Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2015 Issue 1

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Affordable Care Act—Are You Ready For 2015?

by Jerry L. Zimmerman

Over the last two years, the Department of Treasury ("IRS") has issued hundreds of pages of regulations and guidance concerning compliance by employers, including school districts, with the Affordable Care Act (the "Act"). Not only do the Act and regulations impose severe penalties on employers who fail to offer affordable health coverage with minimum value to at least 95% of its full time employees, but the Act and the regulations also impose extremely expensive penalties on employers who fail to accurately, fully and timely report to its employees and to the IRS, required information pertaining to health insurance that was offered by the employer to its employees.

Issues which school districts must consider include the following:

- The required reporting to the IRS and employees for school districts that provide health insurance through EGID or another insurance provider.
- The required reporting to the IRS and employees for school districts that provide health insurance through self-insurance.
- The required reporting to the IRS and employees for school districts that provide health insurance through EGID and self-insurance.
- The deadlines imposed on filing the returns and providing the informational returns to employees.
- Mandates concerning electronic filing.
- Mandates on providing notices to employees.
- The imposition of penalties for the failure to file returns, which could be as large as $1,500,000.
- Safe harbor calculations to consider with respect to compliance and reporting.
- The process and mechanics of transitioning newly hired employees into full time

employment status for purposes of the Act.

- The potential for transitional relief that will enable certain employers with 50-99 employees to avoid the imposition of penalties attributable to the failure to provide affordable coverage for all months prior to 2016 if certain conditions are satisfied.
- The ability of school districts with 100 or more full time employees to avoid the harshest of the compliance penalties in 2015 if it offers coverage to at least 70% (as opposed to 95%) of its full time employees.
- Reporting requirements for those employers that qualify for transitional relief.
- Insurance for employees who are not full time employees.
- Circumstances in which full time employees who receive Medicare must be considered for compliance purposes and other circumstances where full time employees who receive Medicare are not required to be considered.
- Methods of calculating hours of service for employees who have a break in service and adjunct teachers or professors.
- The prohibition of previously allowable discrimination in benefits.

RFR can offer assistance to school districts in navigating through the technicalities of the Act. Due to the complexities of the law, as well as the regulations issued under it, and the expensive penalties for noncompliance, Jerry Zimmerman will be available to assist school districts with compliance.

Volunteer Exemption under the Fair Labor Standards Act

by Staci L. Roberds

The Fair Labor Standards Act ("FLSA") includes an exemption from overtime compensation for an individual who performs "volunteer" services. The FLSA deems an individual a volunteer (i) when he engages in services different from those he is normally employed to perform, and (ii) when he receives no compensation, or only a "nominal fee," for his services. The Department of Labor regulations addressing "volunteer" services include additional criteria explaining when an individual is deemed a volunteer. A school district's understanding of these criteria is crucial to the proper application of the overtime exemption, especially if the district permits full-time non-exempt employees to participate in coaching and/or other supplemental or extra-curricular activities for the district.

The regulations define a volunteer as "an individual who performs hours of service for a public agency for civil, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered." The individual must offer his services freely, without any pressure or coercion, direct or implied, from the employer. An individual who "is otherwise employed by the [school district] to perform the same type of services as those for which the individual proposes to volunteer" will not be deemed a volunteer. In determining whether the "same type of service" is involved, consideration must be given on a case-by-case basis "whether the volunteer service is closely related to the

actual duties performed by or responsibilities assigned to the employee." For example, the volunteer exemption would not apply to a district's cook who also works in the concession stand during district athletic events.

A volunteer may receive paid expenses, reasonable benefits, a nominal fee, or any combination of these, without losing his status as a volunteer. The receipt of a nominal fee for "volunteer" services must not be a substitute for compensation and cannot be tied to productivity. The regulations provide factors to consider when determining whether an amount provided to a volunteer is nominal, including: (i) the distance traveled and the time and effort expended by the volunteer; (ii) whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; (iii) and whether the volunteer provides services as needed or throughout the year. Nevertheless, an individual who provides periodic services on a year-round basis will not lose "volunteer" status even if he receives a nominal monthly annual stipend or fee for the services provided.

When applying the volunteer exemption to overtime pay, courts rely heavily on the criteria from the regulations. For example, in the case of *Purdham v. Fairfax County School Board*, the Fourth Circuit Court of Appeals specifically applied the volunteer exemption in the school district setting. In that case, the school district employed its full-time non-exempt safety and security assistant as the district's golf coach. In reaching its decision that the coaching activities fell under the volunteer exemption, the court weighed the totality of the circumstances surrounding the relationship between the school district and the services provided by the employee. The primary considerations included that: (i) the individual was never pressured or coerced by the district into becoming the golf coach and his employment as the safety and security assistant for the district was not dependent upon his coaching; (ii) although the individual was reimbursed for certain expenses related to his coaching activities and also received a yearly stipend from the district for his services as the coach, he received the same stipend regardless of the amount of time spent performing his coaching duties and regardless of the golf team's performance; and (iii) the services he performed as the golf coach were not the same services he performed in his capacity as the district's safety and security assistant. Based on these factors, the court determined the school district had properly deemed the employee a "volunteer" in connection with his coaching activities, and he was therefore not eligible for overtime compensation under the FLSA.

School districts that permit full-time non-exempt employees to also serve the district in coaching and/or in other supplemental or extra-curricular roles must pay close attention to the FLSA's "volunteer" exemption and the criteria set forth in the regulations, including whether the "same type of service" is being performed by the employee. If a school district has any questions regarding whether an employee is considered a volunteer for the performance of certain services, it should consult with its attorney immediately.

