



## February 2019

Court Upholds Bus Driver Non-Renewals Where CBA is Silent ..... 1

Medical Marijuana :  
Employment, Student and  
Federal Grant Issues ..... 2

Is It Time to Let Go? School  
Employee Nonrenewal  
Refresher ..... 3

Lawsuit Filed Against Oregon  
Dept. of Ed Challenging  
Shortend School Days ..... 5

Responsiveness to Bullying  
Pays Off for Texas District ..... 5

## Court Upholds Bus Driver Non-Renewals Where CBA is Silent

On December 14, 2018, the Fifth District Court of Appeals (Morrow County) upheld Highland Local School District Board of Education’s decision to non-renew two first year bus drivers.

The Union filed a grievance in response to the Board’s notice of intent not to renew the limited contracts of two bus drivers. The grievance claimed there was no showing of “just cause” and proceeded to arbitration based upon the language of the collective bargaining agreement – only a “just cause” provision for discipline and discharge and silent on the issue of the non-renewal of limited non-teaching contracts. The agreement also included a general statement that the contract “supersedes” all applicable state law.

While arbitration hearing dates were being scheduled, the union’s attorneys filed a declaratory judgment action in court that was decided in favor of the Board on the basis that because the contract did not address the issue of non-renewal, state law applies.

The Court of Appeals of Ohio’s Fifth District agreed with the trial court, rejecting the union’s claim that a general statement in the contract that the collective bargaining agreement “supersedes applicable state law” somehow preempted the application of Ohio’s non-renewal statutes. The Court stated that such overrides can only occur “when a provision specifically addresses a matter and evinces a clear intent to override the statutory law relating to that matter.”

As such, since the contract made no specification about the issuance, sequence, renewal, or non-renewal of limited non-teaching contracts, there was no discernible conflict between the labor agreement and the statutes, therefore, “both R.C. 3319.081 and 3319.083 apply in the case.”

### What This Decision Means for Your District

This is a strong decision for the proposition that statutory rights can only be superseded by express language in a collective bargaining agreement. This works both ways and districts should take great care in drafting contract proposals that conflict with existing state laws, particularly as they relate to employee rights.

Along those same lines, it is very important that district administration carefully review non-teaching labor agreements relative to the issue of non-renewal given the recent amendments that now extend limited contracts from three years (1, 2, continuing) to seven years (1, 2, 2, 2, continuing). If you have addressed non-renewal in your

**Cincinnati:** 1714 West Galbraith Road • Cincinnati, OH 45239 • (513) 421-2540 • Toll-Free Number: 1 (888) 295-8409

**Cleveland:** 6000 Lombardo Center • Suite 120 • Cleveland, OH 44131 • (216) 487-6672

**Columbus:** 300 Marconi Boulevard • Suite 205 • Columbus, OH 43215 • (614) 705-1333

[www.ennisbritton.com](http://www.ennisbritton.com) | [www.twitter.com/EnnisBritton](https://www.twitter.com/EnnisBritton) | [www.linkedin.com/company/ennis-britton-co-lpa](https://www.linkedin.com/company/ennis-britton-co-lpa)



non-teacher agreement, you will need to verify that you will also be able to take advantage of these additional years before continuing contract status is granted. You should also anticipate proposals from non-teacher unions attempting to restrict the extension of limited contract status.

*United Elec. Radio & Machine Workers of Am. v. Highland Local School Dist. Bd. of Edn.* 2018 Ohio 5307 (Fifth District Court of Appeals, Morrow County, December 14, 2018).

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## Medical Marijuana: Employment, Student and Federal Grant Issues

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Marijuana dispensaries officially opened for business in January. News outlets reported that approximately 3,500 Ohioans had obtained medical marijuana cards by that time. With more dispensaries scheduled to open in the coming months, schools can expect to see more people who suffer from one of 21 qualifying conditions to apply for and obtain a medical marijuana card. Individuals must obtain a physician's recommendation and be added to the registry before they will receive a card.

