School Law Matters

December 2007

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Route to: Board ❑ Personnel ❑ Instruction ❑ PPS ❑ Business ❑ Other: _____

Employers Must Use Revised I-9 Form When Hiring New Employees

The federal government has issued a revised Employment Eligibility Verification Form (I-9). Even though the revised form was just announced in November, employers are supposed to start using it by December 26, 2007.

The new form must be used when hiring new employees on or after December 26, 2007. It need not be used to generally update all current employees who were hired before that date. However, it must be used for any required re-verifications of current employees when their old eligibility to work in the U.S. expires.

The main change in the form deals with the types of documents that you may accept as proof of identity and employment eligibility. Five documents have been removed from the list of acceptable documents. They include: Certificate of U.S. Citizenship (Form N-560 or N-570); Certificate of Naturalization (Form N-550 or N-570); Alien Registration Receipt Card (Form I-151); the unexpired Reentry Permit (Form I-327); and the unexpired Refugee Travel Document (Form I-571). They were removed because they lack sufficient features to help deter counterfeiting, tampering, and fraud. One document (Employment Authorization Document (Form I-766)) has been added to the list. The instructions for the form have also been updated.

You can download or print the form from www.uscis.gov/files/form/i-9.pdf . Employers can order forms from U.S. Citizenship and Immigration Services by calling (800) 870-3676. (The form has a revision date of 06/05/07, which is printed in the lower right corner.)

Title IX Retaliation Claim Costs University Millions

A California jury recently awarded a former Fresno State University women's volleyball coach $5.8 Million dollars in a Title IX "retaliation case" entitled *Vivas v. Fresno State University*.

Lindy Vivas coached the Fresno State Women's Volleyball team from 1991 until 2004. During her tenure she had much success, including a season in 2002 in which the team had the most wins in school history. However, by 2004, University officials had become dissatisfied with Vivas' failure to obtain public support for the team, the poor attendance at the games, and Coach Vivas' failures to win during post-season play. The dissatisfaction culminated in December of 2004, when the University terminated Ms. Vivas' employment by not renewing her contract.

Subsequently, Coach Vivas filed a Title IX action against the University claiming that she was fired in retaliation for her outspoken public criticism that the University was not treating its female athletes the same as its male athletes.

One main issue Vivas introduced in her claim was that the women's volleyball team did not play in the University's new state-of-the-art Save Mart Center. The arena was used by other men's athletic teams, including the men's basketball team, but the University refused to schedule women's volleyball games there despite Coach Vivas' repeated requests. Further, Coach Vivas claimed that the Athletic Department staff was consistently con-

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Title IX Retaliation Claim Costs University Millions (cont'd)

frontational and argumentative with her; which she claimed increased the more she spoke out for women's athletic equality. Finally, she produced evidence of an incident that took place in which three male administrators in the Athletic Department celebrated "Ugly Women Athlete's Day," which included the presentation of a derogatory banner that depicted female athletes as masculine by displaying cutouts of female bodies with ugly male faces on them.

Based on this evidence, a Fresno County Superior Court jury returned an award of $5.8 million, which included past economic losses ($550,000), future economic losses ($1.8 M) and emotional distress damages ($3.5 M). Amazingly, the jury verdict was actually $1.7 million more than Vivas had even requested.

In light of this decision, educational institutions should reexamine their policies and practices related to Title IX. It is important to consider the public perception of the gender equality of your school's athletic and other educational programs. As the decision in this case suggests, schools should consider maintaining equality in the use of athletic facilities, a gender-balanced staff, and reasonably comparable salaries for women's and men's coaches. In addition, schools should have clear procedures for reporting inequitable treatment and disciplinary structure that prohibits and reprimands individual employees who engage in discriminatory and/or derogatory actions.

New IRS Requirements for When Teachers Choose to Be Paid Over More Than Ten Months

Many school districts allow teachers and other 10-month employees to choose to have their pay spread out over more pay periods. They may be paid in the summer, or in one or more additional paychecks after the end of the regular school year. The Internal Revenue Service has issued regulations that outline steps that must be taken when this is done. (The new rules do not require school districts that do not currently offer this option to start doing so.)

The regulations implement Section 409A of the Internal Revenue Code. This section deals with certain "deferred compensation" that is earned in one year but paid in a future year. If the requirements of this section are satisfied, then it has no effect on the employee's taxes. However, if they are not met, then there may be additional taxes.

The IRS now considers employees who choose to be paid over a 12-month period instead of during the school year to be deferring part of their income from one year to the next.

Therefore, if a 10 or 11 month school employee chooses an alternate schedule of pay periods, the employee must make an "annualization election". This is a written or electronic notice to the employer that the employee wants to spread out the compensation. The election must describe how the compensation will be paid. No particular form is necessary and it does not have to be filed with the IRS.

