COLLINS & BLAHA, P.C.
ATTORNEYS AT LAW

EDUCATION LAW UPDATE

SPRING 2019

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REQUESTING EXTRA SNOW DAYS

With heavy snow, sub-zero temperatures, and freezing rain and sleet, schools across southeast Michigan have had to close their doors to learning this winter season. The Michigan State School Aid Act, MCL 388.1701(4), allows school districts to cancel six days of school each year due to conditions beyond their control, such as severe storms, fires, epidemics, power outages, water or sewer failure, or other health issues as defined by the city, county or state health authorities. Because Michigan is a "local control state" for school districts, the decision for closing schools due to bad weather or other reasons is made by the district superintendent. With the weather we have seen this year, six days may not be enough.

The State Superintendent may approve an additional three days for school closings due to the same types of "unusual and extenuating occurrences" beyond school authorities' control like those listed above." A request for "additional forgiven time" is not automatically approved, as school districts must show a need for extra time and an inability to reschedule missed days later in the year. The "Additional Forgiven Time Request" form is available here: https://fs10.formsite.com/SASF/form9/index.html. Requests must be made *after* the cancellation has occurred and after a school district has attempted to reschedule the instructional day(s). The form explains:

> The request for additional forgiven time must exhibit the need for the additional forgiven time, including a strong rationale supporting why these days cannot be rescheduled before the end of the school year. The request must also demonstrate how the district initially prepared for cancelations for the current school year, as well as indicate how they might improve upon their planning process for subsequent school years.

All requests for additional forgiven time must be submitted prior to the last scheduled day of instruction. The six days of school each school district may cancel each year, as well as any days forgiven pursuant to a request to the State Superintendent, do not count against minimal instruction time requirements (pursuant to Section 101 of the State School Aid Act, school districts are required to offer at least 180 days and 1,098 hours of instruction each school year). Any additional time lost must be rescheduled to comply with the minimal instruction time requirements. Otherwise, a school district risks losing state aid funds. The Michigan Department of Education ("MDE") encourages districts to "make up the cancelled instructional time by adding days of instruction," as opposed to adding minutes or hours of instructional time on the remaining school days.

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Bills have been introduced in both the Michigan House and Senate providing that school cancelled on days for which the governor has declared a state of emergency will still count as days of pupil instruction for purposes of the State School Aid Act's requirements. Thus far this school year, the governor has declared a state of emergency for Tuesday, January 29, 2019 through Saturday, February 2, 2019. Both bills were referred to committee in their respective houses. We will keep you apprised of any further developments.

Should you have any additional questions or concerns regarding snow days or assistance in completing the Additional Forgiven Time Request Waiver for your district, please contact Collins & Blaha, P.C.

EMAILS BETWEEN SCHOOL BOARD MEMBERS - A POTENTIAL OMA VIOLATION?

In order to foster openness in government and government accountability, the Open Meetings Act (the "OMA"), MCL 15.261 *et seq.,* requires that public bodies constituting a quorum engage in deliberations and make decisions at a meeting that is open to the public. Electronic forms of communication require that public bodies adjust their practices to accommodate the OMA.

Board members who wish to communicate via email must be sure that their communications do not violate OMA's mandate that policy discussions happen in the open. Members may distribute information such as agenda items to fellow board members over email. However, when members engage with each other over email in deliberations toward a public policy decision, this may constitute an impermissible closed session in violation of the Act's requirements.

If there is no quorum, there is no meeting, and in such a case there can be no violation of the OMA. Courts generally consider the determination as to whether a quorum is present as a factual question. If two separate email chains that respectively do not constitute a quorum are used to discuss a policy issue before the board, a court may nonetheless find a constructive quorum. This is especially the case if the board members on each chain later take cohesive action on an issue raised in the emails. Courts do not require affirmative responses to find that a quorum deliberated on a matter of public policy. Generally, board members may blind copy other members on emails, but where other evidence, such as the content or manner of sending, suggests deliberation on a matter of policy occurred, this is not permissible.

So be thoughtful the next time you are ready to shoot off a quick email to a few fellow board members about your thoughts on next meeting's agenda items.

Should you have any additional questions or concerns regarding the Open Meetings Act, please contact Collins & Blaha, P.C.

IMPORTANT DATES FOR SCHOOL DISTRICTS SEEKING TO PASS A MILLAGE OR BOND IN 2019

A school district seeking voter approval of a millage or bond proposition this year must file a certified copy of the school board's resolution approving the ballot language for the millage or bond with the school district's election coordinator at least 12 weeks before the election date.

