Employment Law Update

Brad Banasik
Legal Counsel & Director of Labor Relations
Michigan Association of School Boards

I. Overview

A. Whistleblowers Protection Act.

B. Fair Labor Standards Act

C. Family Medical Leave Act

D. Conclusion

II. Whistleblowers' Protection Act (WPA)

A. General Requirements.

1. Provides employment protection for two types of "whistleblowers": (1) those who report, or are about to report, violations of law, regulation, or rule to a public body, and (2) those who are requested by a public body to participate in an investigation held by the public body or in a court action.

a. **Type 1 Whisteblowers**: Employees who communicate, on their own initiative, the employer's wrongful conduct to a public body in an attempt to bring a hidden violation to light to remedy the situation or harm done by the violation.

b. **Type 2 Whistleblowers**: Employees who participate in a previously initiated investigation or hearing at the behest of a public body.

2. Michigan courts characterize the retaliatory actions that are prohibited by the WPA as "adverse employment actions."

a. Employees must show that they were discharged, threatened, or otherwise discriminated against, such that their compensation, terms, conditions, location or privileges of employment were affected.

b. Must be more than a mere inconvenience or an alteration of job responsibilities.

3. Employees must establish a causal connection between the protected activity and the adverse employment action.

4. The WPA requires an employee to bring a claim "within 90 days after the occurrence of the alleged violation of the act."

B. Court Cases.

1. *Wurtz v Beecher Metropolitan District*, 495 Mich 242 (2014)

a. Michigan Supreme Court concluded that the WPA does not apply when employer declines to extend or renew an employee's contract.

b. Important Footnote: "Wurtz's contract did not contain any renewal clause imposing some obligation or duty on the employer to act. Thus, we need not address the effect that such a clause would have on our analysis." *Wurtz* at footnote 32.

- **Unanswered Question:** *Would the WPA apply when a school board declines to renew an administrative contract?*

2. *Pace v Edel-Harrelson,* ____ Mich ____ (2016)

a. Michigan Supreme Court concluded that the WPA does not apply to reporting a future, planned, or anticipated act amounting to a violation or a suspected violation of a law.

b. "[B]ecause plaintiff reported a suspected future violation of a law, not a suspected existing violation, plaintiff did not engage in a protected activity for the purposes of the WPA."

3. Court of Appeals Case, No. 321349 (2016)

a. School administrator received a misdemeanor ticket for "hosting" in July 2011. The charges were eventually dismissed, but the administrator still reported the charge to the district as required by MCL 380.1230d.

b. In September 2011, the MDE received any anonymous tip that the administrator shared secured test items from a MEAP test booklet with staff and begins 2-day surprise investigation in October 2011.

c. In October, the administrator is reassigned from her elementary principal position to a high school assistant principal position after a school district investigation.

d. The administrator's contract was not renewed (a year early) and she was reassigned to a teaching position (for the next school year) in March 2012 as a result of:

- Sharing secured test items from a MEAP test booklet with staff, failing to secure test booklets, impeding the MDE investigation, and failing to properly cooperate with investigators from the MDE.
- Pressuring and influencing staff to be untruthful during the MDE investigation.
- Being untruthful during district investigation.
- Staff complaints.
- Poor rapport and working relationships with district administration.

e. In April 2012, the administrator filed a complaint against the district alleging a violation of the WPA.

f. In early May 2012, the administrator reported a "24-hitlist" found in a district bathroom to the police, and reported an alleged alcohol incident at prom involving a board member's son to the high school principal.

g. In mid-May 2012, the administrator was placed on paid, administrative leave before the summer break as a result of the district's administrative team transitioning.

h. **Ruling**: In regard to the MDE investigation, administrator was (1) protected as a Type 2 Whistleblower, (2) suffered an adverse employment action, but (3) could not establish a causal connection between the MDE's request to participate in the investigation and the alleged adverse employment actions.

(1) Although the administrator was disciplined for her obstruction of the investigation, the infractions did not constitute "participation" under the WPA.

