Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2018 Issue 2

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Leave of Absence as a Reasonable Accommodation for an Employee's Disability Under the ADA

by Staci L. Roberds

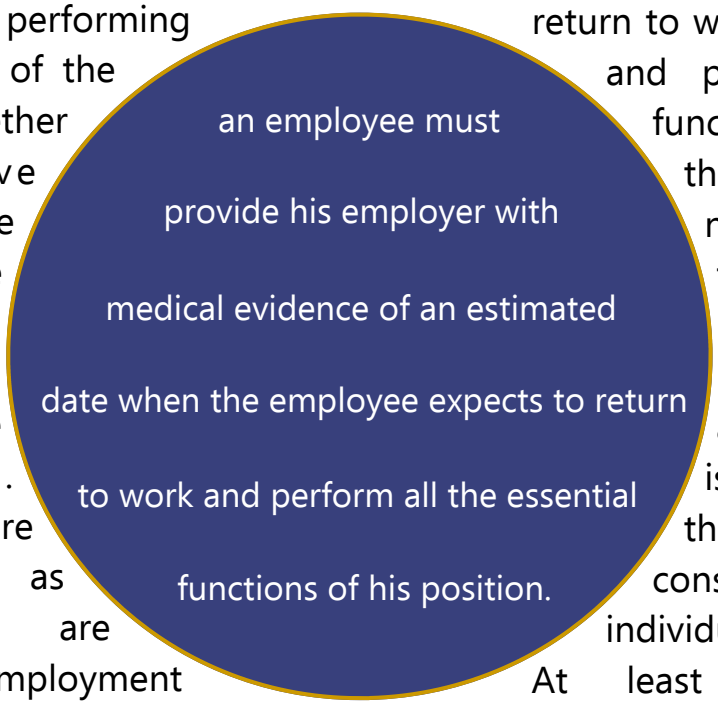
As an employer, a school district could face a situation in which an employee has exhausted all paid leave and leave under the Family and Medical Leave Act ("FMLA") and remains unable to perform the essential functions of his position because of a disability. If such a situation arises, the school district must understand (1) how the Americans with Disabilities Act ("ADA") treats a leave of absence as a reasonable accommodation, and (2) at what point the district may consider terminating the employee, if he has exhausted all available leave and remains unable to perform the essential functions of his job. Consideration of these issues will help protect a school district from a potential claim by an employee for disability discrimination under the ADA.

To establish a claim of disability discrimination under the ADA, a former employee must show (1) he was a disabled person as 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. Under the ADA, a "qualified individual" is defined as a person who, with or without accommodation, can perform the essential functions

UPDATE

The 2018 RFR School Law Conference was cancelled due to weather conditions in the Oklahoma City area. Watch your e-mail or check www.rfrlaw.com for information regarding a rescheduled date.

of the employment position that he holds or desires. Two criteria considered when determining whether an employee is a qualified individual with a disability include (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.



If an employee is completely unable to perform the essential functions of his position, the only potential accommodation the employer can provide to the employee is temporary relief from performing those essential job duties. As an accommodation, an employer could allow the employee to take a leave of absence in order to seek medical treatment or provide the employee time to recover from his medical condition. However, courts have imposed certain requirements on the employee when determining whether such an accommodation is reasonable.

Courts have determined that an employee must provide his employer with medical evidence of an estimated date when the employee expects to return to work and perform all the essential functions of his position. If an employee cannot provide assurance to the employer that he can return to work in the near future and perform all essential functions of his position, then the indefinite nature of the temporary reprieve from job duties results in an accommodation that is unreasonable, and the employee is not considered a qualified individual under the ADA. At least one court has determined that a six-month leave request by an employee was too long to be a reasonable accommodation.

Based upon these limitations, prior to the decision to terminate an employee, a school district should provide an employee who has exhausted all available leave (paid leave and FMLA), the opportunity to provide written medical evidence of when the employee expects to return to work and perform all essential functions of his position. If the employee cannot provide an estimated date, the school district may then terminate the employee. If the employee provides an estimated date for return to perform all essential job duties, the school district must then determine

