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10 Common Mistakes to Avoid in Administering FMLA Leave

The Family and Medical Leave Act of 1993 ("FMLA") establishes minimum federal standards that Ohio School Districts must follow for medical, child care and family-related leave. Properly administering FMLA leave will save your School District money and reduce its liability.

Below are ten common mistakes school districts should avoid in administering FMLA leave:

1. Failing to run FMLA leave concurrent with workers' compensation leave. An employee who is injured or suffers an occupational disease while in the course and scope of employment may be granted temporary total disability or other forms of workers compensation leave. A workers' compensation injury or occupational disease that causes an employee to miss significant periods of work is likely a "serious health condition" under the FMLA. In such event, School Districts should run FMLA leave and workers compensation leave concurrently.

2. Granting FMLA leave to ineligible employees before determining whether or not there is a serious health condition. The service requirements to be eligible for FMLA require the employee to be employed for at least 12 months, and to have worked for at least 1,250 hours during the 12-month period immediately preceding the commencement of leave. Full-time teachers are eligible for FMLA leave even if they do not work 1,250 hours in a year. If an employee fails to meet these service requirements, he/she is not eligible for FMLA leave, even if there is a serious health condition.

3. Failing to notify employees of their rights. The regulations to the FMLA require employers to provide notice as follows:

- General Notice: Notice has to be given at time of hire in a handbook or a copy of the general notice itself if your School District does not have a handbook.
- Eligibility Notice: Notice whether the employee meets the statutory eligibility criteria must be provided within 5 business days after the employee requests FMLA leave or the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason.
 - If the employee is not eligible for leave, the notice must state at least one reason why the employee is not eligible.
 - During the leave year, must provide another eligibility notice only if the employee's status has changed.
- Rights and Responsibilities Notice: Details the specific expectations and obligations of the employee and any consequences of the employee's failure to meet these obligations. Must be provided each time the eligibility notice is provided to an employee

- Designation Notice: The employer must notify the employee if the leave is not designated as FMLA leave due to insufficient information or a non-qualifying reason. The notice must also include a statement of the employee's essential job functions if the employer will require that those functions be addressed in a fitness-for-duty certification.

4. Failing to recognize an employee may be entitled to FMLA leave when an employee does not specifically request it, yet provides information of a serious condition. Many School Districts, through Board policy or collective bargaining agreement, require employees utilizing extended sick leave or unpaid medical leave, to present proof of illness, injury, disability or other health condition through a physician statement. Proof of medical conditions qualifying an employee for extended sick leave or medical leave will oftentimes also qualify as a serious health condition under the FMLA. In such instances, FMLA leave should run concurrent with sick leave and/or unpaid medical leave.

5. Failing to train administrators, supervisors and managers on FMLA requirements. The FMLA, either through legislative amendment or judicial decision, is subject to frequent change. Training on administering FMLA leave should be a recurrent topic of training for all administrative team members who handle human resources and personnel decisions.

6. Failing to provide a job description with the Designation Notice if a fitness for duty certification is required to address the employee's ability to perform essential job functions. A job description is oftentimes the best resource for a physician to review to certify whether an employee is fit for duty. Also, this document will likely be utilized in certifying that an employee is fit to return to work.

7. Failing to explore whether intermittent or reduced-schedule leave can be taken in such a manner as to minimize disruption to School District operations. If an employee has been approved for intermittent or reduced-schedule FMLA leave, the FMLA requires the employee to make a "reasonable effort" to schedule leave so as to not unduly disrupt the employer's operations. The School District may meet with the employee to discuss the best way to schedule intermittent or reduced-schedule FMLA leave to both accommodate the employee's serious health condition and to minimize the disruption to School District operations. However, if a health care provider determines the medical necessity for a particular treatment time, the medical determination prevails.

8. Failing to insure medical certification is complete and sufficient prior to approving FMLA leave. If an employer determines a certification is incomplete or insufficient, the employer must state, in writing, what additional information is necessary and allow the employee seven calendar days to cure the deficiency. If the employee refuses to cooperate, the employer may deny the leave.

9. Failing to authenticate or clarify FMLA certification with health care providers. The employer has the right under the FMLA to provide the health care provider with a copy of the certification, and may request verification that the information contained therein was completed and/or authorized by the provider who signed the document. Such contact does not require employee consent and does not violate HIPPA.

