Miller, Tracy, Braun, Funk & Miller, Ltd. presents

School Law Update:

12 Months of Employment Law

www.millertracy.com

- **SB7 and PERA Update: Rules, Regulations and Rights**
- **FLSA, Unemployment, and EEOC – Understanding Some Basic Requirements**
- **Bargaining Implications**

September 17, 2013

iHotel and Conference Center

Champaign, IL

MBF&MT
EST. 1975

Miller, Tracy, Braun, Funk & Miller, Ltd.
316 S. Charter St., P.O. Box 80
Monticello, IL 61856-0080
(217)-762-9416

www.millertracy.com

As the state and federal legislatures pass increasingly complicated requirements, and as courts weigh in on individual fact patterns, staying current on the rules for assessing individual employment situations is becoming a progressively more difficult task. Moreover, knowing "when" during the year to accomplish certain tasks is increasingly important.

The attorneys at Miller, Tracy, Braun, Funk & Miller, Ltd. will work through 12 months of examples, tasks, and tips to help you manage your staff effectively through a full year of employment. While many of the requirements are included within a particular month due to specific legal requirements, many others apply year-round.

August

Evaluation Notices

The Illinois State Board of Education's regulations on Teacher Evaluation now occur at Part 50 (replacing the former part 51). The requirements now require a school district to develop two different components of their plan: a professional practice component, and a student growth component. The professional practice component has new requirements, and the student growth component must be created with a joint committee on evaluation (newly created by the Performance Evaluation Reform Act, also known as "SB315" or "PERA").

Among the new components for professional practice parts of the professional evaluation plan required notice. That requirement for teachers occurs in part 50.100 of Title 23 of the Illinois Administrative Code:

> Each school district shall implement a performance evaluation plan for its teachers no later than the [PERA Implementation Date]. The plan shall address each of the components contained in this Section.
>
> a) The plan shall provide for an evaluation at least once every two years of each teacher in contractual continued service (i.e., tenured); however, a tenured teacher who has obtained a "needs improvement" or "unsatisfactory" rating on the previous year's evaluation shall be evaluated in the next school year after receiving that rating. (See Section 24A-5 of the School Code.)
>
> b) The plan shall provide for an evaluation at least once every year of each teacher not in contractual continued service (i.e., nontenured). (See Section 24A-5 of the School Code.)

c) At the start of the school term (i.e., the first day students are required to be in attendance), the school district shall provide a written notice (either electronic or paper) that a performance evaluation will be conducted in that school term to each teacher affected or, if the affected teacher is hired after the start of the school term, then no later than 30 days after the contract is executed. The written notice shall include:

1) a copy of the rubric to be used to rate the teacher against identified standards and goals and other tools to be used to determine a performance evaluation rating;

2) a summary of the manner in which measures of student growth and professional practice to be used in the evaluation relate to the performance evaluation ratings of "excellent", "proficient", "needs improvement", and "unsatisfactory" as set forth in Sections 24A-5(e) and 34-85c of the School Code; and

3) a summary of the district's procedures related to the provision of professional development in the event a teacher receives a "needs improvement" or remediation in the event a teacher receives an "unsatisfactory" rating, to include evaluation tools to be used during the remediation period.

d) Any professional development provided as part of a professional development or remediation plan under Section 24A-5 of the School Code shall align to Standards for Professional Learning (2011) published by Learning Forward, 504 South Locust Street, Oxford, Ohio 45056 and posted at http://www.learningforward.org/ standards/index.cfm. No later amendments to or editions of these standards are incorporated by this Section.

23 Ill. Adm. Code § 50.100 (emphasis added). Because the notice requirements for teachers do not kick in until after the District's applicable implementation date, no panic should set in at this point – but it is good practice to begin complying with these requirements today, and from here-forward, the District is well-advised to get the

evaluation tool and notice of evaluation to teachers on the first date of student attendance.

The notice requirements are somewhat different for principals, and it is imperative to note that they are *already in effect*. Those requirements are that notice must be delivered as follows:

> d) At the start of the school term (i.e., the first day students are required to be in attendance), the school district shall provide a written notice (either electronic or paper) to each principal and, as applicable, assistant principal that a performance evaluation will be conducted, or, if the principal or assistant principal is hired or assigned to the position after the start of the school term, then no later than 30 days after the contract is signed or the assignment is made. The written notice shall include:
>
> 1) a copy of the rubric to be used to rate student growth and professional practice of the principal or assistant principal; and
>
> 2) a summary of the manner in which student growth and professional practice measures to be used in the evaluation relate to the performance evaluation ratings of "excellent", "proficient", "needs improvement", and "unsatisfactory".

23 Ill. Adm. Code § 50.300 (d) (emphasis added). As these requirements are already in effect, the school district should already be compliant. Also note that new requirements for the notice of evaluations continue throughout the year with principals. Important dates are October 1 of each year to meet and set goals and discuss targets, and upon completion of the evaluation to discuss evidence used and rating result:

> e) On or before October 1 of each year, the qualified evaluator and principal or assistant principal shall meet to set the student growth measurement models and targets to be used. If the qualified evaluator and principal or assistant principal fail to agree on the student growth measures and targets to be included, then the qualified evaluator shall determine the goals to be considered.
>
> f) On or before October 1 of each year, the qualified evaluator and principal or assistant principal shall establish professional growth goals, which shall be based on the results of the performance evaluation conducted in the previous school year, if any. If the qualified evaluator and principal or assistant principal fail to agree on the professional growth goals to be

included, then the qualified evaluator shall determine the goals to be considered.

g) When the performance evaluation is completed, the qualified evaluator shall meet with the principal or assistant principal to inform the principal or assistant principal of the rating given for the student growth and professional practice components of the evaluation and of the final performance evaluation rating received, and discuss the evidence used in making these determinations. The qualified evaluator shall discuss the strengths demonstrated by the principal or assistant principal and identify specific areas of growth.

23 Ill. Adm. Code § 50.300 (e), (f), (g) (emphasis added).

Criminal Background Check Requirements for School Personnel

A. Checks Required by Statute

1. Criminal Background

105 ILCS 5/10-21.9:

Sec. 10-21.9. *Criminal history records checks and checks of the Statewide Sex Offender Database and Statewide Murderer and Violent Offender Against Youth Database*.

* * *

(d) No school board shall knowingly employ a person for whom a criminal history records check and a Statewide Sex Offender Database check has not been initiated.

* * *

(a) Certified and noncertified applicants for employment with a school district… are required as a condition of employment to authorize a fingerprint-based criminal history records check to determine if such applicants have been convicted of any of the enumerated criminal or drug offenses in subsection (c) of this Section or have been convicted, within 7 years of the application for employment with the school district, of any other felony under the laws of this State or of any offense committed or attempted in any other state or against the laws of the United States that, if committed or attempted in this State, would have been punishable as a felony under the laws of this State…

* * *

(c) No school board shall knowingly employ a person who has been convicted of any offense that would subject him or her to license suspension or revocation pursuant to Section 21B-80 of this Code. Further, no school board shall knowingly employ a person who has been found to be the perpetrator of sexual or physical abuse of any minor under 18 years of age pursuant to proceedings under Article II of the Juvenile Court Act of 1987.

2. Other Databases

(a-5) The school district or regional superintendent shall further perform a check of the Statewide Sex Offender Database, as authorized by the Sex Offender Community Notification Law, for each applicant.

(a-6) The school district or regional superintendent shall further perform a check of the Statewide Murderer and Violent Offender Against Youth Database, as authorized by the Murderer and Violent Offender Against Youth Community Notification Law, for each applicant.

B. "Pre-Employment" – Issues with Delayed Results

What happens when the individual has been hired, but the results show a finding…

1. …that would prohibit employment?

2. …that would not automatically prohibit employment, but the District finds problematic?

C. Volunteers and Contractors

1. Student Teachers

(g) In order to student teach in the public schools, a person is required to authorize a fingerprint-based criminal history records check and checks of the Statewide Sex Offender Database and Statewide Murderer and Violent Offender Against Youth Database prior to participating in any field experiences in the public schools. Authorization for and payment of the costs of the checks must be furnished by the student teacher. Results of the checks must be furnished to the higher education institution where the student teacher is enrolled and the superintendent of the school district where the student is assigned.

