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School Law Review

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Inside This Issue:

Ethics Refresher on Accepting Gifts From Businesses

Public employees and officials have a duty, when awarding public contracts, to base their decisions on the best interests of the public (e.g. cost, quality, etc.). Therefore, public employees and officials also have a duty to avoid conflicts of interest that could arise from accepting personal compensation, discounts, or other incentives from businesses.

According to O.R.C. 102.03(E) public officials and employees should not accept anything of value from a business if it would manifest a substantial and improper influence upon the public official or employee with respect to the official's or employee's duties because: (1) it is of a substantial nature or value; and (2) it is from a source that is doing or seeking to do business with the agency the official or employee serves. A 2011 Ohio Ethics Opinion made clear that "a thing of value manifests a substantial influence on a public official or employee if it could impair the official's or employee's objectivity and independence of judgment in matters affecting the source of the thing of value."

The Ohio Ethics Commission also concluded that public officials or employees with the authority to negotiate or authorize an agency's contracts may be improperly influenced by discounts or things of value from the business subject to the contract. Consequently, officials and employees who are a part of negotiating or authorizing contracts should not accept any discount or thing of value for their personal use from entities seeking to do business with a board of education.

This is not to say that an employee cannot accept any nominal gift from a business. Small gifts, such as a book, a meal at a family restaurant, a promotional item, and other things of nominal value, are not prohibited from being accepted. To be permissible, the thing of value should in no way resemble compensation for duties the employee is obligated to complete. O.R.C. 2921.43 (A)(1) states that no public servant shall knowingly solicit or accept any compensation (other than otherwise allowed by law) to perform the public servant's official duties or other acts or services that are part of the public servant's duties. Compensation can include cash, tangible goods, or other financial gain or benefit. When a business offers a discount or other compensation only to an exclusive or limited group of public employees, the discount is likely compensatory in nature, and therefore prohibited under law.

Further, any public employee who violates O.R.C. 2921.43(A)(1) is guilty of a first degree misdemeanor, which is punishable with jail time.

District officials and employees should keep this in mind when negotiating or deciding on district contracts. Many businesses like to offer special discounts and benefits to employees and officials of their current or potential customers. In the case of public entities, there are some rules that must be followed in order for the businesses to offer these discounts or benefits. The business must offer the same discount or thing of value to all of its current and potential customers. This cannot be a discount that is only offered to public entities, it cannot only be offered to non-customers, and it cannot be offered at the request of a public official. In fact, no public official who is part of the negotiation or authorization of the business contract should take part in the discount or benefits offered.

When negotiating contracts, school officials need to understand what is most important: awarding public contracts based on the best interests of the public (e.g. cost, quality, etc.). In no way should the ability of a business entity to give a personal discount or benefit be used as a swaying point in making decisions about public contracts. Rather, public employees and officials should work to avoid conflicts of interest that could arise from accepting personal compensation, discounts, or other incentives from businesses.

FMLA 2013 Final Regulations

The 2013 Final Regulations for the FMLA became effective March 8, 2013. Most of the changes relate to the military leave provisions and are outlined below. Districts should review their FMLA policies, forms, and internal processes

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FMLA 2013 Final Regulations, Cont.

to ensure they are not running afoul of the new law.

Because of these changes the FMLA poster that is required to be displayed in all covered workplaces has changed. Therefore, your district should obtain the new poster and replace the old out-of-date posters. The new poster can be found at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

Qualifying Exigency Leave – (Section 825.126)

- "Covered military member" is now "military member" and includes both members of the National Guard and Reserves and the Regular Armed Forces.
- "Active duty" is now "covered active duty" and requires deployment to a foreign country.
- A new qualifying exigency leave category for parental care leave is added. Eligible employees may take leave to care for a military member's parent who is incapable of self-care when the care is necessitated by the member's covered active duty. Such care may include arranging for alternative care, providing care on an immediate need basis, admitting or transferring the parent to a care facility, or attending meetings with staff at a care facility.
- The amount of time an eligible employee may take for Rest and Recuperation qualifying exigency leave is expanded from 5 days to a maximum of 15 calendar days.

Military Caregiver Leave – Section 825.127

- The definition of covered servicemember is expanded to include covered veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness.
- A covered veteran is an individual who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran.
- The period between enactment of the FY 2010 National Defense Authorization Act ("NDAA") on October 28, 2009 and the effective date (March 8, 2013) of this Rule cannot be counted in determining the five-year period for covered veteran status.

