



January 2020

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|--|---|
| Family Medical Leave Act: A Letter From the WHD | 1 |
| Ohio's EdChoice Program | 2 |
| Facebook and First Amendment Rights | 3 |
| Records of Deceased Student and Mass Shooter Case Decided..... | 4 |
| Maximizing the Success of School Construction Projects | 5 |
| Upcoming Deadlines..... | 7 |
| Upcoming Presentations..... | 7 |

Family Medical Leave Act: A Letter From the WHD

In March, 2019, the U.S. Department of Labor’s Wage and Hour Division (WHD) responded to an inquiry letter about the Family Medical Leave Act (FMLA) interpreting the question of whether an employer may delay designating paid sick leave as FMLA leave and whether employers may choose to extend FMLA leave beyond the 12-week period provided for by the federal law (or 26 weeks for covered servicemember leave). In their letter requesting the interpretation, the employers relied on an FMLA regulation which provides that employers must first observe employment benefit programs that have greater benefits than those established by the FMLA.

The first WHD opinion letter states that an employer is prohibited from delaying the designation of FMLA-qualifying leave once it has sufficient information that indicates the employee’s leave request qualifies for the use of FMLA leave. Additionally, the letter concludes that an employer is prohibited from expanding the FMLA 12-week entitlement (or 26-week covered servicemember leave). If the employee substitutes paid leave for unpaid FMLA leave, the paid leave will run concurrent with the 12 weeks and will count against the total number of protected weeks.

A follow-up question was submitted after the first opinion letter was issued, and the WHD responded in September 2019 with another opinion letter. This inquiry came from a public employee asking whether an employee may delay designating paid leave as FMLA leave if the delay complies with collective bargaining agreement (CBA) provisions allowing it and the employee prefers that the designation be delayed.

Under the CBA’s described in the request for the opinion, employees may, or in one case employees must, delay taking unpaid leave, including unpaid FMLA leave, until after the paid leave provided by the CBA was exhausted. Thus, the CBAs provide a greater benefit than FMLA alone, because the period covered by the CBA-protected paid leave does not affect an employee’s seniority status under state civil service rules. It suggests this is not the case for a period of unpaid leave, including unpaid FMLA leave.

The WHD opinion letter found that once an employer has determined that an employee's leave request qualifies as FMLA leave, it must designate the leave as FMLA leave without delay. Following the designation, neither the employer nor employee may decline FMLA protections for that leave.

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The WHD opinion letter also states that if a CBA provides for accrual of seniority when employees utilize paid leave, the employer must allow employees to accrue seniority when substituting FMLA leave for paid leave. When an employee is using FMLA-qualified leave concurrent with CBA-protected paid leave, the employee's seniority status would be the same as if they took only the CBA-protected paid leave.

The FMLA and its requirements applies to public employers. Employers also may enter into collective bargaining agreements and/or adopt policies that provide additional benefits. However, those agreements and policies will apply only so long as they are in compliance with the FMLA. Policies can be more generous than FMLA but may not reduce or deny FMLA benefits and protections.

What this means for your District:

This is a good time to review your CBAs and board-adopted policies to determine if they are compliant with both opinion letters issued in 2019. Due to the interpretation, revisions may need to be made. Failure to follow the procedures for FMLA leave may result in a claim of interference with, restraint on, or denial of the exercise of an employee's FMLA rights.

Ohio's EdChoice Program

Ohio's public schools receive a report card every year on their performance. The report card results in letter grades for six components as well as an overall grade. These report cards are then used to determine which schools will qualify for the EdChoice scholarship program. This program allows parents in those schools to receive a scholarship to use for private school tuition.

For the 2020-2021 school year, legislation in the budget bill has expanded this program to include many more public schools than ever before. Previously, 120 schools qualified for participation in the EdChoice Scholarship program: now, over 1,200 Ohio public schools will be qualified under the program.

The amounts of the scholarships are \$4,650 for grades K-8 and \$6,000 for grades 9-12. This money is deducted from the district's funding and may cause school districts to lose a substantial amount of money. In the course of just one year, some school districts could lose millions of dollars.

Solon City Schools, one of the top performing school districts in the state, has a school building that will be eligible for EdChoice. Despite 97% of its students earning proficient grades or higher, and 90% reaching accelerated or advanced levels, Solon fell from 4th to 5th in performance of all Ohio public schools and earned a report card grade of "D" in student progress.

