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# Education Law

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## NEW IRS REGULATIONS IMPACT HOW DISTRICTS MUST STRUCTURE PAYMENTS TO EMPLOYEES

Unless you're a CPA, a tax lawyer, or you choose to relax by reading the Internal Revenue Code after dinner, you are probably not aware of a new provision of the Tax Code, Section 409A, which regulates the taxing of deferred compensation. You may be asking yourself, "If I didn't know about it before, why do I need to know about it now?" The answer is simple: if you are an educator or a public school district, the Treasury Department recently clarified that Section 409A applies to the annualization of a teacher's salary. A teacher's salary is annualized when it is paid over a twelve month period so that he or she receives pay during the summer months when he or she is not working.

Though this alert talks in terms of a teacher's annualized salary, it is important to note that the Treasury Department has made it clear that Section 409A applies to any annualized salary, regardless of the employee's occupation or the employer for whom he or she works. Compliance with Section 409A is critical, as violation by an employer of Section 409A has grave consequences for their employees. An employee who receives an annualized salary, and who does not qualify for exemption under Section 409A, will be subject to the following penalties: 1) all deferred compensation will still be subject to tax in the year it is earned; 2) an excise tax equal to 20% of the compensation required to be included in gross income will be assessed on the employee or independent contractor receiving the compensation (not the employer or service recipient); and 3) interest will be imposed on the amount of compensation that should have been reported in prior years.

With respect to school districts, Section 409A will be applied to annualized salaries beginning January 1, 2008. For many teachers and school districts who have academic years beginning in August and ending in May or June, this means that the new law will begin affecting their annualization arrangements for the 2008/2009 school year. In order to ensure that teachers and school districts comply with Section 409A, the Treasury Department and the Internal Revenue Service have provided two methods by which an educator and his or her school district can comply with the final regulations to Section 409A as they relate to the annualization of a teacher's salary.

Method 1: School Districts May Refrain from Offering Employees a Choice Whether or Not to Annualize their Salaries.

The simplest way to avoid application of Section 409A is for school districts to establish uniform policies regarding annualization and not offer employees the option to elect payment in any other form. For example, a district could exclusively make payments over a ten-month period, or it could exclusively make payments over a twelve-month period. If only one option is offered, even if that option is a twelve-month period, nothing further needs to be done by either the school district or the employee--the salary is automatically exempt.

This option, though easier from an IRS-compliance standpoint, may not be lend itself to being easily or quickly implemented, particularly if the district had formerly allowed its employees a choice in payment method that has been memorialized into a collective bargaining agreement.

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Method 2: School Districts Allow Employees to Elect the Timing of Payments as Permitted by Section 409A.

School districts that allow an employee to elect whether to be paid over twelve months may only annualize the employee's salary if the following requirements of Section 409A are met:

1. Before the first day worked by the employee in a school year (which may be prior to the date on which students arrive and classes begin), the employee must give written or electronic notice to the district of his or her election to be paid on a twelve-month schedule;
2. The election must state how the compensation is to be paid (i.e., ratably over the applicable twelve months); and
3. The election must be irrevocable.

If these requirements are met, a teacher's annualized salary will be exempt from additional taxation under Section 409A. Please note that these requirements are absolute; if an employee fails to submit an election at all or fails to submit an election by the deadline--even if the deadline is missed by just one day--the employee must be paid in the same manner as those employees who did not seek the election.

Section 409A does not require that the notice of election be filed with the IRS, nor does it require that the election be done on any particular form. Administratively speaking, however, it is advisable for a district to prepare one standard form for employees to use. In addition, districts should consider incorporating the form and requirements for election into any applicable collective bargaining agreements in order to document that employees have been clearly notified of their rights and obligations under Section 409A.

