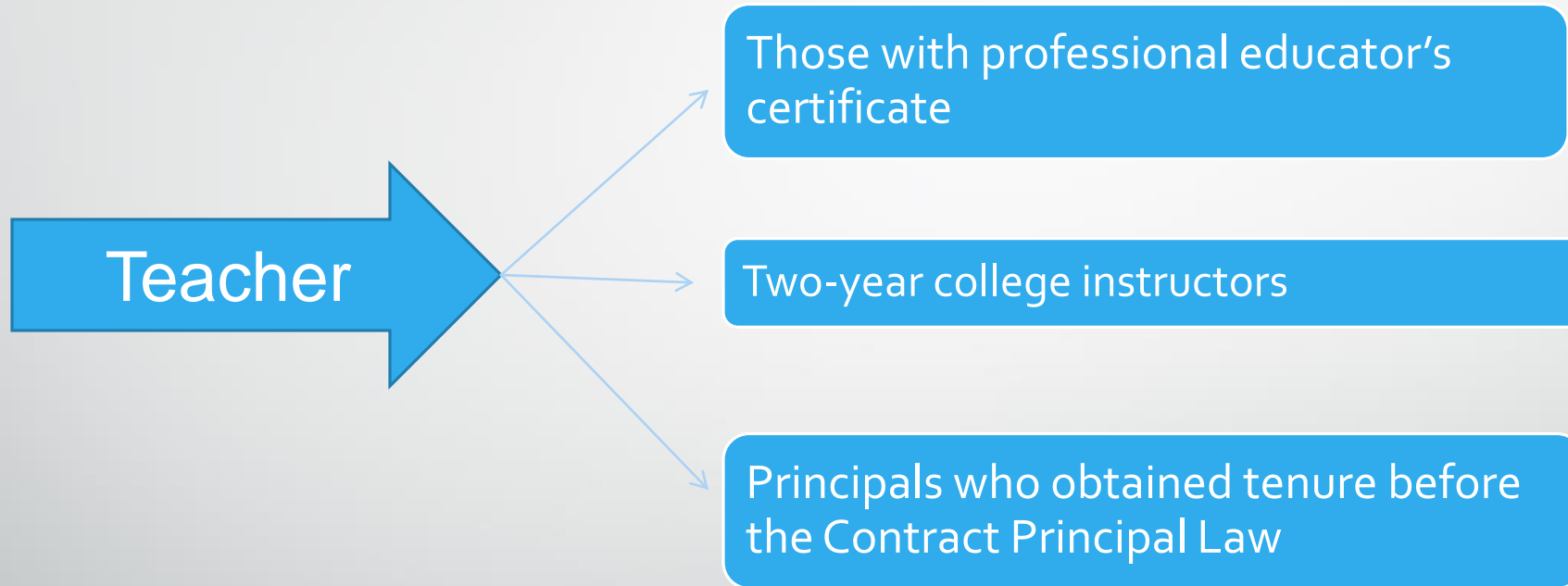




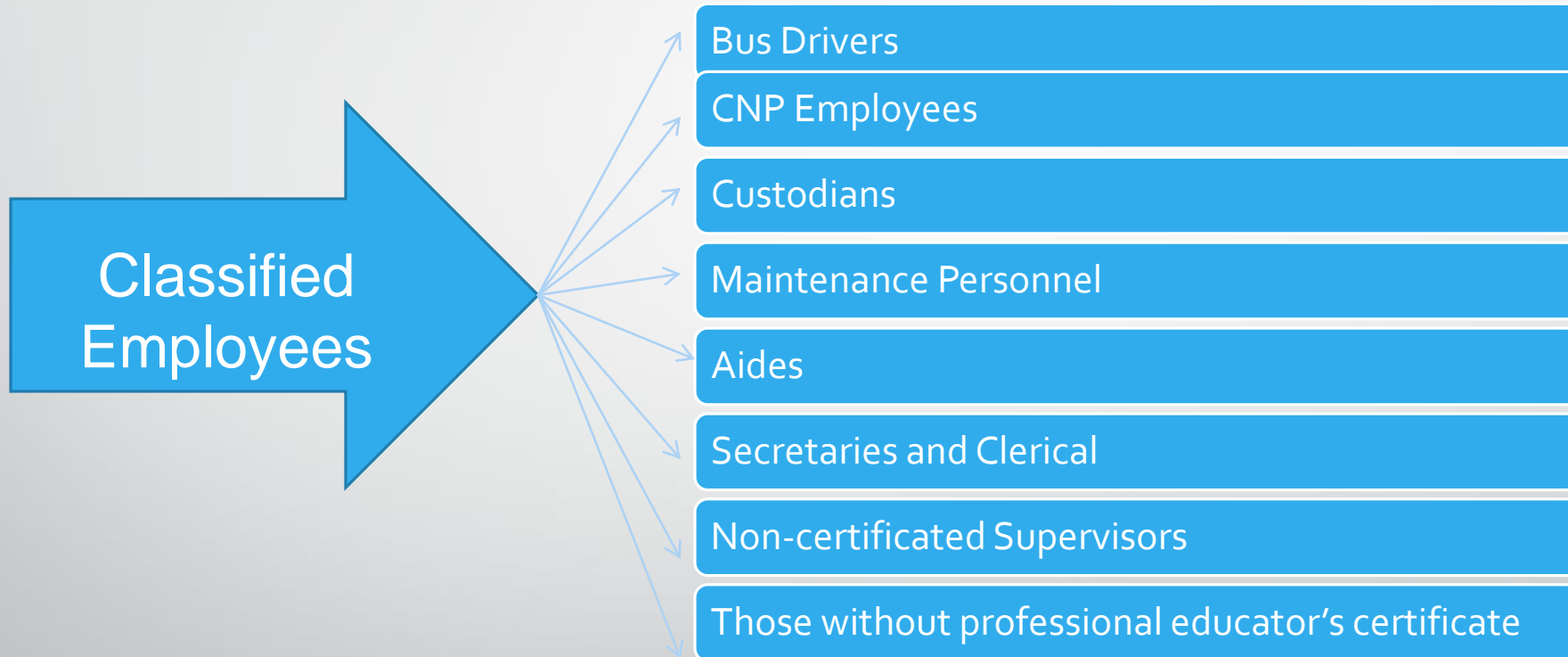
# Employment Law

*Students First Act, Federal Employment Laws, Leave, FMLA, FLSA, and More. . . .*

# Students First Act Who is Covered?



# Students First Act Who is Covered?



# Students First Act

## Earning “Tenure” & “Nonprobationary Status”

- Three consecutive complete school years
- Complete school year is anytime before October 1<sup>st</sup> through end of year
  - If hired after October 1<sup>st</sup>, that year doesn't count
- Earn it unless written notice is given :
  - For teachers, on or before last day of third consecutive school year
  - For classified employees, on or before June 15<sup>th</sup> following that third year (except for 1<sup>st</sup> year of legislative quadrennium, then June 30<sup>th</sup>).

# Students First Act

## Earning “Tenure” and “Nonprobationary Status”

- Only complete school years count
- Includes creditable leave time
- Tenure/nonprobationary status as teacher or classified employee separate and not transferrable or interchangeable between categories
- Not transferrable between boards, except for annexation, school district formation, consolidation, or a similar reorganization

# Students First Act

## Earning "Tenure" and "Nonprobationary Status"

Tenure is not earned in:

Position

Rank

Title

Work Site

Location

Assignment

or Rate of Compensation

# Students First Act Termination Probationary Classified Employees

- May be terminated any time upon written notice (recommendation by Superintendent, vote of Board) before nonprobationary status is earned
- If terminated, get 15 days pay and benefits from issuance of notice
- Decision not appealable

# Students First Act Termination Non-tenured Teachers

- May be terminated any time upon written notice (after recommendation of Superintendent and vote of the Board) on or before June 15<sup>th</sup> unless it is the third year and then the deadline is the last day of the school year
- During school year, requires 30 days notice
  - Teacher can submit written statement to Board
- Decision not appealable



# Students First Act Termination

## Tenured and Nonprobationary Employees

- Reasons for Termination
  - Justifiable decrease in number of positions
  - Incompetency
  - Insubordination
  - Neglect of duty
  - Immorality
  - Failure to perform duties in a satisfactory manner
  - Other good and just cause
- Cannot be for political or personal reasons