Ohio is the 26<sup>th</sup> state in the U.S. to adopt some type of legalized marijuana scheme. Each state has its own laws and regulations governing its programs. Some states have authorized use of recreational marijuana while others like Ohio have authorized use of marijuana for medical purposes only. As Ohio implements its program, public school districts should prepare for what will inevitably create employment and student related issues along with federal funding concerns by looking to the experience of other states that have already passed laws permitting the use of marijuana.

### Employment issues

The law authorizing medical marijuana in Ohio does not require an Ohio employer to change their drug-free workplace policies and does not prevent an employer from disciplining an employee, up to and including termination, for possessing or using marijuana. Even if marijuana possession and use is legal for qualifying conditions in Ohio, Ohio employers are not required to permit use of marijuana for their employees or accommodate those who have cards. In addition, marijuana remains an illegal Schedule I drug at the federal level. Federal law impacts schools who receive federal grants, as discussed more fully below.

### Student issues

Schools can anticipate that issues concerning student use of medical marijuana will come up in particular for students with disabilities who have been diagnosed with one of the qualifying conditions. Parents or students may request that the district include use or administration of medical marijuana as an accommodation on a Section 504 plan or IEP.

**Cincinnati:** 1714 West Galbraith Road • Cincinnati, OH 45239 • (513) 421-2540 • Toll-Free Number: 1 (888) 295-8409

**Cleveland:** 6000 Lombardo Center • Suite 120 • Cleveland, OH 44131 • (216) 487-6672

**Columbus:** 300 Marconi Boulevard • Suite 205 • Columbus, OH 43215 • (614) 705-1333

[www.ennisbritton.com](http://www.ennisbritton.com) | [www.twitter.com/EnnisBritton](https://www.twitter.com/EnnisBritton) | [www.linkedin.com/company/ennis-britton-co-lpa](https://www.linkedin.com/company/ennis-britton-co-lpa)

In fact, a lawsuit was filed in Illinois on these same general facts in 2018. The parents had requested that the student, who received services for multiple disabilities as outlined in her IEP, be allowed to receive medical marijuana during the school day under the Illinois Medical Cannabis Pilot Program. The student had leukemia, and chemotherapy treatments had resulted in epilepsy and seizures. The student wore a cannabis patch on her foot and sometimes used cannabis drops on her tongue or wrists to regulate her epilepsy and seizures.

The Illinois law allowed cannabis to be present in various locations excluded schools, school buses and school grounds. Their statute specifically stated that school personnel are not required to be qualified caregivers who can administer medical cannabis. The school district was willing to administer the medical cannabis, but it ultimately denied the request for accommodations due to the issues of state and federal liability and criminal prosecution for violating the Illinois law. The parents sued in federal court, alleging violations of the ADA and Section 504 as well as denial of FAPE pursuant to the IDEA.

The district eventually filed a motion asking for a temporary restraining order, indicating it was willing and able to administer the medical cannabis to the student during the school day, but asked the federal court to issue an order allowing the District to possess and administer the medical cannabis, and to protect it from state or federal prosecution from doing so pursuant to the order. The court did not issue the order, and the matter settled in April of 2018. There is therefore no public resolution or legal precedent. However, this case illustrates the potential claims and the difficulties school districts face as medical marijuana use expands.

### **Medical marijuana and federal grant funds**

Given the federal position that marijuana remains an illegal drug, there is a question about how a school board's position on medical marijuana may impact federal grants for schools. The state of Ohio and many Ohio school districts receive federal grants through programs such as Title I and U.S. Department of Agriculture school nutrition programs for low income students.

As a condition of receiving and maintaining these grants, grantees and sub-grantees are required to make "a good faith effort" to maintain a drug-free workplace. This includes school buildings where work is done in connection with a grant award.

The federal agencies have discretion in determining whether a grantee or sub-grantee is in compliance with the conditions of the grant and have a range of options to compel compliance. However, suspension of grant payments and termination of awards are compliance options available to the agencies, and while it would ordinarily be considered a last resort or extreme action, it is a possible consequence that districts should consider as this issue continues to unfold in Ohio.

The federal agencies that award these grants have declined to address the issue of medical marijuana or provide any exception for medical marijuana in as it relates to the drug free requirement of the workplaces where grant activities are carried out.

