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Edited by Evelyn A. Peyton, Esq.

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**CELL PHONE /TEXTING POLICY UPDATES FOR SCHOOL BUS DRIVERS
by Ramon Vigil, Jr.**

Recently, school officials received a memorandum from New Mexico's School Transportation Bureau Chief with a request that school districts review and update their cell phone/texting policies for school bus drivers to conform with the 2010 Federal Motor Carriers Safety Administration (FMCSA) policy changes and recommendations from the American School Bus Council (ASBC). The new FMCSA policy limits the use of wireless communication devices by commercial motor vehicle

(õCMVö) drivers while operating commercial motor vehicles. Wireless communication devices are defined in the new policy as cell phones; hands-free communication devices; and sending, receiving, or reading text messages. The ASBC recommendations (1) prohibit the use of cell phones or other portable electronic devices ó even those equipped with hands-free devices ówhile driving, and (2) ban the use of cellular phones while supervising the loading and unloading of students. The School Transportation Bureau Chief requests that school districts implement these policy changes as soon as possible, but no later than February 1, 2011.

The following is a recommended policy from our firm that complies with the requested changes:

*CELL PHONE / ELECTRONIC WIRELESS COMMUNICATION DEVICES
IN SCHOOL-OWNED VEHICLES*

The use of electronic wireless communication devices while operating a school-owned vehicle, including school buses, is strictly prohibited, except in case of an emergency. For purposes of this policy, ñelectronic wireless communication devicesö are defined as cell phones or any communication devices (including hands-free devices) used in sending, receiving, or reading text messages, photos, or other electronic files. The use of cell phones and other electronic communications devices, even those equipped with for hands-free use, is strictly prohibited while driving. Additionally, bus drivers are prohibited from using cell phones or other electronic wireless communication devices while supervising the loading and unloading of students. Authorized drivers of school-owned vehicles, including bus drivers, must be in a stopped, secure vehicle and out of the roadway when using any electronic wireless communication device, such as a cell phone. Violations of this provision may result in employee discipline, up to and including termination or discharge.

We suggest that you consult your school district's legal counsel regarding updating your cell phone and texting policy to comply with the changes requested by the School Transportation Bureau Chief.

TAX TREATMENT OF PER DIEM PAYMENTS TO SCHOOL BOARD MEMBERS **by Matthew Campbell**

Often our firm receives questions about whether per diem payments made to members of a public school board in New Mexico are "wages or other compensation" that must be reported on Form W-2, and whether these payments are subject to withholding of employment taxes, such as FICA/FUTA and Medicare. The short answer to the question is yes. Although there are a couple of options that board members can consider to avoid the withholding of employment taxes, neither option appears to be practical or viable for school boards.

In order to determine tax treatment of school board members, you must first determine their employment status. The employment status of school board members for taxation purposes is specifically addressed in the public officials section of IRS Publication 963.

Elected and appointed officials are defined as "employees" for income tax withholding purposes. IRS Code §3401(c). Federal income tax withholding applies to wages paid on account of employment. IRS Code §3401(c) provides that, for withholding purposes, the term "employee" includes an officer, employee, or elected official of a state or political subdivision or instrumentality thereof. Income tax withholding applies under this provision regardless of whether the officials are common-law employees, because officers, employees, and officials of a state are defined as employees specifically for this purpose.

Per diem payments are compensation for purposes of reporting the payments to the IRS on Form W-2, with all of the withholding requirements applicable. IRS Regulation 1.62-2(c)(5) states that reimbursements paid under a "non-accountable plan" are included in the employee's gross income and must be reported as wages or other compensation on Form W-2.

The tax treatment of reimbursements, advances, or allowances of employee business expenses hinges upon whether the payments are received under an accountable or non-accountable plan. Employee business expenses that are reimbursed under an accountable plan are excluded from an employee's income, are not required to be reported on the employee's

Form W-2, and are exempt from income tax withholding and FICA/FUTA taxes. *See* Reg. §1.62-2(c)(4) and Reg. §31.3401(a)-4(a).