# Students First Act Termination

## Tenured and Nonprobationary Employees

1. Recommendation by Superintendent – written notice of proposed termination
  - Reason
  - Short and plain statement of facts
  - Statutory grounds for termination
  - Opportunity to request hearing within 15 days of notice
2. No hearing request, Board can go ahead and vote
3. If hearing requested, Board sets hearing between 30 and 60 days of issuance of notice of hearing (can be rescheduled by agreement or good cause)

# Students First Act

## Tenured and Nonprobationary Employees Termination Hearings

- Superintendent has burden of proof
- Employee can present testimony, evidence, and argument, and can cross examine witnesses
- Can have an attorney
- Court reporter paid by State
- Hearing can be private or public (employee choice)
- Subpoenas may be issued
- Board acts as a deliberative body

# Students First Act


## Tenured and Nonprobationary Employees

### Appeal of Board Decision

- After hearing or vote (if no hearing requested), notice from Superintendent within 10 calendar days
- If after hearing, notice of right to appeal should be included
- Appeal is to State Superintendent (15 days of receipt of decision)
- Goes to hearing officer (retired judges trained in ADR)
- Notice of appeal contains grounds and served on Superintendent
- Superintendent will prepare record and send within 20 days of receipt
- Hearing officer holds hearing with deference to Board's decision and renders decision within 5 days
- Can appeal that decision to Court of Civil Appeals

# Students First Act Pay

- Employee decisions are effective immediately
- For tenured and non-probationary classified personnel, pay continues until the sooner of:
  - (1) 75 days
  - (2) When the hearing officer rules
- Termination based on moral turpitude, immorality, abandonment of job, incarceration, or neglect of duty – pay may cease immediately
- If employee wins appeal, can receive back pay



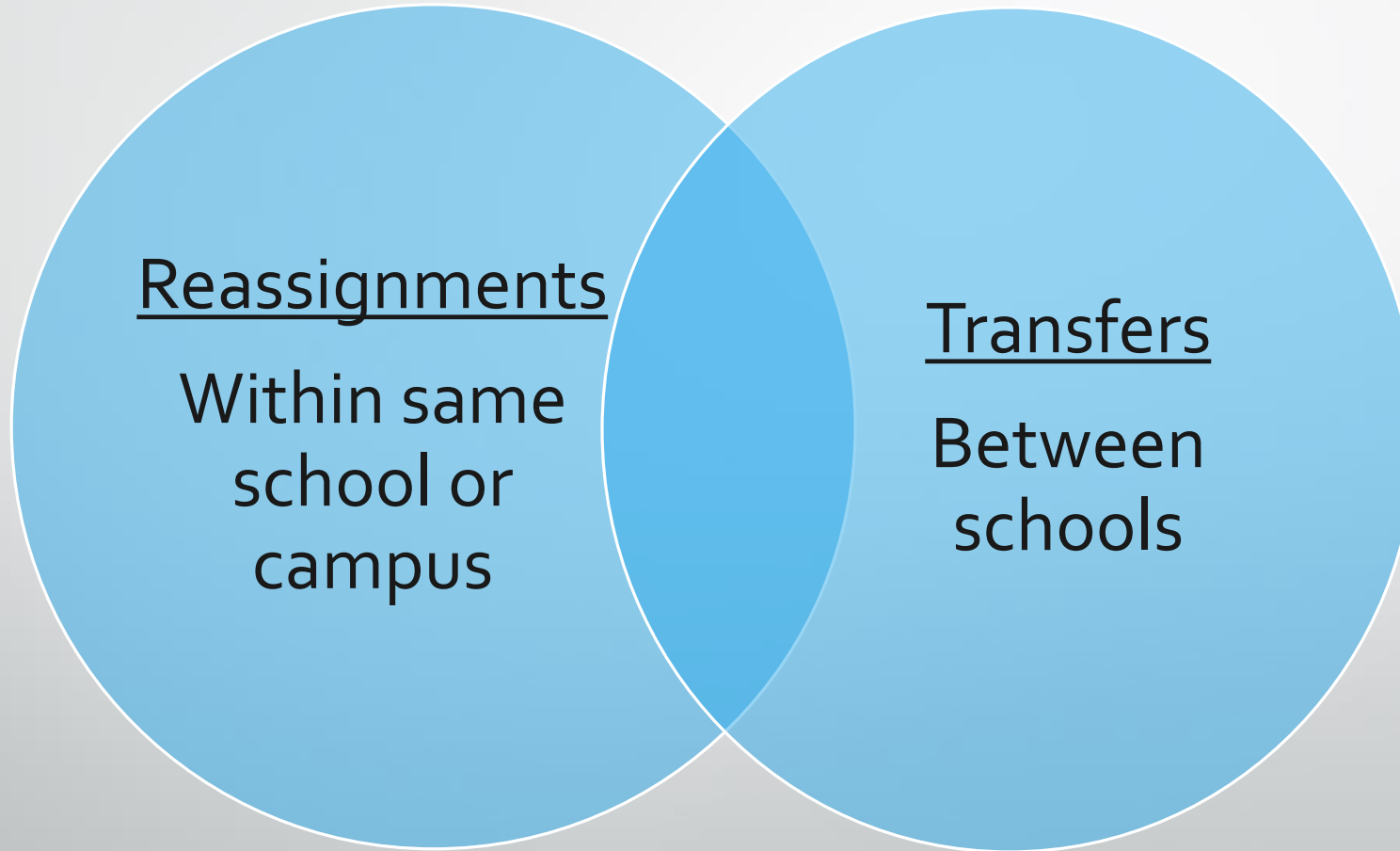
# Students First Act

## Tenured and Nonprobationary Employees Suspensions

- Can suspend for 20 work days without pay
- Notice has to be given and an opportunity to present evidence and argument to the Board
- If over 20 days, notice, hearing, and review process for terminations apply

# Students First Act

## Reassignments and Transfers



# Students First Act Teachers Reassignments

*Superintendent* can reassign

- Within same school, campus, or facility
- By 20<sup>th</sup> calendar day after school begins
- Teacher must have certification
- Only once per year
- Without loss of compensation

No challenge or appeal



# Students First Act Transfer – Tenured Teacher

## Conditions for transfers to another school

- Employee must hold appropriate certification
- No reduction in compensation
- First 20 calendar days of school
- Only once per school year
- Must be Board approved
- If within high school feeder pattern, meeting before vote
- If outside high school feeder pattern, hearing before vote

# Students First Act

## Transfer – Non-probationary Classified

- Can be transferred if no reduction in compensation, written notice is issued not less than 15 days before decision, and transfer is effective not less than 15 calendar days from decision
- If to a work site outside of high school feeder pattern, have opportunity to appeal in same manner as termination
- Only one transfer per year

# Students First Act

## Transfer – Reduction-in-Pay

- Probationary and non-tenured employees
  - Can be transferred to position that pays less or shorter term if:
    1. Appropriate certificate
    2. Written notice is given with explanation of effect on compensation of employee
    3. Opportunity to object in writing before the vote
  - Transfer effective not less than 15 calendar days from vote
- Non-probationary and tenured employees
  - Transfers to positions with lower rate or shorter term may be challenged like a termination
- Transfers in conjunction with RIFs or made in order to comply with state or federal law are not subject to challenge or review

# Students First Act

## Tenured and Nonprobationary Employees

- The following are not considered terminations or transfers
  - Reduction or modification of compensation or benefits
  - Reduction or modification of work or school year

### IF

- Prospective
  - Recommended by Superintendent and approved by Board
  - Applied uniformly to similarly situated employees within system, division, department, or employment classification
- Layoffs or RIFs due to decreased enrollment or shortage of revenues

# Students First Act Paid Administrative Leave

Acknowledges and authorizes paid administrative leave

Paid administrative leave – Superintendent decides

# Students First Act Certification

- Revocation of certificate → termination
- Similarly, no certificate (if revoked, denied, suspended, forfeited, or ineligible) → no rights under Act
- “Rights, remedies, and procedures . . . shall not apply or be available to such employee.”
- Challenge is by way of certification appeal

- Students First is just part of the picture – we also have federal laws to deal with...

# Federal Discrimination Laws



It's not just reading, writing and arithmetic anymore!

