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Education Reform Act

On June 13, Senate Bill 7 became Public Act 97-8, now known as the Education Reform Act, when Governor Quinn signed it into law. The Act follows the Performance Evaluation Reform Act (PERA) of 2010 by connecting teachers' hiring and dismissal (including reductions in force) to teacher performance evaluation tools required by PERA. In order to accomplish these goals, the law makes major revisions to seven areas of school process.

First, **school board member training** is now required, as members must receive a minimum of four hours of professional development leadership training in fiduciary responsibility, financial oversight and accountability, labor law, and education within one year of the beginning of any member's term beginning after June 13, 2011. Although no other consequence is currently specified by the law, completion of board training must be posted on the District's website. Nothing in the law appears to prevent the board from posting other training received by the member.

Second, the Illinois State Board of Education must establish a **survey of learning conditions** and direct it to, at a minimum, grades 6 through 12 students and to teachers. The survey shall be administered in schools at least biannually during teacher meetings or professional development days or at other times that would not interfere with the teachers' regular classroom and direct instructional duties.

Third, the requirements for **attaining tenure** have been revised. As before, a teacher first employed as a full-time teacher prior to the PERA implementation date must teach under probationary status for 4 consecutive terms. A teacher first employed in a school district after the PERA implementation date is subject to new rules altering (and in some cases accelerating) the acquisition of tenure:

- The longest probationary period is 4 consecutive school terms where the teacher receives a rating of at least "Proficient" in the last school term and at least "Proficient" in the second or third school term. The law does not expressly state what happens if a teacher does not achieve the required rating, but it seems the legislation necessarily requires the teacher be terminated. Because of the notice required to terminate such a teacher, and the ease of filing a process challenge, it is incumbent upon administrators to comply with the required process.

- Accelerated tenure - a teacher who receives 3 overall evaluation ratings of "Excellent" in consecutive school terms earns tenure at the conclusion of the third year of service.

- Semi-portable tenure - a teacher can attain tenure status after 2 consecutive school term evaluations of "Excellent" if the teacher was previously tenured in a different school district, was honorably discharged, and received ratings of "Proficient" or higher in a teacher's two most recent evaluations from the previous school district.

A teacher must teach (including sick days, personal days, and days of leave under the Family Medical Leave Act) a minimum of 120 days to be considered as teaching a school term. Failure to meet the 120 day requirement does not count toward attainment of tenure but does not "break" the teacher's streak so long as the teacher actually teaches or is otherwise present and participating in the school district's educational program the following school term.

The foregoing makes evaluation and formal notice procedure critical to surviving challenge on nontenured nonrenewal. School districts must provide written notice of dismissal to the teacher at least 45 days before the end of the school term to be dismissed (this is changed from 60 days for tenured teachers, but school districts should be cautious of policies or contracts with different requirements). *Failure to do so shall result in reemployment the following fall*. Because of changes to reductions in force, it may now be advisable in most situations to distinguish between dismissal for cause and reduction in force. This is a fact-based inquiry, and proper, thorough, and accurate evaluation will be key to the successful navigation of these issues.

"School districts must provide written notice of dismissal to the teacher at least 45 days before the end of the school term to be considered dismissed… Failure to do so shall result in reemployment the following fall."

Most dramatically, the fourth revision in the law changes teacher **Reductions in Force (RIF) and teacher recall procedures**. Replacing the former system based solely upon seniority, RIF and recall are now based primarily on performance evaluations.

Teachers are categorized into one of four groupings based on performance criteria and RIF must eliminate all members of the lowest group before eliminating members of a higher group. Thus, group one is dismissed first and group four last.

- Group 1 consists of non-tenured teachers who have not received a performance evaluation rating. Group 1 dismissal is based on the discretion of the school district. However, as evaluations are required annually for non-tenured teachers and biannually for tenured teachers, a teacher falling into this Group likely has a process argument which may subject the district to litigation. Districts should be careful to comply with evaluation plans and conduct thorough evaluations early rather than waiting until later in the year.

