VARNUM

ATTORNEYS AT LAW

MEMORANDUM

To: Neola Clients

From: Neola Counsel

Re: The Legalization of Marijuana in Michigan and Applicable Neola Policies

Date: January 2019

Effective December 6, 2018, adults 21 years of age or older may use and possess up to 2.5 ounces of marijuana and grow up to twelve marijuana plants in their homes for recreational use. State-licensed retailers may also engage in the commercial sale of marijuana.

Now that marijuana is legal in Michigan under specified circumstances, does this mean that school districts' ability to prohibit possession and use of marijuana on school property or at school functions is up in smoke? The short answer is that the new law has no effect on a school district's right to prohibit use, possession and distribution of marijuana by students or employees.

The new law also had no effect on the fact that a district risks the loss of federal funding if it does not continue to comply with the Drug Free Schools and Communities Act (the "Act") and prohibit marijuana possession and use on campus and at school sponsored events. The Act requires any school that receives federal financial assistance to adopt and implement a program to prevent drug and alcohol abuse by students and employees. To comply with this mandate, a district's policies must, among other things, set "[s]tandards of conduct that clearly prohibit, at a minimum, the unlawful possession, use or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities...."

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ATTORNEYS AT LAW

MEMORANDUM

To: Neola Clients

From: Neola Counsel

Re: Recent Legislative Changes

Date: January 2019

The lame duck session ended 2018 in a flurry of activity, passing nearly 400 bills in the last two weeks of the session. Several of the laws require changes to existing policies and administrative guidelines. These changes, some of which are noted below, are included in the update. However, a number of the new state laws and other information from federal and state agencies impact school operations and practices and may require Districts to implement changes even if policy and guidelines are not affected. For this reason, Neola provides the following list of topics that should be reviewed by each District to determine whether they affect District practices. Please note that the following summaries are not intended to provide legal advice and to the extent that you have questions or concerns about how these issues will impact day-to-day practices in your District, please contact local District counsel.

School Safety Laws: The following laws were passed relating to school safety. Although appropriate changes were made to policy where noted below, given the variety and substance of these laws, this brief overview is provided for your consideration.

- The Open Meetings Act was amended to allow a school board to go into closed session to consider security planning to address existing threats or prevent potential threats to the safety of students and staff. M.C.L. 15.268(k); PO 0167.2

- School districts must consult with the first responder agency for the district regarding school safety issues before starting construction or major renovations on instructional, recreational and athletic facilities used by students. PO 6321

New Criteria for IT and CTE Substitute Teachers: The legislature amended M.C.L. 380.1233 to expand the criteria for persons eligible to substitute teach in the areas of industrial technology and career and technical education. A person is now eligible to substitute teach if: 1) s/he has a high school diploma or equivalency certificate; 2) if substitute teaching in an area in which a professional license or certification is required, s/he has a professional license or certification in that field, or held such a license or certification that expired within two years of initial employment and was in good standing when it expired; and 3) has at least two consecutive years of experience in the relevant subject areas within the preceding ten years.

Information Regarding Courses: The legislature tweaked M.C.L. 380.1472 to require Districts to provide each student in grade 8 and higher with information about college level equivalent courses and college level equivalent credit examinations, "at least annually." Previously, this information was to be provided as part of the process of planning the student's schedule for the upcoming year.

Changes to FOIA: Due to changes to M.C.L. 15.233 and 15.234, a request (other than from an indigent person) must include the person's complete name, address and contact information. If the request is from an entity, it must include this information for the entity's agent. Also, if a public body does not receive a required deposit within 45 days after the requesting person receives notice that a deposit is required, and the person has not appealed the deposit amount, the request shall be considered abandoned and the public body is no longer required to fulfill the request. Notice that a deposit is required must include the due date, which is 48 days after the notice is sent.

