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THE FUTURE OF EIT COLLECTION IS NOW: ACT 32 COMPLIANCE BEGINS THIS YEAR

Act 32 of 2008 resulted from a study initiated in 2004 by the Department of Community and Economic Development (DCED). This article is intended to provide you with a brief summary of the 68 page legislation and how it impacts your District.

Act 32 reduces the 560 Earned Income Tax (EIT) collection entities across the Commonwealth to 69 Tax Collection Districts (TCD). TCDs are ordinarily coterminous with county boundaries, except Allegheny County will be served by four TCDs. School Districts that overlap county boundaries will be included in the TCD where the majority of its population lives. Each TCD will be governed by a Tax Collection Committee (TCC). Each School District and Municipality within the TCC that levies an EIT will appoint a voting delegate and each that does not levy an EIT will appoint a non-voting delegate. TCC delegates vote on committee actions and ultimately select the tax officer (collector) for the TCD. TCCs will be subject to the Right to Know Law, the Sunshine Act and the Ethics Act. Therefore, meetings of the TCCs are open to the public; minutes and other documents are public records; and individual delegates will be required to file a Financial Interest Statement each year. DCED will furnish TCCs with sample bylaws and procedures, sample RFPs for selection of a TCD tax officer and other supporting information.

At the first meeting of the TCC, the chair of the county commissioners (or the county CEO in home rule counties) will serve as chair. Delegates will elect a chair and a vice chair from their voting delegates, as well as a secretary who need not be a voting delegate. Also at this first meeting, delegate votes will be weighted. Weight will initially be calculated by DCED based on two factors, the proportional amount of EIT revenues and population of the taxing jurisdiction each delegate represents in relation to that of the entire TCD. The purpose of the weighting is to ensure a fair voting system based on each taxing jurisdiction's revenue interest. However, after the first meeting, the TCC can opt to switch to a different method of voting, such as one vote per delegate.

TCCs will be responsible for the appointment and oversight of the tax officer, as well as setting the tax officer's bond. TCCs will have the authority to create a tax bureau, hire a director and staff and set their compensation. TCCs will retain legal counsel and auditors and may acquire or lease property for the purpose of housing and running the tax bureau. They will be authorized to enter into joint tax collection arrangements with other TCCs, and will arrange for tax officers to be audited at least once annually. The audits must be provided to every political subdivision within the TCD. The annual budget of the TCD will be paid by the member taxing jurisdictions, prorated according to their shares of EIT revenue. If a TCC fails to appoint a tax officer by September 15, 2010, one will be appointed by the County Court of Common Pleas.

Each TCC has until June 1, 2010 to set up an appeals board, which will consist of at least three delegates. Appeal boards may also be created jointly with another TCC. Taxpayers and employers, as well as taxing jurisdictions, will be able to appeal decisions of the tax officer regarding assessments, collection, refund, withholding or distribution of taxes.

Act 32 requires mediation to resolve disputes that involve a difference in tax rev-

enues of more than ten percent from one year to the next. (Disputes over amounts less than ten percent may go to voluntary mediation.) When there is such a dispute, the taxing jurisdiction must provide notice to DCED and the TCC of the intent to pursue mediation. The taxing jurisdiction, DCED and the tax officer must submit a brief statement of the issues to the mediator within 20 days of the notice. DCED then has 30 days to determine if the dispute qualifies for mandatory mediation. Mediation will then begin and must be completed within 30 days, unless all parties agree to an extension. If settlement is reached, it will be binding. The mediation process is exempt from the Right to Know Law, but the resulting settlement agreement will be a public record. Mediation costs will be shared by all parties to the dispute.

A substantial amount of additional information is contained in the Act and has been reviewed by our attorneys who are prepared to respond to any questions your School District or the newly created TCCs may have. To fulfill the Act's requirements, please refer to the Timeline for Act 32 Compliance which appears in downloadable format on our firm's website at www.mbm-law.net

EMPLOYEE CONTRACT EXPIRATION – OPERATING UNDER THE STATUS QUO

The end of the school year may mark the expiration of some collective bargaining agreements (CBA) or the commencement of formal negotiations for others. If negotiations fail to result in a new CBA prior to the current contract's expiration, the District has a duty to maintain the status quo under the expired CBA while negotiations continue. In ***Fairview School District v. UCBR***, the Pennsylvania Supreme Court held that "maintenance of the status quo is merely another way of stating that the parties must continue the existing relationship in effect at the expiration of the old contract." If the status quo is upset by the District, any resulting work stoppage is considered a lock-out rather than a strike, thus entitling the employees to receive unemployment compensation. On many occasions, the Union will claim that the status quo has been violated and that a lock-out has occurred over any and all minor variations in District operations. While the District cannot be held hostage and the Unions cannot handcuff the District and its Administration in its operations, any potential variations in past operations must be evaluated in the context of whether it would be considered a violation of the status quo by the courts.

