

2022 Municipal Law Webinar 24 Legal Tips in 50 Minutes

presented by
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TIP #1: Home Education Program: 2023-2024 School Year Changes to Home Education Program



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TIP #1: Home Education Program: '23-'24 Changes

- House Bill 1642, Act 55 of 2022, amends the School Code Section 1327.1 relating to home education programs.
- Beginning with the 2023-2024 school year and each year thereafter, the school district of resident shall develop policies and procedures to permit a home education child to participate on the same basis of other school district students in any co-curricular activity that merges extra-curricular activities with a required academic course.
- The law provides examples of band and orchestra.

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TIP #1: Home Education Program, cont.

- In addition, the school district must permit a child who is enrolled in a home education program to participate in academic courses equaling up to at least one quarter of the school day for full time students.
- Home education students must meet eligibility and pre-requisite criteria for participating in the co-curricular and academic courses.
- The parents are required to provide transportation except if the existing district transportation is available at the times for participation by the home education student.
- The school board is required to adopt a policy and may require that the courses are taken consecutively if the parents or home education supervisor cannot provide supervision between the courses.

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TIP #2: Section 504 – Servicing Students with Medical Needs



TIP #2: Section 504 – Medical Needs

- Be careful that you are not accidentally violating Section 504 when you are servicing students with medical conditions.
- Students are eligible under Section 504 when they have a physical or mental impairment which affects one or more “major life activities” to a degree that the student is substantially limited in participating in or having access to the school’s programs and activities.
- Do not focus solely on the major life activity of “learning.” Students who have diabetes, epilepsy, allergies, etc. may be achieving academically but are still eligible under Section 504 because the major life activity of breathing, immune functions, etc., are substantially limited.

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TIP #2: Section 504 – Medical Needs, cont.

- The US Office of Civil Rights has held that a practice of providing individualized health plans to students of a certain category – such as students with diabetes, for example - instead of determining their eligibility on a case-by-case basis violates Section 504.
- Section 504 requires school districts to “conduct an evaluation, in accordance [with 504] of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 CFR 104.35(a).

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TIP #2: Section 504 – Medical Needs, cont.

- Section 504 also requires school district to provide procedural safeguards to students and parents with respect to actions regarding the identification, evaluation or educational placement of disabled students. This system of procedural safeguards must include:
 - Notice;
 - An opportunity for the parents to examine relevant records;
 - An impartial hearing with opportunity for participation by the student’s parents and representation by counsel; and
 - A review procedure. 34 CFR 104.36.
- Many existing “individualized healthcare plans” are likely substantively appropriate relative to the accommodation of the student’s health needs. However – a failure to have complied with Section 504’s procedural requirements can transform what otherwise may have been an appropriate medical plan into one that falls short of Section 504 compliance.

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TIP #3: Mental Health and the ADA



TIP #3: ADA Review

- In general, Title I of the ADA prohibits discrimination against applicants and employees on the basis of a disability, history of having a disability, and/or perceived disability
- Under the Americans with Disabilities Act (ADA) and other nondiscrimination laws, most employers must provide "reasonable accommodations" to qualified employees with disabilities

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TIP #3: ADA Coverage

- Many employers are aware of different accommodations for people with physical and communication disabilities but may be less familiar with accommodations for employees with disabilities that are not visible, such as mental health conditions
- Not all employees with mental health conditions need accommodations to perform their jobs. For those who do, remember the interactive process. The process of developing and implementing accommodations is individualized and should begin with input from the employee.



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TIP #3: ADA Accommodations for Mental Health

▪ Potential Modifications to the Physical Workplace

- Reduction and/or removal of distractions in the work area
- Addition of room dividers, partitions or other soundproofing or visual barriers between workspaces to reduce noise or visual distractions
- Increased natural lighting or full spectrum lighting
- Music (with headset) to block out distractions

▪ Potential Equipment/Technology:

- Tape recorders for recording/reviewing meetings and training sessions
- Handheld electronic organizers, software calendars and organizer programs
- Remote job coaching, laptop computers, personal digital assistants and office computer access via remote locations
- Software that minimizes computerized distractions such as pop-up screens

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TIP #3: ADA Accommodations for Mental Health

▪ Modification of Job Duties

- Modification or removal of non-essential job duties or restructuring of the job to include only the essential job functions
- Division of large assignments into smaller tasks and goals
- Additional assistance and/or time for orientation activities, training and learning job tasks and new responsibilities
- Additional training or modified training materials
- Leave of absence

▪ Management/Supervision

- Implementation of flexible and supportive supervision style
- Additional forms of communication and/or written and visual tools
- Regularly scheduled meetings (weekly or monthly) with employees to discuss workplace issues and productivity
- Written work agreements that include any agreed upon accommodations, long-term and short-term goals, expectations of responsibilities and consequences of not meeting performance standards

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TIP #4: Requests for Police Videos



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TIP #4: Requests for Police Videos

- Act 22 of 2017 governs requests for Police Videos
- Police Videos are not subject to the Right-to-Know Law
- Are to be submitted within 60 days of the date when the recording was made
- Be in writing served upon the Law Enforcement Agency Open-Records Officer
- Be delivered in person, or via certified mail with proof of service

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TIP #4: Requests for Police Videos, cont.