**JAROD'S LAW: HEALTH AND SAFETY INSPECTIONS SET TO BEGIN FOR SCHOOL DISTRICTS**

Effective late September 2007, the Ohio Department of Health ("ODH") implemented rules governing mandatory inspections by local health boards of both public and private school district grounds and buildings for health, safety, and sanitary concerns. These rules have been created pursuant to a compilation of statutes known as "Jarod's Law," enacted in 2005 in response to the tragic death of a boy killed at school when a folding cafeteria table fell on him.

Jarod's Law mandates that the local board of health conduct inspections of school buildings and grounds at least once a year, and more often if the board of health determines it necessary. In the event it determines a public health threat exists, the board of health also has the right to shut down a school. In addition, Jarod's Law mandates that the ODH Director adopt rules related to the minimum standards for such inspections; it is these rules that ODH adopted in September 2007. The inspection rules by ODH are quite lengthy and complete reproduction is outside of the scope of this alert; however, below are some highlights of the rules:

School Indoor Environments Inspections (Oh. Adm. Code 3701-54-07)

- Doors must be properly installed and maintained to fit tightly in their frame;
- Exterior doors shall have no cracks, gaps, or other visible openings that would allow insects or pests into the building;
- There must be a five-step or fifteen feet walk-off mat at all entry points into the building, except if the area cannot accommodate fifteen feet, the mat must be as long as the area will accommodate;
- Furniture and toys must be capable of being cleaned, clean, and in good repair;
- When not in use, portable banquet tables, cafeteria tables and other portable furniture items must be stored where they are not accessible to students or must be secured to the wall or floor;
- There can be no visible bowing, cracks or damage to walls;
- Heating, ventilation and air conditioning systems must, among other things, not have excessive noise, vibration or odor from any system component;
- Water fountains must crest a minimum of one inch above the mouth guard of the fountain;
- There can be no excessive noise in the building that creates hearing hazards or disrupts classroom instruction; and
- So that exiting the building is not impeded, furniture or other items must not be stored in a hallway or stairwell.

School Grounds and Building Exterior Inspections (Oh. Adm. Code 3701-54-06)

- Buildings must be in good repair;
- Except for vehicles used for student transportation, vehicles or gas-powered equipment shall not idle near outside air intakes, building entrances or exits or where students are loading and unloading;

- Students shall only use playground areas during school hours with staff supervision;
- Maximum heights of surfacing must be followed depending upon the surface and associated playground equipment;
- Playground equipment cannot have any openings between three and one half inches and nine inches in size;
- A swing shall have a use zone around it which is twice the height of the swing in front and back and six feet in radius from the sides of the swing structure; and
- Athletic equipment must be stored properly to prevent water collection and to discourage rodents.

#### Specialty Classroom Inspections (Proposed Oh. Adm. Code 3701-54-08)

##### Science classrooms:

- Must be locked when room is not occupied;
- The master gas shutoff valve must be clearly labeled, easily accessible, and immediately operable by staff;
- There can be no excessive accumulation of dust or sediment on any surface; and
- Chemicals must be stored in accordance with specifications relating to the specific type of chemical.

##### Visual art classrooms:

- Food and drinks shall be prohibited;
- Aerosol sprays must be used under exhaust systems, personal protective equipment must be worn, and use must be supervised by staff;
- Local exhaust systems must be in use when hazardous airborne contaminants are generated from classroom activities; and
- Eyewash stations shall be operational, unobstructed, located within ten seconds of all work stations, must have adequate pressure and a minimum of fifteen minutes of continuous water flow, and must be capable of flushing both eyes simultaneously.

##### Industrial Arts Classrooms:

- Aisles shall be unobstructed and there must be no trip, fall or tipping hazards;
- Compressed air cannot be used for cleaning;
- When equipment is used, guards on blades, belts or other devices shall be operational, secure and in place; and
- Electrical switches and outlets shall be in good repair.

