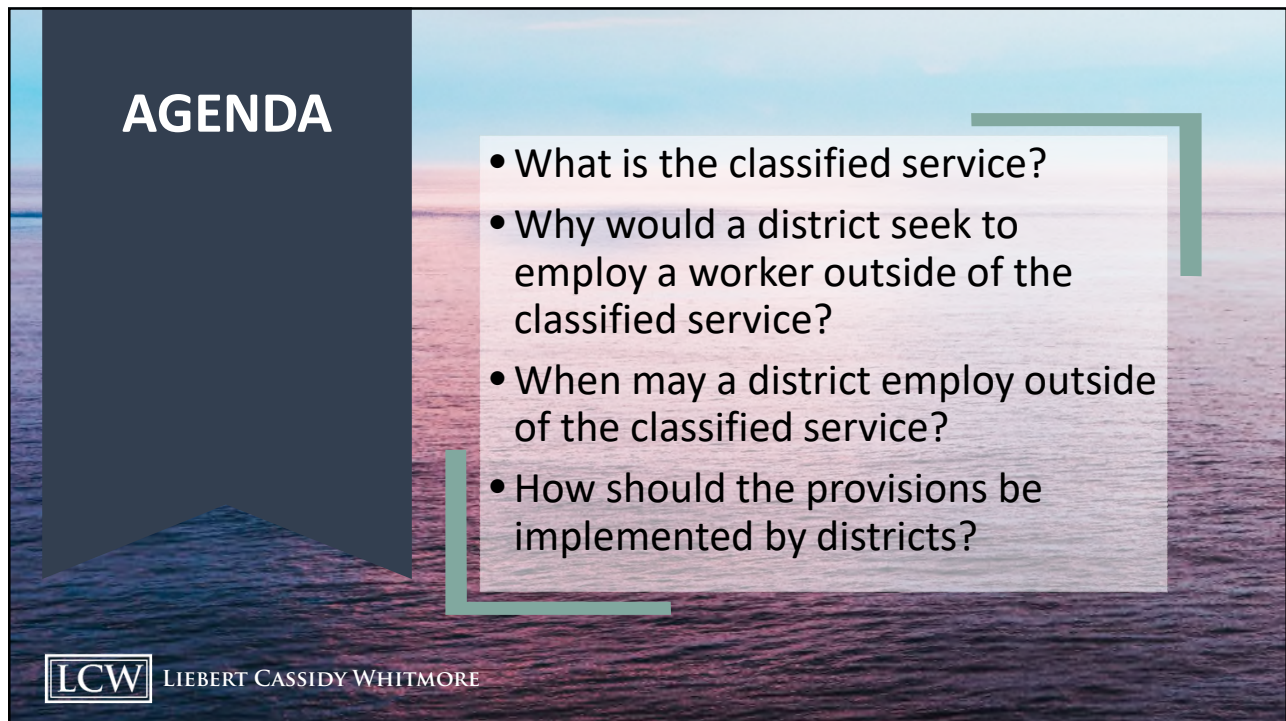


“Entry into the Education Code is Painful.”

*(Hasse v. San Diego Community College District (1980)
113 Cal.App.3d 913.)*

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AGENDA

- What is the classified service?
- Why would a district seek to employ a worker outside of the classified service?
- When may a district employ outside of the classified service?
- How should the provisions be implemented by districts?

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What is Classified Service?

Any position at a CCD that is not:

- Academic
- Explicitly excluded from the classified service



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Characteristics of Classified Service

- Employees Who Have:
 - Designated Title;
 - Regular Minimum Number of Hours Per Day, Days Per Week, and Months Per Year;
 - Specific Statement of Duties; and
 - Regular Monthly Salary Ranges

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Classified vs. Exempt

- Rights that Distinguish Classified from Temporary Employees (Exempt from Classified Service):
 - Right to Continued Employment
 - Termination for Cause Only
 - Discipline for Cause Only
 - Layoff Procedures
 - Workweek Cannot be Changed to Include Saturdays/Sundays Without Written Consent
 - Part-Time Workers - Same Benefits and Leaves as Full-Time

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Merit v. Non-Merit System Distinction

- Make Sure You are Reading the Appropriate Provision Applicable to Your Type of District



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Exemptions from Classified Service

- Both Merit and Non-Merit Systems
 - Apprentices
 - Professional Experts
 - Full-Time Students Employed Part-Time
 - Part-Time Students in Work Study or Work Experience Programs

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Exemptions from Classified Service Continued

- Persons Trained/Experienced/Competent in Financial, Economic, Accounting, Engineering, Legal or Administrative Matters

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Exemptions from Classified Service

- Non-merit
 - “Substitutes”
 - “Short-Term” Employees
- Merit Systems
 - Architectural and Engineering Firms
 - Community Representatives in Advisory or Consulting Capacities

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WHY Go Outside the Classified Service?