The election must be made before the first day of the school year for which the teacher is paid. The election must be irrevocable after that date. That is, it may not be changed after the work period begins. (An arrangement may provide that a pre-existing election will remain in place indefinitely until the employee elects a change. Any change must be made before the beginning of the school year to which the change applies.)

This requirement applies to school years beginning on or after January 1, 2008. That is, it starts with the 2008-09 school year.

This type of arrangement is typically included in a collective bargaining agreement or Board policy. There should already be a procedure for employees to notify the District whether they want to elect a different schedule of salary payments. Changes in procedures that affect represented employees should be discussed with the applicable unions. This is an area where districts and associations should be able to cooperate, as it is in everyone's interest to have the election done properly.

Please feel free to contact us to review whether your procedure complies with the new regulations.

IRS Issues Model Language for Section 403(B) Plans

Section 403(b) of the Internal Revenue Code provides favorable tax treatment for amounts that are deposited into tax-sheltered annuities and custodial accounts, instead of being received directly by the employee as salary. Under regulations issued by the Internal Revenue Service in July 2007, school districts will be required to adopt written Section 403(b) plans by January 1, 2009.

The IRS has issued model plan language to assist school districts in complying with this requirement. If a district adopts a plan that includes the model language, or language that is substantially similar, the IRS will treat it as complying with Section 403(b). This assumes that the district actually operates the plan in accordance with the document.

The model plan is included in Revenue Procedure 2007-71, effective December 17, 2007. It is available on the IRS website at www.irs.gov/pub/irs-drop/rp-07-71.pdf .

The model plan incorporates by reference the individual agreements between the various vendors and the district or participants. It includes several "optional" provisions. It addresses amounts that employees elect to treat as deferred compensation instead of receiving as salary. It does not address employer "nonelective" contributions to employees' Section 403(b) accounts.

Revenue Procedure 2007-71 also provides transitional relief for contracts or custodial accounts that are issued or exchanged before January 1, 2009. For example, the new regulations included requirements for certain "exchanges" occurring after September 24, 2007. If a contract is issued in an exchange after September 24, 2007 and before January 1, 2009 that complies with the existing law, the contract may later be exchanged for another one before July 1, 2009. If the new contract is issued by an issuer which is either receiving contributions as part of the plan or has an information sharing agreement per the regulations, then the information sharing conditions of the regulations will not apply to the contract that was issued before January 1, 2009.

It also deals with situations when vendors are discontinued as issuers under the district's plan or become new issuers under the plan. The district must make a reasonable good faith effort to collect available information about the issuers and notify them of the plan administrator's name and contact information, to satisfy the information sharing requirement.

Pupil's Living Arrangement Must be Temporary to Meet Definition of "Homeless Child"

The Commissioner of Education recently dismissed an appeal by a student's parent claiming that the student was "homeless" within the meaning of the McKinney-Vento Homeless Assistance Act (42 USC §11431 et seq.). Had the student been found to be homeless under this law, she would have been entitled to continue to attend the District schools and to receive transportation, even though she was staying outside of the District. (*C.S. v. Hadley-Luzerne Central School District*, —- E.D.R. —-, Dec. No. 15686, Nov. 13, 2007.)

In 2006, the student and her mother moved out of the Hadley-Luzerne School District to live with the student's grandmother because of an alleged ongoing domestic violence situation. At that time, the student's mother notified the District that she and the student were homeless and staying at her mother's house outside of the District. The District provided the student with transportation to and from her grandmother's house for the entire 2006-2007 school year.

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Pupil's Living Arrangement Must be Temporary to Meet Definition of "Homeless Child" (cont'd)

However, at the beginning of the 2007-2008 school year, the student's mother again requested transportation to and from the grandmother's residence. The School District denied the request citing the fact that the student was no longer "homeless" under the definition of the law.

Education Law §3209(1)(a) defines a homeless child as:

> "a child or youth who lacks a fixed, regular, and adequate night-time residence, including a child or youth who is: ... sharing the housing of other persons due to the loss of housing, economic hardship, or a similar reason ...." (This definition conforms to the definition of "homeless children and youth" in the McKinney-Vento federal law.)

The Commissioner held that the student did not fit the definition of "homeless child" under state or federal law. The facts showed that the student and her mother lived with the grandmother outside of the District for more than a year. This was considered a fixed, regular night-time residence and there was no evidence in the record that such residence was inadequate. Moreover, the Commissioner found that the student's mother provided no evidence that she had made any effort to locate an apartment or a house within the School District during that year. Accordingly, she failed to establish that her and her daughter's living arrangement outside of the District was temporary or transitional.

If you have any questions regarding this case or similar matters, please feel free to contact our office at (315) 437-7600.

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