Dinsmore & Shohl LLP
ATTORNEYS

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**Department of Labor Issues Guidance on FMLA's Definition of In Loco Parentis**

by Kathleen Carnes

On June 22, 2010, the U.S. Department of Labor ("DOL") issued an Administrator's Interpretation publication that broadly defined who may be in loco parentis to a "son or daughter" for purposes of the FMLA. The DOL's interpretation may have an impact on how schools administer Family and Medical Leave ("FML").

The DOL clarified the definition of "son or daughter" under FMLA as it applies to an employee taking FMLA-protected leave for the birth or placement of a child, to care for a newborn or newly placed child, or to care for a child with a serious health condition. The regulations define a "son or daughter" as "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability."

The DOL emphasized Congress's intent to define a "son or daughter" under the FMLA to reflect "the reality that many children in the United States do not live in traditional 'nuclear' families with their biological mother or father." Therefore, a broader understanding of the definition of an employee's son or daughter was needed.

While the DOL found that there are many factors to determine if an employee is standing in loco parentis to a child, the Administrator's Interpretation now makes clear that there is no requirement for a biological or legal relationship with the child to stand in loco parentis. For example, FML can be extended to domestic partners, grandparents, or other family members that provide either day-to-day, on-going care or financial support for a child. As an example, the DOL stated, "an employee who will share equally in the raising of a child with the child's biological parent would be entitled to leave for the child's birth because he or she will stand in loco parentis to the child." Likewise, "an employee who will share equally in the raising of an adopted child with a same sex partner, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child has a serious health condition, because the employee stands in loco parentis to the child."

Additionally, DOL noted that there are no restrictions on the number of parents a child may have. For instance, if a child's biological parents are divorced and remarried, all four parents (i.e., two biological and two stepparents) are entitled to FML related to the child.

It remains lawful to require the employee to provide reasonable documentation or a statement of the family relationship if the employer questions the employee's relationship with the child. However, the DOL has found that a simple statement "asserting the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no biological relationship."

Lesson Learned

Based upon the DOL's Administrator's Interpretation, many school boards may need to adjust their FMLA policies to reflect a more broad definition of in loco parentis for leave related to a child. Even if a school board's policy does not require revision, we recommend that school employees be trained to recognize what qualifies as an employee's "son or daughter" under the FMLA on a case-by-case basis, looking to the specific day-to-day responsibilities of the person requesting leave.

Should you have any questions concerning the aforementioned Administrator's Interpretation of the FMLA, or any other questions regarding the administration of FML, please contact a member of the firm's Education Law or Labor & Employment Departments.

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**Ruling Continues Trend of Courts Strictly Construing Terms of Construction Contract**

by Don Leach

The Franklin County Court of Appeals in June continued the trend of Ohio Courts in recent years strictly enforcing the terms of a construction contract, even if the resulting outcome seems unjust or inequitable.

In *Cleveland Construction, Inc. v. Kent State University*, the court decided litigation arising out of the construction of four residence halls on the main campus of Kent State University ("KSU"). During the course of the project, Cleveland Construction, Inc. ("CCI") was delayed by, among other issues, weather and a labor strike. After trial, the Ohio Court of Claims awarded CCI damages of $3,029,732.60, plus prejudgment interest.

In reversing that decision in part and affirming it in part, the Franklin County Court of Appeals made two rulings which impact those involved in construction. First, it reiterated the principle that courts will strictly construe the claim notice requirements of a construction contract. That holding, however, had no impact on CCI's claim, as counsel for KSU had acknowledged during trial that notice was not an issue.

The second ruling involved the contractually required administrative remedies. In the 1993 decision of *Conti Corp. v. Ohio Dept. of Ad Serv.*, the Franklin County Court of Appeals had ruled that a contractor did not have to exhaust its administrative remedy under Article 8 of the state's contract, which required a contractor to appeal a claim denial to essentially the same persons who had already reviewed and ruled against the claim. The court at that time had held such a step to be a "vain act" - - essentially a waste of time.

In CCI's case, however, the Court of Appeals explicitly overruled *Conti* and held that a court did not have the power to rewrite the contract. Since the contract provided an administrative remedy, the court required that the administrative process be followed to its conclusion. The case was sent back to the trial court to determine whether CCI had fully complied with the administrative remedy, and, if not, the impact.