- Our culture is much more complicated, much of it driven by communication and media access
- We are the government – bound by constitution and laws
- You are agents/officials of government – bound by those same laws
- Focus on function of government – learning and the rest falls into place...

# What is Discrimination

- Discrimination means unfair or unequal treatment of an individual or group based on certain characteristics.

# Federal law makes it unlawful to discriminate on the basis of

- Race
- Color
- Gender
- Age
- Disability
- National Origin
- Religion
- Pregnancy
- Genetic Information

## Cannot discriminate in ...

- Hiring and firing
- Compensation
- Assignment or Classification/Segregation
- Transfer, promotion, layoff or recall
- Job Advertisements
- Recruitment
- Testing
- Use of Facilities
- Training
- Benefits
- Pay, retirement plans, and disability leave
- Other terms and conditions of employment

## Equal Employment Opportunity Policies

- All of you have an EEO policy like...
- Unlawful Discrimination Prohibited – The Board is an equal opportunity employer. Personnel actions and decisions will be made without regard to factors or considerations prohibited by federal or state law (as such laws may from time to time be amended), including but not limited to race, gender, age, disability, national origin, citizenship, and religious preference.

# Title VII Discrimination

- Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating in employment on the basis of:
  - Race
  - Color
  - Religion
  - Sex
  - National origin

# Title VII of the Civil Rights Act of 1964

- Discriminatory practices under Title VII also include:
  - Harassment on the basis of race, color religion, sex or national origin;
  - Retaliation against an individual for filing a charge or discrimination, participating in an investigation or opposing discriminatory practices;
  - Employment decisions based on stereotypes or assumptions about the abilities, traits or performances of individuals of a certain sex, race, age, religion or ethnic group and;
  - Denying employment opportunities to a person because of marriage to, or association with, an individual or a particular race or national origin.

# Age Discrimination

- The Age Discrimination in Employment Act (“ADEA”) was enacted by Congress with the express intent to prohibit arbitrary discrimination in employment and to promote employment of America’s older population based on ability rather than age.



# Age Discrimination

- The current law protects all employees over the age of 40 who are employed by an employer subject to the ADEA. The law generally prohibits an employer from compelling an employee to retire due to age subject to a very narrow exception.

# Americans With Disabilities Act

- The ADA protects employees and prospective employees with disability from discrimination by employers based on their disabilities. All boards of education in Alabama are subject to the ADA since all boards have more than fifteen employees.
- The ADA prohibits employers from engaging in discriminatory and other unlawful practices in the hiring, managing and termination process of disabled individuals and imposes an affirmative obligation on employers, in some instances, to reasonably accommodate disabled applicants and employees.
- Employee must request the accommodation.
- To fall within the scope of the ADA, a person must have a disability and be a qualified employee or applicant.

# Americans With Disabilities Act

- “Disability” is defined as follows:
  - a physical or mental impairment that substantially limits one or more major life activities;
  - a record of such impairment; or
  - being regarded as having an impairment.

In addition, the employee or applicant must be capable of performing the essential job functions with reasonable accommodations if necessary.

# Americans With Disabilities Act

- Reasonable accommodation does not include
  - hiring additional employees;
  - creating a new job;
  - reallocating the “essential functions” of the job;
  - reallocating duties to other employees so they must work harder or longer than the impaired employee;
  - allowing indefinite light duty; and
  - allowing an indefinite leave of absence.

# Pregnancy Discrimination Act

- Unlawful to discriminate on the basis of pregnancy, childbirth or related medical conditions

# Genetic Information Discrimination

- Unlawful to discriminate on the basis of genetic information when it comes to any aspect of employment.
- Genetic information includes information about an individual's genetic tests and the genetic tests of family members, as well as information about the manifestation of a disease or disorder in an individual's family.

# How it works.

- Most cases are “circumstantial” cases, which means that based on all the facts, it would seem that discrimination was the reason for an employment decision. In these cases, to establish a case, the Plaintiff must prove the following:
  - belong to a protected class
  - was qualified for the position they applied or held
  - they were subjected to an adverse job action
  - they were replaced by someone outside the protected group

# How it works.

- The burden shifts to the defendant to articulate some legitimate non-discriminatory reason for the employment decision. If a **legitimate, non-discriminatory reason** is established by the employer, the burden shifts back to the employee to prove that the alleged legitimate reason is a front or pretext to hide discrimination.



# Hiring

## Typical Process

- Job is posted pursuant to Alabama Law
- Applications received
- Screening of Candidates
- Interviews
- Recommendation
- Board Approval

# Alabama's Posting Law

## Where to Post?

- The original law governing the posting of vacant personnel positions which required school systems to post all vacancies “in a conspicuous place at each school campus and worksite”
- the Legislature brought the posting requirements into the modern age when it passed Act 2018-260 which allows vacancies to be posted on **a school board's website.**

# Alabama's Posting Law

## Notice of Vacancy

- Required qualifications
- Salary schedule “and amount”
- Information on where to submit an application
- Information on any deadlines for applying
- Any other relevant information
- List is not exclusive – have to include this information but can include other information in the notice if so desired

## When to Post?

- In addition, the Act 2018-260 shortened the posting timeline for some vacancies.
- While the Legislature retained the requirement to post a vacancy notice for supervisory, managerial, or otherwise newly created position for **14 calendar days**, all other jobs now only have to be posted for **7 days** no matter what time of year the vacancy is posted.

## Alabama's Posting Law

### When to Post?

- Supervisory, managerial or newly created positions
  - 14 calendar days
- All other vacancies
  - 7 days

# Alabama's Posting Law Emergencies

- Can adopt policies to “ensure safety and welfare of students during dire emergency circumstances”
- Posting shall not be abridged or delayed except in dire emergency circumstances
- Delay = temporary in order to “reasonably meet the conditions of the emergency”

# Alabama's Posting Law

## What does it mean?

- Posting law is procedural in nature
- No substantive rights are created (no right to a job)
- Not intended to benefit individual employees
- Failure to follow does not mean that someone else is entitled to the job
- Does not require a particular hiring process, interviews or competition for a job



# Alabama's Posting Law Consequences

- Jackson County Board of Education created two new positions and hired employees without posting
  - **Added duties and increased pay**
- Failure to post = “rescind appointments and return the personnel to the prior positions”
- Left open the possibility of a “charge-back” to the employees, the Board or the Superintendent
- Actions of the employees were valid and binding while serving as “de facto officers or employees”

Attorney General Opinion 2001-164

# Alabama's Posting Law Vacancies

- So what is a vacancy?
  - “when an employee retires, resigns or leaves under other circumstances a vacancy created”
- So what is not?
  - Two teachers switch positions = no vacancy
  - Lateral transfers (even though may be to job with more or less pay)
  - Reduction in force – where no position is to be filled

Attorney General Opinion 2002-069

# Alabama's Posting Law

## Other Considerations

- Can post a vacancy before the employee leaves the position
  - Informed of employee retiring or leaving
  - Can post when receive the notice? Yes

Attorney General Opinion 2014-058

# Alabama's Posting Law

## Final Thoughts

- The posting law leaves more questions than answers
- Very little “law” on it
- Clear that it is required from procedural standpoint
- Better to err on side of caution and post
- Can get a little creative (talk to your attorney about this)
  - Bulk postings
  - Anticipatory postings
  - Permanent fulltime subs or a “bullpen” of teachers
- Transfers make things tricky – the musical chairs scenario
- Whatever you do, be transparent, act in good faith and ask questions

# The Employment Process

- Get a plan and follow it
- Let the experts do their jobs (let teachers teach, let principals manage, let custodians clean, let accountants account and let HR/Personnel do their thing)
- Make it structural
- Know where YOU fit in the process

# The Plan

## Some Possible Options

- Have a consistent application process and make it centralized
- All materials should be submitted to Central Office
- Limit “informal” submissions to local schools or departments
- Keep consistent materials on candidates
- Get a process for deciding who gets interviewed

# The Plan

## Some Possible Options

- Oversight by a committee of those used to dealing with personnel issues
- Think about having committee refer for interviews or review recommendations – help troubleshoot
- Put a consistent (but not rigid) interview process in place
- Interview in teams and shoot for diversity on those teams

# The Plan

## Some Possible Options

- **Review job descriptions** before interviews/referrals
- Screen for qualifications and don't make exceptions (don't make rules and then not follow them)
- Train on trouble spots or things not to talk about in interviews
  - "You sure are in good shape for your age"
  - "Where do you attend church?"
  - "Are you married? Have kids?"
  - Disability questions, etc.