2. Contractors

(f) After January 1, 1990 the provisions of this Section shall apply to all employees of persons or firms holding contracts with any school district including, but not limited to, food service workers, school bus drivers and other transportation employees, who have direct, daily contact with the pupils of any school in such district. For purposes of criminal history records checks and checks of the Statewide Sex Offender Database on employees of persons or firms holding contracts with more than one school district and assigned to more than one school district, the regional superintendent of the educational service region in which the contracting school districts are located may, at the request of any such school district, be responsible for receiving the authorization for a criminal history records check prepared by each such employee and submitting the same to the Department of State Police and for conducting a check of the Statewide Sex Offender Database for each employee. Any information concerning the record of conviction and identification as a sex offender of any such employee obtained by the regional superintendent shall be promptly reported to the president of the appropriate school board or school boards.

3. Volunteers

Insurance requirements?

Direct, daily contact with students?

September – October

Informal Observations

"Informal observation" means observations of a teacher, principal, or assistant principal by a qualified evaluator that are not announced in advance of the observation and not subject to a minimum time requirement.

Formal Observations

A formal observation must comply with certain requirements upon the District's applicable implementation date (or earlier if agreed with the collective bargaining representative).

"Formal observation" means a specific window of time that is scheduled with the teacher, principal, or assistant principal for the qualified evaluator, at any point during that window of time, to directly observe professional practices in the classroom or in the school. (Also see Sections 50.120(c) and 50.320(c) of this Part.)

23 Ill. Adm. Code 50.120

1) The instructional framework shall align to the roles and responsibilities of each teacher who is being evaluated.

2) The evaluation plan shall contain a rubric to be used in rating professional practice that aligns to the instructional framework developed or adopted under this subsection (a).

3) If the rating scale to be used for each indicator of professional practice does not correspond to the performance evaluation ratings required under Section 24A-5(e) or 34-85c of the School Code, then the framework shall include a description of the four rating levels to be used and how these are aligned to the required performance evaluation ratings. In addition, the district shall quantify the relative importance of each portion of the framework to the final professional practice rating.

b) As required under Section 24A-5 of the School Code, the evaluation plan shall consider the teacher's attendance and his or her competency in the subject matter taught, as well as specify the teacher's strengths and weaknesses and the reasons for identifying the areas as such.

c) Evidence of professional practice shall be collected through the use of multiple observations that include formal and informal observations. For the purpose of this subsection (c), a formal observation shall allow the qualified evaluator to acquire evidence of the teacher's planning, instructional delivery, and classroom management skills and shall involve one of the following activities: an observation of the teacher in his or her classroom for a minimum of 45 minutes at a time; or an observation during a complete lesson; or an observation during an entire class period. The qualified evaluator may designate another person to conduct the observation in situations in which he or she cannot complete all of the observations, or the observations cannot be completed in a timely manner, provided the individual so designated is a qualified

evaluator, thus having completed the prequalification process and any retraining, as applicable, required under Section 24A-3 of the School Code.

1) For each tenured teacher who received either an "excellent" or "proficient" performance evaluation rating in his or her last performance evaluation, a minimum of two observations are required during the cycle in which the current evaluation is conducted, one of which must be a formal observation.

2) For each tenured teacher who received a "needs improvement" or "unsatisfactory" performance evaluation rating in his or her last performance evaluation, a minimum of three observations shall be required in the school year immediately following the year in which the "needs improvement" or "unsatisfactory" rating was assigned, of which two must be formal observations.

3) For each nontenured teacher, a minimum of three observations shall be required each school year, of which two must be formal observations.

4) Each formal observation shall be preceded by a conference between the qualified evaluator and the teacher.

   A) In advance of this conference, the teacher shall submit to the qualified evaluator a written lesson or unit plan and/or other evidence of planning for the instruction that will be conducted during the window of time when the formal observation may occur and make recommendations for areas on which the qualified evaluator should focus during the observation.

   B) The qualified evaluator and the teacher shall discuss the lesson or unit plan or instructional planning and any areas on which the qualified evaluator should focus during the observation, if applicable.

5) Following a formal observation, the qualified evaluator shall meet with the teacher to discuss the evidence collected about the teacher's professional practice. The qualified evaluator shall provide feedback following a formal evaluation to the teacher in

writing (electronic or paper). Following an informal observation, the qualified evaluator shall provide feedback to the teacher either orally or in writing (electronic or paper) and if the feedback is in a written format, also provide the teacher with an opportunity to have an in-person discussion with the evaluator.

A) The teacher shall consider (that is, reflect upon) his or her instruction and, if applicable, may provide to the qualified evaluator additional information or explanations about the lesson presented.

B) The qualified evaluator shall provide feedback to the teacher about the individual's professional practice, including evidence specific to areas of focus designated during the conference preceding the observation (see subsection (c)(4) of this Section).

C) If the qualified evaluator determines that the evidence collected to date may result in the teacher receiving either a "needs improvement" or "unsatisfactory" performance evaluation rating, then the qualified evaluator shall notify the teacher of that determination.

D) The teacher shall work with the qualified evaluator or others (e.g., professional learning team, department head), as determined in the plan, to identify areas for improvement.

E) Evidence gathered during the informal observations may be considered in determining the performance evaluation rating, provided it is documented in writing.

d) Evidence of Professional Practice

1) Any evidence collected during an observation shall be consistent with the rubric developed under subsection (a) of this Section.

2) The qualified evaluator shall share with the teacher any evidence collected and judgments made about the evidence during the conference held following the observation (see subsection (c)(5) of this Section).

3) The evaluation plan shall define how the evidence to be collected will be used to determine a final professional practice rating.

November

Fair Labor Standards Act and "Volunteer" Coaches

The Fair Labor Standards Act was enacted in 1938 to ensure that all employees receive a minimum wage, and unless an employee is "exempt" from the requirements of the Act, that he or she receives extra compensation for hours worked in excess of forty (40) in a workweek. The FLSA sets minimum wage, overtime pay, and recording keeping standards for employment, and for all "non-exempt" employees, wages must be paid at least the minimum wage and not less than one and one-half (1½) times their regular rates of pay for overtime hours worked. Employers also have a duty to keep certain records, including the hours worked by an employee, and to pay the employee's wages based on hours worked. Only those employees who are employed in *bona fide* executive, administrative, or professional positions are "exempt" from the FLSA. (In a school context, generally these employees include teachers, administrators, and other certified staff).

The extra-duty positions (such as ticket-taking and coaching) are generally non-exempt as "stand alone" positions because they do not meet the criteria described in Department of Labor regulations for an exempt position, however there is recent guidance from the Department of Labor specific to athletic coaches who are not otherwise employed by the school district.[1] Accordingly, the district must abide by the wage and hour provisions of the FLSA for employees in these positions[2].

In practical terms, if a non-exempt employee—such as a custodian or secretary—were to perform an extra-duty assignment, that employee would be entitled to be paid hourly, to

[1] Assuming coaches are not also employed by the school district in a different, non-exempt capacity, the Department of Labor has advised that coaches qualify for exemption as "teachers" under the FLSA, regardless of whether they hold a teaching certificate or an academic degree. This Opinion specifically makes clear that it does **not** apply to individuals who are otherwise employed in a non-exempt capacity. *Letter to Anonymous*, U.S. Department of Labor, FLSA-2009-10 (1/15/2009).

[2] Please note, however, that the wage and hour provisions do not apply if the extra-duty position is filled by an otherwise exempt employee—such as a teacher—ancillary to his or her exempt position.

be paid at least minimum wage, and to be paid at an overtime rate for any hours worked in excess of forty (40), including their normal duties combined with any extra duties – **unless** that extra-duty assignment was a *bona fide* volunteer activity.

> Example: A teacher assistant works forty (40) hours in a single workweek in her position as teacher assistant and two (2) hours in the same week taking tickets[3] at a volleyball game. The assistant earns $10.00/hour as a teacher assistant, and is paid minimum wage ($8.25/hour) for taking tickets. This employee should be paid two (2) hours of overtime at either an agreed rate or a blended rate of pay.

Furthermore, a non-exempt employee cannot waive his or her rights under the FLSA. Therefore, a non-exempt employee cannot agree to be paid a stipend for an extra-duty assignment instead of being paid hourly.[4]

However, in certain limited circumstances, a non-exempt employee may serve in a "volunteer" capacity and receive a "nominal fee." This same analysis would apply to individuals who are otherwise employed in a non-exempt position by the district as well as to individuals who are not otherwise employed by the district (unless they are coaches exempted as noted above). The FLSA "recognizes the generosity and public benefits of volunteering, and does not seek to pose unnecessary obstacles to *bona fide* volunteer efforts for charitable and public purposes." *Letter to Anonymous*, U.S. Department of Labor, FLSA-2005-51 (11/10/2005).