More Guidance To School Districts Regarding Disability Based Bullying

by Cheryl A. Dixon

In a *Dear Colleague Letter* dated October 21, 2014, the Office for Civil Rights ("OCR") echoed the statements expressed by the Office of Special Education and Rehabilitative Services ("OSERS") in an August 20, 2013, *Dear Colleague Letter* that school districts have an obligation to address the ability of a bullying victim to receive FAPE regardless of whether the student is being bullied based on a disability. This obligation exists whether the student receives FAPE services under the IDEA or Section 504. As a result, school districts may need to broaden the scope of their response to harassment or bullying complaints involving students with disabilities who are receiving special education or related services.

In the October 21 *Dear Colleague Letter*, OCR stated that if an alleged victim is receiving Section 504 or IDEA services, the school district's response to any bullying allegations should include determining whether the bullying behavior impacted the student's receipt of FAPE and, if so, convene the IEP team to address that impact. OCR stated that as a part of a school district's response to bullying *on any basis*, the school should convene the student's IEP team or Section 504 team to determine whether the student is still receiving FAPE. According to OCR, changes that might trigger the obligation to convene an IEP team and amend a student's IEP or 504 plan might include, but are not limited to, a sudden decline in grades, the onset of emotional outbursts, an increase in frequency or intensity of behavioral outbursts, or a rise in missed classes or sessions of Section 504 services. "Ultimately, unless it is clear from the school's investigation into the bullying conduct that there was no effect on the student with a disability's receipt of FAPE, the school should, as a best practice, promptly convene the IEP team or the Section 504 team to determine whether, and to what extent: 1) the student's educational needs have changed; 2) the bullying impacted the student's receipt of IDEA FAPE services or Section 504 FAPE services; and 3) additional or different services, if any are needed, and to ensure any needed changes are made promptly." Office for Civil Rights, *Dear Colleague Letter: Responding to Bullying of Students with Disabilities*, 64 IDELR 115, 114 LRP 45954 (October 21, 2014).

If you have any question or concern regarding this most recent guidance or whether your district is appropriately investigating bullying allegations, you should contact your school district's attorney.

New Rules Jeopardize Funding of Internet Services

by John E. Howland

In late 2014, the administrator of the Public Utility Division (PUD) of the Oklahoma Corporation Commission (OCC) made recommendations regarding several requests for internet funding by the Oklahoma Universal Service Fund (OUSF) that could have a significant effect on Oklahoma school districts. Specifically, the

administrator recommended that the OCC disallow significant portions of the compensation that internet providers had sought. In some cases, the administrator has proposed that almost 80% of the compensation be denied. If the OCC adopts the administrator's recommendations, the impact on affected school districts could be critical, since the internet service providers may seek to recover any charges that are not paid by the OUSF from the school district. This potential problem is increased by the fact that an issue may not arise until long after the school district has entered into a contract with the internet service provider. Under OUSF rules, service providers have 18 months in which to file an application with the PUD for payment from the OUSF. Additional time may elapse before a determination is made as to whether the application will be granted.

The administrator's recent recommendations are based upon the PUD's "Memorandum (on) OUSF Operational Procedures" (MOOP), which is dated July 1, 2014, and more recent proposed rule changes to Oklahoma Administrative Code 165:59-7-1. HB 2738, which became effective Nov. 1, 2012, is the statutory basis for the changes in the criteria for approval of applications for payments that are found in the MOOP and the proposed new rule. HB 2738 amended Okla. Stat. tit. 17, §139.109 by giving the OCC authority to "investigate, and modify or reject in whole or part a Special Universal Services request if … granting the request is not in the public interest." The MOOP and the proposed rule interpret this amendment as generally requiring that the OUSF fund only the lowest reasonable cost for internet access. They also require that internet service contracts be competitively bid and that school districts document the reasons why the least cost alternative was not selected. As evidenced by a number of the administrator's recent recommendations, this means that the PUD will conduct on site reviews of the services provided, may disallow charges for internet line maintenance or quality of service and may disallow charges in excess of those of OneNet or another bidder that the PUD considers to have reasonable experience and provide reasonable service. To make problems worse, although a school district may utilize the criteria that the federal government recognizes as valid for selecting an internet provider for E-rate funding, PUD may not accept the same criteria for selecting the provider.

Presently, providers are requesting reconsideration of the administrator's recommendations for the partial denial of several pending applications for payment from the OUSF. As the result of a hearing on one of those requests for reconsideration, an administrative law judge, in December, 2014, filed a report recommending that the OCC deny the administrator's recommendations and approve payment from the OUSF of the full amount of the provider's application. In that report, the judge found that, in applying the MOOP, the administrator was applying a rule that had not been lawfully adopted. The judge also found that the OCC rules that are now lawfully in effect do not require or allow for disallowance of charges for line maintenance and quality of service. As of this date, the OCC has not decided whether to adopt the judge's

report. Even if it does, the report's analysis will not apply if the proposed new rule is adopted.

Several groups have submitted comments regarding the proposed rule change. If they are successful and the OCC does not adopt the provisions in the proposed new rule that present particular difficulties for schools, there will be less uncertainty about the OUSF's payment for internet services provided to schools. Unless and until that happens, schools will be faced with a significant risk of having to pay for services that they had every reason to believe would be paid by the OUSF. Indeed, even if the OCC decides not to adopt any of the revisions in the proposed new rule, schools will face the prospect that the PUD will seek to have the OCC adopt another new rule to implement the new authority that HB 2738 gave to it. Because of the significant potential economic impact and uncertainty concerning OUSF funding that these recent developments underscore, as well as other pitfalls in the current and proposed rules, we recommend that school districts explore contractual protections with their attorneys before entering into contracts with internet providers.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

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