A school district may also call a special election to submit a ballot question on a millage or bond proposal. To call a special election, an initiative petition must be filed with the county clerk at least 12 weeks before the date of the special election. The petition must be signed by the required number of qualified and registered electors of the district and comply with the other requirements of the Michigan Election Law. A special election must occur on a Tuesday, and may not occur within 30 days before or 35 days after a regular election date, or those dates provided below.

If you have any questions, or your district plans to seek voter approval of a millage or bond this year, contact our office for assistance.

REGULAR ELECTION DATES	DEADLINE FOR FILING BOARD RESOLUTION WITH BALLOT LANGUAGE WITH ELECTION CO-ORDINATOR
MAY 7, 2019	FEBRUARY 12, 2019, 4:00 P.M.
AUGUST 6, 2019	MAY 14, 2019, 4:00 P.M.
NOVEMBER 5, 2019	AUGUST 13, 2019, 4:00 P.M.

LEGALIZED MARIHUANA IN MICHIGAN
IMPLICATIONS FOR SCHOOL DISTRICTS

On November 6, 2018, Michigan voters approved passage of "Proposal 18-1" – the Michigan Regulation and Taxation of Marihuana Act (the "Act"), MCL 333.27951 *et seq*. The Act, which took effect December 6, 2018, permits the limited purchase, possession, use, and transportation of small amounts of marihuana*, by persons 21 years of age or older, for recreational purposes. Some important facts about the Act that school districts should know:

- The Act does not authorize using marihuana, or possessing marihuana or marihuana accessories, on the grounds of a public or private school serving any students in preschool through grade 12, or on a school bus.
- The Act does not authorize the operation of a vehicle while under the influence of marihuana.
- The Act does not require an employer to permit or accommodate conduct allowed by the act in the workplace or on the employer's property.
- The Act does not prohibit an employer from disciplining or taking an adverse employment action against an applicant or employee for violating a workplace drug policy or for working while under the influence of marihuana.
- Schools need not accommodate an employee who wishes to use marihuana on school grounds or who is under the influence of marihuana at work.

The Act does not define the term "influence" or "under the influence." Michigan's Department of Licensing and Regulatory Affairs (LARA) is responsible for promulgating administrative rules to implement the Act. Until LARA promulgates such rules or the meaning of "under the influence" is litigated, we must turn to the phrase's plain and ordinary meaning. According to Black's Law Dictionary (10th Ed. 2014), "influence" is the "quality, state, or condition of being intoxicated from ... foreign substances introduced into the body." A person is "intoxicated" by "[h]aving the brain affected by the presence in the body of a drug..." [emphasis added]. When operating a motor vehicle, a person may be under the "influence" where in a "physically or mentally impaired condition."

Given these definitions, a school district may consider including in its workplace drug policy a prohibition against working while under the influence of marihuana, and a list of factors that may indicate an employee is under the influence. While a positive test result for marihuana may be a factor in concluding an employee is under the influence, this alone is likely insufficient where, unlike alcohol, marihuana remains detectable in an individual's body long after the short-term effects wear off.

Please feel free to contact Collins & Blaha, P.C. with any questions you may have on the effect of the Act on labor, employment or student discipline matters involving marihuana or for assistance with drafting policies to address this issue.

**This article uses the same spelling of "marihuana" that is used in the Michigan Regulation and Taxation of Marihuana Act and other Michigan laws. See MCL 333.27951 et seq.*

MERC HOLDS SCHOOL DISTRICT KITCHEN SUPERVISOR CAN QUESTION UNION REPRESENTATIVE ON CONDUCTING UNION BUSINESS DURING WORK HOURS

In the recent case *Waterford School District*, 32 MPER 13 (2018), the Michigan Employment Relations Commission ("MERC") demonstrated the standard for finding anti-union animus as the factor behind a business decision. In the case, a middle school assistant cook, who was also the local union representative, had her hours reduced after her supervisor complained that the cook was spending too much time conducting union business during the work day. Ultimately, MERC found that comments made by the cook's supervisor questioning whether the cook was allowed to conduct union business during the work day did not rise to the level of establishing anti-union animus.

The collective bargaining agreement ("CBA") regulating the employment of kitchen staff provided union release time for union representatives to handle grievances, subject to the understanding that such time would not be abused. It was also established that union representatives were free to discuss union business with administrators and other members by phone without prior approval from their supervisor. The assistant cook's supervisor did not approve of the cook using time during the work day to conduct union business. The union filed a grievance and argued that the assistant cook's hours had been "capped" at 7.5 hours. Prior to the cap being instituted, the assistant cook regularly worked more than 7.5 hours. The union alleged that the hours had been capped in retaliation for engaging in protected union activity.

MERC will not infer anti-union animus when an employer's representative questions whether a union representative may conduct union business while on the clock.