The state uses the last three years of report card data to determine which schools are considered underperforming and, therefore, EdChoice eligible. For three years, Ohio schools were given a "safe harbor" in order to have time to get used to the adjustment in testing requirements. This means that data is determined from 2017-2018, 2018-2019, and 2013-2014 school years, skipping the two "safe harbor" years, 2014-2015 and 2015-2016. Consequently, if a school's performance improved during the "safe harbor" time period, those improvements could not be used to keep it from becoming eligible for EdChoice. This arbitrary time period is contributing to the problem for some schools.

Education associations OSBA, OASBO, and BASA recently issued calls to action for members to contact their representatives. The goal of these efforts would be that the General Assembly would take action to delay and/or amend the EdChoice Scholarship program expansion before February 1, 2020 – the next voucher application

period. The associations produced a list of some talking points to share with legislators about how EdChoice vouchers are or will affect your district.

Mike Toal, Ohio State Board of Education at-large member, criticized the full list of recommendations. He called it “a grab bag of ideas, including the kitchen sink” that could change “the original intent of the EdChoice program.” The board adopted an amendment to strike seven of the recommendations and unanimously voted to send suggestions to the House and Senate’s education committees.

Ohio House Speaker Larry Householder voiced serious concerns about the EdChoice program, noting that changes must be made quickly. He said the State of Ohio is failing when it comes to the testing system and report cards. “I think we’re going to do a short-term fix for this problem. But the long-term solution is really, let’s get busy and make certain that we have more accurate grade cards and our testing system is one that’s fair to all schools in this state.” Householder said that when the legislature returns in January, their number one priority will be addressing the EdChoice program.

Facebook and First Amendment Rights

Like students, teachers do not shed their constitutional right to free speech while at school. However, their rights are not without limits as the Sixth Circuit demonstrated recently when it issued a ruling upholding termination of a teacher. In *Sensabaugh v. Halliburton*, the District’s head football coach posted concerns on Facebook about the conditions he found when visiting an elementary school (a visit unrelated to his job). One of these posts included photos of a classroom and one included the faces of several students. District officials tried to contact Sensabaugh in an effort to explain their concern that this post could violate school policy as well as FERPA. However, they were unable to get in contact with him.

Meanwhile, Sensabaugh posted a separate entry on Facebook discussing his concerns with prisoners working at the high school. Again, school administration reached out to Sensabaugh to discuss their concerns over the posts. During their conversation, the administration informed Sensabaugh that he did not need to delete the post, but instead asked him to remove only the picture of the students accompanying the post. Sensabaugh yelled at members of the administration and informed them that he would not take the post down.

Following the conversation, administration drafted a “Letter of Guidance” which addressed Sensabaugh’s failure to remove the photos from Facebook, his conduct during the phone call, and other previous misconduct. This letter stated that the administration was not requiring Sensabaugh to remove his comments from his posts but directed him to remove the picture displaying the minor students. The letter clearly stated that failure to follow its directives could lead to discipline up to and including termination. Finally, Sensabaugh agreed to remove the photos from Facebook.

Following the Letter of Guidance, Sensabaugh’s behavior and actions continued to cause problems in the District. This led the administration to issue a Letter of Reprimand which placed Sensabaugh on administrative leave pending investigation. It was alleged that Sensabaugh accused the Athletic Director of coming to work under the influence of prescription pills, as well as threatening a football player and athletic trainer. The administration hired an independent law firm to investigate the alleged misconduct.

The investigator’s report concluded that Sensabaugh had engaged in unprofessional, insubordinate, threatening, and retaliatory behavior towards supervisors, students, and staff. It concluded that Sensabaugh’s actions had intimidated and undermined his coworkers and supervisors. The investigators went on to conclude that Sensabaugh’s repeated, belligerent, and confrontational speech to coworkers made it inconceivable for them to maintain an ongoing employment relationship. As a result, the investigator recommended that Sensabaugh’s employment with the district be terminated.

Administration notified Sensabaugh that the independent investigator had submitted their findings and recommended his termination. Sensabaugh was offered the opportunity to provide any statement or evidence in support of a less severe punishment. However, Sensabaugh never responded. The District then terminated Sensabaugh's employment.

Sensabaugh sued, arguing that the District retaliated against him for exercising his First Amendment right to free speech. In order for a teacher to prevail on a First Amendment retaliation claim, he must show that: 1) he engaged in protected conduct; 2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; and 3) that the adverse action was motivated at least in part by the protected conduct. *Bell v. Johnson*, 308 F.3d 594, 602 (6th Cir. 2002).