# The Plan

## Some Possible Options

- Think about way to communicate recommendations to Superintendent as part of the process – have good information so Superintendent can be well informed of options
- Idea is to avoid “rubber stamp” perception
- Have (and be able to articulate) reasons for making decision and challenge each other about the reasons

# The Plan Advantages


- Don't ever have to make up reasons or process up on back end
- Not personality driven
- Same process applies regardless of personnel or position – consistency
- Still have to worry about substance of decision but not the procedure followed

# Good Management is Essential

- Promotes consistency
- Consistency promotes fairness
- Minimizes subjectivity
- Subjectivity impedes fairness

# Treat Every Decision Like a Potential Lawsuit

- Make sure you have reasons for every hiring recommendation
- Make sure the answer to “why is this person the best applicant” is obvious and articulated
- Be honest and consistent when defending personnel decisions



# Treat Every Decision Like a Potential Lawsuit

If no candidate is chosen, be prepared to explain that too!

# Scheduling & Attendance

# Schedules

- Work hours (both number and specific hours to be worked) should be clear and documented
- Schedule (what employee does during day) should be established
- Lunch needs to be at a set time and staggered for employees doing like duties
  - (Please don't schedule all custodians to eat at the same time)

# Schedules

- Ideally, don't schedule at times when there is no supervision (early morning, night)
- The "honor system" doesn't work
- Break times and lunch have to be 30/20 minutes or they count as paid time
- Break time and lunch should be scheduled
  - (That does not mean take it when you can)



# Schedules

- Typically left to local administrators
- Should have a document showing what schedules are
- Communicate the schedule to employees!!
- How do you deal with extracurricular activities?
- How much flexibility do you want to allow?
- Needs to be consistent and clear

# You Can't Enforce What You Don't Explain!

- What work hours are
- How to account for being there
- That records have to show when at work
- What signing a time sheet/accounting for leave means
- How to address inaccuracies
- Leave issues
- Medical Issues

# The Basics of Attendance

- Attendance is necessary and essential
- Being on time is necessary and essential
- Have to either be there or be on leave
- Leave can only be used for authorized reasons-needs to be certified
- Board needs to be notified when won't be there
- Relate all of this back to core educational function- Teaching and Learning

# Leave

- **Sick Leave** – Ala Code 16-1-18.1
  - Can be used for statutory reasons only
  - Not free days off-designed for when too sick to come to work or one of the reasons applies

# Sick Leave

- Full-time employees & adult bus drivers
- Earn one day per month of employment
- Unlimited accumulation of sick leave

# Sick Leave

- Transfer of sick leave balance between Alabama public education institutions:
  - County and city boards of education,
  - Two-year postsecondary institutions,
  - Four-year colleges and universities,
  - and,
- Various other agencies but limited to only a few specified state agencies.

# Sick Leave Definition

- The employee's absence from duty for
  - Personal illness
  - Incapacitating personal injury
  - Attending to an ill member of the **family**
  - Death in the **family**
  - Death, injury, or illness of another person who has unusually strong personal ties

# Family Members

- **Illness** of a parent, spouse, child, **foster child currently in the care and custody of the employee**, brother or sister, or an individual with a close personal tie.
- **Death** of a parent, spouse, child, brother or sister, in-laws (father, mother, son, brother, daughter, sister), nephew, niece, uncle, aunt, grandparent or grandchild.



# Sick Leave Legal Opinions

- Employee earns sick leave while on sick leave or other leave-with-pay.
- Sick leave may only be used for legal purposes. (Illness, injury, or death).
- Cannot be paid for unused sick leave.
- Sick leave cannot be transferred between employees (except for catastrophic leave).

# Sick Leave Legal Opinions

## (continued)

- An employee that holds two different full-time jobs earns sick leave for each position.
- A doctor's excuse or other justification may only be required if there is probable cause to believe that sick leave is being abused or misused by the employee.

# Leave

## **Personal leave** – Ala Code 16-8-26

- Any certificated employee.
- Support employees who work an average of at least 20 hours per week.
- At least 2 days with pay required.
- Up to 3 additional days:
  - Without pay
  - With pay
    - Partial pay (deduction for the cost of a substitute)

# Leave

## Personal leave – Ala Code 16-8-26

- Unused days do not carry-over to the next year.
- An employee cannot be required to disclose their reasons for requesting personal leave.
- Any employee has the option to convert unused personal leave days to sick leave at the end of the scholastic year if the unused days are funded (full pay or partial pay).
- A certificated employee has an additional option of being paid for unused personal leave days at the end of the scholastic year if the unused days are funded (full pay or partial pay).

# Personal Leave Legal Opinions

- Personal leave days are considered funded even if the employee must pay for a substitute in order to receive the additional personal leave days.
- A certificated employee who chooses to be paid for unused personal leave days is to be reimbursed at the highest daily rate paid to substitute teachers.
- A board of education is not required to reimburse support employees for unused personal leave.

# Leave

- **Vacation** – Ala Code 16-1-18.1
  - Authorized but board gets to decide
  - Most often found in policies
- **OJI** – Ala Code 16-1-18.1
  - Injury while working or on premises
  - NOT negligence based (it doesn't matter if it was employee's fault)
  - Reporting requirements – 24 hour notification
  - Can require medical certification

# Leave

- **Sick Leave Bank and Catastrophic Leave** - Ala Code 16-22-9
  - Bank set up by employees for employees
  - Deposit days in (Up to 5) and can borrow 10 more
  - Elect a Sick leave bank Committee each year (every year!)
  - Committee decides rules and regs and membership votes on them
  - Bank makes decisions for itself through the Committee-Board only handles accounting and administration
  - Catastrophic Leave available – can have days donated by other employees

# Leave

- Leaves of Absences - Paid or Unpaid
- Unavoidable Leave
- Military leave
- FMLA



# Discipline

- What do I do if an employee does not come to work or follow the rules?
  1. Make sure the rules are clear (see earlier slides)
  2. Talk to the employee – be specific and find out what the problem is – there is usually more to the story
  3. Follow up on conversation with written communication
    - a. Describe reason for conversation
    - b. Nature of discussion
    - c. Understanding reached
    - d. Plan moving forward, including ramifications
- Monitor situation – Flag it.
  - If there is a problem, it will surface again

# What About Outsourcing?

- Can't we solve these problems by "farming it out?"

# Independent Contractors

## The New World of Outsourcing

- Expansion of outsourcing opportunities for school boards
  - Substitute employees
  - Bus Services
  - Nurses
  - Custodial/Support
- How you handle the outsourced employees may be more critical

# Independent Contractors

- Sometimes need to contract with individuals, companies or small groups of individuals to provide services on periodic or sporadic basis
- Do this through the use of a contract – we call them independent contractors.
- Contracts are critical – establish the relationship

# Independent Contractor

- Often use a clause like the following:
  - Contractor agrees to provide all services as an independent contractor and both the Board and Contractor disclaim any and all employment relationship between the parties. As Contractor is not an employee, she is not entitled to the benefits provided by the Board to its employees, including, but not limited to, group health insurance and pension plan. Accordingly, fees, taxes, administrative costs and any other costs incurred by Contractor in the performance of any of the services mentioned herein shall be the sole responsibility of Contractor. For the purposes of this Agreement, Contractor, her employees, officers, agents, assigns or representatives shall not be considered as employees, officers, agents, assigns or representatives of Board.

# The problem:

False assumption that outsourcing insulates Boards from all legal obligations and liabilities that attach to traditional employment relationships

# Joint Employment

There is potential for the worst of all worlds  
– both the school system and company are  
considered “employers”

# Potential Consequences of Ambiguity

- Attainment of tenure or continuing service status
- Right to benefits
- Due process
- FLSA
- Taxes
- Penalties



# Joint Employment

- Triggers obligations under laws applicable to public agencies (Federal civil rights laws, FMLA, FLSA)
- Evaluate using “Economic Realities Factors”
  - Power to Hire and Fire
  - Control Over Wage or Other Employment benefits
    - “wage rate is so fundamental to the ultimate question that... (DOL believes) that any entity that sets a wage rate will likely be considered an employer.”
  - Hours and Scheduling
  - Supervises, Directs or Controls the Work
  - Performs Payroll or Other Administrative Functions
  - Other Factors-they reserve the right to look at other factors

## Even discrimination claims:


- Race
- Age
- Gender
- Disability
- Etc. . . .

