



Christopher J. Iamarino
Thrun Law Firm, P.C.

Change

School districts in the State of Michigan have been constantly buffeted by change over the last several years, and 2010 was no different. With a new governor and legislature, 2011 will bring even more change.

In the past year, few areas of school law remained static. In 2010, the Michigan Legislature substantively amended the Re-

vised School Code, the State Aid Act and key elements of the Public Employment Relations Act through 11 different public acts. Those acts impacted a wide range of issues including collective bargaining, contracting for non-instructional services, school millages and tweaks to the Race to the Top requirements. Further, the Michigan Department of Education issued its new special education regulations. At the federal level, multiple adjustments in COBRA premium subsidies, the expiration and exhaustion of the stimulus subsidies for school bonds and new federal guidance on bullying and harassment each added to the ongoing list of new developments that impact (or plague, depending on your perspective) our Michigan school districts. Additionally, by the end of February, the new legislature introduced 24 bills to amend the Revised School Code as well as a set of bills to again amend the school election process.

Aside from the impact of legislative and regulatory changes, the state's staggering budget crisis continues to threaten the stability of Michigan's schools. Though it adopted the 2010-11 education budget far earlier than it had in the last several years, the legislature again left the foundation allowance unaltered, failing to keep pace with the steady rise in school expenses. For many years, the state's educational budgeting has survived on one-time monies, with the 2010-11 solution relying on federal funds. The prospects for 2011-12 appear dim, as Gov. Snyder's proposed budget would slash the foundation allowance by \$470. At the same time, the retirement contribution for school districts is to increase from 20.7 percent to 24.5 percent. The structural defects in the educational budget process remain.

The combined result of ongoing changes in the laws governing schools and the dramatic reductions in school district staffing caused by the state's staggering budget crisis

President's Letter

continues to create serious challenges for public school districts to keep informed of and in compliance with the host of requirements imposed upon them. More than ever, schools are relying on legal counsel to help inform, train and guide school board members, administrators and personnel. It's this call that we, as members of the school law bar, are here to answer.

The Michigan Counsel of School Attorneys (MCSA) continues to do its part to help school districts and their counsel remain on the cutting edge of current school law issues. Our recent annual fall conference, held in Grand Rapids in November 2010, focused on student discipline of regular and special education students, free speech concerns in the school environment, Teacher Tenure Act developments and school policy development considerations. Our seven speakers comprehensively addressed those topics and answered the key questions raised by the attendees. A heartfelt thank you to each of them for their efforts, and a particular thank you to Brad Banasik for his efforts in coordinating the conference.

The MCSA also carries on its tradition of bringing another issue of *Council News* to its members. The timely and

Letter, continued on page 6

In This Issue...

How Independent Are Your Contractors? 2

Court of Appeals Decision Threatens 4

School Construction Projects

New Bill Imposes Due Care Obligations on 5

Local Governments That Own Contaminated Real Property

Federal Court Provides Guidance on 6

Medical Marijuana Law

Official Notice MCSA Annual 8

Membership Meeting

Completing the Required Number of 9

Instructional Days and Hours for the 2010-11 School Year

23rd Annual Spring Law Conference 11

LeadStrong



How Independent Are Your Contractors?

By: Christopher M. Trebilcock, Miller, Canfield, Paddock & Stone, PLC

Effective Dec. 13, 2010, individuals who are informed by the Department of Labor that the Wage and Hour Division isn't pursuing their complaints will be given a toll-free number to contact the newly created ABA-Approved Attorney Referral System. In turn, the ABA will provide the name of a local attorney who is qualified to pursue an FLSA claim. The Department of Labor hopes that the new program "will both provide workers a better opportunity to seek redress for FLSA... violations and help level the playing field for employers who want to do the right thing."¹

This announcement follows U.S. Secretary of Labor Hilda L. Solis' announcement in March 2009 that "the department's Wage and Hour Division has already begun the process of adding 150 new investigators to its field offices to refocus the agency on these enforcement responsibilities."² Following through on that promise, President Obama's FY2011 budget included \$25 million for a Department of Labor initiative to support increased enforcement in industries in which misclassification is prevalent, which it defines as industries relying on subcontracting, third-party management, franchising and independent contracting.³

Why does this matter for Michigan school districts?