### **What This Decision Means for Your District**

While each state's scheme of authorizing the use of medical marijuana is different, schools can look to the laws and the experience of other states' school districts in addressing employment and student issues. Ennis Britton will continue to monitor and report on the issues and legal developments in this area of the law on behalf of our clients.

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## **Is it Time to Let Go? School Employee Non-renewal Refresher**

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With the start of the New Year, it is hard to believe that decisions regarding staff for next school year are right around the corner. It is critical this time of year that districts review and comply with the statutory non-renewal process for

administrators, teachers and non-teaching staff so that districts remain in the position to make employment decisions that are in the best interest of students.

### **Administrator Non-renewal**

Before a board of education takes action to non-renew an administrator's contract, the administrator must be provided with notice of the board's intent to consider non-renewal no later than June 1<sup>st</sup> of the year the contract expires. The notice must indicate that the administrator has the right to request a meeting with the board in executive session to discuss its reasons for considering non-renewal, and the right to have a representative present at the meeting.

In addition to the notice, the administrator must receive both a preliminary and final evaluation in the final year of the contract. A written copy of the preliminary evaluation must be provided to the administrator at least sixty (60) days before the board takes action, and a copy of a final evaluation at least five (5) days prior to board action. The final evaluation must include the Superintendent's intended recommendation that the board not reemploy the administrator.

It is important to note that an administrator who received a contract for multiple years must be evaluated at least once in each of the prior years of the contract, with the written results provided by the end of the contract year, in order to be non-renewed. Keep in mind that principal and assistant principal evaluations may differ from other administrators. Ohio law requires that the evaluation of principals and assistant principals be comparable to teacher evaluations while tailored to the duties and responsibilities of their position and the environment in which they work.

Remember, failure to follow any of the above-referenced procedures will automatically result in the administrator being reemployed for a period of one (1) year unless the administrator has worked in the district for three (3) or more years. In that case, s/he will be automatically reemployed for two (2) years. Notwithstanding the evaluation procedures described above, although the statute requires the board to "consider" an administrator's evaluation when making an employment decision, the board is not required to base its decision on such evaluation(s).

### **Teacher Non-renewal**

In order to non-renew a limited contract teacher, the evaluation procedures in section 3319.111 of the Revised Code and any other requirements set forth in the board's OTEs policy or negotiated contract language must be met. Prior to board action, the superintendent must recommend to the board that the teacher not be reemployed and must deliver notice of nonrenewal to the teacher no later than June 1st. It is presumed that a failure to follow these steps results in the teacher's reemployment for one (1) year at the same salary (plus step(s)) unless the teacher notifies the board otherwise by June 15.

After receiving the notice, the teacher may demand a written statement describing the circumstances that led to the board's decision not to re-employ. The demand must be filed with the Treasurer within ten (10) days of receiving the board's decision with a ten-day grace period for the Treasurer to provide it. Thereafter, the teacher may file a demand for a hearing before the board requiring the board to make a final determination concerning nonrenewal.

### **Non-renewal for Nonteaching Staff**

Boards of education in all non-civil service school districts must provide notice of their intention not to renew a non-teaching contract by June 1 each year. If the board of education fails to provide the notice, the employee automatically receives the next contract in the contract sequence included in R.C. section 3319.081. If an employee is eligible for continuing contract upon expiration of the current contract, the employee will be granted continuing contract by operation of law. Districts should carefully review the terms of an applicable CBA to determine whether other steps must be completed before a non-teaching employee is non-renewed.

As described more fully in a separate article, districts should be aware that the contract sequence was modified significantly in 2018 through Senate Bill 216. Under the new law, a nonteaching employee must receive a one-year contract followed by three two-year contracts before they become eligible for a continuing contract. An employee

was eligible for continuing contract under prior law after only three years of employment. Districts should contact legal counsel for advice on how this change in the law may impact non-renewal of limited contract employees who were hired before the bill's effective date of November 2, 2018.

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## **Lawsuit Filed Against Oregon Dept. of Ed Challenging Shorted School Days**

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A class action lawsuit was recently filed on January 22, 2019, against the Oregon Department of Education, as well as the superintendent of public instruction and the deputy superintendent of public instruction, alleging that the state has a longstanding practice of denying a FAPE to students with disabilities who exhibit severe behaviors by forcing them to attend school on a shortened day.

