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IN THIS ISSUE:

PAGE

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DEPARTMENT OF LABOR ISSUES NEW OPINION LETTER REGARDING FMLA LEAVE

Recently, the United States Department of Labor ("DOL") published an opinion letter stating that employers are prohibited from delaying a determination of whether employee leave qualifies under the Family and Medical Leave Act ("FMLA"). This means that when an employee takes any type of leave for an FMLA-qualifying reason, the employer must count that leave against the employee's FMLA leave.

The question was posed to the DOL by a group of employers who voluntarily permitted employees to exhaust some or all available paid leave (i.e. sick leave) before designating further leave as FMLA-qualifying. These employers sought the DOL's opinion on whether this delay is permissible under FMLA. The DOL found that it is not.

The DOL explained that FMLA provides eligible employees with up to 12 weeks of unpaid, job-protected leave per year (or 26 weeks for enumerated family members of a covered servicemember with a serious illness or injury) for specified family and medical reasons. *See* 29 USC § 2612(a), (d)(2). Within 5 business days, the employer must notify the employee and designate the leave as FMLA-qualifying once it has enough information to classify the leave under FMLA. 29 CFR § 825.300(d)(1). Accordingly, the DOL reasoned that the employer is obligated to designate that leave as FMLA-qualifying, and this obligation applies even if the employee would prefer that the employer delay the designation.

The DOL's statement expressly rejects the United States Court of Appeals for the Ninth Circuit's opinion in *Escribe v Foster Poultry Farms, Inc*, 743 F3d 1236 (9th Cir 2014). This decision allowed for employers to delay designating leave as FMLA-qualifying, thus allowing employees to exhaust their paid leave then unpaid FMLA leave. Under the new DOL position, paid leave must run concurrently with unpaid FMLA leave.

Additionally, the DOL position articulated a strict time limit for FMLA entitlements: 12-week or 26-week for qualifying family members of servicemembers. The DOL stated that while an employer may provide for leave in addition to FMLA-qualifying leave, such additional leave does not extend FMLA protection. This additional leave can be provided in an employment benefit program or collective bargaining agreement. However, the first 12-weeks of FMLA-qualifying leave must be counted toward an employee's entitlement under the Act, regardless of any additional leave the employer has granted its employees. Thus, an employer can provide leave in addition to FMLA, but an employer cannot provide additional FMLA-qualifying leave.

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Therefore, to ensure compliance with FMLA, school districts are advised to make eligibility determinations for employee leave as soon as the district has enough information to determine whether the leave is being taken for an FMLA-qualifying reason. Additionally, school districts must provide employees with notice of a determination within 5 business days of learning the information necessary to make a determination. Finally, collective bargaining agreements that require or permit a school district to delay designation are in violation of the DOL's position and interpretation of the federal regulations. Collective bargaining agreements should be reviewed to ensure compliance with the DOL's position.

Please contact Collins & Blaha, P.C. if you have any questions concerning the effects that this new DOL opinion letter could have on your district's leave policies or collective bargaining agreements.

CROSS EXAMINATION IN STUDENT DISCIPLINE HEARINGS

The Sixth Circuit Court of Appeals has held that public universities must allow cross examination during student discipline hearings when the outcome of the hearing turns on a determination of credibility. On September 7, 2018, the Sixth Circuit Court of Appeals decided the case *Doe v Baum*, which addressed whether a public university was required to allow cross examination of witnesses during student discipline hearings.

Doe v Baum dealt with a situation in which a female college student accused a male fraternity member of sexual assault after they had both been drinking at a fraternity party and engaged in sexual intercourse. The female student alleged that she had told the fraternity member that she did not consent to sexual intercourse. The fraternity member argued that the female student had verbally consented. As part of the investigation into the incident, the university interviewed twenty-three witnesses. All male witnesses interviewed supported the fraternity brother's recollection of events, while all female witnesses supported the female student's version. The initial investigative report concluded that neither side's evidence was more convincing than the other. The female student appealed and the university's Appeals Board reversed the investigator's findings, ruling that the female student's description of events was more credible than the fraternity member's description. The fraternity member withdrew from the university and filed suit in federal court, arguing that the Due Process Clause required the university to grant him the opportunity to cross examine the female student and her witnesses.

