COLLINS & BLAHA, P.C.
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REMINDER: CHANGES TO PERA, ELCRA GO INTO EFFECT FEBRUARY 13

Governor Gretchen Whitmer recently signed into law a number of public acts ("PA") amending various statutes that significantly affect the obligations of public school districts. The amended statutes include the Public Employment Relations Act ("PERA") and the Elliott-Larsen Civil Rights Act ("ELCRA"). **These amendments will take effect on February 13, 2024.**

PERA Amendments Eliminate Many Prohibited Topics of Bargaining

In 2010, Michigan adopted revisions to PERA that departed from national norms of labor law, including adding prohibited subjects of bargaining. This offered significant protection for school districts' unilateral actions regarding layoff and recall, teacher discipline, teacher placement, and teacher and administrator evaluations. This year, the Michigan Legislature modified PERA to eliminate many of the revisions implemented in 2010. The following is a comprehensive list of changes to the PERA effective on February 13, 2024:

PERA Changes – PA 115 and 143 of 2023 – Repeal of Certain Prohibited Topics

PA 115 and PA 143 collectively eliminate the following from the list of prohibited topics of bargaining under PERA:

- Teacher placement policies.
- Policies regarding personnel decisions when conducting a reduction, elimination, recall, hiring, or any related decision.
- The performance evaluation system.
- Policies regarding the discharge or discipline of a teacher.

"Employers should prepare to discuss these topics during negotiations, as it is expected that bargaining units will issue demands to bargain once the acts go into effect."

- The format, timing, or number of classroom observations.
- Policies regarding the method of compensation, including decisions about how an employee performance evaluation may be used to determine performance-based compensation.
- Required notification to parents and legal guardians regarding student placement in a classroom with a teacher rated as ineffective for two consecutive years.
- Public employer's decision to enter into an intergovernmental agreement to consolidate services, including:
    - Procedures for obtaining a contract for the transfer of functions and responsibilities under such agreement, and
    - The identities of any other parties subject to the agreement.
- The decision to contract with a third party for non-instructional support services, including:
    - The procedures for obtaining such a contract,
    - The identity of the third parties, and
    - The impact of the contract for the services on individual employees or the bargaining unit.

Accordingly, upon the effective date of PA 115 and PA 143, the foregoing topics will become mandatory topics of bargaining. Employers should prepare to discuss these topics during negotiations, as it is expected that bargaining

units will issue demands to bargain once the acts go into effect. PA 115 and PA 143 will go into effect on February 13, 2024.

PERA Changes – PA 113 of 2023 – Frozen Wages and Benefits

Currently, section 15b of PERA provides that (1) wages and benefits are required to be "frozen" during contract negotiations; (2) after the expiration date of a collective bargaining agreement ("CBA") and until a new one is in place, a public employer is prohibited from paying wages or providing benefits at a level or amount greater than those in effect on the expiration of the CBA; (3) wages and benefits under a new CBA cannot be made retroactive to the expiration date of the former CBA; and (4) employees are responsible for any increased costs of maintaining insurance benefits after a CBA expires.

PA 113 of 2023 repeals section 15b of PERA pertaining to freezing wages and benefits. Therefore, the requirements in section 15b of PERA will no longer be in place. The repeal will take effect on February 13, 2024.

PERA Changes – PA 114 of 2023 – Employer Deduction of Union Dues

Current law prohibits public school employers from using public school resources to assist a labor organization in collecting dues or services fees from employee wages.

PA 114 removes the prohibition pertaining to collecting dues and services fees. Beginning on February 13, 2024, a public school employer is permitted to deduct union dues or service fees from an employee's paycheck.

ELCRA Amended to Prohibit Sexual Orientation, Gender Identity and Expression Discrimination

On March 16, 2023, Governor Whitmer signed PA 6 of 2023 into law. PA 6 amends ELCRA to prohibit discrimination on the basis of sexual orientation and gender identity or expression. The act includes provisions specific to both the employment context and the school environment. The act will go into effect on February 13, 2024. With respect to employers, the act provides:

(1) An employer shall not do any of the following:

(a) **Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to** employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex**, sexual orientation, gender identity or expression**, height, weight, or marital status.

(b) **Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity or otherwise adversely affects the status of the employee or applicant because of** religion, race, color, national origin, age, sex**, sexual orientation, gender identity or expression**, height, weight, or marital status. [MCL 37.2202 (emphasis added).]

Under the Act, an employer is defined as "a person who has 1 or more employees, and includes an agent of that person." MCL 37.2201.