(2) "There is at least a question of fact regarding whether changing titles, responsibilities, and work locations altered the terms of [the administrator's] employment."

i. **Ruling:** In regard to reporting the hosting charge, the administrator was (1) protected as a Type 1 Whistleblower, (2) suffered an adverse employment action, and (3) able to create a question of fact regarding establishing a causal connection between criminal charge and the adverse employment actions.

j. **Ruling:** In regard to reporting the "24-hitlist" and prom incident and filing a WPA complaint, the administrator was (1) protected as a Type 1 Whistleblower, (2) suffered an adverse employment action, and (3) was able to establish a causal connection between the protected activity and the adverse employment action.

(1) "It can be said that a condition of employment is that one must actually be at their place of employment."

(2) "The fact that the [administrator] was placed on administrative leave shortly after the prom incident may allow a jury to make a reasonable inference that she was put on administrative leave because of her protected activities."

4. Court of Appeals Case, No. 322295 (2015)

a. A school administrator was terminated for misconduct relating to misappropriation of school equipment and public funds and sharing confidential information with a third party.

b. Because the district was involved in a separate lawsuit that administrator participated in, the administrator filed a WPA claim as a Type 2 Whistleblower.

c. **Ruling:** The administrator was engaged in a protected activity when she was requested by the district to participate in a court action, i.e., when she was listed as a witness and her deposition was scheduled or when she provided an affidavit at the request of her employer.

d **Ruling:** No causal connection between protected activity and termination.

(1) The district was not displeased with the administrator's participation in the lawsuit. Rather, the district was displeased with the fact that the administrator gave out a district-paid cell

phone and forwarded Board documents and attorney-client information to a third party in the midst of the lawsuit.

(2) "To allow the administrator to shield herself under the WPA from being terminated for participating in an investigation regarding her own alleged misconduct would undermine the purpose the of the WPA."

C. Guidance.

1. Document, document, document!

2. Recognize "protected activities."

- Can be part of job duties, related to legal obligations or general student investigations/inquiries.

3. Pay attention to employees who have been given notice of a potential contract nonrenewal or layoff -- employees will use the WPA as an insurance policy if they suspect their termination, non-renewal, or layoff.

4. Carefully evaluate adverse employment actions based on "insubordination" or "disloyalty."

5, Follow policies and appropriate procedures at the time of termination.

6. Consider arbitration clauses for individual contracts that specifically include the WPA and other discrimination claims.

- A contract must include clear notice to the employee that he or she is waiving the right to adjudicate discrimination claims in a judicial forum and opting instead to arbitrate those claims.

Thanks to Giarmarco, Mullins, & Horton, P.C. and SET SEG for assisting with this guidance!

III. Fair Labor Standards Act (FLSA)

A. General Requirements.

1. Non-exempt employees are entitled to overtime pay at "time and a half" for all hours worked in a week.

a. Overtime requirement applies regardless of contract provisions or misidentified independent contractor labels.

b. Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment.

2. Covered employees must be paid for all hours worked in a workweek.

a. In general, compensable hours worked include all time an employee is on duty or at a prescribed place of work and any time that an employee is suffered or permitted to work.

b. This would generally include work performed at home, travel time, waiting time, training, and probationary periods.

B. Court Cases.

1. *Keller v Microsystems LLC,* 781 F.3d 799 (6th Cir. Mich. 2015)

a. In this case, an individual identified as an "independent contractor" worked nineteen-hour days, six days a week as a satellite-internet installer with no overtime compensation.

b. The lower court dismissed the case, holding that the installer was an "independent contractor," but the Sixth Circuit reversed, finding genuine questions of fact that required a jury to properly determine the status.

c. The Court applied the "economic reality" test to determine whether the worker was economically dependent on the employer or in business for himself. The test is based on the following factors:

(1) the permanency of the relationship between the parties;
(2) the degree of skill required for the rendering of the services;
(3) the worker's investment in equipment or materials for the task;
(4) the worker's opportunity for profit or loss, depending on his or her skill;
(5) the degree of the alleged employer's right to control the manner in which work is performed; and
(6) whether the service rendered is an integral part of the alleged employer's business.

d. The worker provided the following evidence in regard to the economic reality factors:

(1) worked for the company for almost 20 months and treated the company as his permanent employer, never turning down as assignment;
(2) needed certification, for which training was provided by the company;
(3) invested money in the work he performed; and
(4) couldn't increase his profitability because there were only a limited number of jobs that could be completed within a day.

e. The Court concluded that fact issues existed for each factor.