# How is Joint Employment Status Established?

One Court's View in a discrimination case...

# The “Economic Realities” Test:

- Focuses on economic realities of working relationship
- Draws on common law agency principles
- Who has the right to control the employee (the most important factor)



**Economic realities analysis is based on eleven factors, no one of which is determinative . . .**

# Economic realities analysis

1. The nature and degree of control over the employee and who exercises that control;
2. The degree of supervision, direct or indirect, over the employee's work and who exercises that supervision;
3. Who exercises the power to determine the employee's pay rate or method of payment;

# Economic realities analysis

4. Who has the right, directly or indirectly, to hire, fire, or modify the employee's employment conditions;
5. Who is responsible for preparing the payroll and paying wages;
6. Who made the investment in the equipment and facilities the employee uses;
7. Who has the opportunity for profit and loss;

# Economic realities analysis

8. The employment's permanence and exclusiveness;
9. The degree of skill the job requires;
10. The ownership of the property or facilities where the employee works;
11. The performance of a specialty job within the production line integral to the business.



# Indicia of Control:


- Authority to assign plaintiff to particular classroom;
- Board involvement in selecting candidates for jobs (interviews, designation of work sites);
- Supervising day-to-day activities of plaintiff (no direct supervision by contractor);
- Authority to request removal of plaintiff;
- Work locations owned and operated by Board.

# Indicia of Separate Employment:


- Written agreement between Board and contractor so stating;
- Plaintiff formally hired and trained by contractor;
- Contractor pays plaintiff's wages, provides benefits and makes deductions for taxes;
- Contractor's employees wear badges identifying themselves as contractor's employees.


## Bottom Line:


One federal judge in Alabama has found that sorting and weighing these factors is a jury's job, not the judge's decision to make.




**What can be done to avoid this  
dilemma?**

- 
1. Complete “hands off” approach to employee assignment, supervision, evaluation, manner and means of performing their jobs


- 
2. Strict adherence to formal distinctions noted above (payroll practices, training, employment policies)



**3.** Indemnification of Board by contractor for employment related claims

- 
4. Wean yourself from outsourcing arrangements that can't or won't meet above criteria



- 
5. In weighing benefits of outsourcing, consider the strength of the Board's hand in eliminating unsatisfactory employees under the Students First Act . . .

# Overtime

# Overtime

- FLSA compliance still an issue in some schools
- Overtime has to be managed
- How you manage is extremely important
- Mistakes can have exponential costs
- Overtime will continue to be part of the dialogue in schools from a fiscal responsibility standpoint

# Overtime Basics

- 1 ½ times regular rate of pay
- Only for more than 40 hours in week – cannot average across work weeks
- Paid as cash or time off (compensatory time)
- Regular rate includes all pay
- Only count work time – no credit toward the 40 for vacation, sick leave etc.

# Exemptions

- Certain positions meet exemption criteria from FLSA regulations based on the nature of work performed and the amount and type of pay received
- Positions “exempt” under the FLSA are not entitled to overtime compensation regardless of the number of hours worked
- There are detailed tests for exemption
- Exemption tests are complicated – decisions should not be made by local administrators

## Application of Exemption Tests

- Job titles alone are insufficient to establish exemption
- Job descriptions alone are also insufficient to establish exemption
- Have to look at salary and duties performed

# Exemption Categories Commonly Seen in Education

- Executive
- Administrative – regular and academic
- Professional
  - Learned Professional – doctors, lawyers, teachers
  - Creative Professional – artists, musicians, creative writers
  - Computer Employee

“EAP”

# What about teachers?

- Teachers are “Professional” employees = Professional Exemption
- Special Rule for “bona fide teachers” – do not have to meet the salary threshold
- New rule does not affect “bona fide teachers”



# Bona Fide Teachers

- Primary duty – teaching, tutoring, instructing, lecturing in activity of imparting knowledge
- Employed and engaged as a teacher in an educational establishment
- Includes classroom teachers, career tech teachers (“skilled and semi-skilled trades and occupations), preschool teachers, kindergarten teachers, coaches

# Exempt Positions

## A few things to remember . . .

- NOT eligible for overtime compensation
- Can still be required to complete time records
- Board can still schedule work hours
- Exempt employee pay NOT subject to hourly pay deductions, except for:
  - Major workplace rule violation
  - Unapproved leave of absence
  - Exhaustion of accrued leave or FMLA
  - Mandatory furlough for budgetary reasons
- Exempt employees may be required to use accrued leave to cover work absences
- Improper pay reductions can render employee non-exempt

# Dual Employees

- Two jobs – can result in more than 40 hours
- Don't calculate based on the job which "caused the overtime"
- Use a blended rate, have to custom calculate
- Salary schedule/agreements become important
- Instead, establish hourly rate and pay overtime

# Volunteers

- Use caution!
- General rule: A classified employee cannot work for free as a volunteer
- Cannot waive overtime
- Cannot volunteer for same type of services which employee is employed to perform
- This is tricky and has to be carefully analyzed

# Substitutes

- Avoid using employees as substitutes
- Think of it as two jobs
- Can cause recordkeeping problems

## Lump Sum Payments

- Lump sum payment can count as additional base compensation
- If results in overtime, have to pay overtime on the lump sum
- Lump sum cannot serve as the overtime compensation
- Can substantially raise the hourly rate

# Keep Good Records

- Can use timesheets or electronic means
- Either way, must have ability to record all time worked
  - Bus drivers
  - Weekend Work
  - Special projects
  - Start time and end times for work
- Sign in and out for lunch/breaks

# Other Special Issues

- “On Call” or waiting time - work time if period of waiting is :
  - Unpredictable
  - Short duration
  - Employee unable to use time effectively for own purposes



# Other Special Issues

- Training
  - Mandatory meeting/training time is work time
  - Voluntary training during work hours can be work time
  - Voluntary training after hours to gain additional skill or knowledge is NOT work time, even if job related
- Travel Time
  - Ordinary travel to and from work is NOT work time
  - Travel from work site to work site is work time
  - When required to travel substantial distance to perform a job away from regular work site, travel is work time

# Other Special Issues

- Lunch breaks – bona fide lunch breaks of more than 30 minutes
  - If on duty or interrupted, have to pay
- Other breaks- If less than 20 minutes, compensable
- Comp Time
  - May give leave instead of overtime – 1.5 hours of leave for each OT hour
  - Agreement with employee *in advance* (before the overtime is worked)

# Best Practices

- Time clock or electronic time-keeping system
  - Employee controls input and corrections
  - Should require deliberate action/conscious choices
    - Punch in
    - Swipe a card
    - Scan a fingerprint
    - Sign a sheet
  - “Time clock” in an area where can be supervised
  - A timekeeping system where other Board employees (secretaries and payroll clerks) or supervisors complete time records for employees will lead to problems
  - Develop a system where employees tell the Board when they actually worked NOT the other way around
  - Has to reflect actual time worked NOT scheduled time
  - Be cautious about assumptions . . . Including whether or not lunch or breaks taken

# Best Practices

- Review and Monitoring
  - Time sheets/records should be reviewed (and maybe even certified) weekly, regardless of payroll period
    - Shorter time period promotes accuracy
    - Better chance of remembering
    - Identify problems sooner
    - Eliminate the “hurry up to get paid factor”
    - Can manage time more effectively
  - Timesheets should be reviewed by someone other than the payroll clerk regularly-look for...
    - Erratic work habits
      - Too much consistency
      - Missed entries
      - Leave issues
      - Lots of overtime

# Best Practices

- Review and Monitoring
  - Use schedule. Are people where they are supposed to be?
  - Lunch being taken?
  - Everyone signed/clocked in?
  - Talk to employees
  - Focus on lunchroom workers and custodians
  - Are posters up? Notices?

# Best Practices Handling Complaints and Problems

- Develop a process for reporting issues
  - Should be comfortable for employees
  - Should be outside the “chain of command”
  - Administration – up to speed on overtime
- If you don’t know there is a problem, you can’t fix it!