Further, the act states, in pertinent part:

An educational institution shall not do any of the following:

(a) **Discriminate against an individual** in the full utilization of or benefit from the institution,

> or the services, activities, or programs provided by the institution **because of** religion, race, color, national origin, sex**, sexual orientation, or gender identity or expression**.
>
> (b) Exclude, expel, limit, or otherwise **discriminate against an individual seeking admission as a student or an individual enrolled as a student** in the terms, conditions, or privileges of the institution, because of religion, race, color, national origin, sex, **sexual orientation, or gender identity or expression.** [MCL 37.2402 (emphasis added).]

Under the Act, an educational institution is defined as:

> a public or private institution, or a separate school or department thereof, and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, local school system, university, or a business, nursing, professional, secretarial, technical, or vocational school; and includes an agent of an educational institution. [MCL 37.2202.]

In addition, PA 45 of 2023 amended ELCRA to prohibit discrimination on the basis of traits historically associated with race, including hair texture and protective hairstyles such as braids, locks, and twists. PA 45 amended the definition of race as follows:

> "Race" is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles. For purposes of this definition, "protective hairstyles" includes, but is not limited to, such hairstyles as braids, locks, and twists. [MCL 37.2103.]

PA 45 went into effect on June 15, 2023.

If you have any questions regarding changes to PERA or ELCRA, please contact our office.

PERA Request and FOIA Request – What is the Difference?

As public bodies, Michigan school districts frequently receive Freedom of Information Act ("FOIA") requests for information and documents pertaining to the school district. These information requests are governed by Michigan's Freedom of Information Act, MCL 15.231 *et seq*. Any individual may request public records from a school district, and the individual "has a right to inspect, copy, and or receive copies of the requested public record of the public body." MCL 15.233(1). Many districts have formalized procedures and routinely handle FOIA requests. However, as a public body who negotiates collective bargaining agreements with various unions, school districts are also subject to the Public Employment Relations Act ("PERA"), MCL 423.201 *et seq*. The purpose of PERA is to protect the rights of public employees and help govern the relationship between public employers and their employees. As such, PERA makes it unlawful for a public school district "to refuse to bargain collectively with the representatives of its employees," such as a teacher's union. MCL 423.210(1)(e).

The Michigan Employment Relations Commission ("MERC") is tasked with resolving labor disputes involving school districts and their public employees. For a school district to satisfy its bargaining obligation under PERA, MERC cases have continuously held that an employer must supply in a timely manner requested information which will permit the union to engage in collective bargaining and to police the administration of the contract. See *Ecorse Public Schools*, 1995 MERC Lab Op 384; *City of Pontiac*, 1981 MERC Lab Op 57; *Wayne County and American Federation of State*, 11 MPER 29022 (1997).

Therefore, school districts may receive "PERA requests for information" from union leadership, especially during negotiations of a new collective bargaining agreement. To comply with PERA, a school district is required to provide bargaining unit representatives with requested information if it will reasonably allow the union to engage in collective bargaining. Typical information that is requested by a union includes:

- Personal information of bargaining unit members, such as email addresses, cell phone numbers, and home addresses.
- Information relating to the terms and conditions of employment, including:
    - Wages.
    - Job descriptions.
    - Other relevant information pertaining to bargaining unit employees.

It should be noted that an employer is not required to provide the union with information which it does not possess; however, where the union's request entails compiling specific information from data in the employer's possession, the employer must, at the minimum, grant the union access to its files. If the union requests information pursuant to PERA that is not maintained by the school district in the form requested, the school district may charge the union the cost of compiling the information in the form requested. However, the school district must bargain in good faith with the union over this charge.

Additionally, PERA does not contain any prescribed timelines for when a school district must respond to a PERA request. This is contrary to a FOIA request, wherein a school district is obligated to respond to the requester within five business days. When responding to a PERA request, the school district has a duty to provide the requested information in a timely manner. A refusal or unreasonable delay in supplying relevant information could result in an unfair labor practice. MERC has not articulated the precise time for employers to respond to information requests. However, it has found violations of PERA in cases where the delay has ranged from 2 to 3 months to 9 months.

"…PERA does not contain any prescribed timelines for when a school district must respond to a PERA request. This is contrary to a FOIA request, wherein a school district is obligated to respond to the requester within five business days."

In the alternative, a union may present a school district with a FOIA request for public records, as an ordinary citizen may make such a request. It is important to remember that a PERA request for information is separate and distinct from a FOIA request. Therefore, school districts should contact their legal counsel if they are unsure how to handle PERA requests from union representatives.

Please do not hesitate to contact our office if you have any questions regarding PERA requests.

