

TOP 5 TRENDS FOR THE NEW SCHOOL YEAR



2017 Grand Rapids Labor & Employment Law Conference

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UNION REPRESENTATION AND ABANDONMENT



***Too MUCH vs. Too LITTLE
Union Involvement!***

MEMBERSHIP DECLINE

- Labor organizations representing school employee groups have been experiencing a decline in membership, especially among support staff groups. There are at least two factors driving this erosion in membership:
 - 1) Public Act 152's requirement of cost sharing for medical care insurance benefits
 - 2) Michigan's freedom to work act grants employees' a choice

MEMBERSHIP REVOCATION BY EMPLOYEES

- Employees have a right to revoke union membership at any time. *Teamsters Local 214 v. House* (September 12, 2017)(Unpublished), the Michigan Court of Appeals ruled that the Public Employment Relations Act, as amended, requires that employees have the ability to revoke union membership and union payments at will.
- A union's rejection of this ability constitutes an unfair labor practice

UNION ABANDONMENT

- When membership declines, a union may decide that representation is no longer cost effective. The union may not pay attention to the bargaining unit, or the union may actually abandon the unit.
- Union abandonment raises many questions
 - Is there a duty to recognize the union as the exclusive bargaining representative?
 - Is there a duty to bargain?
 - What happens with grievances or employee discipline?
 - What happens when the employer wants to change the terms and conditions of employment?
 - What happens when the employer wants to grant a wage increase or change insurance benefits?

DECERTIFICATION PETITION

- The first step is to determine the union's majority status
- The most secure method for determining union majority status is a decertification petition
- However:
 - A decertification petition must be filed by employees
 - It can only be filed during a certain time:
 - After the expiration of the collective bargaining agreement
 - For public school districts, if the expiration date of the collective bargaining agreement falls between June 1 and September 30, a petition can be filed between January 2 and March 31 of the same year
 - There can be no other union representation petition for one year

EMPLOYER WITHDRAWAL

- In the alternative, an *employer* can withdraw recognition from the union if there is clear and convincing evidence to support a good faith belief that the union has lost majority support, and there can be no pending unfair labor practice charges

CLEAR AND CONVINCING EVIDENCE

- Employee statements that they no longer want the union to represent them
- Employee petition, signed by the majority of the employees, to the employer asking for union withdrawal
- Bargaining unit's failure to elect officers or notify the employer of the identity of union officers
- Failure to hold any union meetings
- Failure to request bargaining or neglect of contract administration or grievance administration

EMPLOYER WITHDRAWAL (CONT.)

- If the employer withdraws union recognition, the question remains as to what should happen with the terms and conditions of employment for the employee group
 - It is suggested that for the immediate future continue recognizing the status quo in terms and conditions of employment
 - Consider transforming the provisions of the collective bargaining agreement into an employee handbook
 - Develop a communication plan such as employee meetings to discuss changes in terms and conditions of empowerment. Under MCL 423.210, a public employer cannot “initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization” But an employer can confer with employees during working time without loss of pay or time.

FREEDOM OF EXPRESSION



He Has WHAT on His Locker / Facebook?

FREEDOM OF EXPRESSION CONSIDERATION

- Schools may not be immune from the current scrutiny of historical symbols, especially in connection with displays of the Confederate Flag and/or similar symbols
- Displays of symbols and insignia invokes Freedom of Expression consideration



CASE LAW

- Review of Constitutional freedom of expressions that apply to Public Schools:
 - *Tinker v. Des Moines Independent School District*, 393 US 503 (1969): Students wear black arm bands to protest the Vietnam War. The United States Supreme Court rules that students had a first amendment right to wear the arm bands unless the school district could demonstrate a substantial disruption with education environment.
 - *Bethel School District Fraser*, 478 US 675 (1986): A school district disciplined a student for using indecent statements in a commencement speech. The Supreme Court ruled that a school district could regulate school sponsored speech to prohibit lewd, profane, indecent and defamatory speech.