Congress was explicit in the 1985 amendments to the FLSA that a "volunteer" may receive "no compensation," but may be paid "expenses, reasonable benefits, or a nominal fee." 29 U.S.C. §203(e)(4)(A); *see also* 29 C.F.R. §553.106(e) ("Individuals do not lose their volunteer status if they receive a nominal fee from a public agency.")

The regulations promulgated by the Department of Labor make clear that a "nominal fee is not a substitute for compensation and must not be tied to productivity." 29 C.F.R. §553.106(e). The Department of Labor has opined in *Letter to Anonymous,* FLSA-2005-51, that a key factor is whether the amount of the fee <u>varies</u> as the particular individual

---

[3] For purposes of this example, it is my view that ticket-taking, unlike athletic coaching or club sponsorship, is unlikely to be considered for a "civic, charitable or humanitarian" reason and is likely to be considered an extension of the employee's other duties as a non-exempt employee, and therefore not a "volunteer" activity.

[4] The rights applicable under the FLSA cannot be waived by an individual employee or through a collectively bargained agreement.

spends more or less time engaged in the volunteer activities, or varies depending upon the success or failure of a particular team or school activity.

Also, in determining whether a stipend paid for a volunteer is a permissible "nominal fee," the Department of Labor looks to the "economic realities" of the situation and must compare the volunteer stipend to what it would otherwise cost to compensate someone to perform those services. The Department of Labor has determined that in the context of a volunteer acting in a capacity such as a coach or other extra-duty position, a fee paid is nominal as long as the fee does not exceed **twenty percent (20%)** of what the public agency would otherwise pay to hire a full-time coach or advisor for the same services. *Letter to Anonymous,* FLSA-2005-51.

While the "20% rule" has been constructed merely through the guidance and opinion letters crafted by the Department of Labor, it continues to be used by the Department of Labor in enforcement actions. Courts, however, have looked to a more general view of "economic reality" than the specific "20% rule" promulgated by the Department of Labor.

For example, in *Purdham v. Fairfax County School Board*, 637 F.3d 421 (4th Cir. 2011), the Court discussed the "economic realities" test in broader terms and cited an earlier Supreme Court decision that defined an "employee" as one "who as a matter of economic reality [is] dependent upon the business to which they render service". *Bartels v. Birmingham*, 332 U.S. 126 (1947). In *Purdham*, the plaintiff was a non-exempt employee who received a stipend of approximately $2,100 to serve as a golf coach. The Fourth Circuit looked to "all the circumstances" surrounding the stipend and determined that it was a "nominal fee" permitted for volunteers because the amount was not tied to the amount of time spent coaching, not tied to the team's success, and was "considerably less" than what he is paid in his regular employment. *Id.* at 434.

It is significant to note that the Fourth Circuit in *Purdham* paid no attention as to whether the stipend was no more than "20 percent of what the public agency would otherwise pay to hire a full-time coach or extracurricular advisor for the same services," as the Department of Labor has articulated as its standard. The use of the term "full-time" is significant in the Department of Labor's letters of opinion.

Ultimately, in order for a non-exempt employee to serve as a *bona fide* volunteer coach or sponsor, the following must apply:

1. The service must be for a public agency for "civic, charitable or humanitarian" reasons, without promise, expectation or receipt of compensation for services rendered.

2. Although a volunteer can receive no compensation, he or she can be reimbursed for expenses and can be paid a "nominal fee" to perform the services.
3. The volunteer must offer the services freely and without pressure or coercion, direct or implied, from an employer.
4. The volunteer must not be employed by the same public agency to perform the "same type of services" as those for which he or she is volunteering.

Joint Committee on Reductions in Force

With the SB7 trailer bill having finally been signed by the Governor of Illinois this year, several modifications to the SB7 "rules" will go into effect beginning January 1, 2014. Joint committee must, after January 1, meet by December 1 *each year*. (P.A. 98-513). This change revises the legislature's earlier directive that such meeting must only occur once prior to December 1, 2011.

It is important to note that the authority of the reductions in force committee is limited to the five components. The bargaining committee is not charged with changing the operation of these rules, and the RIF committee is not charged with the authority to change other components of RIF, evaluation, or collective bargaining. Making changes to contract or rules that are not within a committee's authority potentially subjects the agreement that is made to challenge because the committee that reached the agreement had no authority to do so.

According to SB7, each school district and special education joint agreement must use a joint committee composed of equal representation selected by the school board and its teachers or, if applicable, the exclusive bargaining representative of its teachers, to address the matters described in the law pertaining to honorable dismissals. The committee must reach agreement by majority vote by February 1 of any year for the changes to become effective for implementation during that year.

The joint committee has authority for the discussion of the following topics:

> (1) The joint committee must consider and may agree to criteria for excluding from grouping 2 and placing into grouping 3 a teacher whose last 2 performance evaluations include a Needs Improvement and either a Proficient or Excellent.
>
> (2) The joint committee must consider and may agree to an alternative definition for grouping 4, which definition must take into account prior

performance evaluation ratings and may take into account other factors that relate to the school district's or program's educational objectives. An alternative definition for grouping 4 may not permit the inclusion of a teacher in the grouping with a Needs Improvement or Unsatisfactory performance evaluation rating on either of the teacher's last 2 performance evaluation ratings.

(3) The joint committee may agree to including within the definition of a performance evaluation rating a performance evaluation rating administered by a school district or joint agreement other than the school district or joint agreement determining the sequence of dismissal.

(4) For each school district or joint agreement that administers performance evaluation ratings that are inconsistent with either of the rating category systems... the school district or joint agreement must consult with the joint committee on the basis for assigning a rating that complies with [the four categories required by law] to each performance evaluation rating that will be used in a sequence of dismissal.

(5) Upon request by a joint committee member submitted to the employing board by no later than 10 days after the distribution of the sequence of honorable dismissal list, a representative of the employing board shall, within 5 days after the request, provide to members of the joint committee a list showing the most recent and prior performance evaluation ratings of each teacher identified only by length of continuing service in the district or joint agreement and not by name.

If, after review of this list, a member of the joint committee has a good faith belief that a disproportionate number of teachers with greater length of continuing service with the district or joint agreement have received a recent performance evaluation rating lower than the prior rating, the member may request that the joint committee review the list to assess whether such a trend may exist.

Following the joint committee's review, but by no later than the end of the applicable school term, the joint committee or any member or members of the joint committee may submit a report of the review to the employing board and exclusive bargaining representative, if any.

The formation of the committee is a pre-requisite to the implementation of RIF procedure which is compliant with the law. Notes should be taken at a meeting prior to the implementation of the new RIF procedure to document that the required topics were

discussed.

It is also worth noting that Public Act 98-513 (the SB7 trailer bill) modified the definition of the Groupings. Under SB7, part-time teachers were not excluded from the definitions of any of the Groupings – so, in addition to being required to evaluate such teachers annually, it was possible (depending on practices for awarding seniority, that a retired, part-time teacher would acquire "seniority" and advance beyond a nontenured or even a tenured teacher over time within Grouping 3 or 4. The trailer bill has changed the rule, placing part-time teachers into Grouping 1, whose dismissal is at the discretion of the employing board:

> (1) Grouping one shall consist of each teacher who is not in contractual continued service and who (i) has not received a performance evaluation rating, (ii) is employed for one school term or less to replace a teacher on leave, or (iii) is employed on a part-time basis. "Part-time basis" for the purposes of this subsection (b) means a teacher who is employed to teach less than a full-day, teacher workload or less than 5 days of the normal student attendance week, unless otherwise provided for in a collective bargaining agreement between the district and the exclusive representative of the district's teachers. For the purposes of this Section, a teacher (A) who is employed as a full-time teacher but who actually teaches or is otherwise present and participating in the district's educational program for less than a school term or (B) who, in the immediately previous school term, was employed on a full-time basis and actually taught or was otherwise present and participated in the district's educational program for 120 days or more is not considered employed on a part-time basis.

Public Act 98-513.

December

Discussion and action on RIFs: Open Meetings Act and other considerations.

The Illinois Open Meetings Act (5 ILCS 120/1, et seq.) permits meetings, or portions of meetings, to be closed to the public only when expressly permitted by one of the exceptions set forth in Section 2 of the Act. The Act states that those exceptions are to be strictly construed in favor of openness, and closed meetings or sessions only allowed when the subject matter clearly falls within the scope of an exception. Section 2 of the Act permits closed session to discuss the appointment, employment, compensation, discipline, performance, or dismissal of specific employees (see, 5 ILCS 120/2(c)(1)), but this exception is narrow, and should be interpreted literally.