A reimbursement, advance, or allowance is considered made under an accountable plan if it meets the following conditions under Reg. §162-2(c)(2): (1) it is paid for business expenses that are allowable as business deductions and that are paid or incurred by the employee in connection with the performance of services as an employee of the employer; (2) the expense is substantiated to the employer within a reasonable period of time; and (3) advances or reimbursements in excess of expenses must be returned by the employee to the employer within a reasonable period of time. *See IRS Publication 15* for a detailed discussion of the accountable plan requirements.

A reimbursement, advance, or allowance that is not considered made under an accountable plan is treated as paid under a non-accountable plan. Expenses that are reimbursed under a non-accountable plan are included in the employee's gross income, are reported on Form W-2, and are subject to income tax withholding and to FICA/FUTA taxes. Reg. §1.62-2(c)(5) and Reg. §31.3401(a)-4(b). The employer may either combine the reimbursement amounts with the employee's regular wages and withhold on the total, or treat the reimbursement as a supplemental payment and withhold at the third-lowest rate of tax applicable under Code Sec. 1(c) (Reg. §31.3401(a)-4(c)). The employee may claim an itemized deduction (subject to the two-percent floor on miscellaneous itemized deductions) for expenses reimbursed under a non-accountable plan in the same manner as for unreimbursed expenses.

Per diem payments made to School Board members in New Mexico are typically considered to be paid under a non-accountable plan and must be included in the school board member's gross income, reported on Form W-2, and are subject to income and employee tax withholding. It is our understanding that the per diem payments do not relate specifically to any expense incurred, but rather serve as an assumed reimbursement. Because the per diem is not reimbursing the board member for any actual or specific out of pocket expenses or costs, the payment of per diem is not part of an accountable plan.

Moreover, even though a per diem approach to expense reimbursements is allowed by the IRS, the use of per diem is apparently

always referred to in connection with travel, but the school board members' payments are not linked specifically to travel under state law. The per diem payment is not directly reimbursing any otherwise deductible business expenses, but is serving more as compensation, at least in the eyes of the IRS.

Although school board members are considered employees for IRS income withholding purposes, that does not necessarily mean that they are "employees" for state law or FICA/FUTA and Medicare withholding purposes.

The employer must withhold social security and Medicare taxes for any official who is (1) covered under a Section 218 Agreement; or (2) not a qualified participant in a public retirement system. However, any official elected or appointed after March 31, 1986 is subject to Medicare.

Therefore, in accordance with the regulations, the per diem payments are considered wages or other compensation and would have to be shown on a W-2 form, with all of the usual deductions.

Consequences of misclassifying a worker

If the School District has not been treating Board members per diem payments as ordinary income or compensation for tax purposes, it is exposed to a claim by the IRS that it has "misclassified" the Board member and these payments. Generally, when an employer erroneously classifies an employee as an independent contractor and does not withhold federal payroll taxes, the employer could be liable for the employer and employee shares of all applicable federal payroll taxes, as well as penalties.

If the IRS audits a governmental entity, Section 530 of the Revenue Act of 1978 can provide relief from Federal employment tax obligations if certain requirements are met. The purpose of Section 530 is to allow employers who misclassified employees as independent contractors to continue to treat those workers as independent contractors, provided the employer had a reasonable basis for the classification. To qualify for Section 530 treatment, the governmental entity must meet the following consistency and reasonable-basis requirements:

- (1) Consistency Test ó The entity must have treated the worker, and all workers in substantially similar positions, consistently as independent contractors. This test is comprised of two parts, and both must be satisfied: (1) the entity must have filed all required Forms 1099 for the worker (reporting consistency); and (2) the entity must have always treated this worker, and all workers in substantially similar positions as independent contractors (substantive consistency).
- (2) Reasonable Basis Test ó A governmental entity that satisfied the consistency tests must also have a reasonable basis for classifying the workers as independent contractors. The entity can establish it had a reasonable basis by showing that it relied on: judicial precedent or published rulings; a prior IRS audit; an established, long-standing practice in the industry; or another reasonable basis. These criteria for reasonable basis are often called safe havens.