Jarod's Law places an affirmative duty on a school district to cooperate with inspections conducted by the board of health. Namely, a school district must provide access to the building and grounds at any time during the school's operation; it must provide any records or information that the board of health considers necessary; and, if applicable, it must submit in writing to the board of health a plan of abatement of any conditions deemed to be hazardous. Upon request by the inspector, a representative must accompany the inspector during the inspection provided that advance notice from the board of health is given, and the written plan of abatement must be submitted to the board of health within 60 days of receipt by the district of the inspection report.

What is not clear from Jarod's Law and the accompanying rules is what effect, if any, they will have on the availability of the sovereign immunity defense to litigation arising from personal injuries occurring on school grounds. For instance, traditionally, the sovereign immunity statutes, R.C. 2744 et seq, have provided immunity to school districts, its board members, and employees for personal injuries that "resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resource unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03 (emphasis added). Now that rules have been implemented which will provide specific guidelines as to what is deemed safe and sanitary in school buildings and on school grounds, the guidelines could result in a challenge to the applicability of sovereign immunity in litigation where the district failed to follow guidelines and personal injury resulted. The failure to follow the guidelines could arguably be used as evidence of malicious purpose, bad faith, and/or wanton or reckless behavior in a lawsuit seeking to defeat sovereign immunity protection. As with any new law or regulation, the true and full impact of Jarod's Law and the implementation of the inspection rules will not be known until the issue is brought before the courts; however, a school district can best protect itself by being proactive in inspecting its buildings and grounds and taking steps to remedy any conditions not in compliance with the ODH standards.

Again, the ODH rules on buildings, safety, and sanitary inspections are voluminous. Thus, the list above is not exhaustive of all requirements, nor is this alert designed to address all aspects and ramifications of Jarod's Law and the ODH rules. If you are in doubt of your school district's rights and obligations under Jarod's Law, it is recommended that you seek the advice of an attorney.

### **THE OHIO ATTORNEY GENERAL CONCLUDES THAT SCHOOL DISTRICTS CANNOT CHARGE TUITION FOR ALL-DAY KINDERGARTEN**

On September 5, 2007, the Ohio Attorney General issued an advisory opinion to the Ohio Department of Education ("ODE") finding that a board of education has "no authority to charge tuition to resident parents whose children attend all-day kindergarten classes in the school district." The opinion came in response to the following two questions from the ODE: (1) "If a school district receives state funding for all-day kindergarten, may the district require that resident parents pay tuition on a sliding fee scale?"; and (2) "May a school district that does not receive state funding for all-day kindergarten require that resident parents pay tuition for any portion of an all-day kindergarten course?" The Attorney General answered both questions in the negative.

In concluding that a school district may not charge tuition for any part of an all-day kindergarten program, regardless of whether it receives state funding for such a program, the Attorney General's rationale boils down to two points. First, state law generally requires boards of education to provide free education to all children. Further, unlike preschool programs and other statutorily enumerated circumstances, the Ohio Legislature has not granted school districts express statutory authority to charge tuition for all-day kindergarten.

While an Attorney General's opinion is not binding law, it is highly persuasive legal authority. As you know, this opinion has generated considerable confusion and concern for both parents and administration alike. The Ohio School Boards Association is currently considering how to respond to the ruling and is soliciting input from districts via an online survey available at its website, [www.osba-ohio.org](http://www.osba-ohio.org). Additionally, according to the ODE, education officials and state lawmakers have discussed passing a law allowing districts to charge for all-day kindergarten on a sliding scale according to parents' incomes.

In light of the uncertainty surrounding the issue and possible future legislative action, many school districts are not making any changes to their current all-day kindergarten structure but instead are awaiting further guidance from the ODE. For specific guidance as to how your district should proceed with this difficult issue, legal counsel should be consulted.