A reduction in force would not fall within the scope of Section 2(c)(1). A reduction-in force is a decision to eliminate a position, not a specific person. The employee who is ultimately honorably discharged is determined by application of the detailed statutory framework after the determination to eliminate the position has been reached. Section 2(c)(1) does not allow closed session discussion or consideration of program or subject matter cuts, nor does the exception extend to discussion of school district finances as they might relate to reductions-in-force. Similarly, a reduction-in-force should never be based upon the performance or discipline of the specific employee who will ultimately receive an honorable discharge.

Closed session discussion in violation of the limited and narrow exception exposes the district not only to risk of adverse media coverage, but also creates the risk of inquiry from the Attorney General's Office of the Public Access Counselor, penalties, litigation and attorneys fees (5 ILCS 120/3.5). Moreover, detailed public discussion about the financial (employee neutral) reasons for a reduction-in-force will help to insulate the school district from liability - particularly from a charge that the reduction-in-force was an improper termination, retaliatory, and/or discriminatory.

A reduction-in-force need not be specifically listed on an Agenda to be discussed, however, a specific agenda item is required for action. The Fourth District Appellate Court (in *Rice v. Board of Trustees of Adams County*, 326 ILL.App.3d 1120, 762 N.E.2d 1205, 261 Ill.Dec. 278 (4th Dist. 2002) upheld a trial court decision stating that the Open Meetings Act allowed consideration of new topics at public meetings, but not action upon those new items, unless the agenda for the meeting in question specifically named that action item. Therefore, any action by a school board at either a regular or special meeting must be anticipated by a properly and timely posted agenda in order for such item to be acted upon. School districts must make certain that the Agenda for any Board meeting at which the reduction-in-force occurs explicitly states that action will be taken upon the reduction-in-force of certified or noncertified employees.

Additionally, effective January 1, 2013, the Open Meetings Act requires that the agenda of any meeting "set forth the general subject matter of any resolution... that will be the subject of final action at the meeting." School districts should list a separate Agenda item for each reduction-in-force resolution, and the same should include the title of each resolution. Any action not explicitly noted on the posted agenda could result in a legal challenge, and, if said action were to be invalidated under the Open Meetings Act, it could cause the school district to miss the timelines required for a reduction-in-force essentially invalidating the same.

Bargaining Reductions in Force

An educational employer is required to bargain with an exclusive bargaining representative (whether representing certified/licensed employees or non-certified/licensed employees) over matters related to wages, hours, and other terms and conditions of employment. 115 ILCS 5/10. Where an employer makes a change to those conditions (including, but not limited to, the number of staff members), the employer is required to bargain. *Id*. When a number of employees are let go, the work load may increase for remaining staff, benefits may be effected, preparation times may be effected, and other working conditions may be effected – all of these changes must be bargained unless waived by the exclusive bargaining representative.

The solution is to notify the exclusive bargaining representative *well in advance* of the board's decision to conduct a reduction in force. Such notifications should occur very early – ideally at the end of fall semester or at the very beginning of spring semester. The more time there is to discuss any potential changes, the more likely an agreement will be reached or sufficient discussion to implement a result will be reached.

Remember – bargaining is nothing more than meeting at reasonable times, conferring in good faith, and reducing any agreements that are reached to writing. 115 ILCS 5/10(a). The employer is not obligated to agree to any specific provision (*Id*.,) – the Act presumes merely that sufficient times and meetings will ultimately result in agreement.

January

Generating the "Sequence of Honorable Dismissal" List

A. Statutory Requirements

Each board, including the governing board of a joint agreement, shall, in consultation with any exclusive employee representatives, each year establish a sequence of honorable dismissal list categorized by positions and the groupings. Copies of the list must be distributed to the exclusive bargaining representative at least 75 days before the end of the school term, provided that the school district or joint agreement may, with notice to any exclusive employee representatives, move teachers from grouping one into another grouping during the period of time from 75 days until 45 days before the end of the school term.

Grouping 1 must consist of 1) each teacher not in contractual continued service who has not received a performance evaluation rating; 2) each teacher not in contractual

continued service employed for one school term or less to replace a teacher on leave; or 3) each teacher not in contractual continued service employed on a part-time basis.

The risk with grouping 1 is that probationary teachers must be evaluated at least annually. Failure to evaluate an employee by the date of the RIF in order to place an employee into this grouping would likely result in a challenge by the employee that the process was impure because the reasoning for dismissal was mere pretextual for illegal motivation. Therefore, administrators should conduct proper and complete evaluations early to avoid challenge.

On August 20, 2013, Governor Quinn signed into law the long-awaited "trailer bill" to SB7 (the Education Reform Act). Previously known as SB1762, Public Act 98-513 accomplishes several important changes to the rules for reduction in force and evaluation. Some of the changes may "clean up" some of the unanswered questions left by SB7, but given the two years between the two bills, some districts may have (by necessity) already developed solutions that conflict with the law. Among the many changes, there has been significant change to the definition of Grouping 1, as noted above.

Grouping 2 must consist of each teacher with a Needs Improvement or Unsatisfactory performance evaluation rating on either of the teacher's last two performance evaluation ratings.

Evaluating a teacher negatively may subject a district to process challenge of a RIF because the employee falls into grouping 2. Moreover, challenge will not occur until RIF, months after evaluation.

Administrators should carefully examine and support evaluations at the time they are crafted ensuring that documentation is complete and well-supports the conclusion reached.

Grouping 3 must consist of each teacher with a performance evaluation rating of at least Satisfactory or Proficient on both of the teacher's last two performance evaluation ratings, if two ratings are available, or on the teacher's last performance evaluation rating, if only one rating is available, unless the teacher qualifies for placement into grouping 4.

The danger with this category is the number of employees who likely will fall here. An employee who falls into this grouping(of which there are likely many) and is subsequently RIF'd may argue that they should have been in Grouping 4 but for the failure of some process.

Again, evaluation is the key to avoiding trouble in this category. Carefully examine and support evaluation documentation before it is delivered, and be sure all evaluations are complete. No longer should any teacher be treated as though the evaluation is "unimportant" or merely a foregone conclusion.

Grouping 4 must consist of each teacher with two Excellent performance evaluation ratings out of the teacher's last three performance evaluation ratings with a third rating of at least Satisfactory or Proficient.

NEW REQUIREMENT:

- SB7 Trailer Bill now also requires a separate seniority list:
- **Each year, each board shall also establish, in consultation with any exclusive employee representatives, a list showing the length of continuing service of each teacher who is qualified to hold any such positions, unless an alternative method of determining a sequence of dismissal is established as provided for in this Section, in which case a list must be made in accordance with the alternative method. Copies of the list must be distributed to the exclusive employee representative at least 75 days before the end of the school term.**

Non-Certified Seniority List

According to the Illinois School Code,

> Each board shall, in consultation with any exclusive employee representative or bargaining agent, each year establish a list, categorized by positions, showing the length of continuing service of each full time educational support personnel employee who is qualified to hold any such positions, unless an alternative method of determining a sequence of dismissal is established as provided for in this Section, in which case a list shall be made in accordance with the alternative method. Copies of the list shall be distributed to the exclusive employee representative or bargaining agent on or before February 1 of each year.

105 ILCS 5/10-23.5(a) (emphasis added). Although the list must be distributed to the exclusive bargaining representative by February 1, nothing in the law limits the seniority list to non-certified/licensed employees who are covered by a collective bargaining agreement. In other words, non-certified/licensed employees who are either excluded

from the bargaining unit or not represented by a bargaining unit need to be listed on a non-certified seniority list – but they may very well be in their own categories.

The "categories" of the seniority list are a mandatory subject of collective bargaining. How many categories exist is subject to bargaining, and reductions in force may occur within the categories – therefore, maximum latitude for the board of education in determining who to reduce in force is accomplished by increasing the number of categories.

To illustrate, a collective bargaining agreement could specify one category for all teacher aides. Another collective bargaining agreement may specify a category for Title 1 aides as distinct from the category for classroom aides. The reduction in force, therefore, may occur from either or both categories – allowing greater flexibility, because the least senior person in one category may *not* be the least senior person employed.

Within each category, reductions occur from the least senior to the most senior employee, whether or not the employees are represented by a collective bargaining agent.

