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10 Practical Steps to Avoid Employment Liability in 2010

In January, the U.S. Equal Employment Opportunity Commission (EEOC) issued a press release announcing that 93,277 workplace discrimination charges were filed with the federal agency nationwide during Fiscal Year 2009 - the second highest level ever. The number of charges alleging age-based discrimination reached the second-highest level ever. Continuing a decade-long trend, the most frequently filed charges with the EEOC in FY 2009 were charges alleging discrimination based on race (36%), retaliation (36%), and sex-based discrimination (30%). Monetary relief obtained by the EEOC for victims in FY 2009 totaled over $376 million.

In releasing these statistics, EEOC Acting Chairman Stuart J. Ishimaru stated, "[t]he latest data tell us that, as the first decade of the 21st century comes to a close, the Commission's work is far from finished." The EEOC opined that the near-historic level of total discrimination charge filings may be due to multiple factors, including greater accessibility of the EEOC to the public, economic conditions, increased diversity and demographic shifts in the labor force, employees' greater awareness of their rights under the law, and changes to the agency's intake practices that cut down on the steps needed for an individual to file a charge.

Undoubtedly, from the ADA Amendments Act, to new FMLA regulations, to the stimulus package, 2009 was a year of change in the employment law arena. With such sweeping changes and in light of the EEOC's reported statistics for FY 2009, this is a good time for schools to internally audit, update and review Board policies, administrative guidelines, and employee handbooks. Here are some recommendations for avoiding liability.

1. **Review and update job descriptions**. Accurate job descriptions can be a school district's best tool in ADA matters, interviewing, evaluations and workers' compensation claims. However in order for job descriptions to be a useful tool, they must be current and accurate. A task to accomplish this year may be to review job descriptions to ensure they are complete, accurate, and correspond to the actual duties performed.

2. **Check your postings**. The new FMLA/DOL poster has been published including the new provisions on military leave. Ensure that your DOL, state, federal and workers' compensation notifications are all current and up to date. Don't wait for a surprise audit or investigation to alert you to deficiencies.

3. **Provide harassment training**. Harassment training is a great way to reiterate the commitment to a harassment free workplace. It is also a way to alert individuals to the means by which to report those concerns. Review applicable policies, administrative regulations and employee handbooks on harassment and/or hostile work environment with all staff. Each year have all employees acknowledge, in writing, that they have received and understand such policies and regulations.

Taking these actions will not only deter harassment, but may alert you to potential problems and aid in the defense of future claims.

4. **Conduct ADA training**. The ADA Amendments Act went into effect in 2009. Ensure that your administrative team, supervisors and managers understand the new definitions and obligations to better engage and interact with your employees and job applicants.

5. **Update military leave policies**. With the recent passage and amendment to the FMLA military leave provisions for the family of military members, ensure that policies and regulations accurately reflect the obligations under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and FMLA, with regard to protection extended to military members and their families.

6. **Review, update or implement performance evaluations**. Is your district using the same evaluation instrument it used a decade ago? Are all employees (including all classified employees) subject to a regular performance evaluation cycle? Performance evaluations are only as good as the information they solicit and the timeliness of such information. Review evaluation instruments, and if necessary, update them to accurately capture the data you need. Train administrators, supervisors and managers to understand the deadlines, procedures and content of performance evaluations that are required for each class of employees by law, policy, and if applicable, collective bargaining agreement. If a class of employees are unionized, review the current collective bargaining agreement to ensure any desired changes to the evaluation instrument can be made mid-term.

7. **Update FMLA forms**. With the new regulations that came into effect in 2009, the Department of Labor published new FMLA certification forms and notifications that must be provided to employees. Review your forms and notices to ensure they are in compliance with the new regulations and DOL requirements.

8. **Conduct a thorough handbook review**. Update any employee handbooks to ensure that all necessary policies are included, are current, and reflective of the above-mentioned 2009 laws. If updates are necessary, the employee handbook should reflect the date such changes were made. Have each employee acknowledge, in writing, that they have received, reviewed, and understand the updated handbooks.