An entity that can establish consistent treatment (reporting consistency and substantive consistency), and also qualify for a safe haven, is allowed to continue treating the workers as independent contractors. *See Revenue Procedure 85-18 1985-1 C.B. 518.*

If a school board does not wish to issue Form W-2 to school board members with income and employee tax withholding, the board has a couple of options:

Option 1: The board can rely on Section 530 protection for all per diem payments made to date, if the board can meet the Consistency and Reasonable Basis Tests listed above. However, the board would have a difficult argument to make should it continue to rely on Section 530 treatment for future payments, because its reliance on an established, long-standing practice in the industry is not reasonable if the board is made aware that the per diem payments should be subject to income and employee tax withholding. In addition, if any of the school boards begin to issue Form W-2 to members, the “long-standing practice in the industry” will degrade.

Option 2: To avoid the requirements to withhold income and employee taxes, the school board can also begin making school board member per diem payments under an accountable plan as described above.

In conclusion, if a school board wishes to continue providing a lump sum per diem payment that is not related to actual business or out of pocket costs or expenses of the school board members, then the board must begin issuing W-2s for, and withholding income and employee taxes from, those per diem payments.

AVOID PITFALLS OF EMPLOYEE EVALUATIONS **by Evelyn Peyton**

All too often, school district administrators don't provide candid, accurate evaluations to their employees. Nobody enjoys delivering bad news to an employee, but failing to do so can get the school district into deep legal trouble later. For example, some school district administrators believe that non-tenured employees can be terminated for any reason; or that non-tenured employees are not entitled to reasons for their termination; or that if an evaluator intends to recommend termination for a non-tenured employee, the evaluator can give the non-tenured employee a satisfactory evaluation regardless of the employee's actual work performance. Such beliefs are not merely wrong, but also legally dangerous.

Even non-tenured employees can request reasons for their termination, and the school district must provide written reasons for the termination within ten working days of the request. NMSA 1978, § 22-10A-24(A). Although a school district can terminate a non-tenured employee for any reason it deems sufficient, the school district cannot terminate any employee for any discriminatory or retaliatory reason. Saying that an employee was terminated because he or she "just didn't work out" or "wasn't a good fit" is insufficient and could be construed as code for "wasn't one of us" — in other words, wasn't part of our group. Obviously, such a reason for termination could be determined to be discriminatory and therefore impermissible.

Tenured and non-tenured employees whose contracts are not renewed often file discrimination claims with administrative agencies such as the United States Equal Employment Opportunity Commission ("EEOC") or the

New Mexico Department of Workforce Solutions, Human Rights Bureau (õHRBö). These employees claim that they were terminated because of their membership in a protected class, including but not limited to gender, age, race, color, national origin, religion, or disability. In order to defend against such a discrimination charge, the school district must show that it had one or more legitimate, nondiscriminatory reasons for the employee's termination. Even if the school district can make that showing, the employee can then argue that the showing is simply a pretext for discrimination.

If one of the reasons for an employee's termination is poor work performance, the school district will need to be able to produce documentary evidence of that poor work performance. At a minimum, that evidence includes evaluations showing that the employee's performance was unsatisfactory. If the evaluations indicate that the employee's work performance was satisfactory, the school district may be unable to convince a federal investigator that it discharged the employee for poor work performance. The school district probably will lose not only the EEOC or HRB case, but also the lawsuit that the employee most likely will file after receiving a favorable ruling from the EEOC or HRB.

Administrators must document employee work performance problems promptly and accurately, regardless of the employee's status. Employees who have performance problems must be put on professional growth plans, even if the employees are temporary or non-tenured. In order to enable the school district to defend itself against possible discrimination claims, all employees must receive truthful, timely and candid evaluations, regardless of whether the evaluator believes the employee will be rehired.

In addition to discrimination claims, terminated employees often claim they were not rehired because the employer retaliated against them for engaging in protected activities. Such protected activities can include, but are not limited to, opposing allegedly discriminatory practices by the employer. For example, if a teacher has complained to the administration during the school year that he or she was subjected to discrimination, and then that teacher is not rehired for the following school year, the teacher may file an EEOC or HRB charge alleging that the non-renewal was retaliation for making the complaint. Employees can also file retaliation claims based on their association with other employees or with parents who have engaged in protected activities. In general, retaliation claims are easier to prove than discrimination claims. In addition, the adoption by the New Mexico

Legislature of the new Whistleblower Protection Act could be raised as another basis for a claim that the termination or discharge was not legally supportable. If poor work performance is one of the reasons for the employee's termination, the school district will need truthful and accurate evaluations to show that the employee's work performance was unsatisfactory. The truth may hurt, but being on the wrong end of a discrimination or retaliation lawsuit without a defense hurts even more.