The complaint specifically asserts that the state department has failed to stop a practice among public school districts across the state of shortening the school day for hundreds of students who exhibit severe behaviors. Students in Oregon typically attend school for six hours a day. Some students attended school for as little as one to two hours during extended periods of time according to the complaint. This practice, the complaint indicates, deprived the students an appropriate education in accordance with IDEA specifically when the districts failed to explore or provide other supports that may have enabled the students to successfully attend school for longer periods of time.

### **What This Case Means for Your District**

The decision to reduce a student's school day should only be made when a student demonstrates an individual need. There are certainly situations when a schedule change is the appropriate way to address an individual student's needs, but a blanket policy or practice of shortening days for all students in a particular disability category or classroom will generate questions. When large groups of students are on reduced schedules it can appear that IEP teams are not considering other approaches to addressing each individual student's needs. When schedules are shortened IEP teams should continue to review the student's progress to ensure the student receives special education and related services as appropriate, and should make plans to increase the student's day when the student shows the ability to be successful with the change.

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## **Special Education Spotlight: Responsiveness to Bullying Pays off For Texas District**

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A case recently published by the U.S. District Court in the Southern District of Texas illustrates the importance of school districts being responsive to claims of bullying brought by students with disabilities. The Houston Independent School District successfully defended multiple claims brought under the Individuals with Disabilities Act (IDEA), in large part because it demonstrated that staff were responsive to the student's repeated complaints of bullying and further that it continued to offer a Free Appropriate Public Education (FAPE) even when the parents refused to send their child to school.

The complaint was filed by the parents of a student named C.J. C.J. was diagnosed with autism, ADHD and intellectual disabilities and was therefore placed on an individualized education program ("IEP"). C.J.'s behavior began to deteriorate in the fall of his eighth grade year for unexplained reasons. Two months later, the student's mother complained that C.J.'s behavior was caused by peer and staff bullying and harassment. A few days after, the parents began to keep C.J. home from school. The district promptly investigated the allegations, and even though it found no evidence of harassment or bullying, proposed a plan to support the student when he returned to school by providing him with adult supervision and allowing him to spend the first hour in the office to help with his transition into school.

The parents refused to permit C.J. to return to school and subsequently requested homebound instruction. In Texas, students may only be assigned to homebound instruction if there is evidence of a medical need. When the district repeatedly requested medical documentation to support home instruction, the parents failed to respond. The district continued to communicate with the parents in an attempt to resolve the situation and return C.J. to school over the next few months. Nonetheless, C.J. missed over five months of school during the spring and summer.

When C.J. returned to school in the fall for his ninth grade year, the team conducted a reevaluation and met on several occasions with the family to consider changes to C.J.'s IEP. Dissatisfied with the IEP offered by the district, the parents filed for due process. The hearing officer appointed to the case found in favor of the district. The hearing officer specifically determined that the district had not only been responsive to complaints of bullying, but further that it continued to offer FAPE in the least restrictive environment even though the parents refused to make C.J. available to receive services. The hearing officer therefore concluded that the district met its obligations under IDEA, and C.J.'s failure to receive FAPE rested with the actions of his parents. The district court affirmed the hearing officer's decision and dismissed the complaint.

### **What This Decision Means for Your District**

This case illustrates how important it is for school districts to carefully investigate and document steps it takes to respond to complaints of bullying from students with disabilities. It further emphasizes the importance of districts to remain responsive to a student's needs even when parents are not being cooperative.

*Renee J. ex rel. C.J. v. Houston Indep. Sch. Dist., 119 LRP 1275 (5th Cir. 01/16/19)*

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## **Upcoming Deadlines**

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As your school district prepares for the next couple of months, please keep in mind the following upcoming deadlines. For questions about these requirements, please contact an Ennis Britton attorney.