February

Principal Evaluations: Issues to Consider Before Final Rating

- **Be mindful of timelines**
  - Process complete before March 1st
- **Be alert to the student growth data cycle**
  - When you select the assessments, when will you have the results?
- **Be careful to comply with other contractual requirements**
  - Earlier dates? More steps?
- **Be ready for inclusion on the Sequence of Honorable Dismissal List**
  - Only in the categories of their non-administrative teaching certification

Additional Evaluation Discussion

By February, evaluations should be wrapping up. Administrators will want sufficient time to identify issues in evaluations and the resulting reductions in force or dismissals. The school will need to begin making plans for any professional development plans which result.

The law requires a professional development plan be implemented within 30 days after rating any *tenured teacher* with a needs improvement summative rating. The professional development plan must be developed *in consultation* with the teacher, but it is not to be *collectively bargained* – a deficient teacher is unlikely to agree to the plan as written, so the district should not agree to language in a collective bargaining agreement which requires bargaining of those plans.

The law does not define the length of plan, and does not define its contents. Nor does it require an evaluation at the conclusion of the plan. A professional development plan should be tailored to the specific weaknesses of the teacher, and should be no shorter than a full quarter in duration, because demonstrating strength or improvement will be difficult if the district fails to offer support through an entire quarter.

Most importantly, both an evaluation and a professional development plan should be directed toward offering firm directives for improvement. The first argument a teacher who is dismissed may make is that they did not know what to do to meet with the approval of the board and administration. Defeating such an argument requires that the evaluation clearly dictate not just what happened in a classroom, but what the expectations are for improvement. There must be clear directives (such as "you shall," or "you are directed to," or "you must,") and there must not be vague or permissive language (such as "I would suggest," or "maybe you could," or "you might"). Putting in writing *how* a teacher can succeed in their job will serve not only to prove the district made the expectations clear, but also will protect the district from arguments about illicit motivation. Finally, it puts the teacher on notice that their job may be in jeopardy, and among the best ways to reduce the likelihood of a lawsuit is to permit an employee sufficient notice to find other employment.

March

Action on Reductions in Force

(105 ILCS 5/24-12)

Sec. 24-12. *Removal or dismissal of teachers in contractual continued service*.

…If any teacher, whether or not in contractual continued service, is removed or dismissed as a result of a decision of a school board to decrease the number of teachers employed by the board, a decision of a school board to discontinue some particular type of teaching service, or a reduction in the number of programs or positions in a special education joint agreement, then written notice must be mailed to the teacher and also given to the teacher either by certified mail, return receipt requested, or personal delivery with receipt at least 45 days before the end of the school term, together with a statement of honorable dismissal and the reason therefor…

Reclassification of Principals

(105 ILCS 5/10-23.8b):

Sec. 10-23.8b. *Reclassification of principals and assistant principals*. Upon non-renewal of a principal's or assistant principal's administrative contract, the principal or assistant principal shall be reclassified pursuant to this Section. No principal or assistant principal may be reclassified by demotion or reduction in rank from one position within a school district to another for which a lower salary is paid without written notice from the board of the proposed reclassification by April 1 of the year in which the contract expires.

Within 10 days of the principal's or assistant principal's receipt of this notice, the school board shall provide the principal or assistant principal with a written statement of the facts regarding reclassification, and the principal or assistant principal may request and receive a private hearing with the board to discuss the reasons for the reclassification. If the principal or assistant principal is not satisfied with the results of the private hearing, he or she may, within 5 days thereafter, request and receive a public hearing on the reclassification. Any principal or assistant principal may be represented by counsel at a private or public hearing conducted under this Section.

If the board decides to proceed with the reclassification, it shall give the principal or assistant principal written notice of its decision within 15 days of the private hearing or

within 15 days of the public hearing held under this Section whichever is later. The decision of the board thereupon becomes final.

Nothing in this Section prohibits a board from ordering lateral transfers of principals or assistant principals to positions of similar rank and equal salary.

April

Reduction in Force - Noncertified Employees

105 ILCS 5/10-23.5 states in relevant part (emphasis added):

(a) ... If an educational support personnel employee is removed or dismissed or the hours he or she works are reduced as a result of a decision of the school board (i) to decrease the number of educational support personnel employees employed by the board or (ii) to discontinue some particular type of educational support service, written notice shall be mailed to the employee and also given to the employee either by certified mail, return receipt requested, or personal delivery with receipt, at least 30 days before the employee is removed or dismissed or the hours he or she works are reduced, together with a statement of honorable dismissal and the reason therefor if applicable. However, if a reduction in hours is due to an unforeseen reduction in the student population, then the written notice must be mailed and given to the employee at least 5 days before the hours are reduced. The employee with the shorter length of continuing service with the district, within the respective category of position, shall be dismissed first unless an alternative method of determining the sequence of dismissal is established in a collective bargaining agreement or contract between the board and any exclusive bargaining agent and except that this provision shall not impair the operation of any affirmative action program in the district, regardless of whether it exists by operation of law or is conducted on a voluntary basis by the board. If the board has any vacancies for the following school term or within one calendar year from the beginning of the following school term, the positions thereby becoming available within a specific category of position shall be tendered to the employees so removed or dismissed from that category or any other category of position, so far as they are qualified to hold such positions. Each board shall, in consultation with any exclusive employee representative or bargaining agent, each year establish a list, categorized by positions, showing the length of continuing service of each full time educational support personnel employee who is qualified to hold any such positions, unless an alternative method of determining a sequence of dismissal is established as provided for in this Section, in which case a list shall be made in accordance with the alternative method. Copies of the list shall be distributed to the exclusive employee representative or bargaining agent on or before

February 1 of each year. Where an educational support personnel employee is dismissed by the board as a result of a decrease in the number of employees or the discontinuance of the employee's job, the employee shall be paid all earned compensation on or before the next regular pay date following his or her last day of employment...

Notices to Remedy

A. Statutory Basis

(1) If a dismissal of a teacher in contractual continued service is sought for any reason or cause other than an honorable dismissal …, the board must first approve a motion containing specific charges by a majority vote of all its members. …

Before setting a hearing on charges stemming from causes that are considered remediable, a board must give the teacher reasonable warning in writing, stating specifically the causes that, if not removed, may result in charges; however, no such written warning is required if the causes have been the subject of a remediation plan pursuant to Article 24A of this Code.

105 ILCS 24-12(d)(1).

May

Job Descriptions and Qualifications of Employment

With the passage of Public Act 97-8 (also known as "SB7"), qualifications for certified/licensed staff must be determined by May 10 of each year *prior* to the year in which a reduction in force is to be conducted:

> Each teacher must be categorized into one or more positions for which the teacher is qualified to hold, based upon legal qualifications and any other qualifications established in a district or joint agreement job description, on or before the May 10 prior to the school year during which the sequence of dismissal is determined.

105 ILCS 5/24-12(b). The limitation requires that job descriptions be crafted for each position in the district. Additionally, the change requires that any limitation on qualification *beyond licensure* be determined by May 10 in the year *prior* to any reduction in force. Therefore, if a teaching position is to be reduced on June 1, 2014, the qualifications will be those in effect on May 10, 2013.

Because of the grouping of employees by evaluation rating, notice requirements to the exclusive bargaining representative, and the number of issues that may arise in deficient licensure or endorsement, a school is well-advised to communicate, before May 10, the list of teachers' qualifications.

June

EEOC Claims

[*See the materials appended at the end of the materials.*]

Unemployment Security

After the conclusion of a school term or when an employee ceases working for a school district, schools often receive one or more notices of a request for unemployment security. Administered by the Illinois Department of Employment Security, when an employee files a request for unemployment (as it is often abbreviated), the former employer is asked to file a response (to agree or disagree that the employee is entitled to unemployment security).

There are several specific exceptions to the general rule that an unemployed person may receive unemployment security compensation, and complicated rules for determining continuing eligibility. Generally, however, people who leave work voluntarily or are dismissed for cause are ineligible for compensation, unless voluntary resignation was for "good cause." A situation even more frequent in Illinois Schools is filings over the summer. The law states (in relevant part):

> An individual shall be ineligible for benefits, on the basis of wages for service in employment in any capacity… performed for an educational institution, for any week which begins after December 31, 1977, during a period between two successive academic years or terms, if the individual performed such service in the first of such academic years or terms and there is a reasonable assurance that the individual will perform such service in the second of such academic years or terms.

820 ILCS 405/612(B)(2) (emphasis addd). In other words, an employee performing the relevant *type* of work for a school district is ineligible for unemployment security during school breaks so long as the employee has a reasonable assurance that they will be reemployed in the following school year.

