

**Bowles Rice**  
**WHAT TO DO WHEN ...**  
**FACING THE PAINS OF PAYROLL**  
 Trey Morrone & Kim Croyle  
 Bowles Rice, LLP  
 May 13, 2021 WVASBO Annual Meeting

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Howard Seufer Leigh Anne Wilson

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2

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### A Word About This Presentation

- We speak in general terms today. The specific facts of each situation can make a difference in the legal principles that apply
- This presentation must not be treated as legal advice about any specific situation
- Due to the rapidly changing nature of the law, information in this presentation may become outdated
- When in doubt, don't act or rely upon the information contained in this presentation without seeking legal advice



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## Bowles Rice

### Some School Law Resources to Help You Keep Up-to-Date All Year Long

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### Education Law Updates



<https://www.bowlesrice.com/education-law-blog>

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**Join the Mailing List**

- **Send an email to Sarah Plantz:**
  - [splantz@bowlesrice.com](mailto:splantz@bowlesrice.com)
- **Tell Sarah:**
  - Who you are
  - Your position in public education
  - Your school board's name
  - That you want to be added to the mailing lists

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**Today's Agenda**

- What to do when . . .
  - **Employees Leave**
  - Employees take Workers Compensation
  - **Employees take Other Forms of Leave**
  - Employees Abuse Leave
  - **You Make a Mistake (not that that ever happens)**

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**WHAT TO DO WHEN . . .**

**EMPLOYEES LEAVE**

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### When Employees Leave

- Board shall pay the employee's wages due for work that the employee performed prior to the separation of employment on or before the next regular payday
- The term "wages" shall also include then accrued fringe benefits capable of calculation and payable directly to an employee
- Includes discharge and resignation of employee

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### Delivery of Final Wages

- May be made in person in any manner permissible under W.Va. Code 21-5-3, through the regular pay channels or,
- If requested by the employee, by mail.
- If the employee requests that payment be made by mail, that payment shall be considered to have been made on the date the mailed payment is postmarked.

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### Suspension

- When an employee for any reason whatsoever is laid off, the Board shall pay wages earned at the time of suspension or layoff, in full, to the employee not later than the next regular payday
  - either through the regular pay channels or
  - by mail if requested by the employee

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12

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**WHAT TO DO WHEN . . .**

**EMPLOYEES TAKE  
WORKERS COMPENSATION**

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**While on WC - Entitled To What?**

- Experience credit for pay?
- **Years of service?**
- Personal leave?
- **Holiday pay?**

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**Loy v Wetzel County Board**

- “the West Virginia Supreme Court of Appeals has determined that policies and rules prohibiting employees who are receiving Workers’ Compensation Temporary Total Disability benefits from also accruing credit for years of service **and annual leave** are not related to a proper government purpose and, therefore, violate the equal protection clause of Section 10, Article III, of the West Virginia Constitution. Syl. Pt. 2, *Canfield, supra.*”  
*(emphasis added)*

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**State Board Policy 5612**

- Section 5.1.1(b)
- "Personal leave shall accrue while an employee is absent from work receiving TTD benefits, pursuant to the provisions of West Virginia Code 18-4-10."

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**State Board Policy 5612**

- Section 5.1.1(c)
- "Any legal school legal school holidays, election days, other noninstructional days such as outside school environment (OS), continuing professional development (CE), and teachers-pupil-parent conferences (TP), and inclement weather days occurring during the period when TTD benefits only are being received, will NOT be paid."