Serious Injury or Illness for Current Servicemember – Section 825.127

- The definition of a serious injury or illness for a current servicemember is expanded to include injuries or illnesses that existed before the beginning of the member's active duty and were aggravated by service in the line of duty on active duty in the Armed Forces.
- A serious injury or illness for a covered veteran means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces and manifested itself before or after the member became a veteran, and is:

  1) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the service member unable to perform the duties of the servicmember's office, grade, rank, or rating; **OR**

  2) A physical or mental condition for which the covered veteran has received VA Service Related Disability Rating (VASRD) of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for care giver leave; **OR**

  3) A physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment; **OR**

  4) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Care givers.

Required Information for Certification of a Qualifying Exigency – Section 825.309

- The list of required information for certification for qualifying exigency leave for Rest and Recuperation leave is expanded to include a copy of the military member's Rest and Recuperation leave orders, or other documentation issued by the military setting forth the dates of the military member's leave.

Certification of Military Caregiver Leave – Section 825.310

- The list of health care providers who are authorized to complete a certification for military caregiver leave for a covered servicemember is expanded to include health care providers who are not affiliated with DOD, VA, or TRICARE.
- If an employer requests certification, an employee may submit documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers as sufficient certification of the covered veteran's serious injury or illness. The documentation is sufficient even if the employee is not the named caregiver on the document.
- If an employee submits documentation of the servicemember's enrollment in the VA Program of Comprehensive Assistance for Family Caregivers, an employer may require the employee to provide additional information, such as confirmation of the familial relationship to the enrolled servicemember or documentation of the veteran's discharge date and status.
- The information from the employee or servicemember that must be included for the certification for military caregiver leave is expanded to account for covered veterans. Employers may require the employee to indicate whether the military member is a veteran, the date of separation, and whether the separation was other than dishonorable. The employer may also require that the employee provide documentation confirming this information.
- Second and third opinions may be required by an employer for military caregiver leave certifications that are completed by health care providers who are not affiliated with DOD, VA, or TRICARE.

Employee Eligibility Hours of Service and USERRA – Section 825.110

- The Uniformed Services Employment and Reemployment Rights Act

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FMLA 2013 Final Regulations, Cont.

("USERRA") protections for employees who miss work due to USERRA-covered military service are clarified: the protections afforded by USERRA extend to all military members (active duty and reserve), and all periods of absence from work due to or necessitated by USERRA-covered service is counted in determining an employee's eligibility for FMLA leave.

Minimum Increments of Leave – Section 825.205

- Clarifying language is added that an employer may not require the employee to take more leave than necessary to address the circumstances that precipitated the need for leave, and that FMLA leave may only be counted against an employee's FMLA entitlement for leave taken and not for time that is worked for the employer.

Varying Minimum Increments – Section 825.205

- Clarifying language is added that employers must track FMLA leave using the smallest increment of time used for other forms of leave but the increments can be no larger than one hour.

Physical Impossibility – Section 825.205

- Clarifying language is added noting that the physical impossibility provision is to be applied in only the most limited circumstances, and the employer bears the responsibility to restore the employee to the same or equivalent position as soon as possible. **NOTE**: The physical impossibility provision provides that where it is physically impossible for an employee to commence or end work midway through a shift, the entire period that the employee is absent is designated as FMLA leave.

Recordkeeping – Section 825.500

- The recordkeeping requirements are updated to specify the employer's obligation to comply with the confidentiality requirements of the Genetic Information Non-Discrimination Act (GINA).

Appendices

- The FMLA optional-use forms and poster are removed from the regulations and no longer available in the appendices. They are now available on the Wage and Hour Division website, www.dol.gov/whd, as well as at local Wage and Hour district offices.

Bus Driver's ADA Claim Fails Due to Neutral Attendance Policy

***Bimberg v. Elkton-Pigeon-Bay Port Laker Schools*, 12-1311 (6th Cir. 2013).**

A bus driver failed to demonstrate that her husband's disability was a factor in a Michigan district's decision to terminate her employment. Therefore, she was not able to continue with her discrimination claim.

In January 2009 the bus driver took FMLA leave in order to care for her husband who had cancer. The district directed the driver to return to work no later than December 18, 2009, but the driver did not report to work. At that point the district terminated her employment and the driver sued, claiming the district had violated the ADA by discriminating against her regarding her association to a person with a disability. In other words, the driver claimed that the district terminated her employment because her husband had cancer. The driver based her belief that the termination was discriminatory on a fellow bus driver's statement that, "she had purposely got her husband sick so she could have a vacation," and her assertion that the superintendent stated that it "must be great to be able to go down south for the winter" in reference to the driver going to Texas for her husband's treatments.