Relevant to the foregoing discussion is that since 2011, it has been required that school districts provide notice of potential eligibility for benefits upon unemployment. Schools should be sure to send the notice upon any potentially qualifying unemployment in order to be safe.

July

Reduction in Force - Recall Rights

105 ILCS 5/24-12(b) states in relevant part:

... If the board or joint agreement has any vacancies for the following school term or within one calendar year from the beginning of the following school term, the positions thereby becoming available must be tendered to the teachers so removed or dismissed who were in groupings 3 or 4 of the sequence of dismissal and are qualified to hold the positions, based upon legal qualifications and any other qualifications established in a district or joint agreement job description, on or before the May 10 prior to the date of the positions becoming available, provided that if the number of honorable dismissal notices based on economic necessity exceeds 15% of the number of full-time equivalent positions filled by certified employees (excluding principals and administrative personnel) during the preceding school year, then the recall period is for the following school term or within 2 calendar years from the beginning of the following school term. Among teachers eligible for recall pursuant to the preceding sentence, the order of recall must be in inverse order of dismissal, unless an alternative order of recall is established in a collective bargaining agreement or contract between the board and a professional faculty members' organization...

105 ILCS 5/24-12.2 states:

Rights of recalled teachers. Any teacher on contractual continued service who is removed or dismissed as a result of a decision of the board to decrease the number of teachers employed by the board or to discontinue some particular type of teaching service and who accepts the tender of a vacancy within one calendar year from the beginning of the following school term pursuant to Section 24-12 shall lose no rights which accrued while in contractual continued service.

New and Vacant Positions

105 ILCS 5/24-1.5:

Filling a new or vacant teaching position, which is not otherwise required to be filled pursuant to Section 24-12 (recall of tenured teachers), requires consideration of factors that include without limitation, certifications, qualifications, merit and ability (including performance evaluations, if available) and relevant experience.

Length of continuing service with a school district must not be considered unless all other factors are determined by the district to be equal.

A school district's decision to select a particular candidate is NOT subject to a CBA's grievance procedure provided that in making the decision the district adheres to the procedural requirements in the CBA relating to the filling of new or vacant positions.

New position and vacancy provisions existing in CBAs in effect on June 13, 2011 shall remain in full force and effect for the term of the agreement, unless terminated by mutual agreement.

Nothing in Section 24-1.5 or SB7 limits or otherwise impacts management's right to hire new employees, affects what currently is or may be a mandatory subject of bargaining or creates a statutory cause of action for a candidate, or a candidate's representative to challenge a district's selection based on the district's failure to adhere to the requirements of Section 24-1.5.

To avoid claims of illegal discrimination, districts must document, in as much detail as possible, each applicant's strengths and weaknesses in relation to the relevant statutory criteria, i.e. certifications, qualifications, merit and ability (including performance evaluations, if available), and relevant experience.

U.S. Equal Employment Opportunity Commission

How to File a Charge of Employment Discrimination

Note: Federal employees and job applicants have a different complaint process.

You may file a charge of employment discrimination at the EEOC office closest to where you live, or at any one of the EEOC's 53 field offices. Your charge, however, may be investigated at the EEOC office closest to where the discrimination occurred. If you are a U.S. citizen working for an American company overseas, you should file your charge with the EEOC field office closest to your employer's corporate headquarters.

Where the discrimination took place can determine how long you have to file a charge. The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a state **or** local law that prohibits employment discrimination on the same basis. The rules are slightly different for age discrimination charges. For age discrimination, the filing deadline is only extended to 300 days if there is a **state** law prohibiting age discrimination in employment and a state agency or authority enforcing that law. The deadline is **not** extended if **only** a local law prohibits age discrimination.

Many states and localities have agencies that enforce laws prohibiting employment discrimination. EEOC refers to these agencies as Fair Employment Practices Agencies (FEPAs). EEOC and some FEPAs have worksharing agreements in place to prevent the duplication of effort in charge processing. According to these agreements, if you file a charge with either EEOC or a FEPA, the charge also will be automatically filed with the other agency. This process, which is defined as dual filing, helps to protect charging party rights under both federal and state or local law.

Online Assessment System

EEOC does not accept charges online. However, we do have an online assessment tool that can help you decide if EEOC is the correct agency to assist you. You can then complete an Intake Questionnaire that you may print and either bring or mail to the appropriate EEOC field office to begin the process of filing a charge.

Filing in Person

Each field office has its own procedures for appointments or walk-ins. Please check our field office list for your office's procedures.

It is always helpful if you bring with you to the meeting any information or papers that will help us understand your case. For example, if you were fired because of your performance, you might bring with you the letter or notice telling you that you were fired and your performance evaluations. You might also bring with you the names of people who know about what happened and information about how to contact them.

You can bring anyone you want to your meeting, especially if you need language assistance and know someone who can help. You can also bring your lawyer, although you don't have to hire a lawyer to file a charge. If you need special assistance during the meeting, like a sign language or foreign language interpreter, let us know ahead of time so we can arrange for someone to be there for you.

By Telephone

Although we do not take charges over the phone, you can get the process started over the phone. You can call 1-800-669-4000 to submit basic information about a possible charge, and we will forward the information to the EEOC field office in your area. Once the field office receives your information, they will contact you to talk to you about your situation.

By Mail

You can file a charge by sending us a letter that includes the following information:

- Your name, address, and telephone number
- The name, address and telephone number of the employer (or employment agency or union) you want to file your charge against
- The number of employees employed there (if known)
- A short description of the events you believe were discriminatory (for example, you were fired, demoted, harassed)
- When the events took place
- Why you believe you were discriminated against (for example, because of your race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information)
- Your signature

Don't forget to sign your letter. If you don't sign it, we cannot investigate it.

Your letter will be reviewed and if more information is needed, we will contact you to gather that information or you may be sent a follow-up questionnaire. At a later date, we will contact you and may put all of the information you sent us on an official EEOC charge form and ask you to sign it.

U.S. Equal Employment Opportunity Commission

Time Limits For Filing A Charge

The anti-discrimination laws give you a limited amount of time to file a charge of discrimination. In general, you need to file a charge within 180 calendar days from the day the discrimination took place. The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. The rules are slightly different for age discrimination charges. For age discrimination, the filing deadline is only extended to 300 days if there is a **state** law prohibiting age discrimination in employment and a state agency or authority enforcing that law. The deadline is **not** extended if **only** a local law prohibits age discrimination.

Note: Federal employees and job applicants have a different complaint process, and generally must contact an agency EEO Counselor within 45 days. The time limit can be extended under certain circumstances.

Regardless of how much time you have to file, it is best to file as soon as you have decided that is what you would like to do.

Time limits for filing a charge with EEOC generally will not be extended while you attempt to resolve a dispute through another forum such as an internal grievance procedure, a union grievance, arbitration or mediation before filing a charge with EEOC. Other forums for resolution may be pursued at the same time as the processing of the EEOC charge.

Holidays and weekends are included in the calculation, although if the deadline falls on a weekend or holiday, you will have until the next business day. Figuring out how much time you have to file a charge is complicated. If you aren't sure how much time is left, you should contact one of our field offices as soon as possible so we can assess whether you still have time.

If More Than One Discriminatory Event Took Place

Also, if more than one discriminatory event took place, the deadline usually applies to each event. For example, let's say you were demoted and then fired a year later. You believe the employer based its decision to demote and fire you on your race, and you file a charge the day after your discharge. In this case, only your claim of discriminatory discharge is timely. In other words, you must have filed a charge challenging the demotion within 180/300 days from the day you were demoted. If you didn't, we would only investigate your discharge. There is one exception to this general rule and that is if you are alleging ongoing harassment.

Ongoing Harassment

In harassment cases, you must file your charge within 180 or 300 days of the last incident of harassment, although we will look at all incidents of harassment when investigating your charge, even if the earlier incidents happened more than 180/300 days earlier.

Equal Pay Act And Time Limits

If you plan to file a charge alleging a violation of the Equal Pay Act (which prohibits sex discrimination in wages and benefits), different deadlines apply. Under the Equal Pay Act, you don't need to file a charge of discrimination with EEOC. Instead, you are allowed to go directly to court and file a lawsuit. The deadline for filing a charge or lawsuit under the EPA is two years from the day you received the last discriminatory paycheck (this is extended to three years in the case of willful discrimination).