# Discipline

- If an employer suffers or permits overtime to be worked, must pay for it
- Suffer or permit – If the employer knew or should have known the work is being performed, must either exercise authority to *prohibit* the work or pay for it
- Can't suffer or permit the work and then just not pay for it
- In other words, the discipline cannot be not to pay for the overtime

THE BURDEN IS ON YOU!

# Discipline

- What do I do if an employee does not follow the rules or works unauthorized overtime?
  1. Pay the employee
  2. Talk to the employee – be specific and find out what the problem is – there is usually more to the story
  3. Follow up on conversation with written communication
    - a. Describe reason for conversation
    - b. Nature of discussion
    - c. Understanding reached
    - d. Plan moving forward, including ramifications
- Monitor situation – Flag it.
  - If there is a problem, it will surface again



# Problem Solving

- May weigh risk and determine the best approach is to leave things as they are
- Be proactive – solve your problems before they become problems

# Family and Medical Leave Act (FMLA)

- Federal Law – passed by Congress
- Covers all public agencies and some private employers
- Provides leave for certain employees
- Amended by National Defense Authorization Act

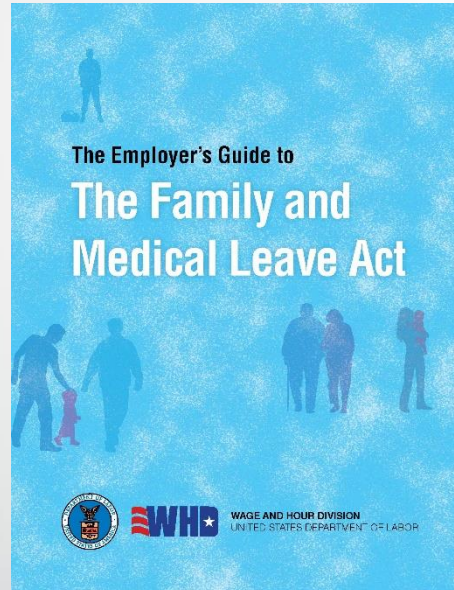
# FMLA

## Intent

- To balance the demands of the workplace with the needs of families
- To promote the stability and economic security of families
- To promote national interests in preserving family integrity
- To entitle employees to take reasonable leave for medical reasons or for family
- To provide that leave in a way that accommodates employees
- To provide that leave in accordance with equal protection
- To promote equal opportunity for men and women

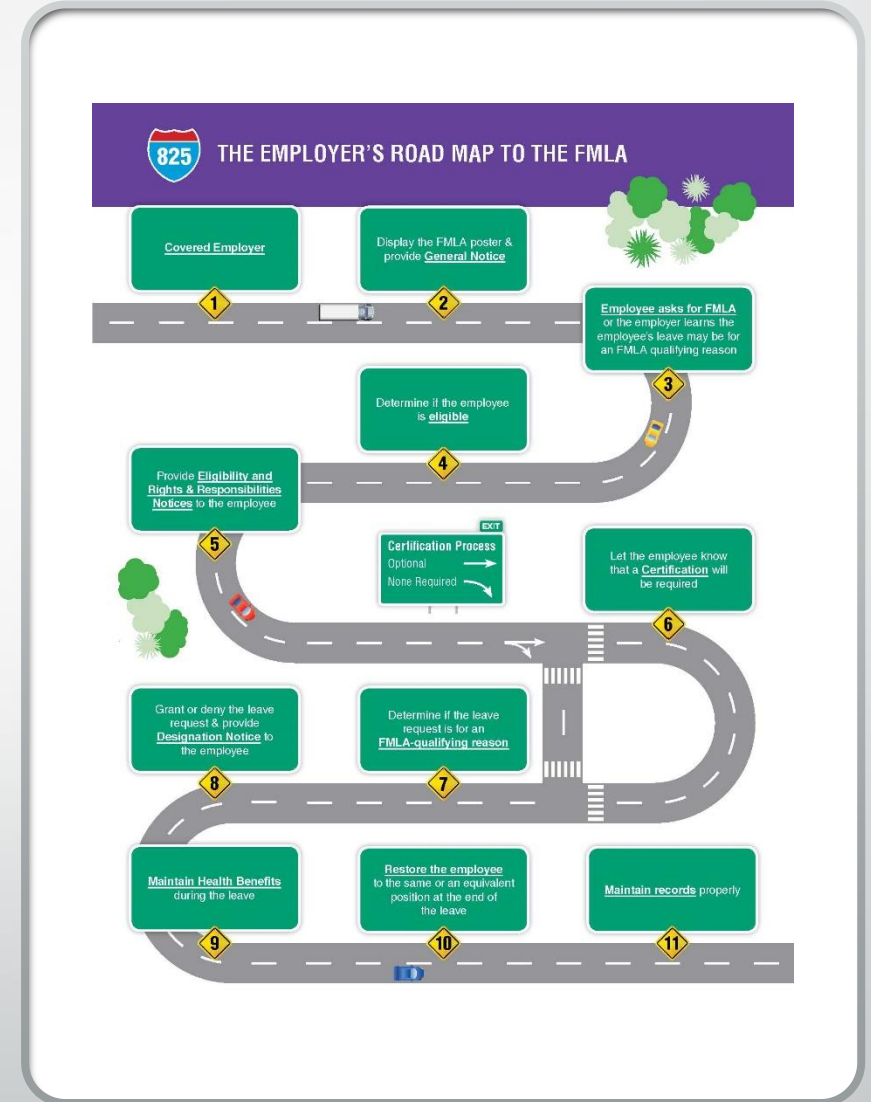
# Enforcement and Guidance

- United States Department of Labor enforces
- In 2016, DOL issued comprehensive guidance in a user friendly format



- <https://www.dol.gov/whd/fmla/employerguide.pdf>

# The DOL Road Map



# Eligibility for FMLA

(1) The employee must have worked for the Board at least 12 months

AND

(2) Employee must have worked at least 1,250 hours during the 12 months prior to the start of the leave

# 12 Months With Employer

- Employee must have 12 months “history” with Board
- Often looked at in terms of weeks – 52 weeks
- Does not have to be 52 full weeks – instead, just have to work part of those weeks
- Test is whether employee was on payroll, even if not actively working
- Leave can count toward the 52 weeks

# Hours Worked

## Second Part of Eligibility Test

1,250 hours in 12 months is the eligibility threshold. How do you get to 1,250?

- In calculating whether an employee worked 1,250 hours, only count the hours actually worked
  - No credit for holidays, vacation, paid or unpaid leave
- Calculation method – Fair Labor Standards Act principles
- Count back from the date leave commences



# Establishing the “Hours Worked”

- Have to keep accurate records – time sheets
- If Board does not have accurate records, burden is on Board to establish the employee did not meet the threshold
- Full-time teachers are deemed “to meet the 1,250 hour test,” unless the Board “clearly demonstrates” the employee did not work 1,250 hours

# FMLA Leave

## Does the Reason Qualify?

- Birth and care of newborn or adoption
- Serious health condition of employee
- Serious health condition of family member of employee

# Birth and Care of Newborn

- Applies to mothers and fathers
- Applies to adoption and children in foster care
- Covers “placement” and application periods for adopted and foster children
- Entitlement ends after first year
- If both father and mother are employees, get combined leave of 12 weeks

# Serious Health Condition

Illness, injury, impairment, or physical or mental condition that involves:

1. Inpatient care (overnight care) and follow up care
2. Continuing treatment by health care provider due to incapacity of more than three (3) consecutive days and any follow-up care that also involves:
  - (a) two or more visits to health care provider, or
  - (b) one visit to provider which results in a regimen of continuing treatment
3. Pregnancy
4. Incapacity due to a chronic , serious health condition, such as asthma, diabetes, epilepsy, etc.
5. Permanent or long-term incapacity for which treatment may not be effective
6. Absence to receive multiple treatments for a condition that would require more than 3 days of incapacity if left untreated (chemo, physical therapy, dialysis)

## Serious Health Condition Regulatory Clarification

- “Continuing treatment” definition requires 3 consecutive days of incapacity AND either two follow up visits OR one follow up visit which results in a continuing regimen of care
  - Under the rule, the two follow up visits have to occur within 30 days, with the first visit within 7 days of first day of incapacity
  - If the “continuing regimen of care” applies, the first visit must have occurred within 7 days of first day of incapacity
- “Chronic health conditions” require at least two periodic visits to health care provider per year in order to trigger the Act