- **February 1** – Deadline to submit May emergency, current operating expenses or conversion levy to county auditor for May election (RC 5705.194, 5705.195, 5705.213, 5705.219)
- **February 6** – Deadline for school districts to file resolution of necessity, resolution to proceed and auditor's certification for bond levy with board of elections for May election (RC 133.18); Deadline for county auditor to certify school district bond levy terms for May election (RC 133.18); Deadline to submit continuing replacement, permanent improvement or operating levy for May election to board of elections (RC 5705.192, 5705.21, 5705.25); Deadline to certify resolution for school district income tax levy or conversion levy for May election to board of elections (RC 5748.02, 5705.219); Deadline to submit emergency levy for May election to board of elections (RC 5705.195); Deadline to submit phased-in levy or current operating expenses levy for May election to board of elections (RC 5705.251)
- **March 1** – Deadline to take action on and deliver written notice of nonrenewal of superintendent's contract (RC 3319.01); Deadline to take action on and deliver written notice of nonrenewal of treasurer's contract (RC 3313.22); Deadline to publish joint statement describing how district's business advisory council has fulfilled its responsibilities (RC 3313.821)
- **March 31** – End of second ADM reporting period (RC 3317.03)

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## Upcoming Presentations

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### 2018–2019 ADMINISTRATOR’S ACADEMY SEMINAR SERIES

#### **December 6, 2018: Employment Law Update – Archive available**

Stay up-to-date on important issues and changes with FMLA, ADA, employee leave, and other employment-related topics.

#### **April 18, 2019: Student Privacy**

Keep current on FERPA, CIPA, COPPA, and other federal and state laws that impact student – and staff – privacy issues in your district.

#### **July 11, 2019: 2018–2019 Education Law Year in Review**

Find out the new education-related laws that passed in the budget bill and other legislation, as well as important court decisions and other changes that affect Ohio schools.

You spoke, and we listened! Based on client input regarding the preferred format for Ennis Britton’s Administrator’s Academy Seminar Series, these presentations will now be offered via a live video webinar professionally produced by the Ohio State Bar Association. As always, an archive will be available also.

Participants must be registered to attend each event. All three webinars will be archived for those who wish to access the event at a later time. You may register on our [website](#) or email Barb Billow at [bbillow@ennisbritton.com](mailto:bbillow@ennisbritton.com).

### OTHER UPCOMING PRESENTATIONS

#### **February 2: Ashland Leadership Academy Seminars (ALAS)**

Presented by John E. Britton, Giselle Spencer and Megan Bair

#### **February 5: Brown County ESC & Southern Ohio ESC *Special Education Legal Update***

Presented by Jeremy Neff and Erin Wessendorf-Wortman

#### **February 22: Southwest Ohio Personnel Administrators**

Presented by Ryan LaFlamme

#### **March 2: OSBA Special Education Law Workshop**

#### ***Proactive and Reactive: Responding Appropriately to Students with Extreme Behaviors***

Presented by Jeremy Neff

#### **March 6: Northwest Ohio Association of School Business Officials *Legal Update***

Presented by Erin Wessendorf-Wortman

#### **March 15: OSBA Cyberlaw Workshop 2019**

Presented by Hollie Reedy

#### **March 20: Trumbull County ESC *Spring Legal Update***

Presented by Giselle Spencer

**April 25: Ohio Association of School Business Officials Annual Workshop  
*Into the Woods: Advanced Public Records Law***

Presented by Hollie Reedy

**April 25: Ohio Association of School Business Officials Annual Workshop  
*Leave it to Me: Understanding Leave Options Available to School Employees***

Presented by Gary Stedronsky

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Want to stay up-to-date about important topics in school law?  
Check out Ennis Britton's [Education Law Blog](#).