Michigan school districts are covered by the Fair Labor Standards Act (FLSA). The FLSA requires that employees receive no less than the current minimum wage and not less than one and one-half times their regular rate of pay for all hours worked in excess of 40 hours per work week (overtime).⁴ Exempt executive, administrative and professional employees (including teachers) who meet certain tests regarding their job duties and are compensated on a salary basis (excluding teachers) are not subject to minimum wage and overtime requirements.⁵

One large category of individuals that are also exempt from coverage under wage and hour laws are independent contractors.⁶ Because of this exemption from overtime under state and federal minimum wage law, many school districts looking to save costs during these tough economic times turn to the common practice of classifying certain individuals as independent contractors.⁷ However, simply labeling someone an independent contractor and executing a contract confirming this label doesn't mean that a school district isn't the employer and that the individual isn't an employee who may be entitled to overtime compensation.⁸

Instead, whether an employment relationship exists under the FLSA depends on several factors comprising an economic reality test:

- (1) whether the worker's services are an integral part of the company's business;
- (2) the permanency of the relationship;
- (3) the amount and extent of the worker's investment in facilities and equipment;
- (4) the nature and degree of a company's control over the worker;
- (5) whether the worker has an opportunity for profit and loss; and
- (6) whether the worker's services are available to the open market.⁹

No one of these factors is determinative. Rather, courts will look at the totality of the circumstances in making the determination.¹⁰ Given the scrutiny that these relationships are receiving, school districts should review all independent contractor agreements carefully because if wrong, the school district could be liable for back pay, overtime and employment taxes.

The exposure arising from independent contractor relationships doesn't end with potential liability for past wages and employment taxes. There's also potential for liability based on a joint employment status under other employment and labor statutes and current collective bargaining agreement obligations.

Joint-employment

Generally speaking, a direct employment relationship provides the usual basis for liability under state and federal employment discrimination statutes such as the Elliott-Larsen Civil Rights Act (ELCRA), Persons With Disabilities Civil Rights Act (PDA), Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA), etc.¹¹ Thus, school districts typically wouldn't have statutory obligations with respect to independent contractors or employees of other entities (i.e., substitutes hired through a third party). However, state and federal courts have adopted several doctrines under which an entity that doesn't directly employ an individual may nevertheless still be subject to liability under one or more of those statutes.

The first doctrine involving indirect employer liability is known as the single employer or integrated enterprise doctrine. According to this theory, courts examine whether two facially separate entities are so interrelated as to really be one entity for practical purposes. The factors relevant to this inquiry are (1) interrelation of operations, i.e., common offices, common record-keeping, shared bank accounts and



Contractors, continued from page 2

equipment, etc.; (2) common management, common directors and boards; (3) centralized control of labor relations and personnel; and (4) common ownership and financial control. Although none of the factors by itself is deemed conclusive to the inquiry, the existence of centralized labor relations between the two entities is given great weight.¹²

The second doctrine, known as the joint employer doctrine, is simply a finding that one entity, while contracting in good faith with a legally distinct and unrelated independent contractor for the right to utilize individuals to perform work normally done by the first entity's employees, retains for itself sufficient control over the terms and conditions of employment of the contracted-for individuals who are nevertheless employed in a direct sense by the independent contractor. The doctrine recognizes the legal separateness of the two entities but that they "share or co-determine those matters governing the essential terms and conditions of employment."¹³ Under the typical contractual relationship used by school districts in these situations, the joint employer doctrine is likely the most applicable.

The third basis for liability arises under agency principles. Using this doctrine, courts examine whether the employing entity charged with discrimination was acting as the agent of another non-employing company, the latter of which may then be held liable under agency principles as the plaintiff-employee's employer. One becomes an agent for purposes of most employment related statutes through "delegation of general supervisory power and authority to act on its behalf."¹⁴

Current collective bargaining agreement obligations

Most school districts, of course, are well aware of obligations under existing collective bargaining agreements. Nevertheless, prudent school districts should review current collective bargaining agreements covering the job classifications in which the district intends to place workers through a direct independent contractor relationship or through a third party, to clarify any ambiguity that might affect its ability to contract with third parties to provide the services. Failure to recognize a labor agreement's limitations on contracting for services (directly or indirectly) through a third party could lead to unfair labor practice charges and/or breach of contract grievances.

What should you do if you have existing independent contractors?

Now is the time to ensure compliance with the FLSA. Attorneys across the country are noticing an increase in wage and hour claims by terminated individuals, such as,

allegedly having been required to work off-the-clock, to work from home or during their off-hours; or misclassified as an exempt employee altogether or incorrectly labeled an independent contractor. School districts should consider conducting an immediate review of their current pay practices to ensure overall compliance with the FLSA and, in particular, that all employees, contractors and third-party relationships are properly categorized.