- Group 2 consists of teachers with a "Needs Improvement" or "Unsatisfactory" performance evaluation rating on either of the teacher's last two performance evaluations. Dismissal within the group shall be based on the average performance evaluation rating. Should there be a tie, the teacher with the shorter length of continued service must be dismissed first, unless otherwise established in the Collective Bargaining Agreement. Although evaluation may not be intended to result in dismissal for cause, the effect (which may be delayed by several months or years pending a reduction in force) may result in a loss of employment suffered by the teacher. Careful support of evaluation ratings is critical to avoiding challenge or loss.

- Group 3 consists of teachers with a performance evaluation rating of at least "Satisfactory" or "Proficient" on both of the teacher's last two performance evaluations. Dismissal within the group follows the same procedures as Group 2. Because of the number of employees likely falling into Groups 3 and 4, it is critical that the employer carefully distinguish between "Proficient" and "Excellent" employees with thorough evaluation and other documentary support. No longer should long-term teacher evaluation be considered non-critical: each and every evaluation should be considered important because every evaluation now requires support to differentiate it from others.

- Group 4 consists of teachers with a performance evaluation rating of "Excellent" on the last two evaluations, and teachers with a performance evaluation rating of "Excellent" in two out of the last three evaluations, with the third evaluation rating being "Satisfactory" or "Proficient." Dismissal within the group follows the same procedures as Group 2.

Teacher RIF notices must be delivered *at least* 45 calendar days before the end of the school term. The Reform Act further delineates the necessary recall procedures should there be any vacancies. School districts must develop their teacher evaluation process, including the method and determination

of whether there has been adequate student growth following PERA implementation, the execution of which is the critical component to success in all hiring and termination decisions.

A public hearing must now be held in a district that exceeds five RIF notices or 150% of the average number of teachers honorably dismissed in the previous three years (a provision which previously applied only to tenured teachers – it now applies to all teachers in a district). Following the hearing, the board must approve the reduction by majority vote.

School districts, through a joint committee of equal representation selected by the school board and the teachers, may create a performance evaluation review that is in compliance with Illinois law. The committee may also alter the groupings within certain limitations.

The fifth major change creates new guidelines for the **hiring of new or vacant** teaching positions. Factors that must be considered include, but are not limited to certifications, qualifications, merit and ability, and relevant experience. Unlike previous law in which seniority was the most important or decisive factor in reductions in force, the length of continued service with the school district must not be considered as a factor unless all other factors are equal.

Miller, Tracy, Braun, Funk & Miller, Ltd. is committed to helping you understand and implement the provisions of the Education Reform Act. We will keep you apprised of changes as well as any regulations and any follow up legislation that affects the provisions of the Act.

Sixth, the legislation updates the **definition of incompetency** to include teachers who receive an unsatisfactory performance evaluation in two or more school terms within a seven year period. Being deemed incompetent is grounds for potential dismissal, suspension, or license revocation action by the Illinois State Superintendent of Schools, though it is currently unclear as to if, when, or how often the State Superintendent will use this provision. Moreover, funding to support such action may or may not be forthcoming. The bill also amends the process for dismissal of tenured teachers and challenge of dismissal of teachers, including a new alternative dismissal process based upon the revised PERA evaluation tool.

And finally, **impasse procedures** in a collective bargaining session have been modified. Although it is unlikely the changes alter the definition of "impasse," (which has been defined by the courts as occurring *only* when no ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions, and further discussions would be futile) the legislation added a method for publication of final offers following declaration of impasse. If impasse is declared after 15 days of mediation, the parties must notify the Illinois Educational Labor Relations Board (IELRB) of the declaration. Within seven days of declaring impasse, each party must submit final offers and a cost summary to the mediator, the other party, and IELRB. Within seven days of receiving the offers, IELRB must publish the offers and cost summaries. Teachers may not engage in a strike until at least 14 days have elapsed after IELRB has made public the offers.