Request is to include:

- Description of the incident that is subject of the recording
- Date, time and location of the incident or event
- Statement describing the requesters relationship to the incident or event that is subject to the recording
- If the recording occurred inside a residence, the request is to identify each individual who was present at the time the recording was made, unless the identities are not known and not reasonably ascertainable

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TIP #4: Requests for Police Videos, cont.

Request is to be denied if:

- Potential evidence in a criminal matter
- Info pertaining to an investigation or a matter in which a criminal charge has been filed
- Confidential information or victim information – and redaction would not safeguard potential evidence
- Information pertaining to an investigation, confidential information or victim information

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TIP #5: Public Employee Incident Investigation



TIP #5: When to Conduct an Investigation?

- Complaint of discrimination
- Suspected employee misconduct
- Customer complaint
- Anonymous complaints
- “Hostile” work environment claims
- Workplace injury

TIP #5: Reasons for Conducting an Investigation

- Gather facts and evidence so an appropriate employment action can be taken
- Obtain information which may be helpful in defending against employment litigation
- May avoid employer liability
- Demonstrates employer's fairness
- Demonstrates the seriousness of the misconduct

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TIP #5: *Weingarten* Rights 101

- *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975)
 - During the course of an investigatory interview at which an employee was interrogated by the employer about reported thefts at respondent's store, the employee asked for but was denied the presence at the interview of her union representative. The union thereupon filed an unfair labor practice charge with the National Labor Relations Board (NLRB).
 - *The basics*: A union employee who reasonably believes that he is being subjected to an investigatory interview that could lead to discipline has the right to demand representation by a union agent or fellow employee before giving any information to the employer.

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TIP #5: *Garrity* Rights 101

- *Garrity v. New Jersey*, 385 U.S. 493 (1967)
 - The Supreme Court held that the threat of the loss of employment placed the employee in the bind of being forced to choose between self-incrimination and the loss of livelihood.
 - In such a situation, there is no chance for the employee to reach a free and rational decision.
 - *Garrity* Rights protect public employees from being compelled to incriminate themselves during investigatory interviews conducted by their employers.

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TIP #6: Fireworks



TIP #6: Fireworks

- Act 74 of 2022 has amended Act 43 of 2017 to focus on the use and restrictions of Consumer Fireworks and to increase insurance coverage for Display Fireworks.
- The governing body of the municipality shall require a permittee of Display Fireworks to carry insurance not less than \$1,000,000 conditioned for the payment of all damages caused to person or property by reason of the use of Display Fireworks arising from an act of the permittee or an agent, an employee or a subcontractor of the permittee.

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TIP #6: Fireworks, cont.

- Consumer Fireworks are any combustible or explosive composition or any substance or combination of substances which is intended to produce visible or audible effects by combustion, is suitable for use by the public, complies with the construction, performance, composition and labeling requirements promulgated by the Consumer Products Safety Commission, the sale or possession and use of which is permitted throughout the Commonwealth.
- It does not include devices such as ground and hand-held sparkling devices, novelties or toy caps. These items are permitted to be sold, possessed and used at all times in the Commonwealth.

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TIP #6: Fireworks, cont.

- A person who is at least 18 years old may purchase, possess and use consumer fireworks but he or she cannot intentionally use Consumer Fireworks in the following situations:
 - On private property or on public property without the express permission of the owner or entity;
 - Within, directed at or from a vehicle or building;
 - Directed at another person;
 - Under the influence of a controlled substance, other drug or alcohol;
 - Within 150 feet of a building or vehicle, whether that building or vehicle is owned by the user of Consumer Fireworks; and
 - Within 150 feet of an animal housing facility or a fenced area designed to confine livestock owned or managed by another person. If the use is 150 to 300 feet from this same facility or area, the user must notify in writing the owner or manage at least 72 hours in advance.