COURT OF APPEALS: STUDENT QUESTIONED BY POLICE AT SCHOOL SHOULD HAVE BEEN READ *MIRANDA* RIGHTS

The Michigan Court of Appeals recently considered whether police should have given a student *Miranda* warnings before being questioned at school regarding an investigation of a shooting threat. The *Miranda* warnings and rights are given in *Miranda v Arizona*, 384 US 436 (1966), in which the United States Supreme Court ruled that police must inform a person of their constitutional rights before a custodial interrogation. The Michigan Court of Appeals held in *In re NC* that *Miranda* warnings were required before police questioning a student in connection with the investigation of a threat. Unpublished per curiam opinion of the Court of Appeals, issued November 21, 2023 (Docket No. 361548).

Background

At the start of the opinion, the Court noted that the Oxford High School shooting occurred nine days before the events surrounding the decision took place in Munising, Michigan. *Id.* at 1. The Court took into consideration, along with several other factors, the timing of the following events, since they shortly followed the Oxford High School shooting. *Id.* at 3.

Facts

A junior high school student in Munising discovered a potential shooting threat note in a school bathroom. The police were contacted. The superintendent, principal, and police chief placed the school on lockdown. During this time, a video was shared with the school of a student, NC, "holding a shotgun and pointing it at the camera . . . [with] text saying . . . 'be ready tomorrow.'" Within five minutes after reviewing the video, the principal and the police chief, in full uniform carrying a loaded firearm, removed NC from class. NC, who was thirteen years old, was taken to the school office where they waited for NC's father to arrive. *Id.* at 1-2.

Upon his arrival, the police chief told NC's father about the video and explained that he needed to question NC. The police chief did not ask NC's father for permission to interview NC. Before the interview began, the police chief did not tell NC he was under arrest. He did not say NC would be unable to go home, that he was free to leave, or that he could contact a lawyer. *Id.* at 2.

The police chief and principal took NC into the principal's office where the police chief interviewed NC. The police chief sat across from NC, NC's father was to his left, and the principal sat at his desk in the back of the room. The principal's office doors stayed closed. *Id.*

During the interview, the police chief told NC about the video and asked NC to explain it. NC said the video was made one week ago, a friend edited it, and someone shared it with a private group of friends on social media. NC also stated that the video and caption were in reference to a school shooting, but that it was a joke. After the interview, the principal suspended NC from school for ten days, and NC went home with his father. *Id.*

Overall, the interview was brief, lasting no longer than 30 minutes, with the police chief as the primary questioner. The decision stated NC was scared, but he was not physically restrained or handcuffed. NC's father did not participate in the interview, and he did not think he was able to remove NC from school or the interview. Further, NC's father, "believed that the only reason he was permitted to be present was

because he promised to be a silent observer," during the interview. *Id.*

NC was later charged "with making a false report or threat of terrorism" and "an intentional threat to commit an act of violence against students or school employees on school ground or school property." *Id.* at 2; MCL 750.543m; MCL 750.235b(1).

Trial Court Ruling

At the trial court, NC moved to suppress his statements to the police chief, arguing that the interview was a custodial interrogation in which NC was not given his *Miranda* warnings.

The trial court examined several factors under the totality of the circumstances. Ultimately, the trial court stated that an objective and reasonable thirteen-year-old would have felt that he could not leave the principal's office during questioning by the police chief and that the factors weighed in favor of *Miranda* warnings being required.

"The Court stated that to determine whether a person is in custodial interrogation and requires Miranda warnings, the totality of the circumstances must be considered."

Therefore, finding that the interview was a custodial interrogation of NC, the trial court decided to suppress NC's statement made during the interview.

Legal Test

Individuals have a right against self-incrimination under the Fifth Amendment. Generally, to protect this right, police must give a person *Miranda* warnings before a custodial interrogation. The Court stated that to determine whether a person is in custodial interrogation and requires *Miranda* warnings, the totality of the circumstances must be considered. *Id.* at 3. Further, the objective inquiry considers "both whether a reasonable person in the defendant's situation would believe that he or she was free to leave and whether the relevant environment present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *People v Cortez*, 299 Mich App 679, 691-92 (2013). Therefore, a person is found to be in custodial interrogation if there is a serious danger of coercion and a person is not free to leave. *People v Barritt*, 325 Mich App 556, 562 (2018); *JDB v North Carolina*, 564 US 261, 270 (2011). Ultimately, statements the person makes are not admissible in a trial unless the person "voluntarily, knowingly, and intelligently waives the constitutional right against self-incrimination." *Barritt*, 325 Mich App at 561-62.

Along with the juvenile's age, the Court will consider the following relevant factors to determine if the person felt free to leave: (1) the location of the questioning; (2) the duration of the questioning; (3) statements made during the interview; (4) the presence or absence of physical restraints during the questioning; and (5) the release of the interviewee at the end of the questioning. *Id*. at 562-63. All factors will be considered along with the totality of the circumstances.