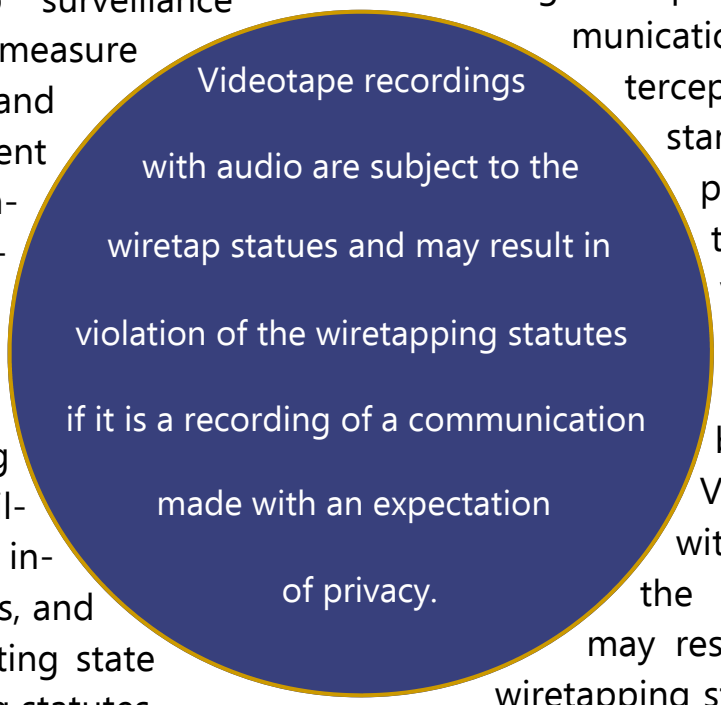
whether the length of time is reasonable, taking into account the employee's position with the district.

Because of the complexity of such issues and possible liability under the ADA, school districts are urged to contact their attorney for assistance when considering the use of leave as an accommodation for an employee's disability. The district's attorney can provide assistance with determining whether an employee's estimated date of return to work is reasonable or with determining whether an employee is subject to termination.

Surveillance Video Footage and the Possible Violation of State and Federal Wiretapping Statutes

by N. Roxane Mock

Last month, I wrote on the issue of school districts using video surveillance footage as a safety measure and disciplinary tool and the creation of student education records under the Family Educational Rights and Privacy Act. As a follow-up to that article, this month I am addressing the use of video surveillance footage, which includes audio recordings, and the possibility of violating state and federal wiretapping statutes.



While usually referred to as "wiretap" statutes, these federal and Oklahoma laws on technological surveillance encompass more than the stereotypical activity of tapping into telephone lines. The federal statute, codified at 18 U.S.C. § 2510 et seq., and the Oklahoma statute, codified at Okla. Stat. tit. 13, § 176.1 et seq., pertain to the interception of oral communications both related to and unrelated to telephone conversations. The federal wiretap statute provides for criminal penalties as well as a vehicle for civil actions to recover damages. Oklahoma's wiretap statute provides for criminal penalties only. Courts addressing the issue have determined that governmental entities and officials [e.g., school districts and school officials] may be sued for civil damages under the federal statute.

Both the federal and state statutes define "oral communication" as a "communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." It is well established that silent videotape recordings are not "oral communications" prohibited by the wiretap statutes. Videotape recordings with audio are subject to the wiretap statues and may result in violation of the wiretapping statutes if it is a record-

ing of a communication made with an expectation of privacy.

To determine if there was such an expectation of privacy, courts will use the same analysis as the one used in evaluating a privacy expectation under the Fourth Amendment of the United States Constitution. Under this standard, the person asserting the violation must show that there was (1) an actual expectation of privacy [i.e., that the person sought to preserve the communication as private], and (2) that the individual's expectation of privacy was objectively reasonable. Courts have considered whether an individual's expectation of privacy was reasonable by determining whether the individual's stated expectation of privacy is one that society is willing to recognize as reasonable.

School districts utilizing video surveillance systems with audio recording capabilities should take steps to reduce their potential liability exposure by allegations that a student or an employee's expectation of privacy was violated by a video surveillance recording with sound. School districts can reduce their potential liability by obtaining consent from everyone who is recorded or by creating conditions that create implied consent by those being recorded. The most fail-proof strategy for prevailing in any wiretap analysis would be to obtain prior written consent from the individuals being audio recorded. But in most cases, this is extremely difficult to obtain. School districts may create conditions implying consent by (1) adopting a policy that states that audio may be recorded, (2) posting signs warning of possible audio recordings or (3) by doing both. By giving notice in student and employee handbooks, positing prominent notices at entrances to schools, and making the presence of such recording equipment open and obvious, school districts can increase the likelihood that a court will find implied consent to audio recordings. In order to create implied consent and to reduce a person's expectation of privacy, notices must be readily observable by a person who is the object of the notice. Size, color, permanence of location, the use of different languages and the sheer number of such notices are all considerations that a court would review in determining whether an individual had consented to an audio recording. *If you have any questions about the federal and state laws regarding audio recordings, a policy for your school district that states audio may be recorded, or a consent form for being subject to audio recordings, please contact your school district's attorney.*