The district argued that it discontinued the driver's employment because the driver was absent from work for more than a year, which was a violation of the district's attendance policy. It argued that the reason for the absence never factored into the decision to terminate her employment.

The Court noted that even if it was true that the other bus driver and the superintendent made the statements, that neither statement was direct evidence of discrimination because more than mere isolated incidents are required to show discrimination. In order to succeed in establishing her case the driver had to show: (1) she was qualified for the job; (2) the district took adverse action; (3) it knew she was associated with a person with a disability; and (4) the adverse action took place under circumstances raising a reasonable inference that her association was a motivating factor.

While the driver was able to establish the first three elements, she failed to establish the fourth. The Court believed the district when it asserted that it was simply applying its attendance policy when it dismissed the bus driver and that the disability of her husband was not a motivating factor.

How This Affects Your District:

Just because an employee is associated with a person with a disability and is caring for that individual does not mean that any adverse action taken regarding that employee will be found to be discriminatory. Districts with clearly written and uniformly applied leave policies are in the best position to prove that disability discrimination did not factor into adverse employment actions.

Districts should be careful to ensure that employees who are eligible for FMLA leave are not adversely affected when they return to work. Also, districts should ensure that all employees who take FMLA leave or any other leave, as allowed by the district, are treated equally. One way districts can get into trouble is when a policy is not strictly implemented and the district picks and chooses which employees the policy is enforced with and which employees are given a pass. In order to be a neutral policy, the district should ensure that it is implemented impartially and uniformly.

Sixth Circuit Rejects School Search of Student Cell Phone

***G.C. v. Owensboro Public Schools*, No. 11-6476 (6th Cir. March 28, 2013).**

The 6th Circuit Court of Appeals in Cincinnati recently ruled that a search of a student's phone was impermissible.

A student in the Owensboro Public School District in Kentucky was using his cell phone during class, which was against school rules. His teacher saw the

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Sixth Circuit Rejects School Search of Student Cell Phone, Cont.

phone and confiscated it, ultimately turning the phone over to the school's assistant principal ("AP"). Upon receiving the phone, the AP looked at four text messages in order to determine whether the student was breaking any other rules and whether the student might be contemplating suicide. During the time the student was enrolled in the district, there had been numerous incidents of bad behavior and he had stated on several occasions that he was contemplating suicide. Upon searching the phone, the AP found nothing to suggest any other school rules or laws had been violated and found no evidence that the student was currently contemplating suicide.

The student sued the school district for a violation of his Fourth Amendment rights, arguing that the search of his phone was not supported by a reasonable suspicion of any wrongdoing that would justify the AP reading his text messages.

The school responded that reasonable suspicion did exist because of the student's documented drug abuse issues and suicidal thoughts. It argued that the search was limited and "aimed at uncovering any evidence of illegal activity" or any indication that the student might hurt himself.

The Court agreed with the student and stated that the use of a cell phone on school grounds "does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone that is not related either substantively or temporally to the infraction." The Court went on to say that general knowledge of drug abuse or depressive tendencies does not enable a school official to search a student's phone when a search would otherwise not be warranted. In this case, there was no indication that the student was engaging in any illegal activity or that he was contemplating injuring himself or anyone else at the school. Therefore, the search of the phone was improper and illegal.

How This Affects Your District:

The standard for search of a cell phone is the same as the standard for any search by school officials. The main question is whether, under the circumstances, the search is reasonable. There are two parts to this reasonableness test: (1) the search must be justified at its inception; and (2) the manner in which the search is conducted must be reasonably related in scope to the circumstances which justified the search.

The case discussed above failed on the first prong. In order to search a student's cell phone district administrators should have a reasonable suspicion that the search will turn up evidence that the student is breaking other school rules or laws or that the search will turn up evidence that the student plans to harm himself or others in the school. General knowledge that the student might be engaged in such activities is not enough. The administrators must have a reasonable suspicion that in this particular situation the student is engaging in the activities noted above. Without reasonable suspicion, district administrators should refrain from reading any of the student's texts or otherwise looking into the content of the student's phone.

Administrators should also remember that when a search is justified in its inception, it must also be limited in the scope. Therefore, if an administrator reasonably believes he or she will find evidence of wrongdoing, it must only look at the data on the phone that will contain that information. For example, if an administrator reasonably believes a student was texting in class regarding a drug deal the administrator can look at the text messages, but cannot look at any pictures on the phone.