Analysis

In the context of *Miranda* rights, questioning a juvenile in school or a principal's office was an issue of first impression for Michigan courts.

The Court noted decisions from the North Carolina Court of Appeals, Indiana Supreme Court, Kentucky Supreme Court, and Minnesota Court of Appeals as being highly persuasive regarding the consideration of the factor that questioning took place in the principal's office or at school. Therefore, the Court found that police questioning which occurs at a school or in a principal's office is a highly relevant factor in considering whether the student is in custody pursuant to *Miranda*. *In re NC*, unpub op at 5-6.

The Court found that certain factors weighed against NC being in custody, such as the brevity of the interview, NC father's presence, and that NC was not arrested or restrained. However, the Court ultimately held that the lower court did not error in determining that the NC was in custody,

requiring the police to give NC *Miranda* warnings. *Id.*

The Court found that the following factors weighed in favor of a finding that NC was in custody: (1) NC was thirteen years old, (2) NC was removed from class by the principal and an armed police officer in full uniform, (3) no explanation was given, (4) NC waited at the main office with a police officer nearby, (5) the school was in a lockdown, and (6) all students were not free to leave or move around the school during the lockdown. Additionally, the principal stated that most thirteen-year-old students would not think they could leave an interview being conducted by a police officer in the principal's office and that, if the student left, this would be considered insubordinate. *Id.* at 7.

Overall, the Court held that there was no clear error in the trial court suppressing NC's statements to the police chief because, "under the totality of the circumstances, *Miranda* warnings were required." *Id.* at 7. The Court therefore affirmed the trial court's decision.

Impact

This decision from the Michigan Court of Appeals creates an additional factor for Michigan courts in considering whether a juvenile student is in "custodial interrogation," and thus requires a *Miranda* warning. In the future, Michigan courts will consider if the student is a juvenile and if the questioning took place in the principal's office or at school. An appeal has not been filed to the Michigan Supreme Court as of the date of this publication.

Miranda Warnings in School Generally

Overall, "custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody." *Illinois v Perkins*, 496 US 292, 296 (1990). An individual's right to receive *Miranda* warnings is a constitutional protection and only applies to governmental action. Further, "a person who is not a police officer and is not acting in concert with or at the request of the police is not required to give *Miranda* warnings before eliciting a statement." *People v Anderson*, 209 Mich App 527, 531 (1995).

Courts have consistently held that custodial interrogation does not occur, and *Miranda* warnings are unnecessary, when a principal or other school administrator questions a student outside the presence of law enforcement.[1] Therefore, if the school principal or another member of administration were to question a student, that individual most likely would not be required to give the student *Miranda* warnings before questioning, unless the individual is acting at the request or direction of law enforcement.

Further, courts have also held that custodial interrogation does not occur if law enforcement is merely present, including Student Resource Officers ("SROs"), but remains silent during questioning or law enforcement is mostly silent and makes only minimal contributions during questioning.[2] However, if the school principal or another member of administration questions a student for the purpose of obtaining evidence to use in a criminal charge and the SRO is present, then *Miranda* warnings are required. *NC v Commonwealth,* 396 SW3d 852 (Ky, 2013).

[1] See *Brian A v Stroudsburg Area Sch Dist*, 141 F Supp 2d 502 (MD Pa, 2001) (public school principal is not required to give *Miranda* warnings to a student facing disciplinary action); *Commonwealth v Snyder*, 413 Mass 521 (1992) (there is no authority requiring a school administrator not acting on behalf of law enforcement officials to furnish *Miranda* warnings); *In re Corey L*, 250 Cal App 3d 1020 (1988) (questioning of a student by a principal cannot be equated with custodial interrogation by law enforcement officers).

[2] See *State v CD,* 947 NE2d 1018 (Ind App, 2011) (incriminating admission made to an assistant principal is admissible without *Miranda* warnings although it was made in the presence of a police officer employed by the school as a security officer); *State v Schloegel*, 2009 WI App 85 (2009) (student was not in custody when questioning was conducted primarily by the assistant principal even though two police officers were present); *Matter of Tateana R*, 64 AD3d 459 (NY App, 2009) (the presence and minimal activity of a police officer during the dean's questioning did not create a police dominated custodial atmosphere such to require the dean to administer *Miranda* warnings).

Likewise, courts have held that custodial interrogation exists when a member of law enforcement, including an SRO, actively participates in the questioning of a student.[3]

Therefore, when law enforcement or an SRO predominantly questions a student, then *Miranda* warnings are required. Further, *Miranda* warnings are required when a school principal or another member of administration questions a student at the direction of law enforcement, including an SRO, such as for the purpose of gathering evidence to use in a criminal charge.