In analyzing whether the school district's decision to cap hours was influenced by anti-union animus, the administrative law judge ("ALJ") analyzed the school district's proffered reason for the cap: a productivity gap between the kitchen where the assistant cook worked and a second district kitchen performing the same type and amount of work. The district's data showed the assistant cook's kitchen averaged approximately 47 meals produced per labor hour, while the second district kitchen averaged approximately 66 meals per labor hour. The ALJ found that the disparity in production was a credible reason for the district to take corrective action at the assistant cook's kitchen. The ALJ also rejected the union's argument that comments made by the assistant cook's supervisor questioning whether the assistant cook was allowed to take phone calls related to union business during the work day constituted evidence of anti-union animus. Further, the ALJ found that the assistant cook's hours were not appreciably different before and after the cap was allegedly introduced, finding that the assistant cook was permitted to work more than 7.5 hours on 32 separate occasions after the cap was allegedly introduced and that any overall reduction in hours was *de minimis* and not an adverse employment action. For these reasons, the ALJ concluded that the school district did not exhibit anti-union animus and did not impermissibly discriminate against the assistant cook based on her participation in protected union activities.

MERC adopted the ALJ's decision. This MERC decision illustrates two main points regarding determining whether an employer has impermissibly discriminated against an employee for participation in union activities. First, an alleged adverse employment action must have more than a *de minimis* adverse effect on the employee in question, which was not proven in this case. Additionally, MERC will not infer anti-union animus when an employer's representative questions whether a union representative may conduct union business while on the clock.

LEGISLATIVE UPDATES

At the end of the 2018 Legislative Session, the Michigan Legislature passed the following public acts affecting school districts, intermediate school districts, and public school academies:

OFFICE OF SCHOOL SAFETY AND COMPETITIVE SCHOOL SAFETY GRANTS, PA 435

- Establishes the Office of School Safety within the Department of State Police. The Office of School Safety will work with the Michigan Department of Education to create model practices for school safety and will offer school safety trainings to school districts.
- The Act also requires the Office of School Safety to create and administer a competitive school safety grant program to improve school safety and security.
- ***Effective March 21, 2019.***

BIANNUAL SCHOOL SAFETY PLAN MEETING, PA 436

- Requires school districts, intermediate school districts, and public school academies to establish emergency operations plans with law enforcement agencies.
- Beginning with the 2019-2020 school year, school districts and law enforcement must work together to review emergency operations plans and vulnerability assessments, or a statewide school safety information policy, every two years.
- ***Effective March 21, 2019; Emergency operations plans must be in place by January 1, 2020.***

CONSULTATION WITH LAW ENFORCEMENT PRIOR TO CONSTRUCTION OR RENOVATION, PA 437

- Requires school districts to consult with relevant first responder law enforcement agencies regarding school safety prior to beginning building construction or major renovation projects.
- ***Effective March 21, 2019.***

OPEN MEETINGS ACT EXCEPTION FOR CLOSED SESSION, PA 467

- Amends the Open Meetings Act to allow a school board to meet in closed session to consider security planning to address existing threats or prevent potential threats to the safety of students and staff.
- ***Effective March 27, 2019.***

THREAT/CRIMINAL ACT REPORTING, PA 670

- Establishes a safety reporting system and hotline for any potential harm or criminal acts targeted at schools.
- The reporting system and hotline will be operated by the Department of the Attorney General.
- ***Effective March 28, 2019.***

CYBERBULLYING, PA 457

- Criminalizes cyberbullying, which is defined as posting a message or statement in a public media forum about any other person if the message or statement is intended to place the person in fear of bodily harm or death and expresses an intent to commit violence against the person, and the message is posted with the intent to communicate a threat or with the knowledge that the message will be viewed as a threat.
- ***Effective March 27, 2019.***

MINIMUM WAGE, PA 368

- Raises the minimum wage to $9.45 per hour.
- Requires that the minimum wage be increased to $12.05 by 2030.
- ***Effective March 29, 2019.***

BUDGET AMENDMENT, PUBLIC ACT 588

- Directs earmarked funds from the School Aid Fund to be used to fund road improvements and environmental cleanup.
- ***Effective December 28, 2018.***

LEGISLATIVE UPDATES
(CONTINUED FROM PAGE 6)

COMPREHENSIVE SCHOOL SAFETY PLAN ACT, PA 538

- Requires the Department of State Police to create a School Safety Commission.
- The Commission will review model practices for determining school safety measures and make policy recommendations to the Office of School Safety.
- ***Effective March 28, 2019; Commission to be established by April 15, 2019.***