9. **Update COBRA notices and policies**. Effective March 1, 2009, the American Recovery and Reinvestment Act of 2009 (ARRA) expands COBRA continuation coverage to provide a 65% federal subsidy toward COBRA premiums for up to nine months to individuals who were involuntarily terminated from their employment between September 1, 2008 and December 31, 2009. Employers are obligated to notify eligible individuals of their rights. School districts may need to update COBRA policies and materials to include these provisions and new DOL notices. Identify those employees who were laid off and/or involuntarily terminated after September 1, 2008 and notify these former employees of their rights and responsibilities under ARRA. Develop procedures for administration of the COBRA subsidy and reimbursement of the 65% of premiums.

10. **Audit your Collective Bargaining Agreements.** If your district is unionized, review all current collective bargaining agreements to determine if any of the aforementioned changes to the law may have a bearing on any provisions in your current labor contract.

Considerations for Least Restrictive Environment Determinations of Students with Autism

Unquestionably, more students are receiving special education services for autism than ever before and the occurrence of autism spectrum disorder continues to rise. As a result, the impact on public education with regard to the Individuals with Disabilities Education Act ("IDEA") and the need to provide a Free and Appropriate Public Education ("FAPE") must achieve the appropriate balance with the consideration for the Least Restrictive Environment ("LRE").

Included are some tips in making LRE determinations for students with autism.

- LRE does not trump FAPE. The significant question is always what is the least restrictive environment where the student can receive meaningful educational benefit. The general educational setting is required to the maximum extent appropriate, not the maximum extent possible.

- Specifically identify the student's needs (academic and non-academic) and target skills and prioritize them, accounting for the nature and severity of the student's disability and the student's age.

- Establish the level of services and supports necessary to meet the defined needs and to support progress on the goals and objectives.

- Ascertain whether the student's needs can be satisfactorily met in the regular education classroom with or without supplementary aids and services.

- Recognize the efforts the school has made to educate in the regular classroom in conjunction with supplemental services provided and a review of progress data.

- If the student's needs cannot be or have not been satisfactorily met in the regular education classroom, gradually move along the continuum of alternative placements beginning with the less restrictive options and moving to the most restrictive to determine where meaningful benefit can be received.

- If the parents dispute the school's LRE recommendation, define the academic and nonacademic benefits of the proposed placement versus the parents' desired placement (using a contrast/compare approach).

- If the ultimate determination is removal from the regular classroom, identify what alternative mainstreaming opportunities can be made available and maximize these opportunities (***i.e.*** physical education, art, music, electives, lunch, non-academic and extracurricular activities).

OHSAA Eligibility Following Student Transfer

The Ohio Second District Court of Appeals recently issued a decision on a student's challenge of an OHSAA eligibility ruling following the transfer of the student after he had turned age18. The case provides insight on how OHSAA will handle the interscholastic athletic eligibility of adult high school students who transfer school districts to live with persons other than parents or legal custodians.

In this case, 18 year old student Benjamin Ulliman filed a preliminary injunction against OHSAA seeking to restrain it from enforcing a one-year ban on Ulliman participating in interscholastic athletics. As a freshman, Ulliman attended Alter High School and played football. During his tenth-grade year, Ulliman transferred to Centerville High School, which was the school district of residence for his parents. However, Ulliman did not play sports at Centerville due to grade ineligibility. During the summer following his junior year, Ulliman moved into his grandparents' home in Springfield and began to practice with the Catholic Central High

School football team. Again, Ulliman was unable to participate in athletics until October 12, 2008 due to grade ineligibility.

On October 13, 2008, OHSAA issued a letter ruling to Central stating that Ulliman was ineligible to play interscholastic athletics at Central for one year from the date of his transfer under OHSAA Bylaw 4-7-2. OHSAA Bylaw 4-7-2 states in relevant part:

> If a student transfers after the first day of the student's ninth grade year or after having established eligibility prior to the start of school by playing in a contest (scrimmage, preview or regular season/tournament contest), the student will be ineligible for one year from the date of enrollment in the school to which the student is transferred. A student is considered to have transferred whenever the student changes from that school in which the student was enrolled as a ninth grader to any other school regardless of whether the school from which the student transferred or to which the student transferred is a public or non-public, member or non-member or whether the high schools are within the same district.