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TIP #6: Fireworks: Restrictions on Use

- A Municipality may enact by Ordinance the following restrictions on the use of Consumer Fireworks:
- Consumer Fireworks may not be used between the hours of 10:00 p.m. and 10:00 a.m. except:
 - On July 2, 3, 4 and December 31, when Consumer Fireworks may be used until 1:00 a.m. the following day; and
 - When July 4 Falls on A Tuesday, Wednesday or Thursday, Consumer Fireworks May be used until 1:00 a.m. on the immediately preceding and following Friday.

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TIP #6: Fireworks: Penalties

- A person using Consumer Fireworks in violation of Act 74 of 2022 has committed a summary offense and upon conviction, in addition to any other penalty authorized by law be punishable by a fine of not more than \$500. A subsequent offense within three years of a prior conviction is also summary offense but the fine increases to not more than \$1,000. In addition to surrendering any unused Consumer Fireworks.
- Persons selling Consumer Fireworks or selling or using Display Fireworks in violation of the Act have committed misdemeanor and felony offenses and law enforcement should reference the Crimes Code and Act 74 for charges and penalties upon conviction. As the offenses are more serious, it is likely that search warrants or consent to search requests will be made to permit the police to seize the remaining Consumer or Display Fireworks. Either way, the storage and destruction costs are on the person charged with the crime or crimes.

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TIP #7: Special Education: Conflict of Laws



TIP #7: Special Education Conflict of Laws

- Special Education services are regulated at both the State and Federal levels with overlapping and corresponding sets of laws, regulations, and guidance promulgated and enforced by federal agencies and their state-level counterparts.
- Sometimes these regulatory schemes contradict each other.
- LEA must ensure compliance with BOTH the federal and state statutes and regulations
- Federal scheme sets the floor; states can raise the bar.

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TIP #7: Special Education Conflict of Laws

- Example:
 - Where IEP or 504 plan provides for administration of both an Epi-Pen and OTC medication as part of the response to an allergic reaction, state and federal agree on which individuals at the LEA can administer the Epi-Pen, but differ on who must be available to administer the OTC medication.
 - Pennsylvania Department of Education takes the position a CSN, RN, or LPN must administer OTC medication; federal DOE has no such requirement
 - Best Practice: comply with PDE guidance

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TIP #8: Medical Marijuana Act



TIP #8: Impact of the PA MMA

- Impact of Pennsylvania's Medical Marijuana Act (MMA)
 - The MMA – effective May 17, 2016 – allows patients suffering from a variety of ailments, including HIV/AIDS, autism, cancer, and post-traumatic stress disorder, to use marijuana to treat their conditions.
 - Smoking marijuana is still illegal under the MMA, and marijuana may only be dispensed using alternative delivery systems such as pills, oils, topical gels, creams, or vapor.
 - Under the law, medical marijuana will be dispensed only to an individual (or a caregiver of an individual) who receives a certification from a medical provider and an identification card issued by the Pennsylvania Department of Health.
 - Note: Medical marijuana remains illegal under federal law.

TIP #8: PA MMA Basics

- The MMA prohibits employers from discharging, threatening, refusing to hire, discriminating or retaliating against employees “solely on the basis of such employee’s status as an individual who is certified to use medical marijuana”
- The MMA does not, however, require employers to accommodate the use of marijuana on the job “when the employee’s conduct falls below the standard of care normally accepted for that position,” and allows employers to discipline employees who are “under the influence” of medical marijuana at work. (This type of language should be included in the Policy)

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TIP #8: PA MMA – What Should or Can You Do?

- You can prohibit employees, whether medical marijuana users or not, from performing certain job duties while under the influence of medical marijuana that are “life threatening” or risky to the “public health and safety of others”
- You can always discipline an employee for subpar performance
- You can prohibit the usage of medical marijuana on the property or premises, regardless of job position or duty
- You should define a uniform multipoint test to determine if someone is “under the influence,” which would include an analysis of side effects common to marijuana usage (e.g. red eyes, slurred speech, slowness, etc.)

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TIP #8: PA MMA – What Shouldn't or Can't You Do?

- You should not inquire into an applicant's or employee's medical marijuana status
- You cannot refuse to hire a candidate based solely on the candidate's medical marijuana status
- You cannot limit a candidate's or employee's job duties based solely on the candidate's or employee's medical marijuana status
 - See “life threatening” and “public health and safety” exceptions
- You cannot take an adverse employment action or discriminate against a medical marijuana using employee not in a position that is deemed to be “life threatening” or a “risk” to the “public health and safety of others” (think desk job) while the employee is under the influence of medical marijuana, unless the employee's conduct “falls below the standard of care normally acceptable for that position”

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TIP #9: Home Education Program: Career and Technical Education



TIP #9: Home Education Program: Career & Technical

- Beginning in the 2023-2024 school year, school districts shall develop a policy consistent with enrollment and/or seat allocation criteria or establish with the career and technical education center to permit home education students to participate in career education programs on the same basis of other school district students.
- Again, home education students must meet eligibility and pre-requisite requirements to participate in the program.
- Home education students can utilize district transportation if it is already operating and there are seats available.