If you are considering not renewing an employee's contract at the end of the contract year, make sure your school district will be in a defensible position if the employee challenges his or her termination. Ask your school district's legal counsel now for advice and guidance regarding the evidence your school district needs in order to show its legitimate, nondiscriminatory, and non-retaliatory reasons for the employee's termination.

DEALING WITH EMANCIPATED MINORS
by Ramon Vigil, Jr.

Often school districts are faced with students under age 18 who are living independently and free from family financial support and supervision. Thus, school officials want to know whether such a student can be treated as an adult and whether school officials still must consult with the student's parent(s) with regard to decisions affecting attendance, grades, student records, or disciplinary matters.

The law in New Mexico regarding emancipated minors is clear. The "Emancipation of Minors Act," NMSA 1978, Sections 32A-21-1 *et seq.*, defines an emancipated minor as "any person sixteen years of age or older who:

- A. has entered into a valid marriage, whether or not the marriage was terminated by dissolution;
- B. is on active duty with any of the armed forces of the United States of America; or
- C. has received a declaration of emancipation pursuant to the Emancipation of Minors Act."

NMSA 1978, § 32A-21-3.

Unless a student falls into one of the above-listed categories, the school district may not treat the student as an emancipated minor. In order for a minor to receive a declaration of emancipation pursuant to the Emancipation of Minors Act, as set forth in subsection C of the above-listed statute, the minor must petition the local New Mexico district court for a declaration of emancipation. NMSA 1978, § 32A-21-7. The court will hold a hearing regarding the facts allegedly bringing the minor within the provisions of the Emancipation of Minors Act. *Id.* If the petition is sustained, the court will issue a declaration of emancipation containing specific findings of fact and will file that declaration with the County Clerk. *Id.*, subsec. D.

A declaration of emancipation issued by the Court will entitle the student to enroll in any school, and the student shall be considered as being over the age of majority. NMSA 1978, § 32A-21-5. Thus, the school district may treat a student under the age of 18 as a student over the age of majority (18) if he or she can produce a copy of a declaration of emancipation issued by a New Mexico district court judge.

Unless a student under age 18 has entered into a valid marriage, is on active duty with the armed forces, or has received a declaration of emancipation from a New Mexico district court, a school district must consider the student to be a minor. Accordingly, the school district must inform the student's parent(s) and get parental permission from the parent(s) of such students in matters regarding student records, as required by the Family Educational Rights and Privacy Act (FERPA), including but not limited to records pertaining to attendance, grades, and disciplinary matters. In addition, if the student is being served in a special education program, federal law requires that the School District notify the parent or guardian of the student one year before the student reaches the age of majority that the authority to make educational decisions as to appropriate services will transfer to the student at age 18. 34 CFR 300.320(c).

If a student is under the age of 18 and living with one or more adults other than his/her parents, the parent of the student may delegate his/her parental powers through a Power of Attorney Delegating Powers of Parent or Guardian as permitted by NMSA 1978, Section 45-5-104. Through such

power of attorney, a parent/guardian may delegate his/her powers regarding care, custody, educational decisions, and property of the student, including but not limited to responsibility for the school attendance and conduct of the student, except that the person receiving these powers shall not have the power to consent to marriage or adoption of a minor ward. NMSA 1978, § 45-5-104. Such delegation may be made for only a period of six months at a time. *Id.* Thus, this six-month limitation may require renewal of the power of attorney every six months. Of course, the parent may cancel the power of attorney at any time and, thus, regain his/her parental authority.

If a student is under the age of 18 and living independently and is free from family financial support and supervision but is not legally an emancipated minor, the School District should (1) notify the New Mexico Children, Youth, and Families Department (CYFD) about the matter so that CYFD can determine whether this is a case of child neglect, or (2) assist the student in seeking a judicial order of declaration of emancipation. You should consult with your school district's legal counsel to determine how to proceed in such a situation.

The Education Law Quarterly provides general information of interest to our clients and should not be used or taken as legal advice for specific situations, which depend on evaluation of precise factual circumstances.