The Education Reform Act is still in its infancy; we await regulatory and legislative clarification as to how this law will be implemented. Miller, Tracy, Braun, Funk & Miller, Ltd. looks forward to working with you to keep you abreast of the changes and help you learn how best to handle the new rules.

Court of Appeals Affirms Lower Court's Ruling That High School Coach Was a Volunteer under FLSA

On March 10, 2011, the United States Court of Appeals for the Fourth Circuit found that a School Board in Virginia did not violate the Fair Labor Standards Act ("FLSA") when it deemed its golf coach a volunteer within the meaning of the FLSA. *Purdham v. Fairfax County Public Schools*, 629 F. Supp. 2d 544 (E.D. Va. 2011).

"The court disagreed with Purdham and deemed him a volunteer"

James Purdham worked for the Fairfax County Public Schools in Fairfax, Virginia as a safety and security assistant and also served as the head golf coach for a high school in the district. Purdham claimed that his position as golf coach deemed him an "employee" and thus he was entitled to overtime pay under FLSA for his golf coach work. The

court disagreed with Purdham and deemed him a volunteer.

The court articulated numerous reasons why he should be deemed a volunteer under FLSA: Purdham was motivated in part by civic, charitable or humanitarian reasons, Purdham was not coerced into volunteering in order to retain his security position, the amount of money Purdham made for his services can be considered "nominal" (Purdham earned roughly $2,000 a year for his coaching efforts, an amount the court says is not tied to productivity nor compensatory for services rendered). Congress' intent in carving out an exception for volunteers under FLSA was to encourage school employees to volunteer as coaches, and Purdham's access to a grievance procedure regarding his coaching status has no bearing on the voluntariness determination. For these reasons, Purdham was not considered an employee and not entitled to overtime pay.

"Congress' intent in carving out an exception for volunteers under FLSA was to encourage school employees to volunteer as coaches"

While the Seventh Circuit has not yet cited this case with approval nor reached the same conclusion, this case helps shed more light on the FLSA's implications for non-certified staff who also perform extra-curricular functions. *Purdham* serves as a reminder to school districts to review their practices regarding extra-duty pay, particularly in view of the additional clarity to the FLSA's definition of volunteer.

Third Circuit Case on Social Media Websites Limits Schools' Ability to Punish Students

On June 13, 2011, the United States Court of Appeals Third Circuit issued two *en banc* opinions concerning school districts' ability to punish students who created inappropriate Facebook or MySpace profiles parodying teachers. The court held that the school districts could not punish the students because the profiles were created off school property and the First Amendment protects speech that is made outside the school. Further, the profiles did not create a substantial disruption of school activities and, therefore, did not become on-campus speech.

The Third Circuit heard two similar cases on this issue: *Snyder v. Blue Mountain School District*, --- F.3d ---- (2011) and *Layshock v. Hermitage School District*, --- F.3d ---- (2011). In *Snyder*, an eighth grade student created a fake MySpace profile of the Principal that contained inappropriate humor, crude content, and vulgar language at her home computer. The profile was set to "private" and MySpace was blocked by the School District's computer so no students were able to view the profile from school. The Principal learned of this profile and disciplined the student under the School District's Disciplinary Code. The student pursued legal action.

"The profiles did not create a substantial disruption with school activities and therefore did not become on-campus speech"

In *Layshock*, a high school senior created a parody profile of his Principal on MySpace. The creation of the parody took place off campus on home computers and during non-school hours. This profile was accessible by the general public and students were able to view the profile at school. The student accessed the profile during school hours. The School District disciplined the student for violating the School District's Discipline Code. The student pursued legal action. The Supreme Court has stated that public school students are entitled

to free speech as long as it does not "materially and substantially disrupt the work and discipline of the school. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The Supreme Court has carved out exceptions to this test. For an informative reading on the evolution of First Amendment rights in public schools please read *Layshock* or *Snyder*.