The Sixth Circuit Court of Appeals first determined that the Letter of Guidance was not an adverse action. The letter did not impose any discipline, but instead simply imposed directives that Sensabaugh needed to follow in order to avoid discipline. Likewise, the Court also found that the Letter of Reprimand was not an adverse action. Though the letter resulted in paid administrative leave, this still did not result in an adverse action. *Ehrlich v. Kovack*, 710 F.App'x 646, 650 (6th Cir. 2017).

There is no dispute that the termination was an adverse action. However, Sensabaugh must show that the Facebook posts were a substantial or motivating factor in the adverse employment action. Though the Letter of Guidance, Letter of Reprimand, and termination came within six months after the Facebook posts, temporal proximity alone is rarely, if ever, sufficient to establish the causation requirement. Here, there was no other indication to demonstrate that Sensabaugh was terminated because of his Facebook posts. The court noted that at no time leading up to the termination did the administration ask or require Sensabaugh to remove the Facebook posts. Instead, the letters acknowledged Sensabaugh's right to comment on public concerns. He was asked to remove the content from his posts that violated FERPA. Additionally, the independent investigation substantiated other allegations of misconduct that supported termination.

Ultimately, the court determined that when deciding to end Sensabaugh's employment, the District relied on several instances of misconduct which were unrebutted by Sensabaugh. There was no indication that the viewpoints expressed in his Facebook posts (other than the FERPA-protected images of students) played any part in the District's decision to terminate. Therefore, the District did not violate his constitutional rights.

What this means for your District:

The law on First Amendment free speech and expression issues as they relate to social media and public employment continue to evolve. This case is a good explanation of how the Sixth Circuit is currently interpreting those issues. Careful review of this decision reveals the district's response carefully avoided limiting the employee's right to express his opinion on issues of public concern via his Facebook posts. The District's guidance to the employee and its further actions leading up to termination supported the right to terminate based on misconduct, not on the basis of the opinions expressed in his Facebook posts.

Sensabaugh v. Halliburton, 937 F.3d 621 (6th Cir.2019)

Records of Deceased Student and Mass Shooter Case Decided

Recently, in *State ex. rel CNN, Inc. v. Bellbrook-Sugarcreek Local School Dist.*, 2019-Ohio-4187, the Second Appellate District ruled that the death of a student does not remove the legal protections of the confidentiality of student records.

In August 2019, an adult gunman killed nine people and injured twenty-seven others in a mass shooting in Dayton. Following the incident, several media outlets requested public records of the gunman's educational records, including disciplinary records, from the school district from which he graduated.

The district released directory information concerning the student but declined to release any other records. The media outlets sued, filing a mandamus action seeking the release of the records. Ohio Revised Code (R.C.) Section 149.43 requires a public agency to release public records upon request, unless an exception applies. That section provides that records are not "public records" subject to release if a state or federal law prohibits the release of them.

The district argued that the Ohio Student Privacy Act limits access to records concerning students, specifically, that "[n]o person shall release, or permit access to personally identifiable information other than directory information concerning any student attending a public school ... without the written consent of each such student who is eighteen years of age or older."

The court concluded that, based on the plain language of R.C. 149.43, the district is barred from releasing the records requested, rejecting the news media's argument that the district was compelled to release the requested records because the former student's right to privacy expired with his death. The case has been appealed to the Ohio Supreme Court.

Attorney General Dave Yost filed a brief to the Supreme Court of Ohio. His brief is in support of the media outlets that are suing in order to have rights to view the student's records. Yost argued that neither Family Educational Rights and Privacy Act nor Ohio Student Privacy Acts protects the records of students who die after becoming an adult. A local TV station and other news organizations filed briefs amicus curiae in support of CNN.

Yost's brief states that the attorney general's office has a duty to "ensure transparency in all levels of government." One of the duties involved is to provide training and guidance on Ohio's Sunshine Laws. This duty, the brief reads, is being directly impacted because the Public Records Act is being violated in not allowing access to the student records.

What this means for you district:

The decision in this case will affect how your district may handle requests for the records of deceased students in the future. Regardless of the ruling, districts will have clear guidance on handling these requests once this decision is reached. Ennis Britton will continue to monitor this action and provide updates as they occur.

Maximizing the Success of School Construction Projects

Planning and executing a school construction project can be complex; full of challenges and risks. Because of the amount of money involved and the enormous community support that is frequently needed to obtain that funding, it is critically important for the project to be a success. This article will provide some suggestions that can help maximize the success of your next project.

Know your project agreements:

All construction projects have three key players: the architect, the construction manager and the school district. Your architect and construction manager's roles are carefully defined in what is called the project agreement. This document outlines exactly what the architect and construction manager will be doing (and will not be doing) over the life of the project. Carefully read and understand these agreements; consider having an experienced construction attorney modify them to address any issues that are specific to your district and project.