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### 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, please email Barb Billow at [bbillow@ennisbritton.com](mailto:bbillow@ennisbritton.com). Archived topics include the following:

#### Labor and Employment

- Employment Law Update (December 2018)
- School Employee Nonrenewal
- Employee Licensure
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Requirements for Medicaid Claims
- Discrimination: What Administrators Need to Know

#### Student Education and Discipline

- New Truancy and Discipline Laws – HB 410
- Transgender and Gender-Nonconforming Students
- Student Discipline

#### School Finance

- School Levy Campaign Compliance

#### School Board Policy

- What You Should Know about Guns in Schools
- Crisis, Media, and Public Relations
- Low-Stress Solutions to High-Tech Troubles
- Ohio Sunshine Laws

#### Special Education

- Three Hot Topics in Special Education
- Supreme Court Special Education Decisions
- Special Education Scramble (2018)
- Special Education Legal Update (2017)
- Special Education Legal Update (2016)
- Effective IEP Teams

#### Legal Updates

- 2018 Lame Duck Legislation, Lobbying, and the Legislative Process
- 2017–2018 Education Law Year in Review
- 2016–2017 Education Law Year in Review
- 2015–2016 Education Law Year in Review



# Ennis Britton Practice Teams

At Ennis Britton, we have assembled a team of attorneys whose collective expertise enables us to handle the wide variety of issues that currently challenge school districts and local municipalities. From sensitive labor negotiations to complex real estate transactions, our attorneys can provide sound legal guidance that will keep your organization in a secure position.

When you have questions in general areas of education law, our team of attorneys help you make competent decisions quickly and efficiently. These areas include:

## Labor & Employment Law

## Student Education & Discipline

## Board Policy & Representation

There are times when you have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly in one of these areas of law, we have created topic-specific practice teams. These teams comprise attorneys who already have experience in and currently practice in these specialized areas.

### Construction & Real Estate

Construction Contracts • Easements •  
Land Purchases & Sales • Liens •  
Mediations • Litigation

#### Team Members:

Ryan LaFlamme  
Bronston McCord  
Giselle Spencer  
Gary Stedronsky

### Workers' Compensation

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

#### Team Members:

Ryan LaFlamme  
Pam Leist  
Giselle Spencer  
Erin Wessendorf-Wortman

### Special Education

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

#### Team Members:

Megan Bair  
John Britton  
Bill Deters  
Michael Fischer  
Pam Leist  
Jeremy Neff  
Hollie Reedy  
Giselle Spencer  
Erin Wessendorf-Wortman

### School Finance

Taxes • School Levies •  
Bonds • Board of Revision

#### Team Members:

Megan Bair  
John Britton  
Bill Deters  
Ryan LaFlamme  
Bronston McCord  
Jeremy Neff  
Hollie Reedy  
Giselle Spencer  
Gary Stedronsky

# Attorney Directory

**Megan Bair**

6000 Lombardo Center, Suite 120  
Cleveland, Ohio 44131  
P: 216.487.6675  
C: 330.519.7071  
Email: mbair@ennisbritton.com

**John Britton**

6000 Lombardo Center, Suite 120  
Cleveland, Ohio 44131  
P: 216.487.6673  
C: 216.287.7555  
Email: jbritton@ennisbritton.com

**William M. Deters II**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.200.1176  
Email: wmdeters@ennisbritton.com

**J. Michael Fischer**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.910.6845  
Email: jmfischer@ennisbritton.com

**Ryan M. LaFlamme**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.310.5766  
Email: rlaflamme@ennisbritton.com

**Pamela A. Leist**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.226.0566  
Email: pleist@ennisbritton.com

**C. Bronston McCord III**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.235.4453  
Email: cbmccord@ennisbritton.com

**Jeremy J. Neff**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.460.7579  
Email: jneff@ennisbritton.com

**Hollie F. Reedy**

300 Marconi Boulevard, Suite 205  
Columbus, Ohio 43215  
P: 614.705.1332  
C: 614.915.9615  
Email: hreedy@ennisbritton.com

**Giselle Spencer**

6000 Lombardo Center, Suite 120  
Cleveland, Ohio 44131  
P: 216.487.6674  
C: 216.926.7120  
Email: gspencer@ennisbritton.com

**Gary T. Stedronsky**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.886.1542  
Email: gstedronsky@ennisbritton.com

**Erin Wessendorf-Wortman**

1714 West Galbraith Road  
Cincinnati, Ohio 45239  
P: 513.421.2540  
C: 513.375.4795  
Email: ewwortman@ennisbritton.com

**Cincinnati Office:** 513.421.2540

**Cleveland Office:** 216.487.6672

**Columbus Office:** 614.705.1333