Please do not hesitate to contact our office if you have any questions regarding students' Fifth Amendment rights or the impact of this ruling.

Sixth Circuit Set to Hear Challenge to School District's Transgender Anti-Harassment Policy

On February 1, 2024, the Sixth Circuit Court of Appeals will hear oral arguments on an Ohio school district's anti-harassment and discrimination policies regarding transgender students. The Sixth Circuit governs Michigan, Ohio, Kentucky, and Tennessee.

In *Parents Defending Education v Olentangy Local School District Board of Education*, an organization of students and parents is challenging the Ohio school district's anti-harassment and bullying policies which include, among other things, disciplinary action for intentionally misgendering a transgender student. Unpublished per curiam opinion of the United States District Court for the Southern District of Ohio, issued July 28, 2023 (Docket No. 2:23-cv-01595). Misgendering occurs when an individual fails to address another individual, particularly a transgender individual, by their preferred pronouns. The district has a policy that prohibits discriminatory and obscene language and defines discriminatory as the following:

> "[V]erbal or written comments, jokes, and slurs that are derogatory towards an individual or group based on one or more of the following characteristics: race, color, national origin, sex (including sexual orientation and transgender identity), disability, age, religion, ancestry, or genetic information." [*Id*. at 3 (quoting Pl.'s Ex. B at 9).]

"PDE cites to the First and Fourteenth Amendments for its legal basis, arguing that the district's policies compel students to restrict their speech to align with the stance that gender is fluid."

Parents Defending Education ("PDE") is seeking a preliminary injunction to prevent the Olentangy school district from enforcing the anti-harassment and bullying policies until the lawsuit is heard. PDE cites to the First and Fourteenth Amendments for its legal basis, arguing that the district's policies compel students to restrict their speech to align

[3] See *MH v State,* 851 So 2d 233 (Fla App, 2003) (statements made in response to a question asked by an SRO, who was a police officer, were properly suppressed because a *Miranda* warning was not provided); *In re RH,* 791 A2d 331 (Pa, 2002) (school police officers, who are employees of the school district but explicitly authorized to exercise the same power as municipal police, are required to administer *Miranda* warnings before questioning students); *In re Killitz,* 59 Ore App 720 (1982) (student should have been advised of his *Miranda* rights where he was interrogated by an armed, uniformed police officer in the principal's office with the principal present).

with the stance that gender is fluid. **No student has been punished under the policies yet.** PDE states that anonymous parents and students have indicated a desire to engage in speech they believe would be punished under the district's policy.

The United States District Court for the Southern District of Ohio first ruled that PDE likely has standing to bring the case. *Id*. at 8. Article III of the U.S. Constitution only permits federal courts to hear cases and controversies. Effectively, a plaintiff bringing a case must show that they have suffered an actual injury and that a favorable decision from the court would redress that injury in order to bring their case. *Lujan v Defs of Wildlife*, 504 US 555 (1992). The Southern District of Ohio judge ruled that PDE likely has standing but noted that there is some uncertainty. The Sixth Circuit Court of Appeals will first have to address whether PDE has standing before addressing the merits of the case.

On July 28, 2023, the court denied PDE's preliminary injunction. In its opinion, the court found that a hostile environment could cause a substantial disruption to student learning, especially when slurs or discriminatory language is used. *Id*. at 11-12. The court also did not consider the district's policies to be compelled speech or viewpoint discrimination since, under the policies, students are still able to voice their beliefs on gender as long as it is not targeted at students. *Id*. at 14-15. Additionally, students would not be punished for accidentally misgendering a student since it does not qualify as harassment under the policy. *Id.* at 13. While oral argument is scheduled for February 1, 2024, a decision from the Sixth Circuit Court of Appeals may take several months. Moreover, an unsuccessful party may appeal an adverse decision. Nonetheless, a decision could provide guidance for other school districts that currently have or choose to establish similar policies.

Please contact our office if you have questions about this case or other legal developments regarding gender identity in schools.

Dental Exams Required for Incoming Kindergarteners for 2024-2025 Year

Public Act 316 of 2023 ("PA 316") amends Michigan's Public Health Code to, beginning in 2024-2025, require dental oral assessments for students registering for the first time in kindergarten or first grade. MCL 333.9316. In its bill analysis, the Michigan Senate provides that acute and unplanned dental care is responsible for approximately 34 million hours of missed classroom time in the United States annually.[4] Guidance from the Michigan Department of Health and Human Services ("MDHHS") explains that dental problems can cause students to experience difficulties concentrating, prevent them from eating and sleeping well, and affect their behavior.[5] PA 316 took effect on December 14, 2023.