Equal Pay Act And Title VII And Time Limits

Keep in mind, Title VII also makes it illegal to discriminate based on sex in the payment of wages and benefits. What this means is, if you have an Equal Pay Act claim, you may also want to file a Title VII claim. In order to pursue a Title VII claim, you must file a charge with EEOC first. Filing a Title VII charge will not extend the deadline for filing

an EPA lawsuit. Figuring out how much time you have to file a charge is complicated. It also can be difficult to figure out the pros and cons of filing a charge under the EPA instead of a lawsuit. Our field office staff would be happy to speak with you to explore your options.

U.S. Equal Employment Opportunity Commission

The Charge Handling Process

Note: Federal employees and job applicants have a different complaint process.

At the time your charge is filed, we will give you a copy of your charge with your charge number. Within 10 days, we will also send a notice and a copy of the charge to the employer. In some cases, we will ask both you and the employer to take part in our mediation program. If the case is not sent to mediation, or if mediation doesn't resolve the problem, we usually will ask the employer to give us a written answer to your charge. We may also ask the employer to answer questions we have about the claims in your charge. Then your charge will be given to an investigator.

Mediation

If you and the employer agree to mediation, a mediator will try to help you both reach a voluntary settlement. Mediation allows you and the employer to talk about your concerns. Mediators don't decide who is right or wrong, but they are very good at suggesting ways to solve problems and disagreements.

Possible Dismissal

If the EEOC does not have jurisdiction, or if your charge is untimely, we will close your charge quickly. We may also close your charge quickly if we decide that we probably will not be able to find discrimination. If your charge is dismissed, you will be notified.

Investigation

How we investigate a charge depends on the facts of the case and the kinds of information we need to gather. In some cases, we visit the employer to hold interviews and gather documents. In other cases, we interview witnesses over the phone and ask for documents by mail. After we finish our investigation, we will let you and the employer know the result.

How long the investigation takes depends on a lot of different things, including the amount of information that needs to be gathered and analyzed. It took us – on average – nearly 6 months to investigate a charge in 2004. We are often able to settle a charge faster through mediation (usually in less than 3 months).

Subpoena

If an employer refuses to cooperate with an EEOC investigation, EEOC can issue an administrative subpoena to obtain documents, testimony or gain access to facilities.

Possible Action After Investigation Completed

If we haven't found a violation of the law, we will send you a Notice-of-Right-to-Sue. This notice gives you permission to file a lawsuit in a court of law. If we find a violation, we will try to reach a voluntary settlement with the employer. If we cannot reach a settlement, your case will be referred to our legal staff (or the Department of Justice in certain cases), who will decide whether or not the agency should file a lawsuit. If we decide not to file a lawsuit, we will give you a Notice-of-Right-to-Sue.

U.S. Equal Employment Opportunity Commission

The Charge Handling Process

When a charge is filed against you, you will be notified within 10 days that a charge of discrimination has been filed and you will be provided with the name and contact information for the investigator assigned to your case. A charge does not constitute a finding that your company engaged in discrimination. The EEOC has a responsibility to investigate and determine whether there is a reasonable cause to believe discrimination occurred.

In many cases, you may opt to resolve a charge early in the process through mediation or settlement. At the start of an investigation, EEOC will advise you if your charge is eligible for mediation, but feel free to ask the investigator about the settlement option. **Mediation and settlement are voluntary resolutions.**

During the investigation, you and the Charging Party will be asked to provide information. Your investigator will evaluate the information submitted to determine whether unlawful discrimination has taken place. You may be asked to:

- submit a **statement of position**. This is your opportunity to tell your side of the story and you should take advantage of it.
- respond to a **Request for Information** (RFI). The RFI may ask you to submit copies of personnel policies, Charging Party's personnel files, the personnel files of other individuals and other relevant information.
- permit an **on-site visit**. While you may view such a visit as being disruptive to your operations, our experience has been that such visits greatly expedite the fact- finding process and may help achieve quicker resolutions. In some cases, an on- site visit may be an alternative to a RFI if requested documents are made available for viewing or photocopying.
- provide contact information for or have employees available for **witness interviews**. You may be present during interviews with management personnel, but an investigator is allowed to conduct interviews of non-management level employees without your presence or permission.

If the charge was not dismissed by the EEOC when it was received, that means there was some basis for proceeding with further investigation. There are many cases where it is unclear whether discrimination may have occurred and an investigation is necessary. You are encouraged to present any facts that you believe show the allegations are incorrect or do not amount to a violation of the law. An employer's input and cooperation will assist EEOC in promptly and thoroughly investigating a charge.

- Work with the investigator to identify the most efficient and least burdensome way to gather relevant evidence.
- You should submit a prompt response to the EEOC and provide the information requested, even if you believe the charge is frivolous.
  - *If there are extenuating circumstances preventing a timely response from you, contact your investigator to work out a new due date for the information.*
- Provide complete and accurate information in response to requests from your investigator.
- The average time it takes to process an EEOC investigation is about 182 days.
  - *Our experience shows that undue delay in responding to requests for information extends the time it takes to complete an investigation.*
- If you have concerns regarding the scope of the information being sought, advise the investigator. Although EEOC is entitled to all information relevant to the allegations contained in the charge, and has the authority to subpoena such information, in some instances, the information request may be modified.
- Keep relevant documents. If you are unsure whether a document is needed, ask your investigator. By law, you are required to keep certain documents for a set period of time.

Your investigator will:

- be available to answer most questions you have about the process.
- keep you informed about the charge process, including the rights and responsibilities of the parties at the conclusion of the investigation.
- conduct an appropriate, thorough and timely investigation.

- allow you to respond to the allegations.
- inform you of the outcome of the investigation.

Once the investigator has completed the investigation, EEOC will make a determination on the merits of the charge.

- If EEOC determines that there is no reasonable cause to believe that discrimination occurred, the charging party will be issued a letter called a **Dismissal and Notice of Rights** that tells the charging party s/he has the right to file a lawsuit in federal court within 90 days from the date of receipt of the letter. The employer will also receive a copy of this document.
- If EEOC determines there is reasonable cause to believe discrimination has occurred, both parties will be issued a **Letter of Determination** stating that there is reason to believe that discrimination occurred and inviting the parties to join the agency in seeking to resolve the charge, through an informal process known as **conciliation**.
- Where conciliation fails, EEOC has the authority to enforce violations of its statutes by filing a lawsuit in federal court. If the EEOC decides not to litigate, the charging party will receive a **Notice of Right to Sue** and may file a lawsuit in federal court within 90 days.

U.S. Equal Employment Opportunity Commission

Resolving a Charge

EEOC offers employers many opportunities to resolve charges of discrimination. Successfully resolving the case through one of these voluntary processes may save you time, effort and money. Methods of resolution include mediation, settlement and conciliation.

Mediation

EEOC has greatly expanded its mediation program. The program is free, quick, voluntary and confidential. If mediation is successful, there is no investigation.

If the charge filed against your company is eligible for mediation, you will be invited to take part in the mediation process. If mediation is unsuccessful, the charge is referred for investigation.

Advantages of Mediation

1. EEOC's mediation program is **free**.
2. Mediation is **efficient.** The process is initiated before an investigation begins and most mediations are completed in one session, which usually lasts for one to five hours.
3. The average processing time for mediation is **84 days**.
4. The mediation program is completely **voluntary.**
5. Successful mediation results in the **closure of the charge** filed with EEOC. If mediation is unsuccessful, the charge is referred for investigation.
6. Mediators are **neutral** third parties who have no interest in the outcome of the mediation.
7. Mediation is a **confidential** process. The sessions are not tape-recorded or transcribed. Mediator notes taken during the mediation are discarded. Information learned during the mediation can not be used during an EEOC investigation if the mediation is unsuccessful.
8. Mediation is an **informal** process. The goal of mediation is not fact finding. The purpose is to discuss the charge and reach an agreement that is satisfactory to all parties.
9. Settlement agreements secured during mediation **are not admissions by the employer** of any violation of laws enforced by the EEOC.
10. Mediation **avoids lengthy and unnecessary litigation.**
11. Settlement agreements secured during mediation are **enforceable**.
12. The overwhelming majority of employers and charging parties participating in EEOC mediation program are **satisfied with the process and would use it again.**
13. Mediation can help the parties understand **why the employment relationship broke down**.
14. Mediation can help the parties identify ways to **repair an ongoing relationship**.

To learn more about EEOC's mediation program, and how to participate in it, visit the mediation section of the website.

Settlement

Charges of discrimination may be settled at any time during the investigation. EEOC investigators are experienced in working with the parties to reach satisfactory settlements. You should contact the investigator if you are interested in resolving your charge through settlement.