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TIP #9: Home Education Program: Career & Technical

- The school district shall adopt a policy and that policy is permitted to prioritize participation in courses or programs with limited seating for enrollment.
- Home school students shall be included in the average daily membership calculated by the time the home school student spends in the co-curricular academic course or career education program.

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TIP #10: Special Education – Identify and Support Executive Functioning Needs for Students with Disabilities



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TIP #10: Special Education – Executive Functioning

- Executive functioning skills refer to a wide collection of abilities that include: self-regulation, attention, planning, focus, task initiation, problem-solving, organization and time management.
- Though difficult to clearly measure and quantify, these skills are critical to education success because they serve as a foundation for all types of learning.
- The role of executive functioning in learning is extremely important for IEP teams to be aware of because many common medical diagnoses (ADHD, autism) include executive functioning differences.
- School districts are vulnerable when teachers comment that they observe or notice issues with a student's attention or organization or time-management skills, etc., but the IEP is silent on how to address and support those deficiencies. This leads to requests for IEEs, which often uncover executive functioning deficits and opens the door to denial of FAPE claims.

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TIP #10: Special Education – Executive Functioning

- IEP teams should identify executive functioning needs and customize executive functioning supports for students:
 - Ensure IEP teams are knowledgeable on how executive functioning differences might manifest.
 - Be able to identify and quantify the student’s specific needs.
 - Consider what specially designed instruction might be warranted.
 - If SDI is not necessary, identify which type/s of accommodations would provide appropriate supports to the student’s identified executive functioning needs.

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TIP #11: Public Employee Discipline



TIP #11: Due Process – *Loudermill* Rights 101

- *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)
 - *The basics*: The Supreme Court of the United States held that, under the 14th Amendment, public employees can be found to have a protected property interest in their continued employment (in other words, “tenure”). Because the government cannot deprive an individual of these interests without due process of law, an employee facing discipline is entitled to due process protections
- So, who is owed these due process rights?

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TIP #11: *Loudermill* Rights 101

- In *Loudermill*, the U.S. Supreme Court ruled that, in any case in which a public employee has a property interest in their job, they are entitled to a hearing of some kind before they can be terminated, suspended, or otherwise disciplined in a way which deprives them of “substantial benefits” of their employment
- Under *Loudermill*, an employee would be considered to have a property interest in a job if a statute, ordinance, or contract protected that employee from being dismissed or suspended without being given at least an informal for-cause hearing
- Although this may seem complicated, ***you are probably satisfying Loudermill in the normal course of your investigation.*** All that is required under the *Loudermill* framework is an informal hearing which gives the employee (1) notice of the charges against the employee; (2) an explanation of the employer’s evidence, and (3) an opportunity to respond, including the chance to present reasons the discipline should not be imposed, either in person or in writing

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TIP #11: “Just Cause”

- Prior to taking any disciplinary measure, it is important that you establish “just cause” for the action
 - The employee was forewarned of the possible consequences of their conduct (e.g., at employee orientation or in a management directive)
 - The rule is reasonably related to the orderly, efficient and safe operation of the employer’s business and/or the performance expected of the employee
 - There was a thorough investigation into the employee’s conduct

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TIP #11: Discipline

- Consistent Discipline
- Progressive Discipline System
- Steps of Progressive Discipline:
 - Counseling
 - Oral reprimand
 - Written reprimand
 - Suspension
 - Demotion
 - Discharge/Termination

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TIP #12: Requests for School Videos