Previously, the passage of Public Act 261 of 2020 required the MDHHS to contract with a government entity to establish and maintain a dental oral assessment program for children. The MDHHS established the Kindergarten Oral Health Assessment Program ("KOHA"), which is administered through local health departments. The 2020 Act recommended that first-time kindergarteners and first graders

[4] See *Senate Bill Analysis*, available at https://www.legislature.mi.gov/documents/2023-2024/billanalysis/Senate/pdf/2023-SFA-0280-C.pdf.

[5] See https://www.michigan.gov/mdhhs/adult-child-serv/childrenfamilies/familyhealth/oralhealth/koha/schools.

receive a dental oral assessment before starting at a Michigan school. Now, PA 316 amends this provision to *require* dental oral assessments for children registering for the first time in kindergarten or first grade. The assessment may be performed by the child's dentist, or at no cost by the local health department.

PA 316 requires the dental assessment to be conducted no earlier than six months prior to the date of the child's registration. The child's parent must obtain a written statement on the KOHA assessment form certifying that their child has received the assessment within this six-month period. At the time of registration, and no later than the first day of school, the child's parent must present to school officials either a written statement certifying the completion of the dental exam, a written statement that the parent will provide for the child's dental assessment by the local health department, or a written statement indicating that the dental assessment requirement violates the parent's religious beliefs. It should be noted that even if a child's parent fails to provide the required statement, PA 316 requires that their child not be excluded from attending school.

"Guidance from the Michigan Department of Health and Human Services ("MDHHS") explains that dental problems can cause students to experience difficulties concentrating, prevent them from eating and sleeping well, and affect their behavior."

PA 316 further requires the principal or administrator of each school to provide the MDHHS with a summary of dental reports before November 1 of each year. The MDHHS recommends that schools provide information about dental screenings in parent letters and social media posts and include the KOHA assessment form and dental screening information in their school registration packets. The MDHHS also states that schools may work with their local health department to offer dental oral assessments at pre-enrollment events.[6]

Please do not hesitate to contact us at Collins & Blaha, P.C. if you have any questions regarding this legislation.

MICHIGAN TAKES ADDITIONAL STEPS TO ADDRESS TEACHER SHORTAGE

Within the last few months, the Michigan legislature has taken a number of actions to address the teacher shortage. A summary of key actions taken by the legislature are as follows:

Return to Employment After Retirement (Public Act 147 of 2023)

Pursuant to Public Act 147 of 2023 ("PA 147"), retired public school employees may return to work while continuing to receive their retirement benefits if certain conditions are met. MCL 38.1361.

Under PA 147, a retirant can return to work while receiving their pension and subsidy for retirement health care benefits if they wait at least six months after retirement to return to work, or they earn $15,100 or less in a calendar year in their new post-retirement position. Additionally, the Act requires that the retirant was employed in a position other than the superintendent at the time of retirement, and that the retirant is now employed at a reporting unit

[6] See https://www.michigan.gov/mdhhs/-/media/Project/Websites/mdhhs/Adult-and-Childrens-Services/Children-and-Families/Healthy-Children-and-Healthy-Families/Oral-Health/FAQs_Schools.pdf; See also https://www.michigan.gov/mdhhs/adult-child-serv/childrenfamilies/familyhealth/oralhealth/koha/schools.

after a bona fide termination of employment. A bona fide termination requires that an individual: 1) does not work during the month of their effective retirement date and 2) has no intention, expectation, offer, or contingency to return to work for the reporting unit at the time of retirement. The Office of Retirement Services provides an FAQ for retired public school employees to further clarify when retirants may return to work without having to forfeit their retirement benefits.[7] PA 147 took effect on October 10, 2023.

Position Flexibility with Certifications

The Michigan Department of Education ("MDE") released a memorandum regarding staffing flexibilities for elementary and world language teachers for public school districts and academies.[8] The MDE relaxed teaching requirements by allowing teachers with certain certifications to teach different grade levels and subjects. For example, teachers who are certified in Elementary K-5 All Subjects (K-8 All Subjects in Self-Contained Classroom) (ZG), may also teach any subject within grades K-8, regardless of whether the classroom is self-contained. Further, the world language endorsement (FA-FS) that was previously confined to a narrower range than Pre-K-12, may now be taught at any level of the Pre-K-12 range.

Funding and Other Programs

In 2022, Governor Whitmer and the Michigan legislature appropriated $575 million to help decrease the teacher shortage.[9] Of that amount, $175 million was dedicated to Grow Your Own

"The MDE relaxed teaching requirements by allowing teachers with certain certifications to teach different grade levels and subjects."