Legislative Update

HB 279 and HB 532 were signed into law in December 2012. All other bills discussed below are from the current Ohio General Assembly.

House Bill 279—In effect
This bill made significant changes to the laws regarding the grandparent power of attorney and caretaker authorization affidavit. The bill eliminated two requirements: (1) the automatic termination of grandparent power of attorney and caretaker authorization affidavit after one year; and (2) requirement that a new notarized affidavit would have to be submitted each year to the school district.

House Bill 532—In effect
This bill dealt with property disposition, and now allows districts to sell or lease real property directly to a STEM school. Under the law, districts will not be required to first offer property to community schools in certain limited circumstances. The property at issue must have been offered to community schools under RC 3313.41(G) prior to June 30, 2011 and the offer was not accepted. The district board must still own the property and have made the decision to sell or lease the property. In addition, the STEM school must have been approved for operation between October 1 and December 31, 2012. If all of these requirements are satisfied, a district is permitted to sell or lease the property directly to that STEM school. Because of how narrowly tailored the requirements are, it is likely that only a few districts will qualify under the new law.

Senate Bill 42— In Senate Ways & Means
The bill would authorize school districts to levy a tax up to 10 mills for safety and security measures, including additional lighting, upgrading security monitoring systems and hiring a resource officer. Districts are currently able to levy property taxes for general permanent improvements, including security measures. In contract, under SB 42, boards would be required to allocate revenue from security levies for security purposes only.

House Bill 18—In House Education
This bill provides for the development of a process by which boards of education can apply for federal or other financial assistance to install metal detectors at the entrance of school buildings. The bill does not require districts to install metal detectors, but instead creates the opportunity for schools to do so if they wish.

Senate Bill 21—in House Education (Passed by Senate)
This bill removes the requirement that reading teachers under the third-grade reading guarantee have been actively engaged in the reading instruction of students for the previous three years.

New I-9 Form
The U.S. Citizenship and Immigration Services Office issued a new I-9 form for employers on March 8, 2013. All employers should use this new form. After May 7, 2013 only the newly issued form will be accepted.

Education Law Speeches/Seminars

Administrator's Academy Dates at Great Oaks Instructional Resource Center

You can enroll in an Administrator's Academy session using the form on our website or by emailing Pam Leist at pleist@erflegal.com.

June 13th—*Special Education Legal Update*

July 11th—*Education Law Legal Updates 2012-2013*

"Filling in the Blanks" on Your Teacher Evaluation Policy

Ennis Roberts & Fischer will join with **Britton Smith Peters & Kalail** to develop a unique workshop for school administrators designed to help ease the apprehension we all feel about finalizing a comprehensive teacher evaluation policy. Our goal is to get your district to "yes" on all the important issues surrounding the new OTES system.

At the workshop, key stakeholders—including school law attorneys, labor negotiations representatives, state government representatives, and local educational leaders—will participate in a frank discussion regarding the major obstacles to completion so that educators are better able to understand the needs of all involved in the process. In addition the presenters will walk step by step through each of the required component of the evaluation policy and provide suggestions for how districts can address potential areas of contention and move forward in a positive way. In addition, workshop participants will be given a copy of a sample evaluation policy.

The workshop will be available statewide, and is free of charge. Registration is required. To register, contact Pam Leist (pleist@erflegal.com; 513-421-2540). Please provide a valid email address at the time of registration.

Cleveland
April 12th, 2013
8:00 a.m. to 12:00 p.m.
Cleveland Marriott East

Other Upcoming Presentations

Erin Wessendorf-Wortman
OASBO Annual Workshop on April 24, 2013
Making Booster Groups Work for You

Gary Stedronsky
OASBO Annual Workshop on April 25, 2013
Medical Leave: It's Not Brain Surgery

Bill Deters
OASBO Annual Workshop on April 25, 2013
Technology in the Workplace? Disaster or Boon?

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, send your request to Pam Leist at pleist@erflegal.com or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

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Ryan LaFlamme
Gary Stedronsky

Workers' Compensation

Administrative Hearings, Court Appeals, Collaboration with TPAs, General Advice

Team Members:
Ryan LaFlamme
Pam Leist
Erin Wessendorf-Wortman

Special Education

Due Process Claims, IEPs, Change of Placement, FAPE, IDEA, Section 504, and any other topic related to Special Education

Team Members:
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Pam Leist
Jeremy Neff
Erin Wessendorf-Wortman
Michael Fischer

School Finance

Taxes, School Levies, Bonds, Board of Revision

Team Members:
Bill Deters
Bronston McCord
Gary Stedronsky
Jeremy Neff