CASE LAW (CONT.)

- *Hazlewood v. Kuhlmeier*, 484 US 260 (1988): The students associated with the school newspaper wanted to publish an article about pregnancy and birth control. The Supreme Court ruled that the school district had the right to regulate and even censor speech that was part of a school sponsored activity when the speech contradicted the education and mission values.
- *Morse v. Frederick*, 551 US 393 (2007): A school district disciplined a student who displayed a sign during a school activity that advocated “bongs for Jesus.” The Supreme Court ruled that speech which advocated illegal activity was not prohibited.

STUDENT DISPLAYS OF CONFEDERATE FLAG

- *Bar v. Lafon*, 583 F3d 554 (CA 6, 2008): The United Sixth Circuit Court of Appeals upheld a school district's ban against students displaying the confederate flag. However, the court still applied the *Tinker* analysis - was there substantial disruption to the education environment? The school district was able to show racial tension in the school, including previous racial altercations and racist graffiti.



STUDENT DISPLAYS OF CONFEDERATE FLAG (CONT.)

- *Harwick v. Heyward*, 711 F3d 426 (CA 4, 2013): This case upheld a South Carolina school district's ban against student displays of the confederate flag. The school district was allowed to show past racial tension - some dating years ago. The court supported a broad based ban, including:
 - Shirts worn by the same female middle school student which displayed Southern chicks, Dixie chicks and Southern girls, all displaying the confederate flag
 - Then she wore a shirt honoring the Black Confederates of the 1st Louisiana Reg. which was comprised of free African Americans
 - Then a shirt with an American Flag and statement that it flew over legalized slavery for 90 years
 - Then a Robert E. Lee shirt with a confederate symbol
 - Then a shirt stating "Jesus and Confederate Flags, banned from schools forever"
 - Finally, a shirt that stated "Our schools support Freedom of Speech for all, except for southern heritage"

“SUBSTANTIAL DISRUPTION”

- The question still remains whether a school must show the *Tinker* “substantial disruption” to ban confederate symbols. Generally, the current legal trend is to uphold a public school’s ban of offensive symbols. The courts’ evidentiary requirements seem to be showing increasing deference to public schools in showing a potential disruption.

OCR AND TITLE IX



TRANSGENDER STUDENT RIGHTS

- **CURRENT OCR:** Previous guidance (May 2016 DCL) rescinded on February 22, 2017
- **CURRENT MDE:** Current guidance still applicable (February 2016)
 - Restroom and locker room consistent with gender identity
 - PE and interscholastic sports consistent with gender identity
 - Neutral dress code (think prom and graduation)
 - Support extracurricular clubs (gay-straight alliances)
 - Transgender student chosen name and pronouns honored
 - Requests to change unofficial records granted
 - Treat like any other student in bullying/harassment complaint
- **CURRENT TREND: LITIGATION**
 - Remember, Title IX does not require a Complainant to go to the OCR first

WHAT IS OUR COURT SAYING?

- *Dodds v. United States Dep't of Education*, Case No. 16-4117 (6th Cir., December 15, 2016)
 - United States 6th Circuit Court of Appeals upheld a preliminary injunction that ordered a Local School District to allow an 11 year old transgender student, who identified as female, to use the girl's restroom
 - Majority opinion determined that settled law prohibits discrimination based on transgender status
 - Binding precedential authority on Michigan unless overturned by US Supreme Court
 - The 6th Circuit decision in *Dodds* demonstrates that the Sixth Circuit will protect transgender student's rights under Title IX as interpreted and applied by the OCR



WHAT ABOUT OTHER COURTS?