School District Employment of Minor Students

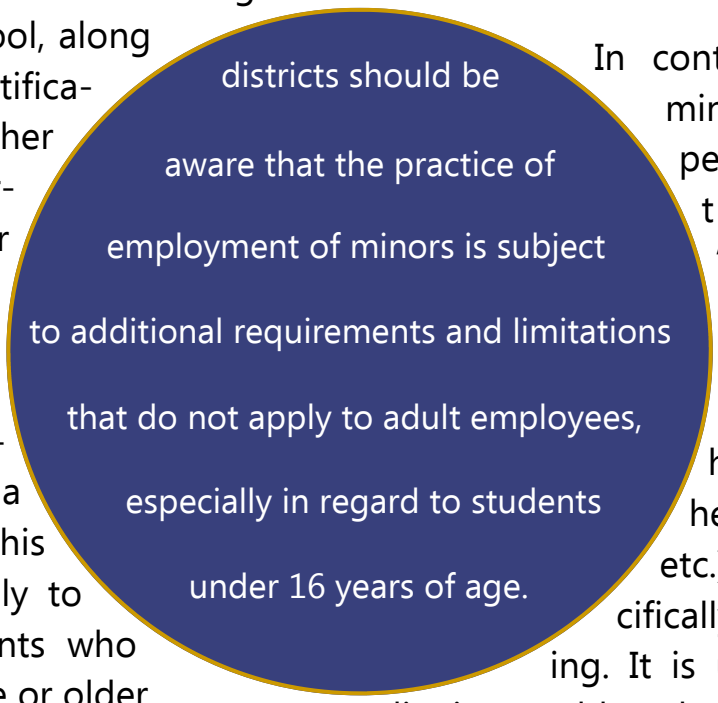
by Adam S. Breipohl

School districts sometimes seek to employ their students on a part-time basis to perform various jobs at school, e.g., to mow the grass at a school site over the summer break or perform certain janitorial services after school, etc., especially in light of the current financial situation facing many dis-

tricts. While this practice is generally permissible, districts should be aware that the practice of employment of minors is subject to additional requirements and limitations that do not apply to adult employees, especially in regard to students under 16 years of age.

Both relevant Oklahoma statutes and the federal Fair Labor Standards Act ("FLSA") impose detailed regulations on the employment of minors, under which the general age at which a minor is eligible to work at 16 years, with 14 and 15 year olds also being eligible for employment under certain circumstances, subject to a large number of additional requirements and restrictions.

First, before a 14 or 15 year old student can work for a school district, the district is required to obtain an "age and schooling certificate" from the student's parent or guardian verifying the student's age and enrollment in school, along with one form of identification, which can be either the student's birth certificate, passport, or certificate of baptism. These materials must be presented to the school principal in person by the child and a parent/guardian. This process does not apply to employment of students who are sixteen years of age or older.



State and federal child labor laws also provide for an exclusive list of jobs that 14 and 15 year old minors are specifically allowed to do, which include jobs such as office and clerical work, food preparation, cleaning and maintenance, etc. These categories encompass many of the most likely tasks that school districts might want to have minors perform, but districts should take care to ensure that they comply with these rules. There are also certain rules regarding certain activities that 14 and 15 year olds are specifically not allowed to perform, such as operating powered machinery or working in a warehouse. Furthermore, if a school district does employ minors under 16 years of age, it is required to comply with restrictions provided by Oklahoma law regarding the hours that such minors may work (e.g., they may work a maximum of three hours per school day and eight hours per non-school day) and provide required breaks.

In contrast, 16-17 year old minors are permitted to perform any job other than certain "particularly hazardous" jobs (e.g., jobs involving explosives, dangerous machinery, hazards such as heights or chemicals, etc.) which they are specifically forbidden from doing. It is unlikely that a school district would seek to employ students to do any "particularly hazardous" tasks, but

2018 Legislative Session

The legislative session for 2018 has begun and the firm has compiled its annual tracking list of bills that are likely to impact Oklahoma schools. Hot topic items include Budget Plans, Training, Charter Schools, Boards of Education, Administrative Consolidation, State Aid & Teacher Salary.

Please email Bernadette Young (byoung@rfrlaw.com) if you would like access to the firm's legislative resources.

districts should be cognizant of this restriction.

Counterbalancing the additional regulatory burdens imposed when a district employs minors to perform work for the district, employing minor students for certain tasks carries the potential for costs savings: the FLSA allows for employees under 20 years of age to be paid $4.25 per hour for their first 90 calendar days of being employed with an employer. After the initial 90-day period expires, students would be entitled to the usual federal minimum wage ($7.25 per hour).

Overall, part-time employment of students can be a useful source of services for the district and an opportunity to provide students with valuable work experience at the same time. However, districts must be careful to avoid violating any relevant statutory or regulatory requirements that apply to employment of minors, especially with respect to 14 and 15 year old students. Districts that have questions or concerns regarding their compliance with state and federal labor laws should contact their legal counsel.

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Chalkboard is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published monthly through the school year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find Chalkboard to be informative and helpful with the difficult task of operating our educational institutions.

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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