# What Does All That Mean?

## What Qualifies?

- Hospital stays
- Conditions which do not just come and go
- Pregnancy
- Terminal diseases, Alzheimer's, Parkinson's, Multiple Sclerosis, etc.
- Asthma, diabetes, epilepsy or other condition which may be controllable but does not go away
- Multiple treatments for the above treatments

## What Doesn't Qualify?

- Routine physical exams, eye exams, dental exams
- A regimen of continuing treatment involving merely the taking of over-the-counter medications, bed rest, exercise, drinking fluids or other common treatment options
- Cosmetic treatments such as skin blemish treatments and plastic surgery (although complications from that may qualify)
- Common cold, flu, ear aches, upset stomach, minor ulcers, headaches, routine dental problems
- Absence due to substance abuse UNLESS it is treatment by a health care provider for that abuse

## Doctor's Excuses Can We Ask for Proof?

- Yes, employer can require certification related to serious medical conditions
- Employer has to give the employee at least 15 calendar days to get the certification

# Certification - What is Sufficient?

Certification “shall be sufficient” if it states:

- The date the condition commenced
- Probable duration of condition
- “Appropriate” medical facts
- If care is for family member, statement that care is needed and estimate of time to provide care
- For serious health care of employee, statement of inability to perform job
- In case of intermittent leave, statement of medical necessity of the time and dates of future treatment
- In case of intermittent leave for family member, statement of necessity and schedule



# Certification – What is Sufficient?

## Some Changes in New Rule

- Limits those who can ask for certification to a health care provider, Human Resources professional, a leave administrator, or management official, but CANNOT be immediate supervisor
- May only ask for information on the certification form
- If certification is incomplete, specify what is missing in writing and give employee 7 days to cure the deficiency

[\* Department of Labor has a form \*]

# Second Opinions

- Board may get a second opinion when it “has reason to doubt the validity of the certification”
- Board gets to choose the doctor
- Board has to pay for the doctor
- If Board’s doctor and employee’s doctor disagree, can get a tiebreaker opinion from a third doctor chosen by the Board and the employee
- Third opinion is final and must be paid for by the Board

# Who Counts as a Health Care Provider?

- Licensed physicians
- Licensed podiatrists, dentist, psychologists, optometrists, and chiropractors (for limited purposes)
- Nurse practitioners, midwives, and clinical social workers
- Christian Science practitioners
- Any health care provider recognized by the Board or by PEEHIP
- Foreign providers (review rules carefully in that instance)

# Immediate Family Member

- Can take leave to care for an immediate family member with a serious health condition
- Employer may request reasonable documentation concerning the family relationship

- **Spouse:** Husband or wife, as defined or recognized under state law for purposes of marriage – can include common law spouses
- **Son or Daughter:** Includes adopted children, stepchildren, child of person “in loco parentis” either under 18 or over 18 and “incapable of self care because of a mental or physical disability
- **Parent:** Biological parent or “in loco parentis”  
(“in loco parentis” means those who brought up and raised the child; does not include parents “in law”)

Who counts  
as a family  
member?

# Military Family Leave

## Two Types

Military  
Caregiver  
Leave

Qualifying  
Exigency  
Leave

# Military Family Leave Caregiver Leave

May take to care for a covered service member  
with serious illness or injury

# Serious Illness or Injury

Any injury or illness in the line of duty on active duty that may render the service member medically unfit or perform the duties of the member's office, grade or rank



# Who can take the leave?

- Spouse, son, daughter, parent or next of kin
- Next of kin = nearest blood relative other than spouse, parent or child

## Lists by priority

- (1) Blood relative with legal custody
- (2) Brothers and sisters
- (3) Grandparents
- (4) Aunts and uncles
- (5) First cousins

UNLESS, service member has designated someone else

# Who can take the leave?

- Stepchildren and stepparents are included
  - Covers biological, adopted, foster children, stepchildren, legal wards or other *in loco parentis* relationships
- Age is not a factor
  - Covers whether above or below 18 years of age

# Covered Service Member

- Current member of armed forces (including National Guard or Reserves)
- Who is undergoing medical treatment, recuperation therapy, is in outpatient status or on temporary disability retired list
- For serious injury or illness in line of duty on active duty

# Leave Amount

- 26 weeks during “single 12 month period”
- 12 month period begins on 1<sup>st</sup> day of leave and ends 12 months later (regardless of way 12 weeks of FMLA is calculated)
- During this 12 month period, only 26 weeks of leave – includes FMLA leave (26 weeks combined)

# Limitations

- Only get 26 weeks/12 months once per service member, per injury
- Entitled to same leave (26 weeks) for a different 12 month period and a different service member OR same service member with different injury
  - Example : Another injury after returning to duty, or another injury arising later from same incident

# Certification

- May require health care provider to certify
- Has to be military provider, DOD Tricare Network provider, DOD non-network Tricare provider, or Veterans Affairs provider
- Follow FMLA procedures for authentication and clarification of certification

EXCEPT

- CANNOT require second or third opinions or request recertification

# Military Family Leave Qualifying Exigency Leave

- Family member may take for a “Qualifying Exigency” arising out of deployment, active duty or a call to active duty of a service member in the National Guard or Reserves
- Regular service members are not included

# Qualifying Exigency?

- Issues arising from short notice deployment (7 days or less of notice) for a period of 7 days
- Military events and related activities such as ceremonies, programs, events, support groups, etc.
- Childcare and related activities
- Making financial or legal arrangements
- Counseling sessions
- Leave to see service member on temporary leave
- Attending post-deployment activities
- Other



# Leave Amount

- 12 work weeks during any 12 month period
- Works like standard FMLA leave
- Same 12 weeks for qualifying exigency leave and FMLA

# Qualifying Exigency Leave

- Act itself delegates to the Secretary of Labor to define “qualifying exigency”
- Will be interpreted liberally
- May include providing childcare in emergency, going to meetings, etc., but not for routine events
- Includes a period of up to 90 days to be with a service member upon return from deployment

# Certification for Qualifying Exigency Leave

Can ask for certification for qualifying exigency leave

- For a first request, Board may ask for active duty orders or like documents and dates of active service
- For each specific request, may ask for certification, including:
  - Facts supporting need for leave, including documents supporting
  - Beginning and ending dates
  - Whether leave will be intermittent or not
  - Frequency and duration of exigency
  - Contact information if exigency involves third party

[\* Department of Labor has an available form \*]

# Taking FMLA

## How Does it Arise?

1. Employee gets sick or hurt
2. Employee does not make it to work
3. Wants to use sick leave or OJI
4. Stays out for a considerable time
5. Runs out of sick days
6. Tries to join sick leave bank
7. Completely out of days – asks about FMLA leave
8. Coworkers report employee seen cutting grass or at another job
9. Board asks for certification
10. Doctor's letter is insufficient – not very specific
11. Board denies leave
12. Employee doesn't come to work
13. Employee is terminated



# How to Make the FMLA Process Smooth (and Legal)

Make expectations clear  
and be sensitive, thoughtful  
and deliberate



## Making Expectations Clear Employer Notice Obligations

New regulations combine all employer  
notice sections into one section and  
“simplifies” notice

# Making Expectations Clear

## Required Types of Employer Notice

- General FMLA Notice
- Eligibility Notice
- Rights and Responsibilities Notice
- Designation Notice

# Making Expectations Clear

## Notice of FMLA Rights

### General FMLA Notice - Poster

- Post notice “explaining the Act’s provisions and providing information concerning filing complaints”
- Must be posted prominently
- Can use Department of Labor’s notice
- Can be electronic



# Making Expectations Clear

## General Notice of FMLA Rights

### Written Guidance

- If have handbook or other written guidance on leave or benefits, have to include FMLA information
- If the Board does not have a handbook, policy or manual, still have to provide “written guidance” – may be distributed upon hiring
- Can use Department of Labor publications
- May be distributed electronically

# Making Expectations Clear

## Eligibility Notice

- Required when FMLA requested or when employer finds out leave may be FMLA qualifying
- Must inform of eligibility within 5 business days
- Don't have to do for subsequent requests in same 12 month period, if eligibility status is the same

# Making Expectations Clear

## Eligibility Notice - Contents

- Whether employee is eligible
- If not, the reason why not – number of months worked, number of hours worked, whether employee number is met
- Can be oral or in writing – DO IT IN WRITING