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17

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**WHAT TO DO WHEN . . .**

**EMPLOYEES TAKE  
OTHER FORMS OF LEAVE**

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18

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### WV School Employee Leave Rights

- 18A-4-10 leave
  - accident, sickness, death in the immediate family, or life-threatening illness of the employee's source, parents or child, or **other cause authorized or approved by the board**
  - no-cause days
    - rules restricting use
- Leave banks
- Leave donation
- Paid vacation
- FMLA
- **18A-2-2a leaves of absence**
- Other leaves of absence
  - school board-created leaves
  - usually similar to 18A-2-2a leaves
- **Unpaid vacation**
- Leave as an accommodation under the ADA
- **WV Parental Leave Act**
- USERRA
  - uniformed services employment and reemployment rights act

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19

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### FMLA – Basics/Rules

- Employees are covered if:
  - They have been employed for at least 12 months (even if not consecutive) AND
  - They have at least 1,250 hours\* of service during that time (not counting paid and unpaid leave, including FMLA leave) AND
  - You employ 50 people
- What are employees entitled to:
  - 12 weeks of unpaid leave; employee chosen paid leave; or employer chosen paid leave during any 12-month period;
  - 26 weeks to care for a covered service member
  - Spouses of the same employer may be limited to a combined 12/26 weeks
  - May be intermittent

\* With professionals, a lot of leeway is given on the 1250 hours

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### FMLA – Basics/Rules

- Once the employer has enough information to determine whether the leave qualifies for FMLA, it must designate the leave as FMLA within 5 business days.
- **Employers cannot waive, nor may employers induce employees to waive, prospective rights under FMLA.**
- Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employer nor the employee may decline FMLA protection for that leave.
- **An employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer it.**

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21

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### FMLA – Possible Solutions

<p><b>Issue/Problem</b></p> <ul style="list-style-type: none"> <li>• Paid v. Unpaid Leave</li> <li>• Second Opinion?</li> <li>• Health Insurance?</li> </ul>	<p><b>Possible Solution</b></p> <ul style="list-style-type: none"> <li>• Employer can designate FMLA to run concurrently             <ul style="list-style-type: none"> <li>• What happens if we don't?</li> </ul> </li> <li>• Second opinion if the employer pays</li> <li>• Yes! Must pay the employer's share. BUT there are provisions that help if an employee does not pay or fails to return to work.</li> </ul>
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22

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### FMLA – Possible Solutions

<p><b>Issue/Problem</b></p> <ul style="list-style-type: none"> <li>• Cannot do their job upon return to work</li> </ul>	<p><b>Possible Solution</b></p> <ul style="list-style-type: none"> <li>• If the employee is unable to perform the essential function of the position, they are not entitled to reinstatement <b>BUT you have to undergo the ADA interactive dialogue first!</b></li> </ul>
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23

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### 18A-4-10 Paid Leave Entitlement & Accumulation

- 1.5 Days Per Month
- Leave is Personal Leave
- Accumulated Without Limitation

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**18A-4-10  
Paid  
Leave  
Leave Without  
Cause**

- Four Days Without Cause (eff. 07/01/19)
- Restrictions/Limitations:
  - 24-hours **advance notice** required (unless sudden or unexpected)
  - Cannot use **consecutive days**, w/o approval
  - **Discretionary denial**, if 15% or 3 employees (whichever is greater) previously give notice of intent to use that day for leave
  - Cannot use for **work stoppage or strike**

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**18A-4-10  
Paid  
Leave  
Availability of  
Leave**

- Accident
- **Sickness**
- Death in the Immediate Family
- **Life Threatening Illness of Spouse, Parent, or Child**
- "Other cause authorized or approved by the board"

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26

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**18A-4-10  
Paid  
Leave  
Potential Issues  
and Solutions**

- "Other cause authorized or approved by the board"
  - Reasonable, not arbitrary and capricious
  - Be consistent and uniform
- **Use of Unaccumulated Leave Permitted**
  - Issues could arise if employment ends prior to accumulation of days used
  - Employee required to reimburse county board
- **Representative Cases/Issues**
  - *Clutter v. Webster County Bd. Of Educ.*
  - *Thomas v. Kanawha County Bd. Of Educ.*
  - *Chapman v. Jefferson County Bd. Of Educ.*

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27

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**18A-2-2a  
Leaves of  
Absence  
Entitlement**

- Any teacher who is returning from an approved leave of absence that extended for one year or less shall be restored to the same assignment or position or duties held prior to such leave.
- Employee must notify the county board at least 10 working days before beginning the leave.
- Board must approve the extended leave of absence without pay for any period of time not exceeding one year for the purpose of childbirth, pregnancy, or adoptive or infant bonding. Employee shall not be required to use accumulated annual leave or sick leave prior to taking extended leave.

