



April 2021

Department of Labor Issues New Rule Regarding Independent Contractors 1

Hiring of Assistant Coaches Did Not Constitute an Adverse Employment Action 2

Special Education Spotlight: ODE Sheds Light on How it Might Review COVID-19 Related Complaints 3

Pandemic Relief Bill Sub. HB 67 .. 4

Ennis Britton's 2020-21 Administrator's Academy Seminar Series..... 6

Upcoming Presentations 7

Department of Labor Issues New Rule Regarding Independent Contractors

The DOL has issued a final rule updating the test employers will use to determine whether someone may be treated as an independent contractor for purposes of overtime and minimum wage laws under the Fair Labor Standards Act (FLSA). The new rule will go into effect on May 7, 2021.

The new rule still requires employers to apply a five factor “economic realities test” to an individual situation in order to determine if a person is in business for themselves rather than economically dependent upon the employer for work. However, it changes prior guidance as it provides that no one out of the five total factors is determinative. It is important to note that the first two factors stated below are entitled to greater weight in the

consideration. The factors themselves and the components of how to determine the answers have changed as well.

The new rule states that the five factors to be considered in making this determination are:

1. The nature and degree of the worker’s control over the work (examples: setting their own schedule, selecting their own projects, working for others, vs. the employer setting the schedule, workload and requiring exclusive work for the employer).
2. The worker’s opportunity for profit or loss based on initiative, investment, or both (examples: capital investment in helpers, materials or equipment to further their work and earn profits or incur losses based on initiative and skill, vs. employer controls earnings and employee only may affect by working more hours or faster).
3. The amount of skill required for the work (example: the individual has specialized training or skill the employer does not provide, vs. the employer providing all training and equipment for the job).

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4. The degree of permanence of the relationship between the individual and the potential employer (example: the work is definite in duration or sporadically occurring, vs. indefinite in duration or continuing)
5. Whether the work is part of an integrated unit of production (example: is the work part of the employer's integrated production of a good or service vs. the work separated from the employer's production of goods or services).

These first two factors are considered the “core factors” under the new rule. The DOL notes that in considering these two core factors, if both point towards one classification (employee or independent contractor) it is likely that the individual is in that classification. DOL also makes it clear that the actual practices are more important than contractual terms or what is theoretically possible.

What this means for your district:

With districts continually and more frequently seeking services from third party providers and non-employees, the line of whether these individuals should be considered employees of the district in the eyes of the law can become blurred. There can be significant consequences under wage and hour laws such as the FLSA, as well as others, if that distinction is not clear.

Hiring of Assistant Coaches Did Not Constitute an Adverse Employment Action

Earlier this year, the 3rd Circuit Court of Appeals ruled in favor of a school district on an employee's claims under Title I of the Americans with Disabilities Act (“ADA”). In *Belles v. Wilkes-Barre Area School Dist.*, 62 NDLR 120 (3rd Cir. 2021), the Court held that in order for a high school wrestling coach to show that the district's decision to hire an assistant coach constituted an adverse employment action, the coach had to present evidence showing how the assistant coach's responsibilities had an adverse effect on the head coach's position.

In this case, the head wrestling coach had quadriplegia. The school's wrestling team practiced in a room located in the basement of the school. As a result, the coach asked that the district install a wheelchair lift or find an alternative accessible space for the wrestling team to practice. The wrestling coach claimed that the superintendent denied the requested accommodations. However, the superintendent denied these claims. Instead, the district claimed it hired an associate coach as well as two other assistant coaches. Additionally, the district argued that they had a meeting scheduled with the head coach and a wheelchair lift contractor to discuss placing a lift in the building. Prior to this meeting, the head coach submitted his resignation.

After his resignation, the head coach filed suit claiming violation of ADA Title I. In doing so, the head coach alleged that the district failed to engage in the interactive process in good faith. In ruling in favor of the district, the court determined that the alleged comments from the superintendent were not enough to infer that the district failed to act in good faith. Moreover, the court stated that the head coach terminated the interactive process when he resigned from his position.

In addition to the above reasoning, the court found no evidence that the district took an adverse employment action against the head coach in violation of the ADA. The head coach argued that the district's decision to hire an associate coach in effect was a demotion of his position. However, the coach

did not present any evidence regarding the associate coach's responsibilities and thus the court was unable to determine the actual impact on the head coach's position. Without any further evidence, the court held that the coach did not suffer an adverse employment action.