\* May use Department of Labor Form \*

# Making Expectations Clear

## Rights and Responsibilities Notice

- Must include with eligibility notice
- If leave has already begun, must be mailed to address of record

# Making Expectations Clear

## Rights and Responsibilities Notice - Contents

- Must be in language employee can read
- Must include
  - That leave will count against entitlement
  - Certification requirements and consequences of failing to submit
  - Substitution of paid leave provisions (whether required and conditions)
  - Any co-pay requirements for health insurance and consequences
  - “Key employee” provisions
  - Right to be restored to job
  - Potential liability for premiums if fail to return to work
  - Department of Labor has prototype notice
- Optional - may include information about periodic reporting and intent to return to work, but not required

## Making Expectations Clear Rights and Responsibilities

- If information in Rights and Responsibilities notice changes, have to provide notice of changes
- “Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA”

# Making Expectations Clear Designation Notice

- Employer's responsibility to designate as FMLA – qualifying within 5 days of receiving enough information to determine if leave qualifies
- Only one notice required per reason per 12 months
- Must be written

\* May use Department of Labor Form \*

# Making Expectations Clear

## Designation Notice - Contents

- Whether FMLA qualifying
- Substitution of paid leave
- Fitness for duty/return to work requirements (including essential functions) unless in handbook – then can be oral notice
- Amount of leave counted against FMLA entitlement (if known)
  - If not known, at time of designation notice, required upon request of employee
  - May be communicated orally or in writing – can use pay stubs



# Notice of FMLA Rights

- Cooperation required – employer expected to “responsively answer questions”
- Consequences of failure to follow notice provisions – cannot take action against employee for failure to comply with any provision required to be set forth in notice

## The Flip Side . . .

- Employee also has a responsibility to provide notice  
and
- The notice has to explain the reasons for the needed leave

# Notice of Leave by Employee Foreseeable Leave



General Rule – Employee must provide 30 days notice if need for leave is foreseeable



Notice does not have to specifically request FMLA leave, BUT has to be sufficient to apprise Board of need for “FMLA qualifying” leave



If not clear, regulations place burden on employer to ask for more details so it can make the determination



Can be verbal

# Notice of Leave by Employee

## Foreseeable Leave

- Scheduling procedures or intermittent leave -- should consult with employer so as not to “disrupt unduly” operations
- May require reasons for leave, anticipated duration and anticipated start
- Consequence : New regulations say leave may be “delayed or denied” if employee fails to follow notice requirements and no unusual circumstances justify the failure
- Regulations do not prescribe when may delay and when may deny-be careful!

# Notice of Leave by Employee

## Unforeseeable Leave

- General Rule – employee must provide notice “as soon as practicable” under the facts and circumstances of the individual case
- Employer policies generally establish what is practicable
- In person, telephone, telegraph, facsimile or electronically
- Can be given by employee or “spokesperson”

# Notice of Leave by Employee

## Unforeseeable Leave

- Sufficient information to determine whether FMLA applies, including:
  - That condition makes unable to do job
  - Pregnant or hospitalized
  - Under continuing care of doctor
  - For military, employee is on active duty or call to active duty
  - Specific reasons under regulations
  - Anticipated duration of leave
  - If for care of family, that condition renders family member unable to care for self

# Notice of Leave by Employee

## Unforeseeable Leave

- First request need not mention FMLA
- After FMLA has been provided, employee must mention qualifying reason or FMLA – not enough just to call in “sick” without more information
- If employer cannot tell, employer shall ask for more information
- Failure to respond to employer request may result in denial of FMLA protection

# Designation of Leave

- Once employee gives notice of need for leave, employer should respond promptly – make a decision and communicate it or ask for more information
- FMLA regulations require an employer to designate leave as “FMLA qualifying”



# Penalty for Failure to Designate Leave New Regulations

When employee suffers individualized harm due to a failure to designate leave or provide notice, employer may be liable for interference with rights or other legal theories which are not specified

## What To Do ?

Include provision in policy and written materials that paid or unpaid medical leave will count against FMLA leave and include statement in granting leave that it is FMLA qualifying

# Payment for Leave

- FMLA leave is unpaid leave
- School boards have paid leave options for employees
  - Sick leave
  - Personal leave
  - On-the-job injury leave
  - Vacation leave (for some employees)
  - Unavoidable leave
  - Military leave
  - Sick leave bank
- Can require employees to use paid leave when taking leave under FMLA
- In that case, state and local level leave and FMLA leave will run concurrently

# Benefits

- Even though FMLA provides for unpaid leave, have to continue benefits on same terms as before leave
- Most notable benefit – health insurance
- Same terms and conditions
  - Board funds its portion
  - If family coverage, employee has to pay his or her share
- Retirement plans, savings plans, elective plans

# Intermittent Leave

- FMLA does not require that leave be taken all at one time -- it may be taken “intermittently” under certain circumstances
  - For birth or adoption, only available, if agreed to
  - If due to serious health conditions of employee or family member, has to be a *medical need*
  - Medical need must be best *accommodated* through intermittent schedule

# Intermittent Leave - Schools

- Special rules for schools – instructional personnel
- 20% rule – If the leave will cover more than 20% of the total number of days in the leave period, can require employee to:
  1. Take leave for particular periods, or
  2. Transfer the employee to a position where it is easier to accommodate intermittent leave

# FMLA Leave – Schools

## End of Academic Term Rules

- More than 5 weeks before end of term, may require employee to take leave through end of term, if:
  - Leave is more than 3 weeks or
  - Would return within 3 weeks of term end
- Less than 5 weeks before end of term, may require employee to take leave through end of term, if:
  - Leave is more than 2 weeks or
  - Would return within 2 weeks of term end
- Less than 3 weeks before end of term, may require employee to take leave through end of term, if leave is longer than 5 working days

# Job Restoration

- Employee entitled to be returned to same or equivalent position upon return from FMLA
- Equivalent position = virtually identical in terms of pay, benefits and conditions, including privilege and status
  - If no longer qualified because missed a course, renew license, etc., have to give time



# Equivalent Position Pay

- Entitled to cost of living and other unconditional pay raises
- Entitled to position with similar overtime

# Fitness for Duty Certification

## Serious Health Concerns

- Can adopt uniformly-applied policy for similarly situated employees to provide certification that they are able to resume work
  - Similarly situated = same occupation or same health condition
- Employer may require certification to specifically address employee's ability to perform essential functions of employee's job
  - In that case, have to provide a list of functions
- Can require certification for intermittent leave where reasonable job safety concerns exist (up to every 30 days)
- If requiring fitness duty or "return to work" certification, have to advise employee of requirement in designation notice

# Equivalent Position Benefits

- Must be resumed at same level as when leave started
- Can not require “requalification” or re-enrollment
- Not required to permit accrual of additional benefits (seniority, retirement, sick days) while on leave

# Equivalent Position Terms and Conditions

- Must be reinstated to same or geographically proximate work site (unless employee requests or agrees to another)
- Same or equivalent work schedule
- Same or equivalent opportunity for bonuses, profit sharing and similar payments

\* \*

No greater right to job or benefits than if he or she had been continually employed

# Retaliation / Interference With Rights

- Interference with rights
  - unlawful to “interfere with, restrain, or deny the exercise of or the attempt to exercise,” rights under FMLA
- Discrimination
  - cannot discharge or discriminate for asserting FMLA rights
  - cannot fire or discriminate for filing a charge or making complaints under FMLA, for participating in an investigation, or for testifying about FMLA rights
- Key provision of the Act
  - Can subject Board to damages, monetary losses, liquidated damages, equitable relief (which can include promotions and reinstatement) and fees and costs

# FORMS

- Department of Labor General Notice “Poster” (Pub. 1420)
- Notice of Eligibility & Rights & Responsibilities (WH-381)
- Designation Notice (WH-382)
- Certification forms
  - Employee’s Serious Health Condition (WH-380-E)
  - Family Member’s Serious Health Condition (WH-380-F)
  - Serious Injury or Illness of Covered Service Member (WH-385)
  - Qualifying Exigency for Military Family Leave (WH-384)
- Frequently Asked Questions about Revisions from DOL
  - FMLA
  - Military Family Leave

QUESTIONS . . . ?