Effective use of professionals:

You hired the architect and construction manager because of their extensive knowledge and expertise. Get the most out of them by being explicit about your district's needs and objectives. Encourage them to use their creativity and knowledge to bring a variety of options to the table for your consideration. Do not hesitate to ask questions and be sure they explain things until you are comfortable in your understanding.

Establish district priorities early:

Many stakeholders want a voice in the design process. We encourage you to listen carefully to those suggestions, because they can inform your thinking about the project. After listening, take the time to fully understand what is important to your district, as well as what you want to accomplish with the project. Then, make a list of the district's priorities. Refer back to these priorities as needed, including your team. We recommend that if stakeholders make requests that cannot feasibly be incorporated into the project, explain why and stand firm. Changing your priorities will likely cost you time and money, particularly as you get further into the design process. Unless absolutely necessary, avoid changing anything once construction has started.

Speak with one voice:

The school district's most important role will be to make thousands of decisions. Although you will want to involve many stakeholders to share their feedback and thoughts about the project, your design and construction team must have a single, clear line of communication to avoid confusion around decision-making. We think it makes sense to designate a single person to represent your district. Ideally this person would have some knowledge about the design and construction of school buildings. They should also have significant time to devote to this critically important role.

Have a realistic timeline:

Talk with your architect and construction manager about your scheduling priorities. Do keep in mind that there is an appropriate amount of time to allocate for the design and construction of your project that will ensure you have superior results. While your design and construction professionals can make almost any schedule work, no matter how impossible, remember that the less realistic your timeline, the more it will cost you. Finally, we recommend that you allow plenty of time for your staff to move into the building. Ideally, this should be at least 45 days, which may be longer than you were initially thinking.

Protect your budget:

A multimillion-dollar budget may seem like a lot, but when constructing a large school building it doesn't go nearly as far as you might think. Insist that your design and construction professionals include a realistic budget line item for every phase of the work, from foundations to furniture. You should expect and require your architect and construction manager to do their work while staying within your established budget. We recommend that you request cost estimates during the very earliest design phase and at each major milestone of the design process.

Consider the impact on your current school program:

All construction projects are noisy, messy and dangerous. During the planning phase, be sure to consider the impact of ongoing construction work on your school program, particularly if your new building is being constructed on the same site with an existing building. This advice is doubly important when renovating existing buildings. Have your architect and construction manager develop a plan that will keep students, staff and visitors safe and minimize disruption to the extent possible. Don't forget to consider after school and evening activities.

Ennis Britton Group Construction Advisor Services

The Ennis Britton Consulting Group recently has expanded to provide services that specifically support school leaders during the design and construction of new buildings or major renovation projects. EBCG staff have architectural, construction, and educational experience that makes our team unique and more qualified than any other consultants providing these services in Ohio. Our professionals each have over 30 years of experience in their area of expertise. Many of our team members are former school leaders, who have both architectural and construction expertise. They have been responsible for many successfully completed, large-scale construction projects and they know the challenges your administrative team will be facing!

For more information about the Ennis Britton Consulting Group and their School Construction Advisor services please go to our website at www.ennisbritton.com or contact Steve Shergalis at (330) 441-0562.

Upcoming Deadlines

As your school district prepares for the next couple of months, keep in mind the following upcoming deadlines. For questions about these requirements, contact an Ennis Britton attorney.

- **January 15** – Deadline for boards of education to meet and organize (RC 3313.14); Deadline for boards of education to adopt tax budgets for the coming school fiscal year (RC 5705.28)
 - **January 20** – Deadline for boards of education to submit fiscal tax-year budget to county auditor (RC 5705.30)
 - **January 28** – Deadline to submit certification for May income tax levy to Ohio Department of Taxation (RC 5748.02)
 - **January 31** – Deadline for ESC governing boards to meet and organize (RC 3313.14); Deadline (4:00 p.m.) for annual campaign finance reports to be filed by certain candidates, political action committees, caucus committees, and political parties, detailing contributions and expenditures from the last day reflected in the previous report through December 31, 2017 (RC 3517.10)
 - **February 1** – Deadline to submit May emergency, current operating expenses or conversion levy to county auditor for May election. (RC 5705.194, 5705.195, 5705.213, 5705.219)
 - **February 6** – Deadline for school districts to file resolution of necessity, resolution to proceed and auditor's certification for bond levy with board of elections for May election (RC 133.18); Deadline for county auditor to certify school district bond levy terms for May election (RC 133.18); Deadline to submit continuing replacement, permanent improvement or operating levy for May election to board of elections (RC 5705.192, 5705.21, 5705.25); Deadline to certify resolution for school district income tax levy or conversion levy for May election to board of elections (RC 5748.02, 5705.219); Deadline to submit emergency levy for May election to board of elections (RC 5705.195); Deadline to submit phased-in levy or current operating expenses for May election to board of elections (RC 5705.251)
 - **March 1** – Deadline to take action on and deliver written notice of nonrenewal of superintendent's contract (RC 3319.01); Deadline to take action on and deliver written notice of nonrenewal of treasurer's contract (RC 3313.22); Deadline to publish joint statement describing how district's business advisory council has fulfilled its responsibilities (RC 3313.821)
 - **March 31** – End of second ADM reporting period (RC 3317.03)
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Upcoming Presentations