What this means for your district:

An employee may succeed on a disability discrimination claim by proving a prima facie case of disability discrimination or by proving that the district failed to engage in the interactive process in good faith. In proving a prima facie case of disability discrimination, the employee must show that they were subjected to an adverse employment action. When an employee argues that they were subjected to a demotion due to the hiring of another employee, courts will look to how the employee's job is impacted based on the new hire's job responsibilities. If there is little to no impact, the employee is likely going to be unable to prove that they were subjected to an adverse employment action.

Keep in mind that when an employee requests accommodations for a qualifying disability, the ADA requires the employer to engage in the interactive process in good faith. If the interactive process is terminated by the employee, as was true in this case, a court is less likely to find any violation on the part of the district.

Special Education Spotlight: Ohio Department of Education Sheds Light on How it May Review COVID-19 Related Complaints

While no one is through the COVID-19 pandemic yet, the Ohio Department of Education Office for Exceptional Children ("OEC") is starting to provide insight on how it may consider complaints filed against school districts alleging failure to provide a FAPE due to the COVID-19 pandemic.

In late 2020, the OEC issued a decision on a Complaint filed in spring 2020. This decision provided a specific-to-the-school-district-at-issue rubric when reviewing whether FAPE was provided to students within that particular school district during the March-May 2020 school building closures due to COVID-19. The school-district rubric listed questions where each answer of a "Y" or "N/A" counted as 1 point:

1. Documentation of SDI
2. Documentation of Individual Student contact
3. Documentation or Parent Contact
4. Progress Report Submitted
5. Specific Comments on Progress Report
6. Dad submitted on Progress Report
7. Evidence of SDI based on IS Interview
8. Evidence of SDI based on related service provider interview
9. Evidence of SDI based on parent interview

Once the points were tallied, OEC looked at each student that was part of the class in this complaint, and found students to fall in one of three categories:

Green (7-9 points): There was individualized documentation which demonstrated the students received SDI, or documentation which demonstrated that despite multiple attempts, the student and parent did not respond to any efforts to engage the students. Students in this category had IEP progress reports, which provided data that supported a FAPE was provided during the school

building closure. Finally, the parent, IS and related service provider interviews supported the documentation submitted by the District.

Yellow (4-6 points): There was some documentation which demonstrated the students received SDI or related services, or documentation which demonstrated individual contacts or attempts were made to contact the student and parent. Students in this category had IEP progress reports that contained either the “statement of justification” or no reported progress. Finally, the parent, IS and related service provider interviews supported that some services were provided, and FAPE was attempted, despite inconclusive documentation.

Red (0-3 points): There was no documentation provided which demonstrated the students received SDI or related services, or that contact was made consistently with students and parents. Students in this category had no progress reports, or blank progress reports. Finally, the parent, IS and related service provider interviews supported the documentation submitted by the District.

In issuing its decision, the OEC stated that it considered the guidance provided by the Office for Special Education Programs (“OSEP”) that noted the provision of services required by a student’s IEP may look different in light of the unprecedented nature of the COVID-19 school building closures. However, it appears from this decision that the documentation and the quality of the records maintained by the school district were below that expected by OEC.

As a result, OEC issued a finding/corrective action against the school district. The corrective action outlined requirements tailored to each of the green/yellow/red point categories regarding the provision of FAPE for students involved in the complaint, and which involved determinations of compensatory education. Notably, OEC specifically indicated that recovery services were a separate determination for school districts from a determination to be made regarding compensatory education.

Complaint #CP 0055-2020.

What this Means for Your District:

This decision by OEC (and the accompanying rubric) is specific to the school district at issue in that matter. This decision does not state that the rubric process is a standard to be utilized in any other situation or for all school districts. Remember, there are no new regulations or laws specifically addressing what it means to provide a FAPE during COVID-19. However, what this decision does is shed some light on how OEC may handle and review cases it receives related to the provision of FAPE during the March-May 2020 school building closures related to COVID-19. This case also highlights the ongoing importance of contemporaneous and detailed documentation as an incredibly important component for any school district to demonstrate its efforts and its provision of a FAPE.