- ¹ The attorney referral system also applies for complaints arising under the Family and Medical Leave Act (FMLA). See Wage and Hour Division Attorney Referral Web page at: www.dol.gov/whd/resources/ABAReferralPolicy.htm.
- ² See March 25, 2009 Department of Labor Press Release, available at: www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20090325.xml.
- ³ Executive Summary, *Improved Coordination, Outreach, and Targeting Could Ensure Detection and Prevention*, GAO-09-717 (August 2009) available at: www.gao.gov/products/GAO-09-717.
- ⁴ See 29 C.F.R. Part 778.
- ⁵ See 29 C.F.R. Part 541.
- ⁶ 29 U.S.C. § 203(e)(1); 29 U.S.C. § 203(g).
- ⁷ If properly classified, this also results in having minimal coverage under most labor and employment laws applicable to employees, in addition to the FLSA, saves the school district payroll costs (i.e., FUTA and FICA) and lowers workers compensation and other insurance rates.
- ⁸ *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989)(courts are not limited by any contractual terminology used by parties or by traditional common law concepts of "employee" and "independent contractor" when determining employment relationship under the FLSA); *Usery v. Pilgrim Equipment Co., Inc.*, 527 F.2d 1308 (5th Cir. 1976), cert. denied 429 U.S. 826 (Contractual recitations cannot mandate outcome of cases involving employee status under the FLSA).
- ⁹ *Donovan v. Brandel*, 736 F.2d 1114, 1117-1119 (6th Cir. 1984); *Nichols v. All Points Transport Corp. of Mich., Inc.*, 364 F.Supp.2d 621 (E.D.Mich. 2005).
- ¹⁰ *Lilley v. BTM Corp.*, 958 F.2d 746 (6th Cir. 1992).
- ¹¹ See generally *Swallows v Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 (6th Cir. 1997).
- ¹² See *id.*, at 993-994 (citations omitted).
- ¹³ *Id.*, at 993 n.4 (citations omitted); *Badiee v. Brighton Area Schools*, 265 Mich.App. 343, 360-361, 695 N.W.2d 521 (2005) (Under the ELCRA, a claim for employment discrimination may only be brought by an employee, not independent contractors); *Ashker v. Ford Motor Co.*, 245 Mich.App. 9; 627 N.W.2d 1 (2001)(The economic reality test is used to determine whether a plaintiff could be considered an employee of the defendant for purposes of asserting a claim under the ELCRA).
- ¹⁴ *Elezovic v. Bennett*, 274 Mich.App 1, 10, 731 NW2d 452 (2007).



Court of Appeals Decision Threatens School Construction Projects

By: Christopher J. Iamarino, Thrun Law Firm, P.C.

One of a school district's more common non-educational undertakings is constructing improvements to its facilities. Whether a part of a comprehensive bond issue, a series of ongoing projects funded through a sinking fund, or a simple set of summertime updates and renovations to existing facilities funded through the general fund, school districts constantly battle aging facilities through various construction projects. Because school districts generally aren't in the business of constructing facilities, school boards and their officials often turn to the expertise of professionals in the construction industry for advice and counsel on such projects. In fact, the Construction of School Buildings Act, 1937 PA 306, mandates that any school district undertaking the construction of, addition to or remodeling of a school building valued at over \$15,000 is obligated to retain the services of a Michigan-licensed architect or engineer. While a school district's architect/engineer generally focuses its services on the design and specifications for the project, a school district also relies on its architect/engineer (as well as any construction manager being used) for advice regarding contractors that bid on projects. However, a recent split decision of the Michigan Court of Appeals threatens that practice.

In *Cedroni Assoc Inc v Tomblinson, Harburn Assoc Architects and Planners, Inc.*, ___ Mich App ___ (2010), a contractor that bid on a school construction project in Genesee County filed suit against the architectural firm that reviewed and evaluated bids for that project. Cedroni claimed that the architectural firm tortiously interfered with an expected business relationship by wrongfully advising the school district that the contractor was unqualified to perform on the project. Based on the architect's advice, the school district rejected Cedroni's bid.

To assert a claim of tortious interference with a business expectancy, a plaintiff must prove four key elements, the first of which is the existence of a valid business expectancy. Michigan law requires that there be a reasonable likelihood or probability that the expectancy will come to fruition. Mere wishful thinking won't support such a claim.

In its analysis, the majority for the Michigan Court of Appeals focused on the components of that first element. In doing so, the court identified seven principles to determine whether Cedroni had a valid business expectancy: (1) the presence of some level of discretion exercisable by a governmental body or decision-maker doesn't automatically preclude a recognition of a valid business expectancy; (2) if the discretion is expansive and not restricted by limiting criteria and factors to an extent that it makes it

impossible to reasonably infer that a claimed expectancy would've likely come to fruition, there is no business expectancy; (3) an expectancy generally must be specific and reasonable; (4) it must be shown that there was reasonable likelihood or probability that the expectant relationship would've developed as desired absent the tortious interference; (5) a party needn't prove that the expectancy equated to a certainty or guaranty; (6) innate optimism or mere hope are insufficient; and (7) prior history of the governmental body or decision-maker in governing internal and external rules, policies and laws constitute factors for a court to consider in determining whether a business expectancy was valid and likely achievable.