Programs, which help school support staff receive training to become teachers.[10] Other initiatives that were approved under this budget include tuition reimbursement for aspiring teachers, student teaching stipends, and additional funding to recruit and hire career and technical education instructors.

Additionally, other programs like EXPLORE were created for students in grades 6-12 who are interested in the educational field by providing them an opportunity to participate in teaching related programs. These programs include "hands-on experience and critical conversations" that students would not otherwise receive.[11]

Furthermore, teacher apprenticeship programs were created to help reduce the teacher shortage.[12] Teacher apprenticeship programs provide children an opportunity to work in the classroom and be mentored by veteran teachers. The MDE partnered with the Department of Labor, several school districts in Saginaw County, and Saginaw Valley State University to create this registered apprenticeship program. This program does not replace any of the prerequisites to becoming a teacher.

Please do not hesitate to contact our office if you have any questions regarding the teacher shortage or retirement.

[7] See https://www.michigan.gov/orsschools/pa-147-of-2023-faqs?fbclid=IwAR1EWP729pyY_K7YP2iBdcHHOA5lqwVDG4kZHvjPyGPLp-PQ2nRIK-0gsJQ.
[8] See https://www.michigan.gov/mde/-/media/Project/Websites/mde/Memos/2023/11/Elementary-and-World-Language-Staffing-Flexibilities.pdf?rev=e1b9213f2fa14fc4ab3e29d4a8ada941.
[9] See https://www.michigan.gov/mde/news-and-information/press-releases/2022/12/13/efforts-to-address-teacher-shortage-expand-with-new-state-funding.
[10] See https://www.michigan.gov/mde/news-and-information/press-releases/2023/12/20/state-continues-to-invest-in-grow-your-own-future-proud-michigan-educator-programs.
[11] See https://www.michigan.gov/mde/news-and-information/press-releases/2023/02/13/future-proud-michigan-educator-program-highlighted-in-newest-proudmieducator-video.
[12] See https://www.michigan.gov/mde/news-and-information/press-releases/2023/07/27/michigan-among-nation-leaders-in-addressing-teacher-shortage.

Proposed Independent Contractor Rule Faces Legal Hurdles

Independent contractors are considered exempt from the rules of the Fair Labor Standards Act ("FLSA"), including minimum wage, overtime, and reporting provisions. However, the FLSA does not define the term "independent contractor." For many years, federal courts have used the six-factor "Economic Realities" Test to determine whether an employee is an independent contractor.

On January 9, 2024, U.S. Department of Labor ("DOL") recently issued a final rule stating when a worker should be considered an independent contractor, which is likely to have significant implications for both contractors and the employers that hire them. The rule is effective March 11, 2024.

By way of background, on January 7, 2021, the DOL published a proposed rule[13] addressing whether workers are employees or independent contractors under the FLSA, which went into effect on March 8, 2021.

The DOL identified two "core factors" determining whether a worker is an independent contractor: the nature and degree of the worker's control over the work, and the worker's opportunity for profit or loss based on initiative, investment, or both. The DOL explained that these factors are the most probative of whether workers are economically dependent on someone else's business or are in business for themselves. The DOL also identified three less probative factors to be considered: the amount of skill required for the work, the degree of permanence of the working relationship between the individual and the potential employer, and whether the work is part of an integrated unit of production. The DOL further advised that in determining whether a worker is an independent contractor, the worker's actual practice is more probative than what may be contractually or theoretically possible.

"The DOL identified two 'core factors' determining whether a worker is an independent contractor: the nature and degree of the worker's control over the work, and the worker's opportunity for profit or loss based on initiative, investment, or both."

On January 20, 2021, the Office of Management and Budget ("OMB") issued a memorandum directing federal agencies to postpone the effective dates of rules that had been published but had not yet taken effect.[14] The DOL thereafter issued a notice of proposed rulemaking seeking to delay the independent contractor rule from going into effect, sought comments, and then issued a final rule delaying the effective date of the rule.[15] The DOL officially withdrew the rule on May 6, 2021.[16]

However, on March 14, 2022, the Eastern District of Texas vacated the decision to delay and withdraw the original rule and held that the new independent contractor rule became effective on March 8, 2021. *Coalition for Workforce Innovation v Walsh*, unpublished opinion of the Eastern District of Texas, issued

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[13] See https://www.federalregister.gov/documents/2021/01/07/2020-29274/independent-contractor-status-under-the-fair-labor-standards-act.

[14] See https://www.federalregister.gov/documents/2021/01/28/2021-01868/memorandum-for-the-heads-of-executive-departments-and-agencies.

