

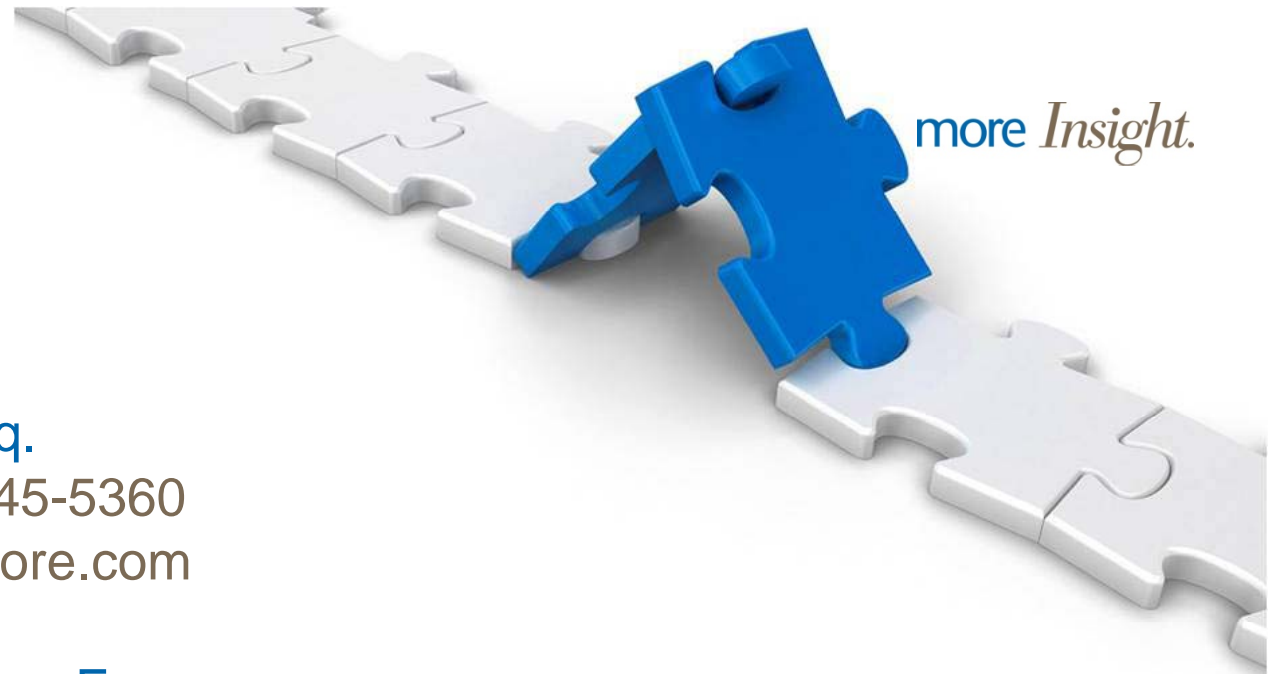


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## WVSPA Fall Conference “Legal Issues in HR”

October 24, 2012

Dinsm<sup>o</sup>re



## Presenters

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Jason Long is a Partner in the firm's Lewisburg office and is the Chair of the West Virginia Education Law Practice Group. Jason's practice concentrates on education related issues and develops from his pre-lawyer days as an educator as well as growing up as the son of a county school superintendent. Jason focuses on representation of numerous county boards of education in the firm's Educational Law Practice Group, providing a wide range of services, including, but not limited to, guidance on personnel matters (both service and professional personnel), student and employee discipline matters, and due process hearings. He often provides in-service training to school personnel on issues such as student rights, student discipline, employee discipline, employee evaluations, and updates on the ever changing educational laws.

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Denise Spatafore is a native of southern West Virginia, Denise is uniquely experienced in the education law area. For many years, she served as an administrative law judge for the Public Employees Grievance Board, authoring hundreds of administrative decisions that are still recognized precedent in the field of West Virginia school personnel law. Most recently before joining the firm, Denise was the personnel director for Harrison County Schools in Clarksburg, West Virginia, providing both legal services and human resources management for a large school system. Because of her background in the very specialized field of West Virginia school law and her experience as a central office administrator, Denise has a unique understanding of the issues facing our board of education clients. She is an of counsel member of the Labor and Employment Department, focusing on education law practice.

