Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2017 Issue 2

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Occupational Safety and Health Administration Issues New Rule Limiting Post-Incident Drug Testing

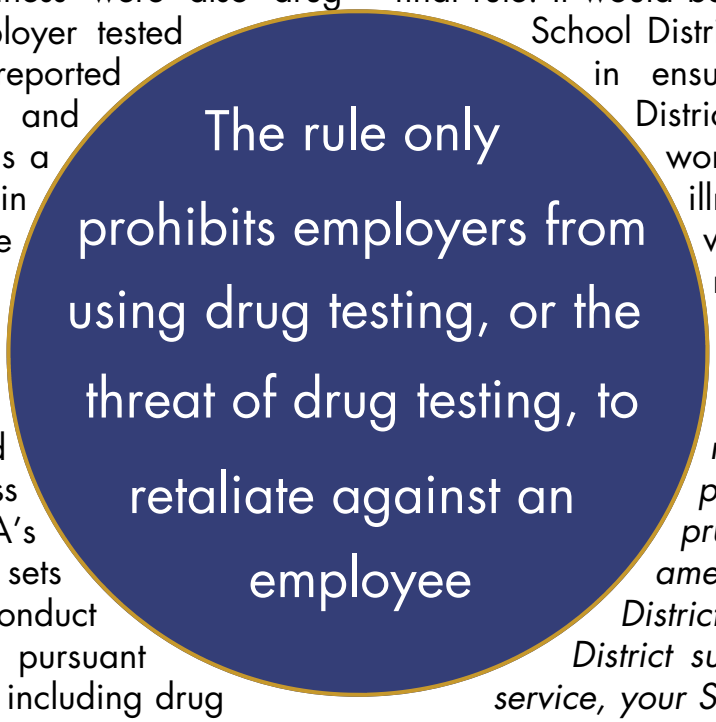
by N. Roxane Gebhart

On May 12, 2016, the Occupational Safety and Health Administration ("OSHA") issued a final rule to revise its recordkeeping requirements regulation regarding employee involvement. Among other things, the final rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation and to develop an injury and illness reporting procedure that does not deter or discourage employees from reporting injuries or illnesses. Moreover, the final rule incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses. While the text of the final rule does not specifically address employers requiring mandatory post-incident drug and alcohol testing, OSHA's commentary accompanying the final rule sets out that OSHA views mandatory post-incident testing as deterring the reporting of workplace safety incidents. Employers who have policies requiring mandatory drug and alcohol testing after a work-related injury or illness has been reported may be in violation of OSHA's recordkeeping requirements regulation regarding employee involvement. Although Oklahoma public entities are not directly regulated by OSHA, OSHA's final recordkeeping rule applies to Oklahoma public entities through the Oklahoma Department of Labor's Public Employees Occupational Safety & Health Division ("PEOSH"). PEOSH adopts most of OSHA's rules with a few minor exceptions. PEOSH has adopted OSHA's recordkeeping requirements regulation regarding employee involvement.

The final rule does not prohibit drug testing of employees, including drug testing pursuant to the Department of Transportation rules or any other federal or state law. The rule only prohibits employers from using drug testing, or the threat of drug testing, to retaliate against an employee for reporting an injury or illness. Employers may conduct post-incident drug testing if there is a reasonable possibility that employee drug use could have contributed to the reported injury or illness. However, if employee

drug use could not have contributed to the injury or illness, OSHA would likely find that post-incident drug testing in such a case discouraged reporting without contributing to the employer's understanding of why the injury occurred.

Employers may utilize post-incident drug testing if they have an objectively reasonable basis for drug testing. In determining whether or not an employer has a reasonable basis to drug test an employee for drug or alcohol use after a report of a work-related injury or illness, OSHA's commentary on the final rule indicates that OSHA may consider factors such as whether an employer believed that there was a reasonable possibility that drug or alcohol use by the reporting employee was a contributing factor to the reported injury or illness, whether other employees involved in the incident that caused the injury or illness were also drug tested, whether the employer tested only the employee who reported the injury or illness, and whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due to the hazardousness of the work being performed when the injury or illness occurred. OSHA's commentary specifically sets out that employers may conduct post-incident drug testing pursuant to a state or federal law, including drug testing under state workers' compensation law.



Additionally, OSHA will consider whether the drug test utilized by an employer is capable of measuring impairment at the time the injury or illness occurred where such a test is available. According to OSHA's commentary on its final rule, for substances other than alcohol, currently available tests are generally unable to establish a relationship between impairment and drug use. Employers should be aware that post-incident drug testing will not necessarily indicate whether drug use played a direct role in the incident. Thus, at this time, OSHA may consider the drug test's ability to detect impairment at the time of the illness or injury for tests that measure alcohol use, but not for tests that measure the use of any other drugs.

OSHA's recordkeeping requirements regulation regarding employee involvement became effective on January 18, 2017. Based upon the foregoing, School Districts should pay close attention to their current policy related to employees reporting work-related injuries or illnesses to ensure that the School District is in compliance with OSHA's final rule. It would be prudent to contact your School District attorney for guidance in ensuring that your School District's policy on reporting work-related injuries or illnesses is in compliance with OSHA's current rules.

If your School District has a post-incident mandatory drug testing policy, it would be prudent to consider amending your School District's policy. If your School District subscribes to RFR's policy service, your School District will receive an updated drug testing policy accounting for OSHA's recently enacted rule during the summer of 2017. If your School District would like an updated drug testing policy sooner, an updated policy is currently available upon request. In addition to an updated drug testing policy, School Districts should use a consistent and simple form documenting a School

District's decision to post-incident drug test an employee and the School District's reasons for drug testing an employee after an injury or illness has been reported. A post-incident drug testing documentation form will be included within RFR's policy service. If your School District would like this form sooner than RFR's policy update, a documentation form is available upon request. If you would like to inquire as to an updated drug testing policy or documentation form, please contact Michelle Siegfried (msiegfried@rfrlaw.com).