2019–2020 ADMINISTRATOR'S ACADEMY SEMINAR SERIES

April 16, 2020: Student Discipline Primer

July 9, 2020: 2019–20120 Education Law Year in Review

Ennis Britton's Administrator's Academy Seminar Series is offered via a live video webinar professionally produced by the Ohio State Bar Association and is free of charge to clients.

Participants must be registered to attend each event. All three webinars will be archived for those who wish to access the event at a later time. You may register on our [website](#) or contact Kayla via [email](#) or phone at 513-674-3451.

**January 11: Ashland Leadership Academy Seminars
*Legal Update***

Presented by John Britton

**January 16: Ohio Association of School Business Officials
*New Treasurers Survival Series 103***

Presented by Bronston McCord

**January 22: Annual Ohio Association of Local School Superintendents Conference
*Putting the Human in Human Resources: Critical Relationships for Educational Leaders***

Presented by John Britton

**January 24: Ohio Association of School Personnel Administrators
*Winter Boot Camp: Collective Bargaining & Negotiations***

Presented by Pam Leist and Gary Stedronsky

**January 24: Ohio Association of School Personnel Administrators
*Classified HR Staff Legal Update***

Presented by Pam Leist

**February 7: Ohio Association of School Personnel Administrators
*Administrative Assistant Legal Update***

Presented by Erin Wessendorf-Wortman

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Want to stay up to date about important topics in school law?
Check out Ennis Britton's [Education Law Blog](#).

Webinar Archives

Did you miss a past webinar, or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, contact Kayla via [email](#) or phone at 513-674-3451. Archived topics include the following:

Labor and Employment

- School Employee Nonrenewal
- Employee Licensure
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Requirements for Medicaid Claims
- Discrimination: What Administrators Need to Know

Student Education and Discipline

- New Truancy and Discipline Laws – HB 410
- Transgender and Gender-Nonconforming Students
- Student Discipline
- Student Privacy

School Finance

- School Levy Campaign Compliance

School Board Policy

- What You Should Know about Guns in Schools
- Crisis, Media, and Public Relations
- Low-Stress Solutions to High-Tech Troubles
- Ohio Sunshine Laws

Special Education

- Three Hot Topics in Special Education
- Supreme Court Special Education Decisions
- Special Education Scramble (2018)
- Special Education Legal Update (2017)
- Special Education Legal Update (2016)
- Effective IEP Teams

Legal Updates

- 2017–2018 Education Law Year in Review
- 2016–2017 Education Law Year in Review
- 2015–2016 Education Law Year in Review

Ennis Britton Practice Teams

At Ennis Britton, we have assembled a team of attorneys whose collective expertise enables us to handle the wide variety of issues that currently challenge school districts and local municipalities. From sensitive labor negotiations to complex real estate transactions, our attorneys can provide sound legal guidance that will keep your organization in a secure position.

When you have questions in general areas of education law, our team of attorneys help you make competent decisions quickly and efficiently. These areas include:

Labor & Employment Law

Student Education & Discipline

Board Policy & Representation

There are times when you have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly in one of these areas of law, we have created topic-specific practice teams. These teams comprise attorneys who already have experience in and currently practice in these specialized areas.

Construction & Real Estate

Construction Contracts • Easements •
Land Purchases & Sales • Liens •
Mediations • Litigation

Team Members:

Ryan LaFlamme
Robert J. McBride
Bronston McCord
Giselle Spencer
Gary Stedronsky

Workers' Compensation

Administrative Hearings •
Court Appeals • Collaboration with TPAs •
General Advice

Team Members:

Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

Special Education

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

Team Members:

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

School Finance

Taxes • School Levies •
Bonds • Board of Revision

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