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## Education Law

Attorneys in Dinsmore & Shohl's Education Law Practice Group possess significant experience representing public and private school districts and professional associations throughout the region. Our law firm has the depth and resources you are looking for in addressing the ever growing complicated legal issues facing educational institutions. Our services are far reaching and unsurpassed and include personnel, ADA, FMLA, immigration, student rights, special education, Title VII, Title IX, HIPAA, bond finance, tax, litigation, real estate, environmental, media and public relations and the like. We offer proactive training and consultation to assist our clients in minimizing and avoiding expensive litigation to the fullest extent possible. Our Education Law Practice Group includes current Board members, who have a unique 1<sup>st</sup> hand insight into the issues, and practical solutions to the problems confronted by our education law clients. We treasure our clients and treat their matters personally.

## Client Relationships

We highly value the relationships we have with our clients and work to instill in them a sense that they can depend on us for quality legal advice and representation with a results-oriented focus. The success of this relationship comes from teamwork and a risk management focus.

## Education Law Issues

The firm advises and represents school districts concerning all matters impacting the educational law arena. We take great pride in our responsiveness and resourcefulness to address our clients' needs.

## Training

The firm provides counseling and workshops for training in a wide range of topics. These workshops include administrative workshops, coaching workshops, teacher workshops, counseling workshops, special education workshops, on topics such as employee code of conduct, reporting suspected child abuse, ethical issues for counselors, overview of employee suspension, board-employee relations, drug-free workplace; anti-harassment, confidentiality of student information, student related policies, the evaluation process, avoiding liability in education issues, complying with the Americans With Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) and handling EEO/sexual harassment issues. Our attorneys are frequent speakers on all aspects of Education Law and write numerous articles on practical education law tips for many news publications.

# TODAY'S TOPICS

- ▶ Leave Issues and FMLA Refresher
- ▶ Accommodations for Disabled Employees
- ▶ Social Media, Acceptable Use and Free Speech

# LEAVE ISSUES & FMLA



# Family & Medical Leave Act Basics

- ▶ Intended to provide eligible employees with up to 12 weeks of unpaid leave in any 12 month period
- ▶ For their own or a family member's Serious Health Condition
- ▶ Eligible Employee
  - ▶ Worked for the employer for at least a year
    - ▶ Need not have been continuous (looks to last 7 years)
  - ▶ Worked at least 1250 hours in the past 12 months

# Family & Medical Leave Act

## Types of leave covered:

- ▶ The birth of a child, and the care of a newborn child;
- ▶ The placement with the employee of a child for adoption or foster care;
- ▶ To care for the employee's spouse, son, daughter, or parent with a "*serious health condition*";
- ▶ The employee's own *serious health condition*;
- ▶ *Military Caregiver Leave*; or
- ▶ *Qualifying Exigency Leave*.



# FMLA “Serious Health Condition”

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- In-patient care (an overnight stay) at a hospital or other medical facility for any period of incapacity; or
- Continuing treatment by a health care provider, which includes:
  - (a) A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that involves:
    - (i) Treatment two or more times by a health care provider; or
    - (ii) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment;

## “Serious Health Condition” cont’d

- b) Any period of incapacity due to pregnancy or prenatal care;
- (c) Any period of incapacity due to a chronic serious health condition;
- (d) Any period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective; or
- (e) Any period of absence due to treatments after surgery or for a condition that, without the treatments, would likely result in a period of incapacity of more than three consecutive calendar days

# Family & Medical Leave Act – cont'd

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Important (but confusing) basics:

- Employee must give 30 days notice (if possible)
- Employees must follow employer's usual and customary call-in procedures for calling in absences and requesting leave. Where employee does not comply with employer's usual procedure, and no unusual circumstances justify the failure to do so, the employer may delay or deny FMLA leave.
- Just calling in sick is NOT notice of FMLA!
- Eligibility notice must be provided within five business days after the employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason. If denied, give a reason.



# FMLA Helpful Tips

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## Tip # 1 – If in doubt, require a medical certification of the employee's condition

### Initial Medical Certification

- ▶ Employer can require that an employee requesting FMLA leave have her physician certify that such leave is necessary
- ▶ The Dept. of Labor provides a standard form for just this purpose  
[MedicalCertification.pdf](#)
- ▶ This is the employer's best opportunity to gather relevant information and stay on top of the situation
- ▶ Courts have upheld denial of leave for inconsistent, incomplete, and/or suspicious medical certifications

# FMLA Helpful Tips

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## Tip # 2 – You can request 2<sup>nd</sup> (and 3<sup>rd</sup>) opinions

- ▶ After an initial medical certification
- ▶ If the employer has reason to doubt the certification
- ▶ The employer can pay to send the employee to a doctor of the employer's choice for a re-evaluation
- ▶ Can't be a "company doctor"
- ▶ If the 2<sup>nd</sup> opinion differs from the initial certification, the employee can request a 3<sup>rd</sup> opinion
- ▶ That doctor is chosen by mutual agreement, and his opinion is final
- ▶ During this process the employee should be treated as conditionally approved for leave

## Tip # 3 – Substitute Paid Leave

- ▶ An employee may request to substitute accrued paid leave (such as vacation, sick time or PTO) for the unpaid leave provided by the FMLA
- ▶ An employee's 12-week FMLA allotment is still decreased by leave taken
- ▶ The employer should follow its routine policies with respect to granting the requested paid leave
- ▶ Likewise, an employer may require that employees taking FMLA leave concurrently use their accrued paid time off, as well

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"I've called this meeting to discuss absenteeism."



## Personal Leave

- ▶ **18A-4-10: All school employees receive 1½ days of personal leave for each month in their employment term (this is granted at the beginning of the school year).**
- ▶ **Personal leave may ONLY be used for “accident, sickness, death in the immediate family, or life threatening illness of the employee's spouse, parents or child, or other cause authorized or approved by the board.”**

# Americans with Disabilities Act (“ADA”)<sup>more *Insight.*</sup>

- ▶ Employers may not discriminate against an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.
- ▶ Requires an employer to reasonably accommodate an employee’s disability, as long as it is not an undue hardship.
- ▶ Similar to a 504, but for an adult, not a disabled student

# Americans with Disabilities Act

## What is a “disability”?

- ▶ A “physical or mental impairment” that “substantially limits” one or more of the “major life activities” of such individual;
- ▶ A record of such impairment; or
- ▶ Being “regarded as” having such an impairment

Should consider the following factors in determining whether an individual is “substantially limited” in a major life activity:

- ▶ The nature and severity of the impairment;
- ▶ The duration or expected duration of the impairment; and
- ▶ The permanent or long term impact, or expected permanent or long term impact of or resulting from the impairment

# Americans with Disabilities Act

## So, what is a “reasonable accommodation”?

- ▶ Making existing facilities used by employees readily accessible and usable by individuals with a disability
- ▶ Job restructuring
- ▶ Reassignment to a vacant position
- ▶ Part-time or modified work schedule
- ▶ Acquisition or modification of equipment or devices
- ▶ \*\*\*Unpaid leave may be a reasonable accommodation, even if it exceeds 12 weeks

# Acceptable Use of Technology & Social Media Issues

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# New State Policy 2460

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## ▶ Section 5 – Accountability & Responsibility

- Acknowledges that social media can enhance all educational relationships (teacher/student, parent/teacher, etc.)
- Establishes guidelines for not “crossing the line” between personal and educational/professional relationships
- Employees must maintain professional relationships with students, both in and out of school – prohibitions when using the Internet or technology include inappropriate language, inappropriate relationships, harassment, inappropriate pictures, and pornography

ALSO:

Student photographs should **ONLY** be published on approved school or class pages and with proper parent notification/permission

## Social Media Issues

- ▶ Off-site activities on the Internet, on home computers, or on personal electronic devices **MAY** still give cause for discipline. Rational nexus must be established.



# Rational Nexus

- ▶ “In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a “rational nexus” between the conduct performed outside the job and the duties the employee is to perform.” *Reed v. Summers County Bd. of Educ.*, Docket No. 06-45-002 (Jan. 26, 2006).
- ▶ In *Rogliano v. Fayette County Board of Education*, 176 W. Va. 700, 347 S.E.2d 220 (1986), the Supreme Court of Appeals of West Virginia stated that a “rational nexus” exists in at least two circumstances: (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position.”



## Rational Nexus & Social Media

- ▶ Employee worked as head cook. She also held an extracurricular position as head cheerleading coach. BOE terminated employee from both of her positions . BOE asserted that the employee participated in an unauthorized overnight, out of county trip with the cheerleaders. While on this unauthorized trip, employee permitted the cheerleaders to behave in an inappropriate manner by allowing them to get into the hot tub topless. Employee posted on MySpace a photo of the cheerleaders, albeit fully clothed, but referring to them as “hoes.” BOE asserts that this behavior violated the sexual harassment policy. Employee argues the trip was not a school function, but instead, a Christmas party organized by a cheerleader mother.
- ▶ BOE failed to prove a rational nexus between Employee’s behavior as the cheerleading coach and her position as cook.  
*Kimble v. Kanawha Cty BOE*, Docket No. 2009-1640-KanED (Nov. 30, 2009).