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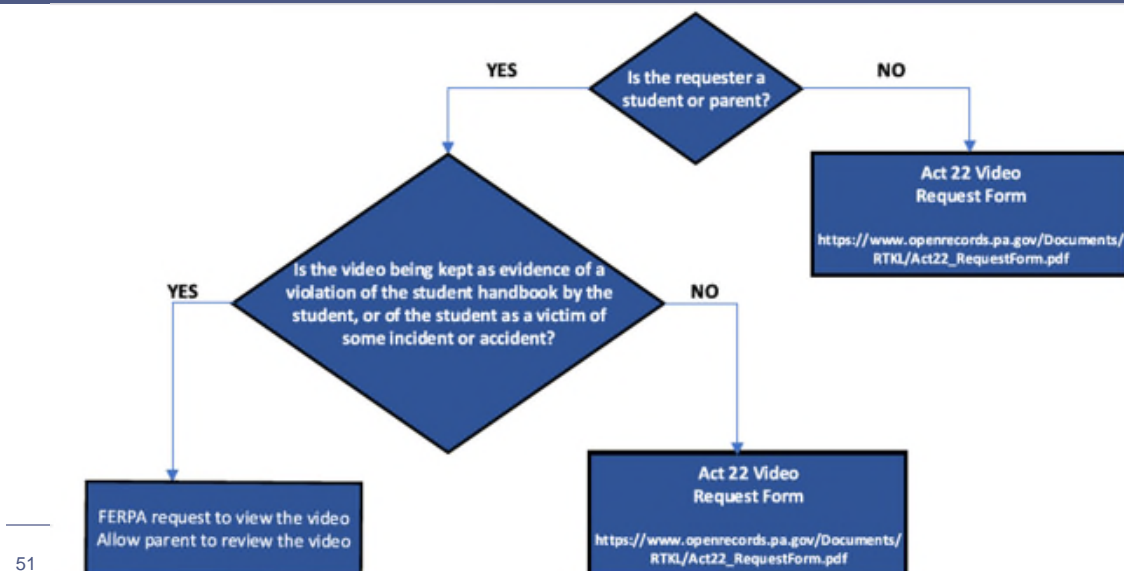
TIP #12: Request for School Videos

- If School District has a School Police Officer who manages the security footage, then can be an Act 22 Video
- But, if video is determined to be an Educational Record per “Letter to Wachter” then parents have right to view video
 - If evidence of disciplinary infraction or victimization
- Pa Supreme Court reaffirmed this, and noted that Districts should have the technology to redact identities of other students

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TIP #12: Request for School Videos, cont.

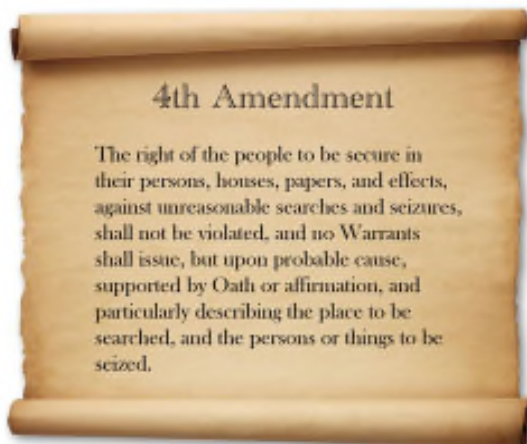


TIP #13: Drug Testing



TIP #13: Constitutional Issues

- 4th Amendment

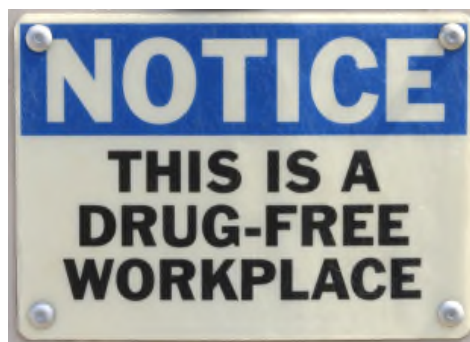


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TIP #13: Employer Policy

- Public employers should have a comprehensive drug and alcohol policy
- Guidance for supervisors
- Consistent enforcement



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TIP #13: Drug Testing

- Pre-employment
 - Generally permitted
 - *Kerns v. Chalfont-New Britain Twp. Joint Sewer Authority*
 - Must be clear, written consent
 - Special need?
 - Blanket pre-employment testing is risky
- Reasonable suspicion
 - Need some objective evidence based on observation
 - Observer should document in writing what he/she witnessed
 - Anonymous Tip?

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TIP #13: Drug Testing

- Post-accident
- Random
 - Most legally scrutinized type of testing
 - Random testing of public employees is only permitted when the employee works in “safety sensitive” positions
 - *Skinner v. Railway*, 489 U.S. 302 (1989)

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TIP #14: Special Education: Statute of Limitations



TIP #14: Special Ed: Statute of Limitations

- The Individuals with Disabilities Act requires a parent or agency to present a due process complaint within two years of the date “the parent knew or should have known about the alleged action that forms the basis of the complaint.” 20 U.S.C. § 1415(b)(6)(B).
- The Third Circuit Court of Appeals recognized in 2015 that “parents have two years from the date they knew or should have known of the violation to request a due process hearing...and [if] liability is proven...a disabled child is entitled to compensatory education for a period equal to the period of deprivation.” *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015).