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28

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**18A-2-2a  
Leaves of  
Absence  
Availability of  
Leave**

- Any purpose?
- Clearly pregnancy, childbirth or adoptive or infant bonding
- Beyond one year?

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29

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**WV  
Parental  
Leave Act**

- W. Va. Code 21-5D-1 et seq
- Basics/rules
- Hudok

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### Parental Leave Act – Basics/Rules

- Employees are covered if:
  - They have been employed for permanent employment and have worked at least 12 consecutive weeks
- What are employees entitled to:
  - 12 weeks of unpaid leave during any 12-month period;
  - Spouses of the same employer are entitled to 12 weeks, too
  - May be intermittent if it does not unduly disrupt the employer's operations

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31

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### Parental Leave Act – Possible Solutions

Issue/Problem	Possible Solution
<ul style="list-style-type: none"> <li>• Paid v. Unpaid Leave</li> </ul>	<ul style="list-style-type: none"> <li>• Employee must use paid leave before using 12 weeks unpaid</li> </ul>
<ul style="list-style-type: none"> <li>• Second Opinion?</li> </ul>	<ul style="list-style-type: none"> <li>• Not really covered by PLA. Will rely on FMLA standard</li> </ul>
<ul style="list-style-type: none"> <li>• Health Insurance?</li> </ul>	<ul style="list-style-type: none"> <li>• No! Employee can stay on the plan provided employee pays ALL of the premium</li> </ul>

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32

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### Hudok

- *Hudok v. Randolph County Bd. of Educ.*, 415 S.E.2d 897 (1992)
  - Parent Leave Act allows school employees to use all of their accrued paid leave time for the same purpose as the Parental Leave Act 21-5D-1 and then to use the 12 weeks of unpaid leave

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33

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**WHAT TO DO WHEN . . .**

**EMPLOYEES ABUSE LEAVE**

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34

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**Abuses of Leave**

"Abuse of Leave"

- Employees falsely claiming to be sick and exercising a paid leave day (claiming illness while on a hunting trip)
- Employees refusing to provide a doctor's excuse per county policy (e.g., needed after 3 consecutive days' absence)
- Employees not showing up to work, but not calling off or reporting their absence in any manner (failure to follow procedure)
- Employees continuing to miss work after exhausting all accrued paid leave time
- Employees asking to take days off without pay even though they still have accrued paid leave time
- Other examples?

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**Abuses of Leave**

- Detecting employees who are misusing or abusing leave
  - Some don't even try to hide what they are doing
    - openly discussing their plans to miss work and use accrued sick leave
  - Computer programs, like eSchools Solutions SmartFindExpress, make it easier to spot patterns of misuse and abuse
    - e.g., frequent Monday/Friday absences
    - e.g., always "sick" a few days before or right after holiday breaks
  - Facebook & Instagram Posts from "sick days"
    - "sick" employee appearing less than sick
    - appearing in the background of someone else's post
  - Pictures from cell phone cameras
    - members of the community
    - fellow employees
    - students

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36

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**Abuses of Leave**

- The cost of leave misuse and abuse adds up fast
  - salaries & benefits are a school board's largest expense
  - high substitute costs

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**Abuses of Leave**

- 18A-2-8 discipline for abuse:
  - Insubordination
  - Willful Neglect of Duty
  - Incompetency (if physically unable to do the job and no available leave – be weary of ADA issues!)

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**WHAT TO DO WHEN . . .**

**YOU MAKE A MISTAKE  
(NOT THAT THAT EVER HAPPENS)**

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### Cost of Failure to Pay

- Must pay unpaid wages due and
- **Liable to the employee for two times that unpaid amount as liquidated damages.**
- Liquidated damages that can be awarded under this section are not available to employees claiming they were misclassified as exempt from overtime under state and federal wage and hour laws

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### Back pay damages

- Wages wrongfully deprived the employee.
- **Back pay may be granted for only one year prior to the filing of a grievance.**
- If Board acted in bad faith in concealing the facts giving rise to the claim for back pay, an 18-month limitation on back pay applies.