In applying those components to the facts of the case, the Court of Appeals found that the board of education approved a board policy that both reserved the right to the school board to reject any or all bids and that further provided for the award of bids to the lowest responsible bidder. In particular, the board policy reserved the right to reject the bid of any contractor who wasn't reasonably determined to be responsible in relation to the board policy. Pursuant to that board policy, the board of education was to base its determination of responsibility on several factors, including the input of the district's architect. Despite those key policy provisions, the Court of Appeals surprisingly concluded that Cedroni could pursue a tortious interference claim since it believed that Cedroni could provide evidence it was the "lowest responsible bidder". The Court of Appeals reasoned that such potential evidence meant that Cedroni's expectation of award of the contract was something more than mere wishful thinking.

The court also examined the bases for the architect's recommendation that the school district reject Cedroni's bid. While the architect identified certain negative reviews of Cedroni, those negative reviews were balanced with several positive reviews and opinions. In particular, the court pointed out numerous instances where the architect had asserted a negative evaluation, only to have those negative evaluations countered by Cedroni. The court found such inconsistency to be proof that the architect somehow misrepresented the evaluation. Based on those mixed evaluations, the court concluded there was sufficient basis to send to a jury the question of whether Cedroni would've reasonably been awarded the contract but for the interference by the defendant architect.

The court recognized both the reasonable expectation that professional judgment would be exercised when mak-

Construction, continued on page 5



Construction, continued from page 4

ing recommendations relative to governmental contracts and also that such projects must be afforded some level of protection and deference; however, the court plainly refused to defer to such judgment if it was merely a disguised attempt to intentionally and improperly interfere with business relationships. Because it found evidence that the architect was being untruthful and inaccurate in its portrayal of the contractor, the Court of Appeals allowed the case to proceed.

A sharp dissenting opinion championed the right of a school district to rely on its architect. The dissent cited the long-standing theory in Michigan law that disappointed bidders on governmental contracts have no action at law to recover lost profits, let alone any protected interest in being awarded a contract absent fraud, injustice or violation of trust. The dissent also cited the long-standing Michigan legal theory that competitive bidding is designed and intended for the benefit of taxpayers only, and not for the benefit of bidders. The dissent further found that because the competitive bidding process was highly

discretionary in nature, pursuant to both the statutory provisions and those of the district's bidding policy, no valid business expectancy could exist.

The present case creates a significant dilemma for school districts undertaking construction projects. Given school districts' lack of expertise and experience in evaluating the responsible nature of a potential bidder, school districts have historically relied on their architects (and construction managers, if used) for such advice and counsel. If providing such advice places a school district's architect in jeopardy of civil lawsuit, school districts certainly will suffer if the result is a refusal by architects to undertake such tasks. As the dissent in the Court of Appeals' decision aptly points out, the majority opinion disregards the body of Michigan case law specific to bidding public projects. Fortunately, this case has been appealed to the Michigan Supreme Court. The outcome of that appeal will be critical for future school construction projects. In the meantime, school districts should ensure that their architectural contracts impose a duty on the architect to evaluate contractor bids.

New Bill Imposes Due Care Obligations On Local Governments That Own Contaminated Real Property

By: Kristin B. Bellar, Clark Hill, PLC

On Dec. 14, 2010, Gov. Jennifer M. Granholm signed a package of bills amending Part 201 of the Natural Resources and Environmental Protection Act, MCL 324.101, *et seq.*, which regulates contaminated sites in Michigan. These amendments have dramatically affected environmental cleanups, due diligence, due care and Baseline Environmental Assessment procedures in Michigan. One particular amendment will impact the state, school districts and other local governmental units who currently own or operate a property known as a facility.

A facility is defined by Part 201 as any property where contamination is detected at concentrations above the relevant cleanup criteria. Generally speaking, owners and operators of facilities are strictly liable for existing and future contamination on property and are obligated to take appropriate response actions and implement cleanup activity. A selling landowner may generally protect itself from liability for future contamination by remediating the contamination to the current level of zoning. Purchasers, and incoming operators, of contaminated property can protect themselves for liability for past and current con-

tamination existing at the time of purchase by conducting and disclosing to the Michigan Department of Natural Resources and Environment an administratively adequate Baseline Environmental Assessment.

Even if owners and operators of a facility aren't liable for contamination, they still have due care obligations under Part 201 to ensure that existing contamination doesn't cause unacceptable risks and to prevent exacerbation of the contamination under Section 20107a of Part 201. Due care obligations include the preparation of a report evaluating existing contamination, an analysis of current activities on the site which may exacerbate or result in exposure to the contamination and a proposal for site use that doesn't exacerbate or result in such exposure. Moreover, due care obligations may require an owner or operator to adjust its planned use of the site to avoid disruption of contaminated soils or other media.

Until Dec. 14, 2010, the state or local units of government (state or LUG) that owned or operated a facility were exempt from these due care obligations. Under the

Property, continued on page 6



Letter, continued from page 1

detailed articles identify practical and important issues to consider as we help to guide our school clients. Looking forward, the annual MCSA spring seminar in Lansing will feature another great line-up of dynamic topics and speakers. See page 11 with seminar details. We hope you can attend.