TIP #14: Special Ed: Statute of Limitations

- Exceptions: The 2 year timeline does not apply to a parent if the parent was prevented from requesting a hearing due to
 - “specific misrepresentations by the [LEA] that is had resolved the problem” (20 U.S.C. § 1415(f)(3)(D)(i))
 - “the [LEA]’s withholding of [statutorily mandated] information from the parent” (*D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d. Cir. 2012), citing 20 U.S.C. § 1415(f)(3)(D)(ii))

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TIP #14: Special Ed: Statute of Limitations

- Best Practices:
 - Ensure you are providing parent with NOREP for every action the LEA takes or declines to take when requested by the parent.
 - Document communications with the parent providing notice of changes.
 - Document reasons for changes of IEP meeting on revised Invitation to Meeting

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TIP #15: Mental Health and the FMLA



TIP #15: Mental Health and the FMLA

- An eligible employee may take FMLA leave for their own serious health condition, or to care for a spouse, child, or parent because of a serious health condition.
- Mental and physical health conditions are considered serious health conditions under the FMLA if they require 1) inpatient care **or** 2) continuing treatment by a health care provider
- A serious mental health condition that requires **inpatient care** includes an overnight stay in a hospital or other medical care facility, such as, for example, a treatment center for addiction or eating disorders

TIP #15: Mental Health and the FMLA

- A serious mental health condition that requires **continuing treatment** by a health care provider includes—
 - Conditions that incapacitate an individual for more than three consecutive days and require ongoing medical treatment, either multiple appointments with a health care provider, including a psychiatrist, clinical psychologist, or clinical social worker, or a single appointment and follow-up care (e.g., prescription medication, outpatient rehabilitation counseling, or behavioral therapy); and
 - Chronic conditions (e.g., anxiety, depression, or dissociative disorders) that cause occasional periods when an individual is incapacitated and require treatment by a health care provider at least twice a year
- An employer may require an employee to submit a certification from a health care provider to support the employee's need for FMLA leave. The information provided on the certification must be sufficient to support the need for leave, but a diagnosis is not required

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TIP #15: Reasons for Leave

- Leave for employee's own health condition;
- Leave to care for a family member with a serious health condition;
- Leave to care for a military member with a serious health condition.

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TIP #16: Fentanyl



TIP #16: Fentanyl

- Fentanyl and Carfentanil use by those with substance use disorder is on the rise and unfortunately, it is being found in schools and places of employment. It is not just students or employees who may bring in the substances or substance, but visitors to the facilities.
- Carfentanil is a synthetic opioid and is 100 times more powerful than Fentanyl.
- Both resemble powdered cocaine or heroin but both can be mixed with other substances, such as marijuana.
- It is wise to think ahead about what to do if and when a baggie of the above described substance is found in a hallway, classroom or office. It may even be found on a student.

TIP #16: Fentanyl, cont.

- Do not touch the baggie, call the police, that may even be your own school district police.
- When the police arrive explain what was found and the reason the police agency was called.
- Until the police arrive, keep people clear of the area.
- If one feels they must remove the item from the area, only touch after one's hands are gloved and best practice would dictate a mask.
- Immediately after interacting with the item, wash one's hands.
- It may also be wise to have Naloxone in the facility in case of accidental exposure or an unexpected overdose. Naloxone can be purchased over the counter at drug stores such as Rite Aid and CVS.

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TIP #16: Fentanyl, cont.

- Schools that have its own police officer or police department may wish to explore a Memorandum of Understanding with a larger, local police agency for the suspected Fentanyl or Carfentanil to be stored or logged into evidence with that agency.
- School Police do not usually to have the facilities to store such evidence and its continued presence in a school building continues to endanger students and staff.

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TIP #17: New Developments in the Bond Market



TIP #17: New Developments in the Bond Market

- The Infrastructure Investment and Jobs Act expanded the use of private activity bonds.
- These tax-exempt bonds are useful in attracting private funds for projects that have some public benefit and conserve a vital role in financing infrastructure.
- Under the new law, private activity bonds can now be used for qualified broadband projects and carbon dioxide capture facilities.
- Private activity bonds are tax-free municipal bonds used to attract private funds for projects that have some public benefit. They were established in 1968 and initially covered 12 eligible activities. Since then the number of eligible activities has more than doubled.

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TIP #17: New Developments in the Bond Market

- Part of the new infrastructure bill included the Carbon Capture Improvement Act. The goal of the law was to make it cheaper through the use of private activity bonds for power plants and industrial facilities to acquire equipment that reduces harmful carbon emissions. The Bill also enables private activity bonds to be used to deploy broadband in areas where availability and quality is limited.
- Unfortunately, Congress did not reinstate advance refunding of bonds which would enable state and local governments to refinance their debt and lower their borrowing cost. However, current refundings are still available for present outstanding bonds.
- A current refunding is a refunding of outstanding bonds which must be closed within 90 days of its optional redemption date.