- Western District PA ruled for three transgender students, but based on the 14th Amendment Equal Protection Clause and **NOT** on Obama guidance under Title IX that had just been withdrawn, *Evancho v. Pine-Richland Sch District* (Feb 27, 2017)
- 7th Circuit ruled in favor of transgender students under gender conformity/sex stereotyping theory of liability under Title IX and Equal Protection in *Whitaker v. Kenosha Bd of Education* (May 30, 2017)
 - “By definition, a transgender student does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth”
 - Sex stereotyping is sex discrimination
 - Did **NOT** rely on May 2016 DCL
- Court: "What the record demonstrates here is that the School District's privacy argument is based upon sheer conjecture and abstraction....A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates"

WHAT ABOUT PLANET FITNESS? (MIDLAND, MI)

- Planet Fitness, a franchise fitness center with over 1,300 clubs across the United States, markets itself as a "Judgement Free Zone"
- Planet Fitness has a policy that allows transgender clients to use the locker room corresponding to their gender identity, even if it does not match their birth certificate
- In an open common area of the women's locker room, the plaintiff came into contact with a transgender woman. She left the locker room and notified the front desk that a "man" was using the women's locker room, and was told the gym's policy is that people are allowed to use the corresponding facilities of whatever sex they identify with, court documents state.
- After plaintiff complained to other Planet Fitness members about the policy, Planet Fitness canceled her membership
- The plaintiff alleged the club's policy of allowing transgender members to use the locker room consistent with their gender identity violated her privacy, constituted sexual harassment in violation of the Michigan Elliot Larsen Civil Rights Act and subjected her to emotional distress

COURT RULES IN FAVOR OF PLANET FITNESS

- On June 1, 2017, in a unanimous 3-0 decision, the Michigan Court of Appeals rejected plaintiff's claims. In addition, the Court found there was no privacy violation as both members were clothed when the plaintiff encountered the transgender female in the locker room.
- It appears for now, Courts are interpreting Title IX and Michigan Civil Rights Laws as protecting transgender persons against discrimination when it comes to use of bathrooms and locker rooms consistent with their sexual identity
- July 12, 2017 – plaintiff files leave to appeal to Michigan Supreme Court



WHAT ABOUT THE OCR?

- Office of Civil Rights has significantly changed
- Candice Jackson is Acting Assistant Secretary
- February 22, 2017 Trump administration withdrew Obama's May 2016 transgender guidance and January 2015 DCL
- The issue *may* be decided by the federal courts
 - U.S. Supreme Court returned case to 4th Circuit which dissolved preliminary injunction in favor of student (March 6, 2017)
 - *G.G. v. Gloucester Cty Sch District* (4th Circuit 2017) (court ruled legal issue could go either way; regulation ambiguous and plausible interpretation either way)

SO WHAT IS THE CURRENT LEGAL STATUS?

- No clearly established right under federal law
- “Answer” lies within Board Policy, local law, state law
- In Michigan, state law non-existent and to the extent it exists, it adopts more narrow definition of sex discrimination
- Unless there is a local law or ordinance, Board Policy and MDE guidance are applicable
- Note: If adopt separate but equal facilities and provide gender-neutral options, improved chances in the event of litigation if conveniently and proximately located to transgender student’s activities

JUNE 6, 2017 OCR INSTRUCTIONS – FORESHADOWING?

- OCR will NOT rely on withdrawn agency guidance
- OCR will NOT investigate claims of discrimination from transgender individuals based on denial of access to facilities or programs
- However, OCR WILL process complaints based on
 - Failure to promptly resolve transgender student’s complaint of sex discrimination
 - Failure to assess whether sexual harassment or gender-based harassment created a hostile learning environment
 - Failure to take steps to address such harassment
 - Retaliation against transgender student
 - Disparate treatment of student based on non-conformance to sex stereotyping
 - Sample policies at www.ed.gov/oses/oshs/emergingpractices.pdf
 - If a complaint alleges a transgender student was denied access to bathrooms and was also subject to harassment, OCR may investigate the harassment while notifying the complainant that facility access is beyond the scope of OCR

OCR COMPLAINT PROCESSING CHANGED

- New guidelines issued regarding scope of complaints
- No longer have priority complaints or hot button issues
- Won't automatically require three years of data on past complaints, facts and circumstances determination
- No automatic systemic or class-action approach unless complaint raises such issues
- Our anecdotal experience...