Using the guidance provided by the Supreme Court, the Third Circuit held that the students' speech did not cause a substantial disruption in the school. Nor did the creation of the profiles forecast a substantial disruption which would allow a school district to punish a student. Further, just because the students' speech was lewd, vulgar, and offensive and had an effect on the school and the educational mission of the District (one of the exceptions to the *Tinker* rule), the fact that it was off-campus speech meant it fell within the free speech umbrella. Even if it reached the school, it was not enough to qualify under the *Tinker* substantial disruption exception.

The cases were not decided unanimously. A strong dissent in *Snyder* shows that this area of the law is not completely resolved and may see the United States Supreme Court in the future. The law is continually in flux regarding technology, and school districts must stay abreast of the most recent legal decisions.

Federal Court Dismisses Administrator's Constitutional Arguments on Validity of Contract Due to Lack of Contract Goals

The United States District Court for the Northern District of Illinois, Eastern Division, recently decided a case where a Superintendent claimed that his 14th Amendment due process rights had been violated when he was dismissed after one year of service without a hearing. 42 U.S.C. § 1983 states that any person who deprives another person of rights (or a property interest) is liable in a court of law for damages he or she causes. Courts have stated that continued employment is a protected property interest. The question in this case was whether the Superintendent had that protected property interest in the form of a valid multi-year contract. *Wynn v. Board of Education of School District No. 159*, 2011 WL 1882454 (2011).

"The plain language of the statute requires that a multi-year, superintendent agreement include the goals and indicators of student performance at the time of the agreement's execution."

In a narrow holding addressing only the Superintendent's constitutional claims, the court held that the Superintendent did not have a valid contract, because the Illinois School Code requires all superintendent contracts that last more than one year to include performance goals and indicators. In this instance, the contract did not have any performance goals when it was adopted and contained language that "goals shall be established by the mutual agreement of the Superintendent and the Board . . . no later than October 1, 2008." The court held that because the contract was entered on July 1, 2008, and there were no specific performance goals at the adoption of the contract, the contract did not comply with the specific requirements of the Illinois School Code regarding multi-year contracts and, therefore, could only be valid for one year. "The plain language of the statute requires that a multi-year, superintendent agreement include the goals and indicators of student performance at the time of the agreement's execution." Because the contract was not in compliance with the Illinois School Code when executed, Superintendent Wynn did not have a property interest in his continued employment, and, therefore, there

could be no violation of the 14th Amendment. Further, he had no property interest based on an implied contract because contracts that are contrary to statutes are unenforceable.

This decision by the District Court looked solely at the federal constitutional claims that the Superintendent brought before the court. The court did not address any state law claims that the Superintendent brought.

This decision is a reminder for school districts to carefully review employee contracts and confirm that the contracts conform to Illinois and federal law. Because the state law claims remain unsettled in this case, and because those claims may ultimately be dispositive on the merits of this case, school districts should be cautious about using this decision as a basis for taking action.

Public Act 97-123 Changes Home or Hospital Instruction

Governor Quinn has signed legislation amending the Children with Disabilities Article of the School Code (105 ILCS 5/14-13.01). The bill changes the home or hospital instruction requirements from a "must miss" basis to an "anticipated miss" basis. The amendment also allows home or hospital instruction in the event that a child misses school on an "ongoing intermittent basis." It requires an anticipated loss in school days of at least 2 days at a time and a total of 10 or more days missed. There is no requirement of a minimum number of days a student must miss in order to qualify for home or hospital instruction. A physician's note is required for home or hospital instruction and the school district must commence instruction within five days of receiving the note. Should a child have an IEP or 504 plan, its requirements must be followed while the student receives the home or hospital instruction unless the IEP or 504 team determines modifications are necessary and appropriate.

This legislation appears problematic, as it appears to remove the decision to change the placement of a student with a disability from the IEP team and leave it entirely to the discretion of a physician. This, on its face, appears inconsistent with the IDEA.

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