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TIP #18: Freedom of Speech



TIP #18: Freedom of Speech

- The First Amendment provides that:
 - “Congress shall make no law...abridging the freedom of speech.”
- The speech of public employees is analyzed under the *Pickering* balancing test.
 - “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

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TIP #18: Freedom of Speech, Cont.

- Subsequent court decisions have clarified the *Pickering* test:
 - “[A] public employee's speech is protected by the First Amendment when (1) in making it, the employee spoke as a citizen; (2) the statement involved a matter of public concern; and (3) the government employer did not have ‘an adequate justification for treating the employee differently from any other member of the general public’ as a result of the statement he made”

Falco v. Zimmer, 767 F. App'x 288, 300 (3d Cir. 2019); *see also*,
Garcetti v. Ceballos, 547 U.S. 410, 422 (2006)

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TIP #18: Freedom of Speech, Cont.

- Speaking as a citizen
 - What is the forum?
 - Where is the speech taking place?
 - Is the employee being instructed to speak through his or her employment?
- Matter of public concern
 - A “matter of public concern” means speech that is “fairly considered as relating to any matter of political, social, or other concern to the community”
- Adequate justification
 - “Impeding the [employee’s] performance of his daily duties” or “interfered with the regular operations of the [employer] generally”
 - Connect speech to discipline

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TIP #18: Freedom of Speech, Cont.

- *Kennedy v. Bremerton School District* (2022)
 - Employer announced that it would not renew employee’s coaching contract after he knelt in prayer at midfield after a game
 - Supreme Court held that Kennedy’s speech was protected
 - He was neither attempting to convey a government-created message nor requiring others to join him
 - He was not engaged in speech “ordinarily within the scope” of his duties as a coach
 - He did not speak pursuant to government policy and was not seeking to convey a government-created message
 - He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach
 - “Mr. Kennedy’s prayers did not “ow[e their] existence” to Mr. Kennedy’s responsibilities as a public employee.”
 - Prayer (religion) considered a matter of public concern

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TIP #19: Internal Predecisional Deliberation



TIP #19: Internal Predecisional Deliberation

- The Internal Predecisional Deliberation Exception to the RTKL

The internal, predecisional deliberations of an agency, *its members, employees or officials, or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency....*

Section 708(b)(10)

- Chester Water Authority v. DCED, 249 A.3d 1106 (Pa 2021)

- Request of DCED for info, DCED denied on basis that documents contained “internal staff and contractor recommendations, comments to documents, draft proposals and discussions that played a role in the Department’s Act 47 decision making process.”

TIP #19: Internal Predecisional Deliberation, cont.

- Requester appealed, claiming that the *Internal* Predecisional Deliberation exemption did not apply to advice or recommendations provided by third party contractors.
- Supreme Court found that “the statutory provision facially does not apply to communications with outside consultants.”
- Result is clear – records, memos, etc., prepared by consultants for the purpose of assisting your agency in making decisions are subject to disclosure
- Impact is muddy – will this chill the candid advice provided by consultants

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TIP #20: Special Education: Best Practices in File Management



TIP #20: Best Practices for File Management

- Document reason(s) for any daily exceptions to requirements of IEP or 504 plan i.e. student would not participate in SDI despite LEA's efforts, parent refused to allow student to receive SDI, etc.
- Take steps during administration of services to prepare effectively to rebut any challenges.
- Maintain copies of all written communication with parents or other student-advocate and maintain detailed call log of verbal communications.
- Organize student record materials for ease of review upon challenge.

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TIP #21: ADA / FMLA Abuse



Medical Clinic
Dr. John Smith, M.D.

Name: _____ DOB: _____
Address: _____ Date: _____

- Medical reason for missing work
- Any absence time required
- Refer to your company's doctor's note policy

X [Doctor Signature]

Fake Doctor's Note



TIP #21: Types of Abuse

- Friday-Monday FMLA Leave Absences
- Engaging in social activities while on leave
- Working at another job while on leave
- Attending to personal errands while on leave

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TIP #21: FMLA – Collect the Right Information

- The employer may require the employee to submit a certification from a health care provider to support the employee's need for FMLA leave to care for a covered family member with a serious health condition or for the employee's own serious health condition.
- If the employer requests medical certification, the employee is responsible for providing a *complete and sufficient certification*, generally within 15 calendar days after the employer's request.

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TIP #21: FMLA – Collect the Right Information

- Once the employer has received a complete and sufficient certification of serious health condition, the employer **may not** request *additional* information from the health care provider beyond:
 - **Authentication** (Is this your signature? Did you complete / review this form?)
 - **Clarification** (The printing is hard to read. Is that a 6 or an 8?)