2. *Moran v. Al Basit*, 2015 U.S. App. LEXIS 9021(6th Cir. Mich. 2015)

a. In this case, an employee filed a complaint under the FLSA stating that he wasn't fully compensated for working overtime. His employer refuted his claims, based on security camera footage and handwritten timesheets that documented arrivals and departures as captured by the footage.

b. The Court concluded that, in some circumstances, an individual's testimony alone regarding disputed overtime can create a genuine issue of material fact to deny summary judgment.

c. "Plaintiff put forward testimony that contradicted that of Defendants, describing his typical work schedule with some specificity and estimating that he worked sixty-five to sixty-eight hours a week on average."

C. Joint Employment (Administrator's Interpretation No. 2016-1[1])

1. A joint employer relationship may occur when two or more entities share employees or use third-party management companies, independent contractors, staffing agencies, or labor providers to perform work.

2. When joint employment exists, all of the joint employers are individually and jointly liable for compliance with the FLSA and other employment laws.

3. The Department of Labor classifies joint employers into two categories:

a. **Horizontal Joint Employers** – Exists when an employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee.

[1] U.S. Department of Labor Wage and Division issues Administrator's Interpretations when further clarity around the proper interpretation of a statutory or regulatory issue is appropriate.

b. **Vertical Joint Employers** - Exists when an employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work.

4. Vertical Joint Employment. This type of joint employment analysis will include an examination of the economic realities of the relationship to determine the degree of the employee's economic dependence on the contracting entity – the potential joint employer:

    (1) Does the potential joint employer direct, control, or supervise (even indirectly) the work?
    (2) Does the potential joint employer have the power (even indirectly) to hire or fire the employee, change employment conditions, or determine the rate and method of pay?
    (3) How permanent or lengthy is the relationship between the employee and the potential joint employer?
    (4) Does the employee perform repetitive work or work requiring little skill?
    (5) Is the employee's work integral to the potential joint employer's work?
    (6) Is the work performed on the potential joint employer's premises?
    (7) Does the potential joint employer perform functions for the employee typically performed by employers?

5. Under the FLSA, each of the joint employers must ensure that the employee receives all employment-related rights under the FLSA (including payment of at least the federal minimum wage for all hours worked and overtime pay at not less than one and one-half the regular rate of pay for hours worked over 40 in a workweek unless an exemption applies).

    - Joint employers must also **combine** all of the hours worked by the employee in a workweek to determine if the employee worked more than 40 hours and is due overtime pay.

6. Guidance.

    a. Review current and future employment structures, focusing on how much the school district's supervisors exercise direct or indirect control over contracted employees.

b. Review third-party contracts and consider renegotiating changes if the terms of a contract provide the school district with the ability to share, control, or codetermine the essential terms and conditions of the contractor's employees.

IV. Family Medical Leave Act (FMLA)

A. General Requirements.

1. Under FMLA, an employee is eligible to take 12 workweeks of unpaid, job-protected leave for specified family or medical reasons if she or he has been employed by the school district for at least 12 months, and has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave.

a. **12 month period.** An employer may calculate the 12-month period in which the 12 weeks of FMLA leave entitlement occurs in one of a variety of ways (but the method must be the same for all employees):

(1) the calendar year;

(2) any fixed 12-month period, such as a fiscal year, or a year starting on the employee's anniversary date;

(3) the 12-month period measured forward from the date any employee's first FMLA leave begins; or

(4) a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

b. **Employee's Notice Request**.

(1) If an employee anticipates needing FMLA leave, she or he should provide the employer with at least 30 days advance notice of the leave.