*Clark v. Putnam County Board of Education, Docket No. 2012-0944-CONS (June 28, 2013)*

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41

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### Back pay awards – with interest

- A grievant who is awarded back pay as reimbursement for wages which he would have received had the county board of education not wrongfully deprived him of such wages must also be awarded prejudgment interest.

*Gillispie v. Kanawha County Board of Education, Docket No. 98 20 216 (August 26, 1998).*

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42

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### Back pay awards – interest request

- Finally, although the Grievance Board does not generally award interest unless it is requested by a grievant, it is appropriate to award interest when a county board's suspension of an employee is overturned upon a finding that the county board abused its discretion in imposing too severe a penalty for the employee's misconduct.

*Blackburn v. Brooke County Board of Education, Docket No. 2009-0618-BroED (May 27, 2009).*

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43

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### Back pay award – No interest

- Where a grievant who seeks back pay does not also request interest upon that amount, the Grievance Board may award none.

*Tibbs v. Hancock County Board of Education, Docket No. 2012-0102-HanED (June 21, 2012).*

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### Back pay award – with interest

- When back pay is awarded, a grievant is not made whole unless prejudgment interest is received.

*Clark v. Putnam County Board of Education, Docket No. 2012-0944-CONS (June 28, 2013)*

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### Agreed Wage Assignments

- Only valid for one year from date of signing
- **Must be signed by both parties**
- No longer have to be notarized!
- **Must include total amount due**
- Must specify that three-fourths of the periodical earnings or wages shall at all times be exempt

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### Overpayment Disputed

- What if wages were paid in excess of that required by law?
- **What if employee was enticed to position because of increased wages?**

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### Williams v Roane County

- Williams was a bus operator
- **Williams was awarded a bus operator/aide position at the beginning of the 2007-2008 school year**
- Williams was paid an extra 12.5% split shift pay beginning with the 2007-2008 school year
- **Do we have an overpayment?**

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### Williams v Roane County

- In the summer of 2013, administrators learned they had misinterpreted the split shift pay statute
- Roane County had paid all multi-classified bus operators the split shift pay, an extra 12.5%
- Roane County Board was notified, and the Board voted to discontinue split shift pay for all multi-classified bus operators

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### Williams v Roane County

- Williams received a letter advising of the mistake and that the split shift pay would be discontinued.
- None of the duties or job responsibilities of Williams changed as a result of the pay change
- What did Williams do?

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### Ruling in Williams v Roane County

- ALJ ruled in favor of Roane County
- Circuit Court ruled in favor of Roane County
- Williams was never entitled to split shift pay
- Board did not violate the non-relegation clause
- Approval of continuing contract did not ratify the error in paying split shift pay
- Board not bound by ultra vires acts

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51

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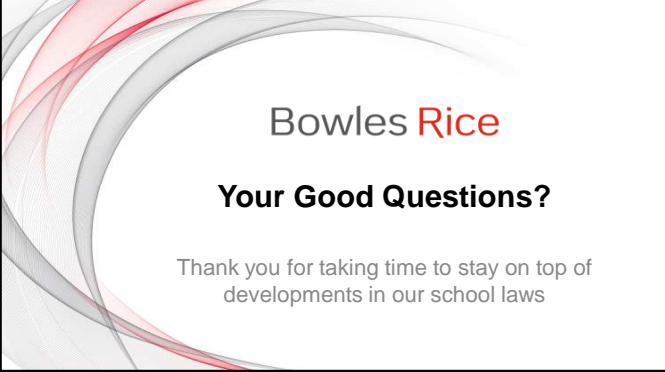
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**Bowles Rice**

**Your Good Questions?**

Thank you for taking time to stay on top of developments in our school laws

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