SCHOOL SAFETY LIAISON TO COMMISSION, PA 549

- Requires school districts to designate a liaison to work with the newly created School Safety Commission and Office of School Safety.
- The liaison must be an employee of the school district who regularly and continuously works under contract for the school district.
- ***Districts must have a liaison by March 21, 2019.***

THREATS AGAINST SCHOOLS, PA 532

- Makes it a misdemeanor to verbally, through the use of an electronic device or system, or through other means to intentionally threaten to use a firearm, explosive, or other dangerous weapon to commit an act of violence against any students or school employees on school grounds or school property if threat can reasonable be interpreted to be harmful or adverse to human life.
- Makes it a felony to make a threat as described above and have the specific intent to carry out the threat or undertake an overt act toward carrying out the threat.
- ***Effective March 28, 2019.***

A-F SCHOOL RATINGS, PUBLIC ACT 601

- Requires the Michigan Department of Education to create and implement a statewide accountability measurement system using A-F grades to evaluate public schools based on a number of indicators, including student proficiency and growth in Mathematics and English, high school graduation rates, and school performance compared to other schools with similar demographics.
- ***Effective March 29, 2019; however, MDE has delayed implementation and requested that the Attorney General review for potential conflicts with federal law.***

RETIREES EMPLOYED BY THIRD PARTY, PA 482

- Requires public school retirees who are employed by a third party or as an independent contractor to forfeit pension benefits if the retired employee performs core services at a reporting unit. For purposes of the Act, "core services" does not include custodial, food, or transportation services.
- ***Effective March 29, 2019***

CLAIMS DATA AVAILABLE TO PUBLIC EMPLOYEES WITH 50+ EMPLOYEES, PA 579

- Requires insurance companies to compile and make available in an electronic format claims data for public employers that have 50 or more public employees covered by the medical benefit plan (was previously 100 employees).
- ***Effective March 29, 2019.***

SICK LEAVE, PUBLIC ACT 369

- Requires employers with 50 or more employees to provide employees with paid sick leave at a rate of one hour of leave for every 35 hours worked, to an annual cap of 40 hours of leave.
- Exempts seasonal employees, part-time employees (those who work, on average, less than 25 hours per week), and employees exempt from the overtime requirements of the Fair Labor Standards Act – including all teachers.
- ***Effective March 29, 2019.***

MDE APPROVAL REQUIRED FOR SCHOOL BUS TRAINING PROGRAMS, PA 422

- MDE must approve all training programs for individuals in charge of school bus operations at a school.
- In addition, a local unit of government may now enter into an agreement with a school for the use of school buses, for a fee, to transport attendees of an activity, event, or outing sponsored by a nonprofit organization.
- ***Effective March 20, 2019.***

FULL-TIME ATTENDANCE AT WORK NOT NECESSARILY AN ESSENTIAL JOB FUNCTION

The Sixth Circuit Court of Appeals recently reversed a lower court decision dismissing an employer's disability discrimination claim and instead remanded the case for a jury trial. See *Hostettler v College of Wooster, 895 F3d 844* (CA 6, 2018). In *Hostettler,* the issue was whether allowing an employee to work from home part of the day was a reasonable accommodation. Hostettler was a Human Resources Generalist who returned from a maternity leave with medical restrictions requiring that she work a reduced schedule. She agreed to work five half days, and to complete some work from home. The college accommodated this modified schedule for several months but later terminated her when she was unable to return to work in a full-time capacity. The college claimed that the modified schedule was placing strain on Hostettler's department.

There was a dispute, however, about whether Hostettler's schedule and working from home was actually problematic. Hostettler's performance review was very positive and her manager did not state Hostettler was needed on a full-time basis. In fact, Hostettler's manager could not identify any specific tasks that Hostettler failed to complete in a timely manner. The Court therefore held that Hostettler's full-time, in-office presence was not, standing alone, an essential job function.

Hostettler and prior decisions from the Sixth Circuit, demonstrate that an employer cannot deny a modified work schedule as an unreasonable accommodation under the Americans with Disabilities Act "ADA" unless the employer can show why the employee's physical presence is needed on a full-time basis. In one prior Sixth Circuit case, the Court concluded that physical presence was an essential job function where the employer showed that the employee who worked from home part-time did not complete her work. In another prior case, the Sixth Circuit concluded that physical presence was an essential function of a job in a call center because employees had to be physically present to answer phone calls -a situation where it was impossible to work from home.

Determining the "essential functions" of a job is a fact-intensive analysis. Courts may consider – among other things– the amount of time spent on a particular function; the employer's judgment; written job descriptions prepared before advertising or interviewing for the position; and the consequences of not requiring the employee to perform the particular function. Merely stating that anything less than full-time is *per se* unreasonable will not relieve an employer of its ADA responsibilities.

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.