Lesson Learned

This decision is one more in a line of cases which stand for the principle that a contract consists of what the parties agree and, in the absence of ambiguity, courts will enforce its explicit terms, even if the contract terms or resulting outcome seem unfair. All involved in construction projects must recognize that the clear language of a contract is what they should expect courts to enforce.

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**Overtime Lawsuit for Use of PDA's Hi-Lights Potential Liability for Off-Duty Electronic Communications**

by David Lampe

A recent lawsuit filed by a group of Chicago Police Sergeants hi-lights the potential for overtime liability that may arise when an employer requires or permits its non-exempt employees to receive and respond to work-related electronic communications outside normal work hours.

On May 24, 2010, a class of Chicago Police Sergeants filed a class action lawsuit against the Chicago Police Department ("CPD") for violations of the Fair Labor Standards Act ("FLSA"). The class of plaintiffs includes all non-exempt FLSA personnel employed by the CPD who worked "off the clock" using CPD-issued personal data assistants ("PDA's") or other electronic communication devices without receiving overtime compensation. The class claims CPD's denial of overtime was willful, and seeks to recover three years of unpaid overtime, liquidated damages and attorneys' fees.

These officers claim the CPD required them to be on call 24 hours a day, 7 days a week so they could access work-related emails, voice mails and text-message work orders. They also claim the CPD violated the record-keeping requirements of the FLSA by failing to keep appropriate records of time these employees spent receiving and responding to CPD-related electronic communications.

To date, no decision has been rendered on the merits of the plaintiffs' lawsuit. Nonetheless, the case hi-lights the potential liability a school board may face should it require or permit its non-exempt employees to receive and respond to employment-related electronic communications outside normal work hours.

Under the FLSA, school boards must pay all non-exempt employees at a rate of time and one-half for all hours worked in excess of 40 per week. This is generally true even if the employee did not seek permission to work overtime. A 2-year statute of limitations generally applies to the recovery of back pay, except in the case of a willful violation, in which case a 3-year statute applies. In addition, for employers who willfully or repeatedly violate the overtime provisions of the FLSA, a civil penalty of $1,000 for each violation may apply.

The FLSA does not apply to executive, administrative and professional employees. This would generally exempt administrators and supervisors from coverage. The FLSA also does not apply to teachers. Therefore, such employees can be expected to review and respond to school-related electronic communications outside normal work hours without the board incurring overtime liability.

However, certain non-exempt employees such as bus drivers, teacher aides, secretaries, maintenance personnel, buildings and grounds personnel, among others, may be expected to regularly receive and respond to phone calls, voice messages, emails or text messages concerning school district business outside of their normal work hours. Performance of these duties may be considered off-duty work for which these employees may claim compensation. Furthermore, should electronic communications with the district cause these non-exempt employees to work in excess of 40 hours in a week, a school board may be liable for overtime compensation.

Emails and text messages identify the sender and recipient, and document the date and time these messages were sent and received. Cell phones normally log the identity of the callers and the date and time spent conversing. These use logs could potentially be used as evidence by non-exempt employees who claim to be owed overtime compensation under the FLSA. Likewise, as in the aforementioned CPD case, such use logs could support an employee's argument that a school board knew or should have known of the employee's overtime work; and therefore, willfully violated the FLSA.

Given the potential for significant overtime liability, school boards may consider reviewing those

employment positions that are or could be considered non-exempt under the FLSA. In doing so, boards should determine whether any of these employees have been issued employer-provided PDA's. Likewise, a board should determine whether these employees are regularly receiving and/or responding to work-related electronic communications outside normal work hours. An audit of these non-exempt positions may avoid overtime claims in the future.

School boards with questions about the FLSA or an employee's use of a PDA's or other electronic communication devices are encouraged to contact the attorneys in Dinsmore & Shohl's Education Law or Labor & Employment Departments.

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**Upcoming Statutory Deadlines**

October 1st

Last day for Board to adopt annual appropriate measure per R.C. 5705.38.

October 4th

Last day to non-renew a Treasurer's contract that expires on December 31, 2010. (i.e., for employment contracts executed prior to March 30, 2007) per R.C. 3313.22.

October 15th

Last day for certification of average daily membership per R.C. 3317.03.

Last day for certification of licensed employees to the State Board of Education per R.C. 3317.061.