Pandemic Relief Bill Sub. HB 67

This won’t be the last of the pandemic response bills, but HB 67 recently was passed on a fast track through the Ohio House and Senate, sent to the Governor and signed by him on March 20, 2021. The bill has an emergency clause, so it is effective immediately. It provides numerous changes in response to the pandemic for schools. What exactly was in this bill that will affect us?

Report cards: There will be no letter grades for districts, buildings or components for the 2020-21 school year, nor will districts need to submit preliminary data for the report cards by July 31. There will be no rankings of districts, community schools or STEM schools. The Department will report on September 15, 2021 the data it has on building and district performance.

Ratings, sanctions and penalties: For district ratings, this year will have no effect on a district's status for sanctions or penalties, and will not be used as a starting point for new sanctions or penalties, and previous years or subsequent years will be used for ratings that are assessed over time. For a district already subject to sanctions or penalties, (academic distress commissions, restructuring, Ed choice scholarship eligibility for buildings, defining a "challenged district" for new start-up community schools, federal and state laws identifying schools for targeted or comprehensive supports, etc.), they will remain in effect next year but will not advance. The law specifically states that Ed Choice performance-based scholarships will be awarded the same as current law outlines in R.C. 3310.03 for 2021-22 and 2022-23.

American History testing: In a compromise on testing, only the end of course exam in American History will not be required to be administered in 2020-21, and ODE was prohibited from failing to count any student in the district's enrollment for whom the test was not administered. If the test is not administered, it cannot be used to determine whether a student is subject to withdrawal. Students on Ed Choice, Jon Peterson or Pilot Project scholarships may renew them even if the test is not administered.

Graduation in 2020-21: Students in 12th grade or who are on track to graduate regardless of graduation cohort but have not completed the requirements for a diploma may graduate if:

- 1.) The principal, consulting with teachers and counselors, agrees that the student has successfully completed the curriculum or their IEP. This option may not be used after September 30, 2021.
- 2.) A school district that has adopted more rigorous requirements for curriculum than the state minimum may require only the minimum curriculum, and after the superintendent reviews whether the student has met the minimum curriculum to determine whether they have successfully completed it.

Additional graduation pathway added in 2020-21: For this year only, students will qualify for graduation if they complete the high school curriculum or their IEP, and earn the OhioMeansJobs readiness seal.

End of course exam flexibility: 11 and 12th grade students who take and retake, or who were unable to take an end of course exam, may use their final grade in the course instead of the end of course exam score to meet graduation requirements. The grade in the course determines what level of skill; advanced, accelerated, proficient, basic, or limited. A grade of "C" or higher qualifies as a competency score.

Testing time frames: For 2020-21 only, spring state assessments online will be completed according to the following schedule:

- ELA assessments for all grades between March 22 and May 7, 2021.
- Math, science and social studies assessment for all grades between March 29 through May 21, 2021.

For districts using paper format testing, the following schedule applies:

- Third grade ELA assessment between March 22- April 23, 2021.
- ELA grades 4-12 assessments between March 22- April 30, 2021.
- Math, science and social studies, all grades, March 29- May 14, 2021.

Schools will receive individual results of third grade ELA assessments by June 28, 2021.

Home school academic assessment waiver: Superintendents may not require home school parents to submit an academic assessment for the 2020-21 school year as a condition of allowing continued home instruction.

ESEA waiver: The law orders ODE to seek a waiver from the ESEA accountability and school identification requirements for this year.

Ennis Britton's 2020-21 Administrator's Academy Seminar Series

We know that school districts face many challenges this year, and we are here to help! We are taking a different approach to the 2020-21 Administrator's Academy Seminar Series by offering five live interactive webinars rather than the typical that we have offered in the past. Our goal is to address a broader list of topics in a way that takes up less time from your busy day. The webinars will be presented in an interactive zoom webinar format. Attendees will have an opportunity to hear about hot topics from an Ennis Britton attorney, and will also have an opportunity to collaborate with colleagues and in smaller discussion groups. The webinars will take place from 11:00 a.m. to 12:00 p.m. on the following dates:

- October 22, 2020: Student Privacy Challenges
- December 10, 2020: Lame Duck Legislative Overview
- February 11, 2021: Managing Employee Leaves
- April 15, 2021: Shedding Light on Sunshine Laws
- July 15, 2021: 2020-2021 School Law Year in Review (from 10:00 a.m. to 12:00 p.m.)