WHAT'S LEFT OF TITLE IX?

- July 13, 2017 Betsy DeVos meets at Department of Education for Title IX summit
 - In lieu of aggressive OCR enforcement, parents and students will seek relief in the courts and state agencies like the MDCR
 - Plaintiffs lawyers have awakened to the liability, and OCR may no longer be needed
 - Districts should continue to be vigilant in addressing these concerns. There should be no lessening of district training, investigation, documentation, implementation of interim and final remedial measures.

WHAT'S LEFT OF TITLE IX? (CONT.)

- September 7, 2017 Betsy DeVos speaks on Title IX Guidance from OCR and says system has “failed” both survivors and accused
- No *OFFICIAL* announcement regarding OCR’s “Dear Colleague Letters” but hinted at rescinding 2011 DCL
 - Major OCR Guidance: Sexual assault and Title IX
 - “The era of rule by letter is over”
 - Probably will not rescind completely, but may re-write.
 - Changes?
 - Burden of proof
 - Rights of accused/due process

A SHIFT IN TITLE IX GUIDANCE

- On September 22, 2017, the U.S. Department of Education issued “interim guidance” on sexual misconduct under Title IX:
 - WITHDREW 2011 GUIDANCE
 - WITHDREW 2014 GUIDANCE



WHAT'S NEW OR DIFFERENT?

- 2017 Q&A Guidance Notables:
 - Interim measures: Can no longer favor one party over another
 - District shall make “every effort” to avoid depriving any student of his or her education
 - Suspend pending investigation?
 - Reserve for most serious allegations?
 - Burden of proof: Preponderance of evidence **OR** clear and convincing
 - No “Gag Orders” – cannot restrict the ability of either party to discuss investigation

WHAT'S NEW OR DIFFERENT? (CONT.)

- 2017 Q&A Guidance Notables:
 - No longer a 60 day timeframe to complete investigations
 - Respondent **MUST** be provided with written notice of the allegations constituting potential violation of the school's sexual misconduct policy, including sufficient details and sufficient time to prepare a response *before any initial interview*.
Written notice must include:
 - Identity of the parties involved
 - Specific section of the code of conduct allegedly violated
 - Precise conduct allegedly constituting the potential violation
 - Date and location of the alleged incident

WHAT'S NEW OR DIFFERENT? (CONT.)

- 2017 Q&A Guidance Notables:
 - Each party receives written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation
 - Investigation shall result in a written report summarizing the relevant evidence
 - Investigation report is **NO** longer confidential – if disciplinary hearing results, investigation report **MUST** be made available to each party
 - Parties have opportunity to respond to report in writing in advance of any decision and/or at a live disciplinary hearing
 - **BOTH** parties have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings

TAKEAWAY? PROCEED WITH CAUTION, BUT . . .

“The guidance is in advance of rulemaking by the Department on Title IX responsibilities arising from complaints of sexual misconduct”



IN THE MEANTIME: TITLE IX SETTLEMENTS AND CASES STILL OCCURRING IN MICHIGAN K-12 SCHOOLS

- Forest Hills School District: \$600,000 settled 2015
- Lansing School District: \$405,000 – two different cases, settled 2017
- Lakewood School District: \$575,000 settled 2017
- Other cases still pending
 - Warren Consolidated Schools
 - Cedar Springs Public Schools
 - Benton Harbor Area Schools
- Lessons Learned?
 - Treat Title IX matters as current status of the law/guidance

CROWDFUNDING



*Can Good Intentions Lead
to Bad Outcomes?*

CROWDFUNDING 101

- Popularity increasing – Stephen Colbert/Bill Gates
- Examples: GoFundMe.com, DonorsChoose.org, ClassWish.org
- Policy: To have or not to have?
 - Legal liability? Unregulated use can lead to legal pitfalls
 - FERPA
 - IDEA
 - Title IX
 - Supplement not supplant (FAPE!)