### **REMINDERS – SIGNIFICANT DATES**

#### **I. Update on the Revised Public Records Law – September 29, 2007**

As indicated in our prior release on the topic, on September 29, 2007, school districts were to have adopted public records policies that comply with the requirements found in House Bill 9. For a full discussion of the newly-imposed legal obligations, please see our prior alert at [http://www.walterhav.com/library/Client\\_Briefings\\_and\\_Alerts/Client\\_Briefing\\_On\\_Education\\_Law\\_Jan\\_2007.pdf](http://www.walterhav.com/library/Client_Briefings_and_Alerts/Client_Briefing_On_Education_Law_Jan_2007.pdf). While that alert outlined the general obligations imposed upon districts, a number of specific questions have arisen in connection with the new law's training mandate.

Answers to some of the common questions are provided below:

- While a number of private entities have begun offering public records training programs, at this point only training conducted by the Attorney General's staff will satisfy the three-hour public records training requirement. The Attorney General has posted the training schedule on his Web site.
- If the Board opts to send designee(s) to the mandated training, it should pass a resolution indicating the same and identifying those designees. The resolution will evidence the fact that a designee was named and will facilitate any compliance audit conducted by the Auditor of State.
- Even if a board member's term expires at the close of this year, that member must still attend the mandated public records training session (or send a designee).

## 2. Anti-Bullying Policy Issues – December 31, 2007

By December 31, 2007, the Board must adopt an anti-bullying policy that complies with the mandates of HB 276, as now incorporated into Ohio Revised Code Sections 3313.666 and 3313.667. Our prior update can be found at [http://www.walterhav.com/library/Client\\_Briefings\\_and\\_Alerts/Client\\_Briefing\\_On\\_Education\\_Law\\_April\\_2007.pdf](http://www.walterhav.com/library/Client_Briefings_and_Alerts/Client_Briefing_On_Education_Law_April_2007.pdf). While ODE has published a model anti-bullying policy, a number of districts have expressed concern over specific provisions in that policy and the scope of the model policy. Prior to adopting any such policy, administrators and board members should carefully consider the specific language of that policy to avoid creating any unintended and unnecessary obligations exposing the district to potential liability.

### ANNOUNCEMENTS AND UPCOMING EVENTS

#### WALTER & HAVERFIELD WELCOMES A NEW ATTORNEY TO THE EDUCATION GROUP

Walter & Haverfield proudly announces that Susan E. Keating has joined its Education Group and will assist the group in providing legal counsel to school districts. Susan has represented numerous school boards across the state in labor negotiations, as well as litigation and administrative proceedings. Susan also counsels boards of education in a variety of matters, including personnel issues; policy formation, implementation, and administration; interpretation and implementation of collective bargaining agreements; and public records and open meetings law issues. Susan's full biography can be accessed through the following link: [http://www.walterhav.com/attorneys/Susan\\_E\\_Keating.htm](http://www.walterhav.com/attorneys/Susan_E_Keating.htm).

#### TWO EDUCATION GROUP ATTORNEYS SELECTED BY OHIO SUPER LAWYERS AS RISING STARS

Ohio Super Lawyers, a publication serving the legal industry, recently named Eric Johnson and Christine Cossler as "Rising Stars" in their field. Only 2.5% of attorneys eligible for consideration received this honor, which is based on peer recommendations and a review of the candidate's background and professional experience.

#### CAPITAL CONFERENCE SESSION ON LEGAL ISSUES RELATED TO INTERNET POSTING

Eric Johnson, Chair of the Firm's Education Group, will be speaking at the OSBA's Capital Conference on November 13, 2007 at 2:00 p.m. Along with Superintendent Dr. Geoffrey Andrews of Oberlin City School District and Dr. Douglas Sebring, Assistant Superintendent of North Olmsted City Schools, Eric will be discussing legal issues related to the posting of material to the Internet by students, school employees and school board members. The presenters will focus on how to make effective use of this powerful educational resource while avoiding the potential liability and public relations nightmares that may result from inappropriate postings.

For more information on these or other education law issues, please contact one of our Education Law lawyers:

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The information in this newsletter is a summary of often complex legal issues and may not cover all the 'fine points' related to a specific situation or court jurisdiction. Accordingly, it is not intended to be legal advice, which should always be obtained in consultation with an attorney.