The Sixth Circuit agreed and held in favor of the fraternity member. The Court of Appeals held that a student accused of misconduct must be given a live hearing and, when the potential sanction is as serious as suspension or expulsion and the university's determination alters based upon the credibility of the accused, accuser, or witnesses, the hearing must allow cross examination. The Court of Appeals clarified that this holding does not require universities to allow the accused to personally cross examine his or her accuser. Rather, the university may require the agent of the accused to conduct cross examination instead.

Notably, the Sixth Circuit previously ruled in *Newsome v Batavia Local School District*, a case from 1988, that public school districts do not need to allow cross examination at student discipline hearings for elementary and secondary students. In *Batavia*, the Court of Appeals had found that cross examination was unnecessary because school administrators at the elementary and secondary levels have enough knowledge of their students to evaluate credibility without the need for cross examination. *Batavia*'s holding was not cited by the court in *Doe v Baum* and was not expressly abrogated. However, because changes at the university level in cases such as these are generally applied to public elementary and secondary schools, it would be prudent for public school districts to review their student discipline hearing procedures and to consider including some form of cross examination in certain cases.

As this issue is still being actively litigated in the federal courts, Collins & Blaha, P.C. will continue to keep you updated on any important federal decisions.

If you have questions regarding your district's student discipline hearing procedures and whether cross examination should be allowed, please contact Collins & Blaha, P.C.

Sixth Circuit Issues New Decision Addressing First Amendment Retaliation

In a First Amendment retaliation case, the Sixth Circuit Court of Appeals ruled that temporal proximity alone was not enough to find that a termination was retaliatory, and that "other indicia of retaliatory conduct" would be necessary to support such a finding. The case, *Sensabaugh v Halliburton*, was decided on August 27, 2019. Plaintiff Gerald Sensabaugh was the head football coach for a Tennessee school district and was terminated from his position. He sued School Director Kimber Halliburton and the district, claiming retaliation for his online speech that criticized the district.

Sensabaugh had made two posts on Facebook. In one post, he posted photos of an elementary school classroom including images of students' faces and criticized the conditions of the school. The district requested several times that he remove the photo containing images of students because the photo violated the Family Educational Rights and Privacy Act ("FERPA") and board policy. The district expressly told Sensabaugh that he was otherwise free to make comments online.

> ***..the Court of Appeals concluded that Sensabaugh was unable to establish causation when his termination occurred six months after his post and after a comprehensive external investigation found that he had engaged in behavior warranting termination…noted that temporal proximity alone was not enough to find that the termination was retaliatory, and that "other indicia of retaliatory conduct" would be necessary to support such a finding…***

Sensabaugh refused to respond to the district's request. He then posted two days later to voice his concerns about people who are incarcerated working at the high school. Administrators contacted him by phone, and Sensabaugh shouted at them.

The district issued Sensabaugh a Letter of Guidance for his refusal to take down the posts, his behavior on the phone call, and for other issues including using profanity with students and requiring an injured student to participate in practice. When the district gave Sensabaugh the letter in a meeting, he engaged in aggressive behavior, and claimed knowledge of his supervisor coming to school "high." After the meeting Sensabaugh immediately confronted the injured student and an athletic trainer in an aggressive manner. Based on these actions, the district issued a Letter of Reprimand, placing Sensabaugh on paid administrative leave. The district then initiated an independent investigation, which ultimately resulted in Sensabaugh's termination. Sensabaugh sued the district for wrongful termination due to First Amendment retaliation.

The Sixth Circuit concluded that while Sensabaugh engaged in speech protected by the First Amendment when he made social media posts, the two letters did not constitute adverse employment action. All parties agreed that his termination did constitute adverse action, and Sensabaugh claimed that the termination was a result of his Facebook posts because he was terminated so close in time to when the posts were made. However, the Court of Appeals concluded that Sensabaugh was unable to establish causation when his termination occurred six months after his post and after a comprehensive external investigation found that he had engaged in behavior warranting termination. The Court of Appeals noted that temporal proximity alone was not enough to find that the termination was retaliatory, and that "other indicia of retaliatory conduct" would be necessary to support such a finding. Sensabaugh's Facebook posts were therefore not the cause of his termination.

If you have questions regarding the First Amendment rights of your employees and permissible restrictions on employee speech, please feel free to contact Collins & Blaha, P.C.