As we wade deeper into 2011, MCSA looks forward to the promise of a brighter future in Michigan education and the opportunity to continue to serve the attorneys who are serving our schools.

Property, continued from page 5

new amendments, state or local units of governments are now subject to due care obligations under the following circumstances:

- State or LUG has knowledge that the property is a facility; and
- State or LUG offers access to that parcel on a regular or continuous basis pursuant to an express public purpose and invites the general public to use that property for the express public purpose.

As defined by Part 201, express public purpose includes, but isn't limited to, activities such as a public park, municipal office building, or municipal public works operation. However, the statute also provides that express public purpose doesn't include activities surrounding the acquisition or compilation of parcels for the purpose of future development.

Under a plain interpretation of the Part 201 amendments, there's no grandfathering of a state or LUG from these obligations for property acquired prior to the date of the amendments. Therefore, it's strongly recommended that a state or LUG with knowledge that it owns or operates a facility consider whether it must meet the due care obligations of Part 201.

Federal Court Provides Guidance on Medical Marijuana Law

By: Brad Banasik, Michigan Association of School Boards

The U.S. District Court for the Western District of Michigan recently concluded that the Michigan Medical Marijuana¹ Act (MMMA) doesn't regulate private employment. The Court's decision in *Casias v Wal-Mart Stores, Inc.*, upheld the termination of a Wal-Mart employee who tested positive for marijuana, but was using the drug for medical purposes under the MMMA. The employee alleged wrongful discharge in violation of public policy and a violation of the MMMA against Wal-Mart and his supervisor.

Prior to this decision, the Michigan Court of Appeals had issued two opinions interpreting the MMMA in regards to prosecution for the possession or manufacture of marijuana.² In both cases, the Court of Appeals emphasized that the MMMA doesn't abrogate state criminal prohibitions on the manufacture or possession of marijuana, but it "merely provides a procedure through which seriously ill individuals using marijuana for its palliative effects can be identified and protected from prosecution under state law."³

The U.S. District Court in *Casias* acknowledged the Michigan Court of Appeals' findings and was unwilling to go beyond those conclusions to create a private cause of action or a special class of civil protections for medical marijuana users under the MMMA. The Court analyzed the text of the law and found no evidence that it regulates private employment, protects private employees from disciplinary action should they use medical marijuana or that it requires private employers to accommodate the use of medical marijuana outside of the workplace.

Nevertheless, the Plaintiff in the case argued that the term "business" in the following provision expanded the reach of the MMMA to cover disciplinary action taken by a private business:

A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including

Marijuana, continued on page 7



but not limited to civil penalty or disciplinary action by a *business* or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act.⁴

The Court determined that the term “business” does not stand alone in the provision, but instead modifies “licensing board or bureau.” The Court went on to observe that its interpretation of how the term is used in the context of the MMNA is “thoroughly consistent with the overall structure and purpose of the Act to address potential criminal prosecution or other adverse action by the state.”

The Court examined another provision of the MMMA to provide further clarification to the intended meaning of the term “business.” Subsection 26424(f) states:

A physician shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by the Michigan board of medicine, the Michigan board of osteopathic medicine or surgery, or any other *business* or occupational or professional licensing board or bureau, solely for providing written certifications...⁵

In this provision, the Court recognized that the term “business” must have a meaning that’s similar or related to the other words in the list — Michigan board of medicine, Michigan board of osteopathic medicine and surgery, and occupation or professional licensing board or bureau — based on established rules of statutory interpretation.⁶ As a result, “the statute contemplate[s] discipline from boards and bureaus of the state — whether described as *business* boards, occupational boards or professional licensing boards — not the entire realm of private employment,” as noted by the Court. And further, the Court observed that the term “business,” to achieve a related meaning, must act as a modifier of “board or bureau,” not as an independent entity, and then, logically, it must “consistently be used as a modifier throughout the statute, not just in subsection 26424(f).”

Lastly, the Court emphasized that not only do the text and structure of the MMMA confirm that it wasn’t meant to regulate private employment, but the purpose of the law provides that same conclusion as well. The Court noted that the “introductory language on the ballot listed a variety purposes of the statute, including to ‘permit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana,’ but it didn’t state

that the MMMA also provided employment protections to medical marijuana users.” Consequently, the Court observed that “the impacts of any private employment regulation in the MMMA would be broadly felt and would extend the statute’s protections much further than the MMMA meant to do.”