Best practice may be for a School District to obtain a signed medical release to contact the employee's health care provider at the time he/she files for FMLA leave. This would allow the School District to contact the employee's health care provider in the event a response on the medical certification requires clarification, without potentially running afoul of HIPPA.

10. Failing to enforce deadlines to submit certifications. When employees take medical leave under the FMLA, School Districts should require certification that confirms the medical condition. Employees have 15 days to submit the certification, unless it is impracticable to do so despite the employee's diligent, good-faith efforts. If an employee fails to submit the certification, FMLA leave may be denied. However, if the certification is incomplete, the School District must notify the employee of the deficiency and allow 7 days to cure, as set forth in item 8 above.

Accommodating Service Animal Requests

Increasingly, service providers are incorporating the use of animals to assist in the education and treatment of disabled children. Under the American's with Disabilities Act ("ADA"), use of a service animal may be an accommodation for a person with a disability. A recent case out of Illinois illustrates the challenges some school districts face in handling a disabled child's request to bring such animals into the education environment.

In August 2009, an Illinois circuit court issued a temporary injunction requiring a school district to allow an autistic student ("Carter") to bring his dog into the classroom during the time needed for the court to hold a formal hearing on whether the animal qualified as a service dog under the ADA. Carter's mother testified the dog was hypoallergenic, and was specifically trained to handle Carter's impulses to eat things that are not food, running impulsively, and tantrums. However, the School District contended that the dog violated the IEP of another child planning to attend the same school who had a rare lung disease. That child's IEP guaranteed she would not be exposed to any animals.

On appeal, the appellate court affirmed, reasoning that the circuit court made the temporary injunction effective three weeks after its entry to allow the School District sufficient time to accommodate the competing interests of the two special needs children. The court also noted that the School District presented no evidence that the IEP student with the lung disorder would be allergic to the specific type of dog that Carter intended to bring to school. Therefore, the appellate court held that the injury Carter would suffer if denied the right to bring his dog to class outweighed any hardship to the School District or the general public.

The case was remanded back to the circuit court, which still must decide if Carter's dog qualifies as a "service animal". To meet the ADA's definition of a "service animal", the dog must be individually trained to perform tasks for the person with the disability. The court must decide if the above-referenced tasks qualify Carter's dog as a "service animal", which according to the court could take "months" to decide.

In the interim, the Department of Justice is expected to issue new regulations shortly regarding what is considered a "service animal". It is likely the new regulations will clearly state that animals used solely for an individual's comfort are not "service animals" and are not covered by the ADA. The new regulations will also likely limit the scope of service animals to dogs. We will keep you posted when these new regulations are promulgated.

Healthy Choices, Healthy Children

Currently, there are identical bills introduced in the Ohio House of Representatives and the Ohio Senate (HB 373 and SB 210, respectively) which are proposing changes on how School Districts promote healthy lifestyles for their students. If passed, the bills will require schools to:

- Provide 30 minutes of moderate to rigorous physical activity for students in grades K through 12 each day.
- Increase required physical education time for high school students from one-half unit to a full unit, and ensure that teachers are licensed in physical education.
- Offer more nutritious food and beverages in vending machines and on menus.

- Require body mass index (BMI) screenings for students enrolled in kindergarten, third, fifth and ninth grades by November 1st of each year, educate parents about the results, and post aggregate results on district report cards.
- Increase access to free breakfast for students who qualify.

The passage of these initiatives in their current forms will require school districts to adapt their curriculum, and possibly their facilities, to accommodate the new requirements. These initiatives could pose scheduling issues such as how to fit a full unit of physical education time into a block scheduling system. Schools that offer half-day kindergarten will need to determine how to schedule 30 minutes of daily physical activity into an already compacted class schedule. Also, schools that have students who split time between a career technical school and a regular high school will need to determine who is responsible for monitoring that such students are following these new requirements.

These bills may also impact the contracts between school districts and vendors who provide soda and snack vending machines to schools, as well as food service providers who provide a la carte items in the cafeteria.

Please note that this analysis is pre-emptive as these bills have not passed yet in their current forms. However, there is bipartisan support for these bills in both the House and the Senate, which suggests that some type of reform on this subject is highly likely to occur.

If you have any questions on the status or implications of Healthy Choices, Healthy Children initiative, please contact the attorneys at Dinsmore & Shohl LLP.

Upcoming Statutory Deadlines in Ohio¹

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 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 limited contract teachers 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.