New MDE Food Service Memo: On October 29, 2018, the Michigan Department of Education issued Administrative Memo No. 6 ("Memo") addressing civil rights compliance requirements for participate in the national school lunch program, school breakfast program, afterschool snack program and special milk program. Districts should compare their current nondiscrimination statement to the language and guidance inthe Memo.

Title IX....Stay Tuned: Last, but not least, the 60 day comment period on the United States Department of Education's notice of proposed rulemaking relating to Title IX has ended, which means that at some point in the foreseeable future the ever-changing proposals may actually stop changing and be implemented. Neola continues to track this issue and, when the final rulemaking is implemented, will make any necessary changes to policy and guidelines.

Please carefully review all of the above issues and, if necessary, discuss these changes with the District's legal counsel.

PETERS KALAIL & MARKAKIS CO, L.P.A.
ATTORNEYS AT LAW

LEGAL ALERT

To: Neola Clients

From: Peters Kalail & Markakis Co., L.P.A.

Re: USDOE Releases Proposed Regulations Addressing Sexual Harassment Under Title IX

Date: January 2019

On November 16, 2018, the U.S. Department of Education ("USDOE") unveiled its proposed amended regulations implementing Title IX. You may recall that in September 2017, the USDOE withdrew its Title IX guidance on campus sexual assault – specifically its April 2011 Dear Colleague Letter and April 2014 Q&A, – and USDOE's Office for Civil Rights ("OCR") issued a new "Q&A on Campus Sexual Misconduct" ("2017 Q&A" or "interim guidance"). The purpose of the 2017 Q&A was to offer guidance while the USDOE engaged in a lengthy, formal rulemaking process on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct (including sexual harassment and violence).

The 11/16/2018 Notice of Proposed Rulemaking states that the proposed regulations seek to clarify and modify existing Title IX regulations, including specifying how covered educational institutions (including public schools) must respond to incidents of sexual harassment. The Notice claims the proposed regulations are intended to promote the purpose of Title IX by requiring recipients to address sexual harassment, assisting and protecting victims of sexual harassment, and ensuring the due process protections are in place for individuals accused of sexual harassment.

The proposed regulations focus on three things: (1) what constitutes sexual harassment for purposes of rising to the level of a civil rights issue under Title IX; (2) what triggers a school's legal obligation to respond to incidents or allegations of sexual harassment; and (3) how must a school respond to such incidents or allegations.

Upon conclusion of the investigation, a written determination must be sent to both parties explaining for each allegation whether the respondent is responsible or not, including the facts and evidence on which the conclusion is based. Where a finding of responsibility is made against the respondent, the written determination must describe what remedies the school will provide to the survivor to restore or preserve equal access to the school's education program or activity, and any sanctions imposed on the respondent. Importantly, the determination must be made by a decision-maker who is not the same person as the Title IX Coordinator or investigator; in other words, a district cannot use a single-investigator or investigator-only model.

The person charged with making the determination must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. However, a school can only use the lower preponderance standard if it uses that same standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. Additionally, schools must use the same standard of evidence in cases against student respondents that it uses in cases against employee respondents.

While a school is not required to have an appeal process, if it chooses to offer an appeal it must allow both parties to appeal. Further, the appeal decision-maker cannot be the same person who served as the Title IX Coordinator, investigator or decision-maker and must be free from bias or conflicts of interest. As part of the appeal, each party must be afforded the opportunity to submit written arguments for or against the outcome.

The proposed regulations permit – if the process is voluntary for all parties – a school to facilitate an informal resolution of a sexual harassment complaint. Possible types of informal resolution processes include mediation, restorative justice, or other models of alternative dispute resolution.

Finally, pursuant to the proposed regulations, schools must create and maintain records documenting every Title IX sexual harassment investigation and determination of responsibility, including any informal resolution or appeal, and all materials used to train the Title IX Coordinators, investigators and decision-makers. Parties are entitled to request copies of the records that pertain to their own case. Schools must also keep records regarding their responses to every report of sexual harassment, even if no formal complaint is filed, including documentation of supportive measures offered and implemented for the complainant. The proposed regulations further specify that a school must maintain documentation of the facts upon which it bases its conclusion that it was not deliberately indifferent to the allegation of sexual harassment.