- To Cover Work that is Temporary in Nature;
- For Work on a:
 - Discrete and Finite Project
 - Position Falls Outside Skills/Knowledge of Existing Classified Service

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WHEN Can You Go Outside the Classified Service (i.e., Hire a Non-Academic Employee Who is Not Classified)?

- Specific Exemption Under Education Code
- AND
- Employment of Temporary (Exempt) Worker Will Not Violate an Existing Collective Bargaining Agreement

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Exempt Employees: Substitutes (Non-Merit Systems Only)

- Employed/Paid Less Than 75% of College Year;
- To Replace Classified Employee Temporarily Absent From Duty;
- 75% of College Year Means 195 Working Days;
- 195 Working Days:
 - Includes Holidays, Sick Leave, Vacation, & Other Leaves of Absence (Irrespective Hours Worked Per Day).
 - (CSEA v. So. Orange County CCD (2004) 124 Cal.App.4th 574.)
 - Non-Working Saturdays and Sundays Not Counted
 - Within Same School Year

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Exempt Employees: Substitutes (Non-Merit Systems Only)

- Can Use Substitutes to Temporarily Fill Permanent Positions While Recruitment is Pending,
- **Only up to 60 days,**
- **UNLESS** Collective Bargaining Agreement Allows Otherwise

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Case Study Instructions

For each of the following problems, assume the following basic facts:

The California Community College District is a medium sized district with one college campus and three outreach centers in the community. It is a non-merit system district

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Case Study Instructions

The normal probationary period for classified employees is six months. The classified employees are members of a wall-to-wall unit represented by a union that has been certified by PERB as the exclusive representative

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Case Study Instructions

It includes all full and part-time permanent classified employees, but does not include substitute, short-term or student workers. There is a collective bargaining agreement in place

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Case Study # 1

The District hired Antonia as a substitute for a permanent secretary in the English department who is on long term medical leave. She works four hours a day, four days a week. She begins work on October 1. She works regularly until the following September 1, when the secretary returns to service

Does Antonia have any right to continue in employment?

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Exempt Employees: Substitutes (Non-Merit Systems Only)

- A Substitute Employee Who Works More Than 195 Working Days in a School Year is **Presumed** to Become a Probationary Employee

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Case Study # 2

Benito is hired by the District as a substitute for a permanent Accounts Payable Specialist on disability leave. He works full-time in this position from March 2021 – March 2022. In April 2022 the District considers hiring Benito as a probationary employee in the Accounting Department but decides not to. When he finds out he argues that he is already a permanent employee

Is Benito a permanent employee based on the length of his substitute service?

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Case Study # 3

Carla is hired as a substitute for an Admissions and Records Assistant who is on maternity leave. She starts on November 1. The employee who Carla was hired to replace decides she wants to stay home with her new baby. On February 1st she notifies the District. The District begins trying to fill the A&R Assistant position but is unable to find a new permanent employee. Carla continues in the position through the end of the year

Does Carla have any right to continue in employment?

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Exempt Employees: Short-Term Employees (Non-Merit Systems Only)

- Person Employed to Perform a Service Upon the Completion of Which Will **Not** be Extended or Needed on a Continuing Basis

AND

- Cannot Exceed 75 Percent of a Year, i.e. 195 Days

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Exempt Employees: Short-Term Employees (Non-Merit Systems Only)

- Governing Board Must:
 - Specify Services to be Performed;
 - Certify the Ending Date of Service
- Governing Board May:
 - Shorten or Extend Ending Date
 - But: Cannot Exceed 75% of College Year

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Exempt Employees: Short-Term Employees (Non-Merit Systems Only)

Certification Must Occur at Regularly Scheduled Board Meeting

- Can Certification be Delegated?
 - Probably Not
- Can Certification be *Ex Post Facto*?
 - Probably Not

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Case Study # 4

The District recently switched to a new computerized payroll system. During the first pay period after the switch, 200 District employees did not receive a paycheck. During the second pay period, 500 employees were paid incorrectly

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Case Study #4

The District has contacted the software company and requested that they correct the defects. However, the problems remain unresolved. The District wants to hire 2 Accounting Clerks immediately to work on resolving these payroll issues

Should the District hire these employees as short-term employees or as part-time employees?