FAILURE TO FOLLOW LAYOFF AND RECALL REQUIREMENTS MAY LEAD TO FEDERAL LAWSUITS

School districts have been facing increasing scrutiny regarding layoff and recall decisions in the federal courts. In two related decisions, the US District Court for the Eastern District of Michigan has found that when school districts do not follow the requirements imposed by both the Revised School Code (the "Code") and local board of education policies that layoff and recall be based on teacher effectiveness ratings, teachers' due process rights are violated and they may seek redress in the federal courts.

In *Southfield Education Association v Board of Education of Southfield Public Schools*, No. 17-11259, 2018 WL 1509190 (ED Mich March 27, 2018), the district court, on a motion for summary disposition brought by Southfield Public Schools, found that tenured teachers have a protectable property interest in their effectiveness ratings, and that if a school district disregards effectiveness ratings when making staffing decisions in violation of Section 1248 of the Code, teachers may bring a due process violation claim in federal court.

The facts of the case arose in 2016 when the Southfield Public Schools consolidated two high schools into one, resulting in a reduction of teaching positions. As part of this process, the district laid off all of its high school teachers. Although the district's board policies provided that layoff and recall decisions would be based on effectiveness ratings as required by Section 1248, the district instead held interviews of the high school teachers who had been laid off in order to fill the positions at the consolidated high school. The teachers were given a score based on these interviews, and the teachers with the highest interview scores were retained to teach at the consolidated high school. Teachers who were not recalled to one of the new teaching positions remained laid off.

The Southfield Education Association (the "Union") filed a federal lawsuit, alleging that the use of interviews instead of effectiveness ratings as required by Section 1248 violated the teachers' federal due process rights. The school district disagreed and moved for summary judgment.

The federal court found in favor of the Union. The court stated that teachers have a protectable interest in their earned effectiveness ratings because Section 1248 requires that effectiveness ratings be used to determine which teachers should be retained in layoff and recall situations. The court further stated that disregarding that requirement by recalling teachers without regard for effectiveness ratings presented a valid due process claim under federal law. Therefore, the court denied summary judgment and held that the Union's federal lawsuit could proceed.

The school district then filed for reconsideration and for certification to the Michigan courts, both of which were denied in the subsequent federal decision *Southfield Education Association v Board of Education of Southfield Public Schools*, 319 F Supp 3d 898 (ED Mich 2018). In its argument for reconsideration, the school district asserted that teachers could not have a protectable interest in effectiveness ratings because the ratings are revisited and revised each year. Disagreeing, the federal court found that the temporary nature of effectiveness ratings did not preclude a protectable interest from existing in them, as the federal courts had recognized protectable interests in a variety of benefits which also had limited durations, such as utility services, disability benefits, a driver's license, and welfare benefits.[1]

The school district further argued that staffing decisions are inherently discretionary and require consideration of a number of factors, which should preclude a protectable interest in a specific employment decision. Again, the federal court disagreed. The court stated that while a teacher does not have a right to a specific effectiveness rating or specific hiring or retention decision, teachers do have a right to the process established by the Code, which requires effectiveness ratings to be considered when making staffing decisions.

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Additionally, the court found that teachers also have a right to the process established by applicable board policies. Because the school district's board policies also stated that layoff and recall would be based on effectiveness, violation of the Board Policies presented a second basis for the Union's claim. Therefore, the federal court again held that the Union's federal lawsuit could proceed. However, instead of proceeding to trial, the school district and Union settled out of court.[2]

[1]*See American Premier Underwriters, Inc v National RR Passenger Corp*, 709 F3d 584, 594 (6th Cir 2013).
[2]According to the Register of Actions for the case, the school district and Union settled on December 18, 2018.

It is important to keep in mind that these two decisions were preliminary in nature and were not based on evidence produced at trial. Instead, the decisions were based on taking the pleadings filed by the teachers and Union as true for the limited purpose of determining whether the federal lawsuit could proceed. It is unclear whether the Union's arguments would have ultimately prevailed at trial. However, in the face of the increased scrutiny being paid by the federal courts, it is important for school districts to ensure that they follow all requirements imposed by the Code and their local board policies when making layoff and recall decisions in order to minimize the probability of facing similar federal lawsuits.