[15] See https://www.federalregister.gov/documents/2021/03/04/2021-04608/independent-contractor-status-under-the-fair-labor-standards-act-flsa-delay-of-effective-date.

[16] See https://www.federalregister.gov/documents/2021/05/06/2021-09518/independent-contractor-status-under-the-fair-labor-standards-act-flsa-withdrawal.

March 14, 2022 (Case No. 1:21-CV-13). The DOL's appeal of that decision is currently pending before the Fifth Circuit. *Id.*, appeal docketed, No. 22-40316 (CA 5, May 16, 2022).

Courts in two cases have stated that the 2021 DOL rule from is not controlling. The court in *Harris v Diamond Dolls of Nevada, LLC*, unpublished opinion of the United States District of Nevada, issued July 26, 2022 (Case No. 319CV00598RCJCBC), p *2 stated that the "DOL's regulations are generally not binding but merely interpretative" and cannot be considered a change in law. *Id*. The court in *Wallen v TendoNova Corp*, unpublished opinion of the District Court of New Hampshire, issued November 22, 2022 (Case No. 20-cv-790-SE) agreed with the *Harris* ruling, finding the 2021 rule not to be controlling and may not be valid, pending appeal.

On October 11, 2022, the DOL issued a proposed rule, which rescinded the 2021 rule and replaced it with a rule that Economic Realities Test."[17] Specifically, the DOL proposed to modify the text published on January 7, 2021, addressing whether workers are employees or independent contractors under the FLSA. The DOL proposed to return to a totality-of-the-circumstances analysis of the economic realities test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity.

The DOL further proposed to return the consideration of investment to a standalone factor, provide additional analysis of the control factor, including detailed discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered, and return to the longstanding interpretation of the integral factor, which considers whether the work is integral to the employer's business.

The proposed rule sets forth the following six factors to serve as a guide to determine, under the totality of the circumstances, whether a worker is a non-exempt employee dependent on the employer, or is in business for themselves as an independent contractor:

1. Opportunity for profit or loss depending on managerial skill.
2. Investments by the worker and the employer.
3. Degree of permanence of the work relationship.
4. Nature and degree of control.
5. Extent to which the work performed is an integral part of the employer's business.
6. Skill and initiative.

This test would do away with the core two-factor approach and replace it with the above six factors that are not given predetermined weight but will be applied based on the facts of each case. Additional factors may also be considered in this analysis.

The Society for Human Resource Management ("SHRM") reports that industries such as construction and transportation could be significantly impacted by the new rule. Moreover, the rule may mean increased misclassification litigation because of the vague nature of the finalized rule.[18] For schools, continued use of staffing firms such as Edustaff may prove as an alternative to hiring third party or outside workers and avoiding potential challenges.

Initially, the DOL sought to issue the final rule in May 2023. However, on June 9, 2023, the U.S. Court of Appeals for the Fifth Circuit granted a 120-day delay to further proceedings related to a DOL appeal in response to the federal district court ruling in March 2022 to allow the DOL

[17] See https://www.federalregister.gov/documents/2022/10/26/2022-23314/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act-extension-of.

[18] See https://www.shrm.org/topics-tools/employment-law-compliance/Independent-Contractor-Rule-Impacts.

time to complete its rulemaking.[19] The DOL stated it continued to review the over 54,000 comments received on the rule. Although the DOL indicated an August 2023 final rule release in the Office of Information and Regulatory Affairs' Spring Agenda, the 120-day delay allowed the DOL until October 2023 to publish the rule, as it was still under review by OMB.[20]

On January 9, the DOL finalized its rule, officially rescinding the 2021 rule.[21] This new rule has an effective date of March 11, 2024. However, the rule is not without challenges. Four freelance workers filed the lawsuit in Georgia federal court late Tuesday, alleging that the rule unveiled last week is so vague that it violates the U.S. Constitution. The plaintiffs stated in their complaint that they would seek an order temporarily blocking the rule while the lawsuit proceeds. On the Congressional level, Senator Bill Cassidy (R-LA) announced he will introduce a Congressional Review Act resolution to repeal the rule.

For now, this rule is set to take effect in March and most federal circuit courts have applied the "Economic Realities Test." Thus, employers should look to the "Economic Realities" Test when determining whether an employee is an "independent contractor" for FLSA purposes.

Please do not hesitate to contact our office if you have any questions regarding the recently finalized independent contractor rule.

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.

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[19] See https://tax.thomsonreuters.com/news/dol-indicates-final-independent-contractor-rule-coming-no-later-than-october/.
[20] See https://www.thinkadvisor.com/2023/10/04/final-dol-independent-contractor-rule-lands-at-omb/.
[21] See https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking.