encourage our clients to confirm that the filing is completed before school recesses for winter break.

Many schools retain an agent, such as a financial advisor, to perform the annual disclosure filing. In such cases, school officials should coordinate with that agent well before the deadline to guarantee timely filing.

Over the past few years, the Securities and Exchange Commission has increased its enforcement efforts for continuing disclosure violations. To avoid unnecessary SEC attention, school officials should ensure that the continuing disclosure documents are filed with EMMA before the annual deadline.

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Thrun's Evaluation Tracker: Don't Forget About Administrator and Ancillary Staff Evaluations

To date, the Evaluation Tracker articles have focused on teacher evaluations. This article focuses on the statutory requirements for administrator evaluations and ancillary staff evaluations.

Administrator Evaluations - Section 1249b

Most of the administrator evaluation requirements are found in Section 1249b of the Revised School Code, but Section 1249 also applies. Under Section 1249b, schools must adopt a performance evaluation system for building level administrators and those central office school administrators who are regularly involved in instructional matters. There are many components to the administrator performance evaluation system. Simply using the state approved evaluation tool is likely not sufficient to comply with the law.

Annual evaluations are required for all school administrators. As with teachers, the law provides that if an administrator is rated "highly effective" on three consecutive annual evaluations, the district may choose to conduct a biennial evaluation. Thereafter, if the administrator is not rated highly effective on a biennial evaluation, the administrator must again receive annual evaluations.

Several components must be considered in an administrator evaluation. The first component is student growth and assessment data. For 2017-18, student growth and assessment data comprises 25% of the annual evaluation. The weight will increase to 40% for 2018-19. To calculate the data, the evaluator must analyze the aggregate student growth and assessment data used in annual year-end teacher evaluations in each school in which the school administrator works and the entire school district for a central office level school administrator.

The second component specifies that the portion of the evaluation that is not based on student growth must be based "primarily" on performance as measured by the evaluation tool. The approved administrator evaluation tools are the: (1) MASA School ADvance Administrator Evaluation Instrument, and (2) Reeve Leadership Performance Rubric.

The third component considers a number of factors: (1) the administrator's (or designee's) proficiency in evaluating teachers using the district's evaluation tool; (2) the school's or district's progress in meeting the school improvement plan goals; (3) student attendance in the district; and (4) student, parent, and teacher feedback, and other pertinent information. The administrator evaluation tool should be audited to determine if it addresses those four factors.

For administrators rated "minimally effective" or "ineffective," the evaluator must develop and implement an improvement plan designed to correct the administrator's deficiencies. The improvement plan must recommend professional development opportunities and other actions designed to improve the administrator's rating. If an administrator is rated as "ineffective" on three consecutive annual evaluations, the school must dismiss the administrator. The school may act sooner to dismiss the administrator.

Section 1249

While much of Section 1249 focuses on teacher evaluations, it also addresses administrator evaluations. The performance evaluation system for administrators must provide timely and constructive feedback for the administrator and evaluate the administrator's job performance using student growth and assessment data. This data must be measured using multiple measures such as student learning objectives, achievement of IEP goals, nationally normed or locally developed assessments aligned to state standards, research-based growth measures, or alternative assessments that are rigorous and comparable across schools within the district.

Evaluations must be used to make decisions regarding an administrator's effectiveness. Evaluations also should support the administrator's development by providing relevant coaching, instructional support, or professional development to ensure that an administrator receives ample opportunities for improvement.

Superintendents should periodically review their district's performance evaluation system to confirm that the system includes all of the requirements provided in both Sections 1249b and 1249. Failing to comply with the statutory requirements may undermine evaluations and future employment decisions.

Ancillary Staff

Ancillary staff include school social workers, psychologists, occupational therapists, and physical therapists. Because those positions do not meet the statutory definition of a "teacher," Section 1249 does not govern that employee's year-end evaluation.

For such employees, the collective bargaining agreement and board policy may still govern the evaluation. When evaluating ancillary staff, the evaluator should always know if the employee is eligible for tenure under the Tenure Act. Speech pathologists and school counselors who maintain a teaching certificate may acquire tenure in certain circumstances.

If you have questions regarding whether an employee can acquire, or has acquired, tenure and the impact that tenure may have on the employee's evaluation, please contact Thrun Law Firm.

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Employee's FMLA Leave Does Not Prevent Termination

The Sixth Circuit Court of Appeals, whose jurisdiction includes Michigan, recently ruled that a city's legitimate decision to terminate its city manager while on medical leave, did not violate the Family and Medical Leave Act (FMLA). *Mullendore v City of Belding*, Case No. 16-2198 (August 23, 2017).

The FMLA prohibits an employer from retaliating against an employee who takes medical leave and from taking any action that interferes with an employee's right to use FMLA leave. The FMLA's prohibitions against retaliation and interference, however, do not completely insulate employees from legitimate and nondiscriminatory adverse employment actions.

Mullendore's tenure as city manager included several instances of conflict with the public and city leaders. Mullendore informed the city council that she would be taking medical leave later in the month for surgery. Two weeks after Mullendore left for surgery, the city council met and voted to terminate Mullendore's employment contract.

Mullendore's at-will employment contract allowed the city to terminate her employment at any time and for any reason with a vote of the city council.

Mullendore sued the city, claiming that: (1) the city council retaliated against her for using her FMLA leave, and (2) the discharge interfered with her FMLA rights. Under this theory, if an employer takes an adverse employment action based (in whole or in part) on the fact that an employee took FMLA leave, the employer would be found to have interfered with the employee's FMLA rights. An adverse employment action against an employee who is on leave or who has exercised his or her FMLA rights, however, does not violate the FMLA if the employer is motivated by a legitimate reason unrelated to the employee's FMLA rights.

The Sixth Circuit held that Mullendore did not produce any evidence that the city terminated her employment because she took FMLA leave. Rather, the court concluded that the city council terminated Mullendore because of political and personal controversies that occurred during her time as city manager. The court found that the city council demonstrated a legitimate reason for terminating Mullendore's employment that was unrelated to her FMLA rights.

This decision is consistent with other Sixth Circuit cases that have held that an employer may investigate and ultimately discipline an employee for misconduct while the employee is on FMLA leave. Being on FMLA leave does not insulate an employee from a legitimate employment action that would be taken otherwise. With that said, school officials should exercise caution before taking an employment action against an employee on FMLA leave. The reasons for any employment action must be legitimate and accurately documented so that the employer's motivation is lawful.

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City Ordered to Pay $72K for Denying FOIA Request

The Michigan Court of Appeals recently ruled that the City of Grand Rapids wrongfully withheld records requested under the Freedom of Information Act and ordered the city to produce the records. The court also ordered the city to pay MLive's reasonable attorneys' fees, which were reported to be $72,216. *MLive Media Group v City of Grand Rapids*, COA Docket No. 338332 (September 12, 2017).

MLive sent a FOIA request to the city for recordings of phone calls made between police officers on a police line designated as "non-recorded." Unknown to the police officers, the phone calls were accidentally recorded. The city denied the FOIA request on the basis that the recordings were "described as exempt under statute." The city relied on Michigan's eavesdropping laws and the federal Wiretapping Act; both laws prohibit the intentional or willful interception of oral communications.

MLive sued the city and sought an order to compel disclosure of the requested records. The Michigan Court of Appeals ruled that the city could not invoke the exemption. Because the recordings were not intentionally intercepted, the eavesdropping laws and Wiretapping Act were inapplicable. The court ordered the city to pay MLive's attorneys' fees, which is an award statutorily *required* by FOIA for a requester who prevails in court.