OHSAA noted that none of the exceptions to Bylaw 4-7-2, most notably a change of custody to another individual living in a new school district (***i.e.*** Exception 2), applied.

Two days after the ruling, Ulliman filed suit against OHSAA in the Clark County Common Pleas Court seeking a preliminary injunction and order restraining OHSAA from enforcing the ban. Ulliman argued that it was impossible to fulfill the aforementioned change of custody exception to Bylaw 4-7-2 because he was 18. As an adult, the domestic relations court could not order a change of legal custody to Ulliman's grandparents. Ulliman also argued that Bylaw 4-7-2 only applied to his initial transfer from Alter to Centerville following his freshman year.

The trial court found that OHSAA had acted arbitrarily in ruling Ulliman ineligible, and issued an order restraining OHSAA from enforcing the one-year ban. The court reasoned that the first sentence of Bylaw 4-7-2 covers all high school transfers from one school to another. However, the second sentence codifies a much narrower definition of "transfer", and does not cover transfers that occur after the initial transfer from the school attended during the student's freshman year. Since Ulliman transferred from Centerville to Central in the summer preceding his senior year, the court found he did not "transfer" according to this narrow definition of Bylaw 4-7-2. The court also found that Exception 2 to Bylaw 4-7-2 could easily have applied but for the fact that Ulliman had turned 18 prior to moving in with his grandparents.

On appeal, the Second District Court of Appeals reversed the trial court and upheld OHSAA's one-year prohibition on Ulliman participating in interscholastic athletics. Interestingly, the Second District found the language of Bylaw 4-7-2 to be ambiguous. However, the Court was persuaded by evidence presented by OHSAA that the intent of Bylaw 4-7-2 was to prevent student-athletes from "shopping" around for a school to attend based solely on which school will best showcase the student's athletic talents. The Second District found this purpose would be best-served by prohibiting all transfers not subject to one of the listed exceptions in Bylaw 4-7-2, and not just an initial transfer from the school where the student began ninth grade.

The Second District also reversed the trial court's holding that OHSAA had acted arbitrarily in not applying Exception 2 to Bylaw 4-7-2 to maintain Ulliman's eligibility. While the court noted that Exception 2 may restrict students who cannot qualify for a change of custody due to their age, Ulliman failed to demonstrate that the rule was not rationally based. To the contrary, OHSAA presented evidence that the rule was designed to protect students to make sure they are not playing against students who are nineteen or twenty years of age. OHSAA also presented evidence that it adopted Exception 2 to Bylaw 4-7-2 with full knowledge of its meaning and impact, and that it had applied this Bylaw and its exceptions consistently in other matters.

Lessons learned from this case

With limited exception, it appears that a non-disabled student, age 18 or older, will lose eligibility to participate in interscholastic athletics for one-year from the date of transfer if the student moves from the home of his/her parents into the home of another individual residing in a new district. This could place a hardship on an 18 year old high school student who moves in with his/her grandparent, relative or other individual residing in a new district because his/her parents are no longer able to properly care for the student.

Although acknowledging that the language of OHSAA Bylaw 4-7-2 is ambiguous, and recognizing it was impossible (due to his age) for Ulliman to obtain a court-ordered change of legal custody per Exception 2, the Second District nevertheless refused to overturn the ruling of OHSAA. The court's holding reinforces the concept that student participation in athletics is a privilege and not a legal right. It also shows that courts are reluctant to interfere with the internal affairs of the OHSAA unless there is clear evidence of mistake, fraud, collusion or arbitrariness by OHSAA.

Court Orders Tape Recording of Executive Session Discussion Be Produced to Administrative Law Judge

To date, no state court in Ohio has definitively analyzed whether confidential, executive session discussions are discoverable in the context of civil litigation or other quasi-judicial proceedings. However, courts from other jurisdictions have recently decided cases addressing this issue. These judicial decisions, while not binding, may ultimately prove persuasive to the Ohio state court that is ultimately charged with deciding this issue.