Guidance for school districts

The scope of the MMMA’s protections has yet to be clearly defined by Michigan courts. In fact, a member of the Michigan Court of Appeals has warned Michigan citizens about using medical marijuana in the absence of clear guidance from the courts or the legislature:

Until [the Michigan] Supreme Court and the legislature clarify and define the scope of the MMMA, it’s important to proceed cautiously when seeking to take advantage of the protections in it. Those citizens who proceed without due caution will become test cases and may lose both their property and their liberty.⁷

Thus, this case provides the first piece to a complicated puzzle on how the courts may apply the MMMA to employers. For the school districts under the jurisdiction of the U.S. District Court for the Western District of Michigan,⁸ the case provides legal authority to support a school district’s decision to continue to enforce policies prohibiting the use of marijuana, including medical marijuana, by school employees. However, school districts should qualify the guidance from this decision by considering the following issues relating to the opinion and the facts of the case:

- This case will likely be appealed to the Sixth Circuit Court of Appeals, where it will take at least a year to receive a decision to affirm the Western District Court’s opinion.
- A lawsuit between a Michigan school district and an employee involving the MMMA will be decided by a state court.⁹ The Michigan state courts may choose not follow this Federal District Court decision. However, much of the analysis in the decision is consistent with the two opinions that have been issued thus far by the Michigan Court of Appeals on the MMMA and how it applies to assertion of a defense to violation of the controlled substance laws. Consequently, both courts, while addressing separate questions, appear to agree that the MMMA is limited to only providing a defense to a prosecution involving marijuana.



Marijuana, continued from page 7

- The employee in the case was an at-will employee. A school employee who is subject to a “just cause” contractual standard may be able to use a medical marijuana registry card to successfully challenge a termination for drug use before an arbitrator or the Tenure Commission.¹⁰
- The Federal District Court didn't rule on the issue of whether the MMMA is preempted by the Federal Controlled Substances Act.¹¹
- The decision notes that the MMMA protects medical marijuana users from “other similar actions of state and local governments” in addition to protecting the users from prosecution. Taken out of context, this statement could arguably be interpreted to say that disciplinary actions by a school district, as a unit of local government, would be covered by the protections of the MMMA. However, in the opinion, the Court refers to local governments in the context of issuing business licenses, not in terms of making employment decisions.

In addition to considering the guidance from the Court’s decision, school districts should also refer to Section 7 of the MMMA for instructive information on the limits of the legal use of medical marijuana. This section specifically prohibits possessing marijuana or engaging in the medical use of marijuana in a school bus or on the grounds of any preschool or primary or secondary school.¹² Further, Section 7 states that the MMMA doesn't require a commercial or non-profit health insurer to reimburse a person for costs associated with the medical use of marijuana, nor does the act require an employer to accommodate the

ingestion of marijuana in any workplace or any employee while working under the influence of marijuana.¹³

Based on the text, structure and purpose of the MMMA, as interpreted by the U.S. District Court for the Western District of Michigan, and until further guidance is issued by Michigan state courts on the scope of the act, Michigan school districts may want to consider providing notice to employees regarding the use of marijuana for medical purposes under the MMMA and federal law.

The notice should emphasize that:

- The MMMA doesn't eliminate state criminal prohibitions on the use, possession or manufacture of marijuana. The Act simply provides a procedure through which seriously ill individuals using marijuana for its palliative effects can be identified and protected from prosecution under state law.
- The Federal Controlled Substances Act continues to list marijuana as a Schedule I drug and prohibits its possession, manufacturing, dispensing and distribution. There's no “medical necessity” exception for Schedule I drugs under federal law and the MMMA doesn't protect an individual from arrest and prosecution under federal law.
- Because federal law still prohibits the manufacturing, dispensing and distribution of marijuana, the school district’s policies haven't changed regarding the use or possession of the drug.
- Consistent with the Drug-Free Workplace Act of 1988 and the Drug-Free Schools and Communities

Marijuana, continued on page 9

OFFICIAL NOTICE

MCSA ANNUAL MEMBERSHIP MEETING

The 2011 MCSA Membership Meeting will be held

Wednesday, May 11, 2011

beginning immediately after the Spring School Law Seminar at the

Lansing Community College, West Campus in Lansing.

Under Article V, Section 4 of the MCSA Bylaws, directors are elected by the members present and voting at this meeting.



Continued from page 8

Act Amendment of 1989, the District's *Drug and Alcohol Policy* prohibits the unlawful manufacture, distribution, dispensation, possession or use of controlled substances, illicit drugs and alcohol on school district property or at any school sponsored activity or event.

The notice should conclude by emphasizing to employees that violators of the district's policy prohibiting the use or possession of illegal drugs on school property or at school events are subject to disciplinary action through the appropriate disciplinary process.

¹ "Marijuana" and "marihuana" are both acceptable spellings for the name of this drug. The spelling with an "h" is consistent with the spelling in the Michigan Public Health Code, Act 368 of 1978, and the MMMA, Initiated Law 1 of 2008, MCL 333.26421 et seq., but "marijuana" is the more commonly used spelling and so will be used throughout this article.

² *People v. Redden*, No. 295809, Sept. 14, 2010 and *People v. King*, No. 294682, Feb. 3, 2011.

³ *Id.*, No. 294682, quoting *Redden*.

⁴ MCL §333.26424(a) (emphasis added).