Agenda Items for Rehiring Employees

by Adam S. Breipohl

As the 2017-18 school year approaches, school districts face various issues regarding the retention (or non-retention) of employees. This article addresses several issues related to agenda items for rehiring employees that school districts should keep in mind to ensure that their decisions on employment matters for the coming school year comply with statutory and constitutional requirements.

School districts must take care in drafting agenda items regarding employment matters to ensure the language complies with the requirements of the Open Meetings Act. The general rule under the Act is that agenda items must give the public adequate notice of the nature of the topics to be discussed and the action that the school district is considering. While the adequacy of an agenda item depends on the particular circumstances involved, there are also several common issues that school districts need to take care to avoid.

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First, a general rule is that agenda items should be drafted so that a person of average intelligence, but with little to no prior knowledge of school law, could understand what the item means. For example, acronyms and abbreviations should be avoided; even if the meaning is obvious to administrators or board members, the public may not be familiar with the jargon.

Second, agenda items should generally state the name of the employee that the school district is considering rehiring. If the School District is rehiring a large group of employees at once, it is acceptable to use a single agenda item for the group if the agenda item lists all employees in the group individually or refers to an exhibit attached to the agenda that identifies the relevant employees. For some more unique positions, it may be enough to identify the position (e.g. if a school district only has one high school, referring to "the high school principal," should give adequate notice of what the agenda item is about). It is worth noting that an individual's employment with a school district cannot be discussed in executive session if the employee's name or position does not appear on the agenda item regarding executive session.

Finally, agenda items regarding reemployment of an employee who has a property interest in his or her continued employment (e.g. teachers on continuing contracts) should be phrased in terms of "discussion and vote to reemploy John Doe or table his reemployment" rather than reemployment or nonreemployment, because if

the board votes not to reemploy that employee, it could inadvertently violate an employee's due process rights by terminating the employee without an opportunity for a hearing or making the board appear to have prejudged whether to terminate the employee before his or her hearing. If the board wishes not to continue to employ a particular employee, tabling the issue allows the superintendent to begin appropriate procedures to terminate the employee without risking these issues.

There are also two statutory deadlines governing the timeframe for making decisions about the employment status of current employees that school districts must keep in mind. If the district intends to nonreemploy a teacher, notice of a recommendation of nonreemployment shall be given to the teacher prior to the first Monday in June. See OKLA. STAT. tit. 70, § 6-101. For support employees, school districts must give all support employees reasonable assurance that the school district will continue to employ them in the subsequent school year within ten days after either June 1st or the effective date of the current year's education appropriation bill, whichever is later, in order to ensure that support employees who do not work over the summer do not become eligible for unemployment. *See* OKLA. STAT. tit. 70, § 6-101.45.

Following these tips should help school districts to ensure that they comply with applicable laws regarding agenda items for rehiring employees. School districts that have questions regarding personnel matters or compliance with the Open Meeting Act should not hesitate to contact their legal counsel.

The Importance of Employee Job Descriptions When Defending Discrimination Claims under the ADA

by Staci L. Roberds

As an employer, a school district could face a claim for disability discrimination brought by an employee (or former employee) under the Americans with Disabilities Act ("ADA"). For example, a former employee could bring a claim against a school district alleging that he was terminated from his employment because of a disability. As part of the process for establishing a disability discrimination claim, the former employee would have to show (1) he was a disabled person defined by statute, (2) he was qualified, with or without accommodation, to perform the essential functions of his job, and (3) he was terminated because of the disability. An employee job description may be very relevant to the second requirement – whether the former employee is a "qualified individual" with a disability.

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Under the ADA, a "qualified individual" is defined as a person who, with or without accommodation, can perform the essential functions of the employment position that he holds or desires. Two criteria considered when determining whether an employee is a qualified individual with a disability are (1) whether the employee's impairment prevented him from performing the essential functions of the job, and (2) if so, whether he might have nevertheless been able to perform those

functions if the employer provided him a reasonable accommodation. Essential functions are defined by the ADA as those duties that are fundamental to the employment position. To determine whether a particular duty is essential to a position, courts consider certain regulatory factors established by the Equal Employment Opportunity Commission, including the written job description that is prepared by an employer before advertising or interviewing applicants for a job.

When considering disability discrimination claims, one of the first steps a court takes is determining the fundamental job duties of a position. This is an important determination by the court because if an employee is unable to perform the essential functions of the job on his own or with a reasonable accommodation, the employee's discrimination claim cannot go forward. When evaluating the essential functions of a position, courts have generally weighed heavily the employer's judgment regarding whether a job function is essential, and they have recognized it is not the court's place to second guess an employer's business judgment about what is an essential function of a job. For example, courts have recognized that a job may involve a multitude of tasks, may be performed in a wide range of environments, and certain tasks need not be performed on a daily basis to be considered essential to the position. Although a court's assessment of the essential functions of a job is multi-faceted and conducted on a case-by-case basis, the importance placed on the employer's written job description for determining the essential functions of a position cannot be overstated.

Based on the weight courts place on an employer's judgment and their reliance on employer job descriptions for determining the essential functions of a position, it is imperative that school districts have job descriptions in place for the myriad of positions in the district. If a school district does not have job descriptions in place and needs assistance with developing them, or if it merely has questions regarding current job descriptions that are already in place, the school district should contact its attorney for assistance.

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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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