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Exempt Employees: Apprentices (Both Merit and Non-Merit Systems)

- Apprentice Not Defined in Education Code
- Use Labor Code Definition: “a person at least 16 years of age who has entered into...an ‘apprentice agreement,’ with an employer or program sponsor.”



APPRENTICESHIPS
which one works for you?

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Exempt Employees: Professional Experts (Both Merit and Non-Merit Systems)

- Professional Experts
 - Employed on Temporary Basis
 - For Specific Project
 - Regardless of Length of Employment



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Exempt Employees: Professional Experts (Both Merit and Non-Merit Systems)

What is a Professional Expert?

- Not Defined in Education Code
- We Interpret to Mean Employee:
 - Has Specialized Knowledge or Expertise Not Generally Required of or Found in the Classifications Established by the District
 - Work Does Not Fit Within the Job Duties For Any Classification Established by the District

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Exempt Employees: Professional Experts (Both Merit and Non-Merit Systems)

What is a Specific Project?

- Read Broadly to Include Anything That Can Be Defined in Terms of a Projected End Date
- Divide Clearly Finite Long-Term Projects into Small Phases if Possible

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Exempt Employees: Professional Experts (Both Merit and Non-Merit Systems)

What is Hiring on a Temporary Basis?

- Term of Employment is Finite
- Distinguish From “Short-Term”
- Term of Employment Cannot be Left Open-Ended
- Consider Funding Stream Before Characterizing as on “on a Temporary Basis”
- Consider Certainty of Demand
- Consider Past Practices and Collective Bargaining Agreement

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Exempt Employees: Professional Experts (Both Merit and Non-Merit Systems)

• Tips for Hiring Professional Experts

- Define Project
- Articulate End Date
- Make Continued Employment Contingent on Continued Demand and/or Funding
- Carefully Review Recurring Professional Expert Contracts
- Break Long-Term Projects into Phases; and
- Communicate with Bargaining Representative



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Case Study # 5

The District enters into a one year contract to hire employees from an outside consulting firm to supervise the District's maintenance workers Monday through Friday during their regular work hours

Do these consultants qualify as professional experts?



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Case Study # 6

The District anticipates that it may be able to assume responsibility for grant projects that are currently being administered by other institutions. These institutions currently employ high level managers and supervisors, and support employees, to administer the grants

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Case Study #6: Question

Can the District hire preexisting high level grant employees as “professional experts” without going through an open hiring search to provide administrative oversight over the grant projects?

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Case Study # 6: Question

Can the District hire preexisting administrative support employees as “professional experts” directly without going through an open hiring search to provide administrative support to the grant projects?

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Exempt Employees: Student Workers (Both Merit and Non-merit Systems)

- Full time Students Working Part-Time
- Part-Time Students in Work-Study or Work Experience (State or Federal funds)
- Cannot Displace Classified Workers
- Cannot Impair Existing Contracts



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Exempt Employees: Architectural and Engineering Firms (Merit Systems Only)

- Governing Board or Commission Can Hire:
 - Architectural and Engineering Firms
 - Employed on a Temporary Basis
 - For a Specific Project



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Exempt Employees: Community Representatives in Advisory or Consulting Capacities (Merit Systems Only)

- Community Representatives in Advisory or Consulting Capacities
- No Longer Than 90 Working Days in a Fiscal Year, **PROVIDED THAT:**
 - Duties Not Those Normally of Classified Service;
 - Duties Approved by the Personnel Commission Before Employment; AND
 - No Regular Classified Employee Has Concurrent Appointment

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Exempt Employees: Services & Advice to District (Both Merit and Non-Merit Systems)


- Narrow Exception
- Legislative Body May Employ:
 - Persons with special training, experience and competence
 - For furnishing of special services and advice in the following matters:
 - Financial
 - Economic,
 - Accounting,
 - Engineering,
 - Legal, or
 - Administrative