This article is not intended to provide legal guidance on specific situations which may be facing your School District. Rather, the following are only a representative sample of how courts have decided the issue of whether the status quo has been altered.

- A change in health insurance policy or provider, regardless of whether the coverage was equivalent, was a violation of the status quo.
- A school district's refusal to "step-up" teachers' salaries, even though the expired labor agreement had provided for such changes, did not constitute a disruption of the status quo. During the interim period between the contract's expiration and the negotiation of a new one, the status quo should be maintained as if the existing conditions were frozen rather than to give effect to a built-in wage escalator such as "step movement."
- A school district's unilateral action in raising pay and benefits after the contract's expiration was a disruption of the status quo.
- An extension of the summer vacation break by two weeks during negotiation of an expired teachers contract was considered a violation of the status quo when the teachers expressed a willingness to continue to work under the status quo.

As the above examples indicate, even a change made by the employer which is beneficial to the union members may be considered a disruption of the status quo. Also, even the smallest of change may be considered a disruption of the status quo. There is no *de minimus* rule of deviation from the terms of a CBA. However, the status quo is a fluid rather than a firm concept, and an employer can successfully convert a lock-out to a strike. The Commonwealth Court recognized that the cause of a work stoppage could change in mid-stream by the actions of the disputing parties. The party who disturbs the status quo bears the responsibility for reestablishing the status quo. When an employer has the ability to restore the pre-existing terms and conditions of employment, the status quo will be restored when the employer takes the necessary action to restore the status quo.

The above examples demonstrate the critical importance of communication and coordination between the Administration, the Board, and your Solicitor to protect your District from the risk of costly unemployment compensation claims. Maiello, Brungo & Maiello, LLP has negotiated numerous CBAs and has counseled many School Districts in maintaining the status quo.

WHEN OCR COMES CALLING – NOW MORE THAN EVER

As school officials well know, there are multiple venues for employees, parents or students to file complaints concerning issues related to education or school employment, including the Pennsylvania Human Relations Commission, the Equal Employment Opportunity Commission, state and federal courts and the Office for Civil Rights (OCR). The OCR is a lesser-used venue for complaints alleging a violation of federal civil rights. Historically, OCR has not been nearly as active as the other agencies in addressing alleged violations. In the past, OCR has declined to take action or to enter a conclusive finding as to whether a violation of law

has occurred. Those days, however, are over.

OCR recently announced that it will be investigating all complaints, and will be entering a finding one way or the other. Accompanying this change in philosophy is a new emphasis on complaint procedure and early case resolution. The OCR revised its Case Processing Manual in May of 2008 and clarified the processes they will follow in investigating complaints. Your school district should be aware of the new procedures to effectively defend any OCR claims which may be brought by students, parents or employees.

OCR requires that complaints be filed within 180 calendar days of the alleged discriminatory act. Any complaints which are filed must explain what happened, identify the person or group which was allegedly injured, identify the person or group allegedly causing the injury, and provide sufficient information detailing the factual basis that discrimination has occurred. If a complaint lacks the required information, OCR will permit 30 days to provide the information or risk dismissal.

OCR will complete its evaluation within 30 days of receiving a complaint. OCR will conduct interviews of relevant witnesses and request documents which are relevant to the investigation. Subpoena power may be exercised by OCR to enforce any information requests which are ignored. OCR will then either enter a finding that no violation has occurred, or it will enter a finding and initiate an enforcement action against the School District, which can lead to a loss of funding, sanctions, Department of Justice proceedings or an OCR compliance review.