(2) When employees learn of a need of FMLA leave fewer than 30 days in advance, they are required to give notice of their leave either the same business day or the next day, absent emergency circumstances.

c. **Employer Notice Requirements** - Covered employers must:

(1) Post notice explaining rights and responsibilities under the FMLA;

(2) Include information about the FMLA in their employee handbooks or provide information to new employees upon hire;

(3) When an employee requests FMLA leave or the employer requires knowledge that leave may be for a FMLA-qualifying reason, provide the employee with notice concerning his or her eligibility for FMLA leave and her or his rights and responsibilities under the FMLA within five business days; and

(4) Notify employees whether leave is designated as FMLA leave and the amount of leave that will be deducted from the employee's FMLA entitlement within five business days.

d. **Certification**.

(1) When an employee requests FMLA Leave due to her or his own serious health condition or a covered family member's serious health condition, the employer may require certification in support of the leave from a health care provider.

- The employer may not request a certification for leave to bond with a newborn child or a child placed for adoption or foster care.

(2) The employer may request a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave.

- If an employer requires a fitness-for-duty certification, it must provide notice of that requirement and whether the certification must address the employee's ability to perform the essential functions of her or his job with the FMLA designation notice.

- If CBA governs an employee's return to work, those provisions must be applied.

e. **Job Restoration and Health Benefits**.

(1) Upon return from FMLA leave, an employee must be restored to her or his original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

(2) An employee's use of FMLA leave cannot be counted against the employee under a "no fault" attendance policy.

(3) Employees are also required to continue group health insurance coverage for an employee on FMLA leave under the same terms and conditions as if the employee had not taken leave.

2. The FMLA was amended in 2008 to provide military family leave. The leave entitlements give specified family members of covered Armed Forces personnel up to 12 weeks off for qualified exigencies due to being called for active duty, or up to 26 weeks off to take care of a service member who was injured while on active duty.

B. Court Cases.

1. *Tilley v Kalamazoo Cnty. Rd. Comm'n.* Docket No. 14-1679 (Jan. 26, 2015)

a. Terry Tilley sued the Road Commission claiming that his termination was in retaliation for exercising his right to medical leave under the FMLA.

b. The Commission argued that Tilley was terminated for failing to complete assignments in a timely fashion, and that he was not eligible for FMLA protection because the Commission did not employ 50 employees within a 75-mile radius.

c. The Commission's employee manual, however, included the following FMLA policy- *"Employees covered under the FMLA are full-time employees who have worked for the Road Commission and accumulated 1,250 work hours in the previous 12 months."*

d. Tilley alleged that this policy contained "clear misrepresentations" regarding his eligibility to receive FMLA benefits that he relied on in seeking medical treatment prior to completing his assignments.

e. The Court concluded that the policy was "an unambiguous and unqualified statement that Road Commission employees, like Tilley, who logged 1,250 hours in the year before seeking FMLA leave are covered by the FMLA and are eligible to apply for FMLA benefits."

f. Thus, it will be up to a jury to decide if Tilley's claim that he relied on the policy in taking medical leave is credible.

2. *Obergefell v. Hodges*, 576 U.S. ____ (2015).

a. The U.S. Supreme Court held that "[t]he Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when the marriage was lawfully licensed and performed out-of-state."

- As a result of the decision, the bans on same-sex marriage that remained prior to Obergefell are now invalid, and same-sex individuals have the right to marry and have their marriage recognized in every state with the United States.

b. This ruling legally substantiates the Department of Labor's Final Rule (March 27, 2015) amending the definition of "spouse" of the FMLA to include all individuals in legal marriages, regardless of where they live.

(1) The rule and case now entitle eligible employees to take FMLA leave to care for a stepchild (child of employee's same-sex spouse) regardless of whether the *in loco parentis* requirement of providing day-to-day care or financial support for the child is met.

(2) The rule did not define "spouse" to cover same-sex civil unions or domestic partnerships.

c. As a result of the rule change and court decision, schools should review and revise handbooks, policies, procedures, and forms covering FMLA leave to provide benefits for same-sex spouses.

V. Conclusion.