⁵ MCL §333.26424(f) (emphasis added).

⁶ *Griffith v. State Farm Mut. Auto Ins. Co.*, 472 Mich. 521, 533, 697 N.W.2d 895 (2005) ("Words grouped in a list must be given related meaning.")

⁷ *Redden*, No. 295809 (O'Connell, P.J., concurring).

⁸ The Western District of Michigan is composed of a Northern Division and a Southern Division. The Southern Division comprises the counties of Allegan, Antrim, Barry, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Clinton, Eaton, Emmet, Grand Traverse, Hillsdale, Ingham, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, Saint Joseph, Van Buren and Wexford. The Northern Division comprises the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon and Schoolcraft. Thus, school districts located in the aforementioned counties are under the jurisdiction of the U.S. District Court for the Western District of Michigan.

⁹ This case was in federal court because the action involved parties that resided in two different states. The decision to terminate the employee was made by Wal-Mart's corporate offices in Arkansas.

¹⁰ For example, the "just cause" standards used by the Tenure Commission from the case *Szopo v. Richmond Community Schools (TTC 93-60)* include a factor that considers whether or not the conduct involved constituted a crime. Because possessing a medical marijuana registry card would be an affirmative defense to any marijuana prosecution, that factor would likely be decided against a school district in a termination case before the Tenure Commission that involved the issue of marijuana use.

¹¹ The use of marijuana is still a federal felony. See 21 U.S.C. § 812; 21 U.S.C. § 841(a)(1). Because federal preemption is premised on the Supremacy Clause of the United States Constitution and because of the long-standing principle that federal courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided, a court must determine whether the matter can be decided without turning to federal preemption. *Quest Corp. v. City of Sante Fe, New Mexico*, 380 F.3d 1258 (10th Cir.2004).

¹² MCL 333.26427(b)(2)(A) and (B).

¹³ MCL 333.26427(c)(1) and (2).

Completing the Required Number of Instructional Days and Hours for the 2010-11 School Year

By: Brad Banasik, Michigan Association of School Boards

This school year, many school districts have likely exceeded their six day allotment of "snow days" under Section 101 of the State School Aid Act. Specifically, this section allows a school district to count toward the required number of instructional days and hours¹ the first six days and equivalent hours of scheduled pupil instruction that isn't provided because of conditions not within the control of the school district (e.g., snow storms, health conditions, power outages, etc.).

In prior years, school districts were able to avoid making up days and hours at the end of the year even after exceeding the allocation of 30 forgivable hours² by scheduling more than the minimum number of required instructional hours. For example, even if a school district missed 40 instructional hours due to inclement weather, the district wouldn't have to make up the 10 hours if it had scheduled 1,108 or more instructional hours for that school year.

For this year, however, a restriction in Section 101 that applies to the 2010-11 school year may result in many school districts having to add instructional days at the end of the school year. The restriction states that a school district "shall not provide fewer days of pupil instruction³ than the district *provided* for 2009-10"⁴ in addition to providing the 1,098 instructional hours and 165 days in 2010-11. So, if a school district *provided* 170 days in 2009-10, it would be required to provide 170 days in 2010-11, in addition to the 1,098 instructional hours.

The restriction is subject to an exception that exempts school districts from compliance if they had an existing collective bargaining agreement on Oct. 19, 2009, which included a complete school calendar that wasn't in compliance with the new instructional day requirements. The exemption applies until the expiration of the collective bargaining agreement.

For school districts that have cancelled more than six days of school, the restriction will come into play if the districts didn't schedule additional days for this school year as compared to last year. For example, ABC School District's calendar provided for 170 instructional days in 2009-10 and 170 days in 2010-11. In 2009-10, the school

Calendar, continued on page 10



district had no snow days and reported to the Department of Education that it provided 170 instructional days. This year, the ABC School District had seven snow days, bringing the total number of instructional days down to 169, after factoring in the six forgiven days. Accordingly, the ABC School District would be required to make up one instructional day to reach the 170 days that were provided and reported in 2009-10.⁵ The need for providing an extra day would still apply even if the district was providing 1,098 or more instructional hours with the 169 days.

A district failing to comply with the minimum required days of pupil instruction will forfeit from its total state aid allocation an amount determined by applying a ratio of the number of days the district was in noncompliance in relation to the required minimum number of days. Thus, if ABC School District's annual state payment is \$10,500,000, the penalty calculation for providing one less day than what was provided in 2009-10 is:

$$\begin{aligned} & \$10,500,000 \text{ adjusted state aid} / 170 \text{ required days} = \\ & \$61,764.71 \text{ per day.} \end{aligned}$$

Thus, ABC School District would receive a \$61,764 deduction if it failed to make-up the one instructional day to reach 170 days. The deduction will be made in the following fiscal year from the first payment of state school aid.

In making up any required days under Section 101, the school district may not rely on the provision that allows

teacher professional development time to count as pupil instructional hours.⁶ Professional development days don't apply to the minimum day requirement.