OCR's new manual adds a third alternative to OCR proceedings—disposition through an Early Complaint Resolution (ECR) process. The ECR process occurs before the OCR makes a determination as to whether a violation has occurred, and may be employed at any point either before or during investigation of the claim. If both parties are willing and the OCR branch director believes the process is appropriate, different OCR staff who did not participate in the investigation will conduct mediation with the parties to attempt to reach a written agreement. During the mediation process, all information is kept separate from OCR's investigation file. If the parties are able to resolve their differences, a written settlement agreement is prepared and signed by both parties. If one of the parties later claims the agreement was breached, OCR retains jurisdiction over the original complaint and will proceed to complete its original investigation. A complaint alleging a breach of the resolution agreement must be filed within 180 days of the original allegedly discriminatory act, or within 60 days of the act which allegedly breached the settlement agreement.

The process of defending against and responding to OCR investigations can be extremely time-consuming and costly to school districts and their employees. In situations where a reasonable, straightforward and manageable resolution can be achieved through the ECR process, school districts should consider this option.

SPECIAL ED FUNDING – PDE'S FORMULA UNDER ATTACK

A Pennsylvania federal judge has permitted a lawsuit to continue against the Pennsylvania Department of Education (PDE) concerning statewide special education funding. In CG v. Commonwealth of Pennsylvania, parents in the Lancaster and Lebanon School Districts filed suit, alleging that the formula for determining special education funding makes it impossible for Districts to provide a free, appropriate public education (FAPE) and violates numerous laws, including IDEA, the Rehabilitation Act and the Due Process Clause of the Fourteenth Amendment. The parents claim that (1) the formula requires PDE to allocate funds based on average daily membership rather than actual expenditures required to provide FAPE, (2) the inequities in funding are worsened by the School Code's hold harmless provision, which guarantees that the amount of funding provided to a District will not decrease in subsequent years (even if the needs decrease), and (3) the ability of school districts to place disabled students in approved private schools deepens the funding inequities by allowing districts to separately account for the tuition subsidies instead of using designated special education funds. Finally, the parents raised an issue of specific interest in the Lancaster and Reading Districts involving the cost of bilingual special education.

In response to the parents' lawsuit, PDE filed a Motion to Dismiss. District Judge Yvette Kane denied the Motion and permitted the complaint to proceed. Judge Kane found that the injuries could be causally connected to the School Code funding provisions which could be redressed by a decision changing the funding formula. The Judge found that there was a substantial probability that the students at issue would receive FAPE if special education funding were more equitably distributed. PDE argued that it was speculative that an alteration in the formula to increase special education funds to the Reading and Lancaster School Districts would improve the FAPE provided to those students, but Judge Kane cited a Congressional finding embedded in IDEA that many students did not have their educational needs met because there was a lack of adequate resources available within the public school system. Judge Kane also found that plaintiffs had advanced a valid claim, on its face. The state's funding formula could give rise to claims under the Fourteenth Amendment, Section 504 of the Rehabilitation Act and the Equal Educational Opportunities Act. Plaintiffs had sufficiently alleged that they had been denied educational opportunities by reason of their disability.

This decision is not a final decision on the merits. Rather, it only indicates that the case will not be dismissed at the earliest stages. However, we will monitor this case because of its potential impact on the state's funding formula and may lead to changes in the School Code and the state budgeting process. As of this time, the case is still proceeding in District Court, and as of March 2009, discovery was continuing.

We will continue to update the status of this litigation in future editions of this newsletter.

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MB&M Special Counsel Services

Challenging legal issues constantly confront School Districts. As an ongoing service to Western Pennsylvania School Districts, MB&M's Education News will feature recent developments in one of the many specialized areas of the law including:

- Special Education: The law of special education is constantly evolving. Our attorneys have the experience to apply the law's intricacies to the specific situations facing your District.
- Construction: Multi-million dollar construction projects require the legal experience to protect this major District investment. Our attorneys have both the legal experience and architectural background to protect your District's interests.
- Personnel & Employment: Our attorneys address personnel matters on a daily basis, including collective bargaining, grievance arbitration proceedings, teacher dismissal actions and discrimination claims.
- Tax Assessment Appeals: With County-wide re-assessments and new commercial and residential construction, our attorneys have a proven track record of protecting and maximizing the tax base of Districts.
- Delinquent Taxes: Our firm has developed a specialized program with respect to earned income and real estate taxes which significantly increases the revenue for Districts.

As special counsel in these areas and others, we interact with your Solicitor, Administration and Board with the goal of providing a positive resolution to issues which may be unfamiliar or burdensome to the District. For more information regarding any of these specialized areas of practice, please contact Alfred C. Maiello or Michael L. Brungo at 412.242.4400.

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