# Social Media & the Sage of Christine Robino

Remember this?

- On June 22, 2010, a NYC public school student drowned during a school field trip.
- On June 23, 2010, Christine Robino, a tenured NYC public school teacher posted on her Facebook page as follows:

"After today, I am thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS! They are the devils (sic) spawn!"

In response to a friend's post about "letting a student float away," she responded that she "would not throw a life jacket in for a million!"



# The Saga of Christine Robino – cont'd

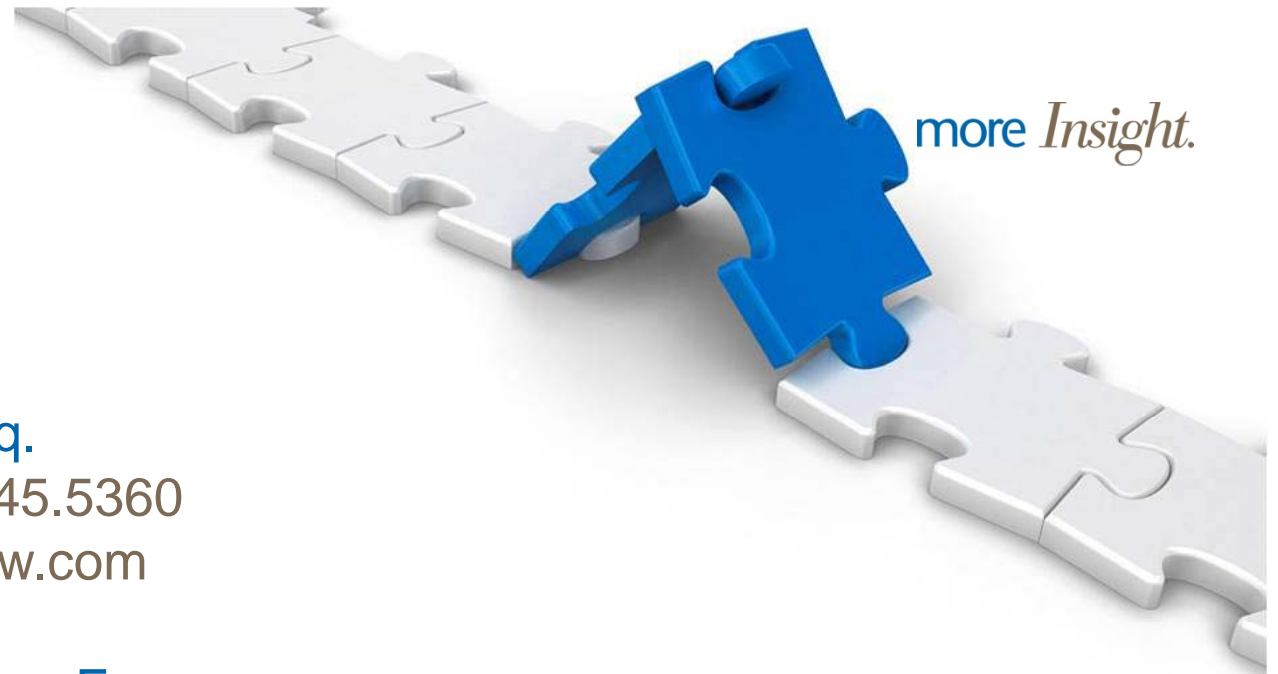
- ▶ Initially, a hearing officer for the Department of Education upheld the recommendation for termination of Christine's employment.
- ▶ In February of 2012, a New York City judge overturned the hearing officer's decision, reinstated the teacher, and remanded the case to the DOE for imposition of a lesser penalty.
- ▶ July 2012 – The DOE imposes a 2-year unpaid suspension, based on the employee's "coverup" of her actions by initially letting a friend take responsibility for posting in her name. The penalty was NOT related to the postings themselves or the nature of her comments.

# Employee Rights & The First Amendment

- ▶ In social media disciplinary cases, many employees are alleging their statements are protected “free speech” or “freedom of association.”
- ▶ There ARE limitations on employee speech, including statements made over the Internet. Remember Norman Alderman?

## Alderman v. Pocahontas

- ▶ “The State, as an employer, . . . has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employees' right to free speech, which is not absolute.”
- ▶ There is a three-pronged test to determine if speech is protected. If not a matter of “public concern,” there is simply no constitutional issue. But, even if the issue is of public concern, the employee’s rights must be balanced with the interests of the school system. Speech which undermines the Board’s authority and interferes with the orderly operations of its affairs need not be tolerated.



## Questions?

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