For questions and interpretations concerning the minimum day requirements in Section 101, school districts should contact the Office of State Aid and School Finance with the Department of Education, Sandy Morford, 517.373.3350.

- ¹ For the 2010-11 school year, school districts are required to provide 1,098 instructional hours and 165 days.
- ² Prior to 2010-11, Section 101 referred to 30 hours, rather than six days, that could be counted as pupil instruction.
- ³ The State School Aid Act doesn't define "day," "instructional day" or "days of pupil instruction."
- ⁴ MCL 388.1701(3)(a), as amended by 2010 PA 121 (emphasis added).
- ⁵ If ABC School District used "forgiven days" ("snow days") in 2009-10, the scenario would be different. The Michigan Department of Education's guidance is that the number of days provided in 2009-10 is the number of days that the district was actually in session plus any forgiven days that the district needed to reach the 1,098 hour requirement. For example, if the ABC School District had five snow days in 2009-2010, but needed two of those five days to reach 1098 hours, the District's requirement for 2010-11 would be to provide 167 (170 - 5 + 2) days instead of 170 days.
- ⁶ Subsection (10) allows a school district to count up to 38 hours of qualified teacher professional development program hours as hours of pupil instruction. MCL 388.1701(10).



23rd Annual Spring Law Conference

Presented By:

The Michigan Council of School Attorneys

Wednesday, May 11, 2011
Lansing Community College, West Campus
9 a.m. – 4 p.m.

The 23rd Annual Spring Law Conference is designed specifically for education leaders and school attorneys. The conference provides an unparalleled opportunity to network among peers and receive up-to-date legal information.

Who Should Attend?

- ◆ **School board members**
- ◆ **School attorneys**
- ◆ **Superintendents**
- ◆ **Assistant superintendents**
- ◆ **Others involved in the legal aspects of education**

Highlights

This seminar will feature school law experts who will offer information, ideas and insight on a variety of topics, including:

- **Confronting Cyberbullying**
- **Open Meetings and Freedom of Information Act: A Plaintiff's Perspective**
- **Fair Labor Standards Act: Common Pitfalls for School Districts**
- **Provisions to Avoid when Negotiating Your Collective Bargaining Agreement**
- **ADA and FMLA Compliance: Leave Time, Accommodations, Terminations and More**
- **Cracker Barrel Session: Three 20 Minute Roundtable Discussions on Hot Topics in School Law**
- **Pending School Legislation**

Register online at: www.masb.org

Administrators – earn State Board-Continuing Education Unit (SB-CEU) Credits. Application has been made to the Michigan Department of Education for .4 of an SB-CEU.

School Board Members – earn 10 MASB Education Credits.

Sponsored by the Michigan Association of School Boards

MCSA Spring School Law Conference

May 11, 2011 • 9 a.m. – 4 p.m.

LCC West Campus • 5708 Cornerstone Drive, Lansing, MI 48917

This seminar will feature school law experts who will offer information, ideas and insight on a variety of topics, including:

- Confronting Cyberbullying
- Open Meetings and Freedom of Information Act: A Plaintiff's Perspective
- Fair Labor Standards Act: Common Pitfalls for School Districts
- Provisions to Avoid When Negotiating Your Collective Bargaining Agreement
- ADA and FMLA Compliance: Leave Time, Accommodations, Terminations and More
- Cracker Barrel Session: Three 20 Minute Roundtable Discussions on Hot Topics in School Law
- Pending School Legislation

Registration Fee: \$125 per person

Total Amount _____

School District or Law Firm		Additional Registration From Same School District or Law Firm	
Name		Name	
Address		Address	
E-mail		E-mail	
Phone	Fax	Phone	Fax

Online 	FAX 	Mail 	Questions?
Visit our website at www.masb.org	Fax registration form to Cheryl Huffman at 517.327.0775	Mail registration form and payment to: MASB Business Office 1001 Centennial Way, Ste. 400 Lansing, MI 48917-8249	Registration questions contact Cheryl Huffman at 517.327.5915 or 1.800.968.4627, ext. 236

Payment Information		
Payment is appreciated at time of registration. A \$25 service fee will be added to any balance due after May 11, 2011. NO REFUNDS after May 4, 2011.		
Credit Card <input type="checkbox"/> VISA <input type="checkbox"/> MASTERCARD Exp. Date _____ Account Number _____ Signature _____	Invoice <input type="checkbox"/> Invoice school district (A \$25 billing fee will be applied.) Attn: _____	Check <input type="checkbox"/> Check enclosed made payable to MASB Check# _____ <input type="checkbox"/> Check to follow—Registration faxed in advance

Cancellations:

A \$25 cancellation fee will be charged for any and all cancellations. Substitutions are accepted. All cancellations must be in writing. **No refunds after May 4, 2011.**

Please register by May 4, 2011.