Advantages of Settlement

1. **Voluntary** settlement efforts can be pursued at any time during the investigation, but settling a charge early may save you the time and effort associated with investigations.
2. Settlement is an **informal** process. The goal of settlement is to reach an agreement that is satisfactory to all

parties.
3. There is no **admission of liability**.
4. If the parties, including EEOC, reach a voluntary agreement, the charge will be **dismissed**.
5. Settlement agreements are **enforceable**.
6. Settlement **avoids lengthy and unnecessary litigation**.

Conciliation

EEOC is statutorily required to attempt to resolve findings of discrimination through "informal methods of conference, conciliation, and persuasion." See 42 U.S.C. 2000e-5. After the parties have been informed by letter that the evidence gathered during the investigation establishes that there is "reasonable cause" to believe that discrimination has occurred, the parties will be invited to participate in conciliation discussions. During conciliation, your investigator will work with you and the Charging Party to develop an appropriate remedy for the discrimination. We encourage you to take advantage of this final opportunity to resolve the charge prior to EEOC considering the matter for litigation.

Advantages of Conciliation

1. Conciliation is a **voluntary** process.
2. Conciliation discussions are negotiations and **counter-offers may be presented**.
3. Conciliation offers the parties a final **opportunity to resolve the charge informally** - - after an investigation has been conducted, but before a litigation decision has been reached.
4. Conciliation agreements **remove the uncertainty, cost and animosity surrounding litigation**.

U.S. Equal Employment Opportunity Commission

Mediation

Mediation is an informal and confidential way for people to resolve disputes with the help of a neutral mediator who is trained to help people discuss their differences. The mediator does not decide who is right or wrong or issue a decision. Instead, the mediator helps the parties work out their own solutions to problems.

Note: Federal agencies are required to have an alternative dispute resolution program. Most use mediation, but not necessarily the EEOC process.

Benefits of Mediation

One of the greatest benefits of mediation is that it allows people to resolve the charge in a friendly way and in ways that meet their own unique needs. Also, a charge can be resolved faster through mediation. While it takes less than 3 months on average to resolve a charge through mediation, it can take 6 months or longer for a charge to be investigated. Mediation is fair, efficient and can help the parties avoid a lengthy investigation and litigation.

EEOC's Mediation Process

Shortly after a charge is filed, we may contact both the employee and employer to ask if they are interested in participating in mediation. The decision to mediate is completely voluntary. If either party turns down mediation, the charge will be forwarded to an investigator. If both parties agree to mediate, we will schedule a mediation, which will be conducted by a trained and experienced mediator. If the parties do not reach an agreement at the mediation, the charge will be investigated like any other charge. A written signed agreement reached during mediation is enforceable in court just like any other contract.

Duration and Cost of Mediation

A mediation session usually lasts from 3 to 4 hours, although the time can vary depending on how complicated the case is. There is no charge to either party to attend the mediation.

Who Should Attend the Mediation

All parties to the charge should attend the mediation session. If you are representing the employer, you should be familiar with the facts of the charge and have the authority to settle the charge on behalf of the employer. Although you don't have to bring an attorney with you to the mediation, either party may choose to do so. The mediator will decide what role the attorney will play during the mediation.

Learn More About Mediation

If you would like to learn more about mediation, we have extensive information about EEOC's Mediation Program available.

U.S. Equal Employment Opportunity Commission

Remedies For Employment Discrimination

Whenever discrimination is found, the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred.

The types of relief will depend upon the discriminatory action and the effect it had on the victim. For example, if someone is not selected for a job or a promotion because of discrimination, the remedy may include placement in the job and/or back pay and benefits the person would have received.

The employer also will be required to stop any discriminatory practices and take steps to prevent discrimination in the future.

A victim of discrimination also may be able to recover attorney's fees, expert witness fees, and court costs.

Remedies May Include Compensatory & Punitive Damages

Compensatory and punitive damages may be awarded in cases involving intentional discrimination based on a person's race, color, national origin, sex (including pregnancy), religion, disability, or genetic information.

Compensatory damages pay victims for out-of-pocket expenses caused by the discrimination (such as costs associated with a job search or medical expenses) and compensate them for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life).

Punitive damages may be awarded to punish an employer who has committed an especially malicious or reckless act of discrimination.

Limits On Compensatory & Punitive Damages

There are limits on the amount of compensatory and punitive damages a person can recover. These limits vary depending on the size of the employer:

For employers with 15-100 employees, the limit is $50,000.
For employers with 101-200 employees, the limit is $100,000.
For employers with 201-500 employees, the limit is $200,000.
For employers with more than 500 employees, the limit is $300,000.

Age Or Sex Discrimination & Liquidated Damages

In cases involving intentional age discrimination, or in cases involving intentional sex-based wage discrimination under the Equal Pay Act, victims cannot recover either compensatory or punitive damages, but may be entitled to "liquidated damages."

Liquidated damages may be awarded to punish an especially malicious or reckless act of discrimination. The amount of liquidated damages that may be awarded is equal to the amount of back pay awarded the victim.

U.S. Equal Employment Opportunity Commission

Prohibited Employment Policies/Practices

Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

The law forbids discrimination in every aspect of employment.

The laws enforced by EEOC prohibit an employer or other covered entity from using neutral employment policies and practices that have a disproportionately negative effect on applicants or employees of a particular race, color, religion, sex (including pregnancy), or national origin, or on an individual with a disability or class of individuals with disabilities, if the polices or practices at issue are not job-related and necessary to the operation of the business. The laws enforced by EEOC also prohibit an employer from using neutral employment policies and practices that have a disproportionately negative impact on applicants or employees age 40 or older, if the policies or practices at issue are not based on a reasonable factor other than age.

Job Advertisements

It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

For example, a help-wanted ad that seeks "females" or "recent college graduates" may discourage men and people over 40 from applying and may violate the law.

Recruitment

It is also illegal for an employer to recruit new employees in a way that discriminates against them because of their race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

For example, an employer's reliance on word-of-mouth recruitment by its mostly Hispanic work force may violate the law if the result is that almost all new hires are Hispanic.

Application & Hiring

It is illegal for an employer to discriminate against a job applicant because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not refuse to give employment applications to people of a certain race.

An employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

If an employer requires job applicants to take a test, the test must be necessary and related to the job and the employer may not exclude people of a particular race, color, religion, sex (including pregnancy), national origin, or individuals with disabilities. In addition, the employer may not use a test that excludes applicants age 40 or older if the test is not based on a reasonable factor other than age.

If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to apply for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer significant difficulty or expense.

Job Referrals

It is illegal for an employer, employment agency or union to take into account a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information when making decisions about job referrals.

Job Assignments & Promotions

It is illegal for an employer to make decisions about job assignments and promotions based on an employee's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not give preference to employees of a certain race when making shift assignments and may not segregate employees of a particular national origin from other employees or from customers.

An employer may not base assignment and promotion decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

If an employer requires employees to take a test before making decisions about assignments or promotions, the test may not exclude people of a particular race, color, religion, sex (including pregnancy), or national origin, or individuals with disabilities, unless the employer can show that the test is necessary and related to the job. In addition, the employer may not use a test that excludes employees age 40 or older if the test is not based on a reasonable factor other than age.

Pay And Benefits

It is illegal for an employer to discriminate against an employee in the payment of wages or employee benefits on the bases of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Employee benefits include sick and vacation leave, insurance, access to overtime as well as overtime pay, and retirement programs. For example, an employer many not pay Hispanic workers less than African-American workers because of their national origin, and men and women in the same workplace must be given equal pay for equal work.

In some situations, an employer may be allowed to reduce some employee benefits for older workers, but only if the cost of providing the reduced benefits is the same as the cost of providing benefits to younger workers.

Discipline & Discharge

An employer may not take into account a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information when making decisions about discipline or discharge. For example, if two employees commit a similar offense, an employer many not discipline them differently because of their race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

When deciding which employees will be laid off, an employer may not choose the oldest workers because of their age.

Employers also may not discriminate when deciding which workers to recall after a layoff.

Employment References

It is illegal for an employer to give a negative or false employment reference (or refuse to give a reference) because of a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

Reasonable Accommodation & Disability

The law requires that an employer provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer.

A reasonable accommodation is any change in the workplace (or in the ways things are usually done) to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.

Reasonable accommodation might include, for example, providing a ramp for a wheelchair user or providing a reader or interpreter for a blind or deaf employee or applicant.