Due to the change in format, these events may not be archived or recorded.

Registration

You must be registered to attend any of these events. You may register on our website or by contacting Hannah via email or phone at 614.705.1333. Attendees will be provided a certificate of attendance. Any administrators and board members from your district are invited to attend.

We hope you can join us!

About Our Administrator's Academy Seminar Series

At Ennis Britton, we believe our role is to provide key legal guidance to our clients before a problem arises. This way, clients can make informed decisions and avoid legal pitfalls. We created the Administrator's Academy to provide school district administrators and board members with the latest legal information to help them manage their districts in an efficient, effective, and proactive manner.

The Administrator's Academy consists of a series of presentations, each covering a specific topic or area of education law. Our experienced attorneys provide a legal overview as well as real-life examples to help administrators navigate and understand the complicated legal environment. Participants have the opportunity to ask questions and to hear different perspectives on topics pertinent to school management. The Administrator's Academy presentations are provided as a complimentary service to our clients and are free of charge. Ennis Britton will also work with LPDCs for the attainment of CEU credit.

Upcoming Presentations

Special Education Coffee Chats

The Ennis Britton Special Education Team invites you to join a series of facilitated conversations with student services personnel and Ennis Britton attorneys to discuss the COVID-19 educational impacts. We know that as educational leaders, you are great collaborators, and if there was ever a time for sharing your insights on how to serve students, it is now.

During the chats, our special education team of attorneys will provide a quick overview of hot topics – then turn things over to you and your colleagues across the state. We will help facilitate discussions and encourage you to take your conversations in the direction that best serves your students and school district.

This series has been offered since May. In light of the slowdown of new guidance and legislation we are moving to a monthly schedule. Just like you, we strive to be responsive to the changing situation with the pandemic and will revisit the scheduling and format of the Coffee Chats regularly.

If you are interested in joining us for this coffee chat, please contact our Legal Secretary, Hannah Reichle, at hreichle@ennisbritton.com to receive the Zoom conference link (it will be sent Thursday morning). If you have already signed up, you are on the list and do not need to sign up again. If you have changed positions, please forward this email to the appropriate people in your district. The general logistics are as follows:

- The next Zoom conference for the 2020-2021 school year is set for Thursday, April 15th starting at 9:00 AM. We aim to be done in less than an hour because we know you are very busy. Attendees will be placed in a virtual waiting room until the meeting begins. After brief introductions, you will be prompted to join a breakout room.
- The Zoom chat feature will be available throughout this session. You may send messages to all participants or send "private" messages to facilitators.
- Special Education Team members will be available by email or cell phone if you have follow-up questions.

We encourage you to continue sending us your suggestions for future chats! We're here to help you with the technical side of compliance, but we also want to make sure we are helping you with the bigger picture. If any professionals are up to the challenge of creatively solving problems and adjusting to ever-changing government directives, it is educators. We are inspired by your efforts and honored to be a part of your team. Thank you again!

Other Presentations

We are currently scheduling administrator retreats for the 2020-2021 school year (in person or via videoconference). Contact us soon if you would like to schedule a retreat for your administrators!

April 9: Brown Co. ESC – *Superintendent’s Legal Briefing*

Presented by Gary Stedronsky

April 16: VASA Superintendent Legal Update

Presented by Hollie Reedy

April 20: LRP National Institute Virtual Event – *Wish You Were Here! Planning for Remote Learning*

Presented by Jeremy Neff

April 21: LRP National Institute Virtual Event — *Trouble on the Home Front: MDRs in Virtual and Hybrid Settings*

Presented by Jeremy Neff

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Want to stay up to date about important topics in school law?

Check out Ennis Britton’s [Education Law Blog](#).

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, contact Hannah via [email](#) or phone at 614-705-1333. Archived topics include the following:

Labor and Employment

- 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
- Student Privacy

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

- 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
Robert J. McBride
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
Kyle Wheeler

Special Education

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

Team Members:

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

School Finance

Taxes • School Levies •
Bonds • Board of Revision

Team Members:

John Britton
Bill Deters
Ryan LaFlamme
Robert J. McBride
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Hollie Reedy
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