CROWDFUNDING 101 (CONT.)

- Template NEOLA Policies
 - BOE/Superintendent designation of approved Crowdfunding sites
 - Education-specific is best; procedural safeguards in place
 - Administrative approval
 - Require sample posting for review
 - Other approval required? (ex: IT)
 - Funds raised are property of the district
 - Allow for requested items in lieu of direct funds
 - Provisions for protection re: FERPA, IDEA and Title IX
 - Photos of students, identifying information, disparaging comments, etc.
 - Student Crowdfunding?

CROWDFUNDING 101 (CONT.)

- All other BOE policies and administrative guidelines
 - Non-discrimination, Anti-harassment
- Crowdfunding Policies extends to affiliated groups: Booster Clubs, PTO, etc.
- No use of District logo or images for personal benefit
- District retains control and can terminate if policy is violated
- Discipline for violations



CROWDFUNDING 101 (CONT.)

- Resources
 - <https://www.donorschoose.org/> (Commonly used education crowdfunding site)
 - <http://www.revtrak.com/> (Another site used by schools)
 - NEOLA Crowdfunding Policies/Clark Hill Policy



FAIR LABOR STANDARDS ACT



OFF the Clock, May Mean ON the Job!

“OFF THE CLOCK WORK” GENERAL RULE

- Whether an employer must compensate employees for work performed outside of regular working hours and outside of the office (hereafter “off the clock” work) is a fact intensive inquiry
- However, the case law generally requires an employer pay an employee for time “off the clock” if:
 - the employee **performed “work”**
 - for more than a *de minimis* amount of time
 - the employer **knew or had reason to know** about the work



MORE THAN A *DE MINIMIS* AMOUNT OF TIME

- Insubstantial or insignificant periods of time working outside scheduled hours may be disregarded
- This means only a few seconds or minutes of work; 10 minutes is not *de minimis*



EMPLOYER POLICIES FOR REPORTING OVERTIME

- Some Federal Circuit Courts recognize an affirmative defense to the 3rd element where an employer establishes a reasonable process for an employee to report uncompensated work time to the employer and the employee fails to follow the established process
 - 2nd, 6th, 8th and 10th Circuits have expressly adopted the defense
- However, the defense is inapplicable if the employer:
 - has an unwritten practice or policy of discouraging reporting off-the-clock and/or overtime hours
 - prevented the employees from reporting overtime
 - was notified of the employee's unreported work

ADVICE TO ALL PUBLIC SCHOOL EMPLOYERS

- Employers must pay non-exempt employees for all hours worked, even unauthorized overtime
- Employers should ensure that non-exempt employees accurately and completely record all hours worked
- Employers may (and should) discipline employees for unauthorized working time
- Employers should define standards about when and under what conditions work is permitted away from the workplace
 - For example, are employees permitted to remotely access the computer system?
Are employees permitted to check e-mails at night?
- Be mindful of employee use of smartphones and other technology from home and outside scheduled work hours

ARE ALL OF YOUR SALARIED EMPLOYEES EXEMPT?

- Basic principle: Non-exempt employees entitled to overtime pay (time and one half) for all hours actually worked over 40 in a workweek
 - Note: HOURS ACTUALLY WORKED
- Conversely, exempt employees are NOT entitled to overtime pay
- Just because the threshold for a salaried basis employee did not in fact increase last year as planned under the prior Administration, does not eliminate risk here
- Paying someone a salary does not mean that employee is exempt
- Administrative classified employees should be reviewed. There may be minefields sitting in your Business Office, HR, and Central Office.

QUESTIONS?



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THANK YOU

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