MARIJUANA USE STILL PROHIBITED ON K-12 SCHOOL PROPERTY

As the landscape regarding the possession and use of marijuana has changed rapidly over the past decade, school districts may have questions regarding what effect both medical and recreational marijuana legalization will have for their districts. The short answer is that the Michigan Medical Marihuana Act (the "MMMA") as well as the Michigan Regulation and Taxation of Marihuana Act (the "MRTA") both specifically exclude marijuana use from school grounds. Additionally, schools are not required by the Americans with Disabilities Act ("ADA"), the Individuals with Disabilities Education Act ("IDEA") or Section 504 of the Rehabilitation Act ("Section 504") to permit the use of medical marijuana at school.

Regarding medical marijuana, the MMMA does not permit a medical marijuana cardholder to:

> Possess marihuana, or otherwise engage in the medical use of marihuana at any of the following locations.
>
> **(A) In a school bus.**
>
> **(B) On the grounds of any preschool or primary or secondary school.**
>
> (C) In any correctional facility.

The MRTA contains a similar provision prohibiting all persons from:

> (h) possessing marihuana accessories or possessing or consuming marihuana on the grounds of a public or private school where children attend classes in preschool programs, kindergarten programs, or grades 1 through 12, in a school bus, or on the grounds of any correctional facility.

Therefore, school districts have no obligation pursuant to state law to allow the possession or use of marijuana on school property or on school buses, and both medical and recreational marijuana users are prohibited from using marijuana on school grounds and school buses.

Additionally, marijuana remains illegal under federal law and federal case decisions have established that federal statutes, such as the ADA and Section 504, create no obligation to allow the use of medical marijuana for disabled persons.

As a result, school districts may continue to prohibit the possession and use of marijuana on school property and school buses regardless of whether a student or employee has been prescribed medical marijuana.

Please contact Collins & Blaha, P.C. if you have questions concerning medical marijuana use at your district's schools.

Online reporting System Available for CPS Reports

The Michigan Department of Health and Human Services ("MDHHS") has recently streamlined its system for reporting suspected child abuse and neglect by introducing a new online reporting system.

If a mandatory reporter suspects child abuse, the reporter is required to contact Children's Protective Services ("CPS") immediately, submit a written report within 72 hours either by mail or by email, and notify the head of his or her organization. The new online reporting system simplifies this process. Reporting using the online system satisfies both the requirement of contacting CPS and the requirement to submit a written report. When a reporter uses the online system, there is no need to contact CPS by phone, and no additional written report is required to be submitted.

To use the new online reporting system, mandatory reporters can register at: https://newmibridges.michigan.gov/s/isd-partnershiplanding?language=en_US by following the link for mandatory reporters.

If a reporter does not wish to use the online reporting system, mandatory reporting responsibilities may still be satisfied by both contacting CPS by phone at 855-444-3911 and by submitting a written report either by email to MDHHS-CPS-CIGroup@michigan.gov or by mail to:

Michigan Department of Health and Human Services
Centralized Intake for Abuse and Neglect
5321 28th Street Court S.E.
Grand Rapids, MI 49546

If you have questions regarding this new online system, or about child abuse reporting requirements, please contact Collins & Blaha, P.C.

Pending Legislation

Mandatory Reporting

- Michigan's Child Protection Law requires certain individuals to report to MDHHS if they have reasonable cause to suspect child abuse or child neglect. These individuals are commonly referred to as "mandated reporters."
  - **House Bill 4376** would add athletic trainers to the list of employees and professionals who are deemed "mandated reporters" under Michigan's Child Protection Law.
  - **House Bill 4377** would require comprehensive training materials to be created for individuals required to report suspected child abuse or neglect.
- Both bills were passed by the House on June 19, 2019. The bills are currently referred to the Senate Committee on Government Operations.

Professional Development

- **Senate Bill 41** would require the MDHHS to develop or adopt a professional development course for teachers on mental health first aid. The professional development course would count toward the professional development requirement (to stay current in knowledge and skills) under Section 1527 of the Revised School Code.
- The bill has been referred to the Senate Committee on Education and Career Readiness. There has been no further action taken on the bill since January 22, 2019.

Since 1981, when Collins & Blaha, P.C. was founded, our attorneys have represented educational institutions in the ever-changing area of educational law. We currently represent some of the largest school districts in the state, and some of the smallest. Whatever the size, the issue, or the challenge, our clients are confident that Collins & Blaha, P.C. will represent their interests competently and with the hands-on approach that a specialized firm can provide.