The latest court addressing this issue is the West Virginia Supreme Court of Appeals. Last month, the court analyzed a West Virginia Open Meetings Act that is similar to Ohio, and held that county commissioners were compelled to surrender an audio tape recording of an executive session discussion to an administrative law judge assigned to hear a disability discrimination case.

In *State ex rel. Marshall County Commissioners and Marshall County Communication 911 v. Carter,* the Marshall County Commissioners entered into executive session to consider applicants for 2 job vacancies in the 911 Department. Similar to Ohio, West Virginia's Open Governmental Proceedings Act generally provides that meetings of public bodies shall be open to the public. And like public bodies in Ohio, West Virginia public bodies may enter into executive session, closed to the public, to consider matters arising from the employment of a prospective public employee.

The County Commissioners, accompanied by their legal counsel, recorded the executive session meeting in which a discussion was held on the applicants to fill the 911 Department's job vacancies. Mr. Bragg, who is legally blind, interviewed for the available positions, but ultimately was not hired. Bragg subsequently filed a complaint with the State's Human Rights Commission alleging disability discrimination.

In preparation for a hearing before the Human Rights Commission's administrative law judge ("ALJ"), Mr. Bragg requested a copy of the tape recording from the County Commissioners' executive session. The ALJ decided to conduct an *in camera* review of the tape recording to determine whether and to what extent the tape contained privileged material. In response, the County Commissioners filed a legal challenge to the ALJ's decision to review the tape. The County Commissioners argued the tape recorded privileged and confidential executive session discussions. The Commissioners also argued the tape was protected from disclosure by the attorney-client privilege and attorney work-product doctrine.

The *Carter* court rejected the County Commissioners' argument that executive session confidentiality precluded the production of the tape to the ALJ. In so holding, the court differentiated between the scope of the general public's access to government meetings versus what may or may not be obtained in the course

of discovery during civil litigation. The court opined that executive session privilege is not intended to prevent legitimate discovery in a civil action of matters discussed which are otherwise not privileged.

The court further opined that an administrative law judge in a job discrimination case may inspect allegedly privilege materials without violating the attorney-client privilege or work-product doctrine. In fact, in this case the court reasoned that the ALJ must review the contents of the alleged privileged communication to determine whether the communication is privileged. In doing so, the court opined that the County Commissioners did not risk waiving the attorney-client privilege or work-product doctrine.

Lessons Learned from this Case

Until a state court in Ohio definitively rules on a legal challenge to compel the discovery of discussions held in executive session, Ohio public bodies must look to other jurisdictions for guidance on this issue. The *Carter* case continues a trend of several cases across the United States that have rejected a public body's claim that the executive session discussions are not subject to disclosure in the context of civil litigation. Members of public bodies should be cautioned that while the general public may not be privy to executive session discussions, litigants in the context of civil litigation may be able to compel the discovery of such information.

Upcoming Statutory Deadlines in Ohio[1]

March 1st
Last day the Board of Education may take action on an expiring contract of a Superintendent. R.C. 3319.01.

Last day the Board of Education may take action on an expiring contract of a Treasurer (for contracts executed after March 30, 2007). R.C. 3313.22.

March 31st
Last day the Board of Education may take action on an expiring contract of an administrator other than Superintendent, including management-level employees and supervisors employed under contracts governed by R.C. 3319.02.

April 1st
For limited contract teachers with an expiring contract, deadline to conduct and complete the second of two required performance evaluations. R.C. 3319.111.

April 10th
For limited contract teachers with an expiring contract, deadline for teacher to receive the results of the second performance evaluation. R.C. 3319.111.

April 15th
Deadline for Board members and administrators to file financial disclosure forms with the Ohio Ethics Commission. R.C. 102.02.

April 30th
Deadline for the Board of Education to provide a limited contract teacher with an expiring contract written notice of the Board's intent to not reemploy the teacher. R.C. 3319.11.

[1] This list of deadlines is from the Ohio Revised Code. School Districts should review applicable Board policies, administrative guidelines, individual employment contracts, and if applicable, collective bargaining agreements to determine whether other dates and/or deadlines may apply.