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Exempt Employees: Services & Advice to District (Both Merit and Non-Merit Systems)

- TEST for When it's Permissible to Contract for Special Services Depends On:
 - Nature of Services,
 - Necessary Qualifications of Person Furnishing Services, AND
 - Availability of Services From Public Sources

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Case Study # 7

The District wants to hire Barnes & Noble to run the District's campus bookstore. B&N has offered to provide a regional manager who will visit the campus on a regular basis to assist the store manager; senior managers who will meet regularly with District administration, faculty and students to ensure that the campus is being properly served; training for store management that includes regional and national meetings and training seminars....

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Case Study #7

...a completely computerized textbook management system; a guaranteed supply of used books to save students money; the purchasing power of over 250 bookstores to bring supplies and sundry items at competitive prices; the ability to transfer books between other B&N stores to alleviate out of stock problems; and a computerized ordering system for all non-book items

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Case Study # 7

Is such a contract permitted under Government Code section 53060?

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Employee in Regular Status Who Reduces Time

In Merit Districts, a Classified Employee Who Has Probationary or Permanent Status in a Full-Time Position May Reduce His or Her Time and Still Retain Regular Status



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A Note on Employees in Categorically Funded Programs

- Classified Employees Working in Categorically Funded Programs are **Not** “Temporary.”
- Just Because They Can be Laid Off for Lack of Funds Does Not Mean They Do Not Have the Same Rights as Other Classified Employees

Education Code Section 88017

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Personal Services Contracts (Merit and Non-Merit Systems)

- Merit Districts Caveat:
 - Personal Services Contracts With Non-Classified Person Only Allowed Under Specific Exemptions Under Education Code Section 88076(b)

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Personal Services Contracts (Merit and Non-Merit Systems)

Only Permitted Under Eight Specific Circumstances:

1. Achieve Cost Savings - Very Narrow Circumstances;
2. Contract Mandated By Legislature;
3. Services Not Available Within District;
4. Services Incidental to Contract for Purchase or Lease of Real Property;

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Personal Services Contracts (Merit and Non-Merit Systems)

Only Permitted Under Eight Specific Circumstances:

5. Contract Necessary to Accomplish Certain District Goals and Purposes;
6. For Emergency Appointments;
7. Equipment/materials Not Available From District; or
8. Services Of Urgent, Temporary, or Occasional Nature

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Education Code: Sections Regarding Temporary Employees

What Do They Really Require Districts to Do?

- Know Who Temporary Employees Are;
- Know When and Where They are Working;
- Disclose Who is Working—When/Where
- Disclose Who is Being Re-employed

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Implementation of Education Code: Sections Regarding Temporary Employees

- Audit Use of Temporary (Exempt) Employees
- Develop Controls for Use of Temporary (Exempt) Employees



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Going Outside the Classified Service: Basic Rules

1. “Substitute Employees” Must Be Replacing Someone Temporarily Absent From Duty OR Serving in a Vacancy for Not More than Sixty (60) Calendar Days

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Going Outside the Classified Service: Basic Rules

2. “Short Term” Employees Should Only Be Performing Services Upon the Completion of Which the Service Required or Similar Services Will Not Be Extended or Needed on a Continuing Basis

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Going Outside the Classified Service: Basic Rules

3. If a Short Term or Substitute Employee Exceeds the 195 Day Threshold, He or She May Possibly Be Classified as a Probationary or Permanent Employee

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Going Outside the Classified Service: Basic Rules

4. For Computation of the 195 College Day Threshold, Holidays, Sick Leave, Vacation and Other Leaves are Counted. Non-Working Saturdays and Sundays are NOT Included

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Going Outside the Classified Service: Basic Rules

5. Regular Employment is the Rule and Temporary Employment the Exception. It Will Probably be the District's Burden to Demonstrate that the Employee is Temporary (Exempt from Classification.)

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Thank you!

Meredith Karasch
Senior Counsel | Los Angeles
310.981.2059 | mkarasch@lcwlegal.com
www.lcwlegal.com/people/meredith-karasch/

Gabriella Kamran
Associate | Los Angeles
310.981.2062 | gkamran@lcwlegal.com
www.lcwlegal.com/people/gabriella-kamran/

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