VARNUM

ATTORNEYS AT LAW

MEMORANDUM

To: Neola Clients

From: Neola Counsel

Re: The Michigan Paid Medical Leave Act and Applicable Neola Policies

Date: February 2019

On December 13, 2018, outgoing Governor Rick Snyder signed into law the Paid Medical Leave Act (PMLA). The PMLA, formerly known as the "Earned Sick Time Act," requires employers to pay eligible employees for earned medical leave time, which may be used for personal or family health needs. The Act takes effect March 29, 2019.

Employers such as school districts are subject to PMLA only if they employ 50 or more individuals, regardless of the employees' full or part-time status or how many hours they work. The PMLA does not require that a school district implement a Board-adopted policy, but it does require compliance with the terms of the Act. Since each district will have different preferences with respect to implementing the Act, districts should assess their needs and preferences and ensure that they are complying with their obligations under the PMLA. Also, if current collective bargaining agreements already provide all of the requirements of the PMLA, those are sufficient to address the district's obligations to that set of employees.

An "eligible employee" is an individual from whom an employer is required to withhold Federal income tax.However, not all employees are eligible to accrue paid medical leave. The PMLA contains twelve categories of ineligible workers, including:

- Employees exempt from overtime requirements under the Fair Labor Standards Act;
- Private sector employees covered by a collective bargaining agreement;
- Employees employed by the US government, another state, or a political subdivision of another state;
- Employees covered by the Railway Labor Act and Railroad Unemployment Insurance Act;
- Employees who work primarily in another state;

When implementing the Act, districts can either use the accrual method or the frontload method. Under the accrual method, eligible employees must accrue one hour of paid medical leave for every 35 hours worked, but not more than one hour of paid medical leave in a calendar week. Employers may limit an eligible employee's accrual of paid medical leave to 40 hours per benefit year. Under the accrual method, employers must allow eligible employees to carry over a minimum of 40 hours of accrued but unused paid medical leave time to the next benefit year. Paid medical leave will begin accruing on the effective date of the Act, or upon a new hire's start date, but employers may require new employees to wait 90 days after the commencement of employment to use accrued time, and may prorate paid leave for eligible employees hired during a benefit year.

Under the frontload method, the employer would frontload the 40 hours of paid medical leave to eligible employees on the Act's effective date, which would be prorated for the first year if the benefit year tracks the calendar year. Under the frontload method, no carryover of paid medical leave is required if an employer elects to frontload paid medical leave to an eligible employee.

A benefit year is any consecutive 12-month period used by an employer to calculate an eligible employee's benefits.

The Act provides that PMLA leave must be used in one-hour increments unless the employer has a different written increment policy.

Employers are presumed to be in compliance with the Act if they provide at least 40 hours of paid leave to an eligible employee each benefit year."Paid leave" includes, but is not limited to, paid vacation days, paid personal days, and paid time off (i.e., PTO).

An employer may require an eligible employee who is using paid medical leave because of domestic violence or sexual assault to provide documentation that the paid medical leave has been used for that purpose. Employees are required to follow their employer's usual practice or procedure for requesting leave; however, employers must give employees three (3) days to acquire the proper documentation for medical leave.

Employers must pay employees at a pay rate equal to the greater of either the normal hourly or base wage rate for that employee or the minimum wage rate. They do not need to include, however, "overtime pay, holiday pay, bonuses, commissions, supplemental pay, piece-rate pay, or gratuities" when calculating an employee's normal hourly wage or base wage rate.

Employers are not required to pay employees for unused, accrued PMLA leave time at the end of the benefit year or upon separation, voluntary or involuntary. Therefore, written policies should state whether PMLA time will be paid out upon separation.