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TIP #21: FMLA – Other Options

- Second Opinion
 - Employer pays;
 - In the case of a disagreement, third opinion is final.
- Recertification
 - Remember the general rule - The employer may request recertification no more often than every 30 days or the minimum stated duration of the serious health condition, whichever is greater, and only in connection with an absence by the employee.
 - However, in all cases, including cases where the condition is of an indefinite duration, the employer may request a recertification for absences every six months.

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TIP #21: ADA – The Interactive Process

- Once an employer is on notice that an employee may need a reasonable accommodation, the employer has an obligation to engage in the interactive process to determine whether a reasonable accommodation is available.
- Ask for the information you need, i.e. job-related and consistent with a business necessity.
- Communication should focus on trying to understand enough about the employee's health challenges to fashion an accommodation. This can include asking the doctor to describe how the disability limits employee's ability to do the job and what other effective accommodations may be available.
- You have more options under the ADA. Remember, the employer's duty is to provide an effective accommodation, when possible. The employer is not obligated to provide the employee's preferred accommodation when other effective accommodations exist.

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TIP #22: Social Media Policies



TIP #22: Social Media Usage

- Social media has quite simply changed the world and employers are now grappling with how to respond to this change, especially as it relates to use of social media by their employees during particularly divisive times.
- While private companies have largely unfettered rights to discipline or fire employees for what they post on social media, public employers are much more constrained in their ability to police their employees' personal social media usage.
- Remember: public employees are protected from retaliation by their employers for exercising their rights to free speech under the First Amendment if they satisfy the test.

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TIP #22: Case Interpretation

- *Fenico v. City of Philadelphia*, 582 F. Supp. 3d 229 (E.D. Pa. 2022)
 - City's interests in maintaining and preserving public's trust and promoting diverse workforce, efficient prosecution, and maintaining orderly internal operations and avoiding potential disruptiveness outweighed police department employees' interest in making offensive, racist, and violent posts on their personal social media accounts.
 - City's disciplinary actions against employees based on content they posted did not violate their First Amendment free speech rights, even though they spoke in their capacity as private citizens, and some of their posts involved matters of public concern.
 - Posts perpetuated public's concerns that department could not serve in unbiased or professional manner, and many officers were placed on list foreclosing them from testifying in criminal proceedings.

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TIP #22: Case Interpretation

- *Grutzmacher v. Howard Cnty.*, 851 F.3d 332 (4th Cir. 2017)
 - A fire department employee posted an offensive joke on his personal Facebook page while on duty.
 - A volunteer replied with a racially charged comment, which the plaintiff liked and responded positively to.
 - The court found that the department provided sufficient evidence of actual or potential disruption in the workplace outweighing plaintiff's First Amendment interests because the comments could interfere with the public's trust in the department and several coworkers had informed plaintiff's supervisor that they were no longer comfortable working with him because of it.

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TIP #22: Guidelines for a Good Policy

- Instruct employees that they are not speaking for the employer when posting on their personal accounts.
- Keep in mind First Amendment protections.
- Use specificity – A vague, overly broad policy opens the door to liability, and will be difficult for employees to comply with.
- Inform and enforce – Keep your workforce apprised of policies, and then enforce them when violated.

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TIP #23: Title IX Update



TIP #23: Title IX Update

- The United States Department of Education is in the process of drafting revisions to the Title IX regulations.
- The USDOE released for public comment proposed changes to the Title IX regulations on June 23, 2022.
- A recent presentation by the Pennsylvania Bar Association estimated the new regulations would not go into effect until the 2023-2024 SY.
- **Some of the proposed changes include:**

TIP #23: Title IX Update, cont.

- Incorporating the Supreme Court's Bostock Title VII holding that it is "impossible to discriminate against a person" on the basis of sexual orientation or gender identity without "discriminating against that individual based on sex" into Title IX.
- Addressing the creation of a sexually hostile environment in the school setting even if the misconduct occurs outside of school. The concept or meaning of "education, program or activity" may be expanded.
- Addressing how to handle respondents (i.e., the accused) who are eligible under the Individuals with Disabilities Education Act.

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TIP #23: Title IX Update, cont.

- Additional required training for all staff, not just Title IX officials.
- Clarifying and streamlining administrative requirements with respect to designating a Title IX Coordinator, disseminating a nondiscrimination notice, adopting grievance procedures, and recordkeeping.
- Engaging in a separate rulemaking to address Title IX's application to athletics.

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TIP #24:
Save the Date!
Wed., March 29, 2023
Municipal Law
Symposium
Erie, PA



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