

# Legal Update, Vendor Contracts, COVID Leave and Independent Contractors

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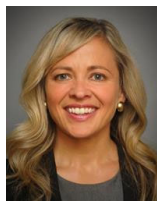
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# Keeping up-to-date with school law developments

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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- Due to the rapidly changing nature of the law, information in this presentation may become outdated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








# Legal Update






SENATE BILL 272  
RELATING TO THE WV EMPLOYMENT LAW  
WORKER CLASSIFICATION ACT  
*In Effect June 9, 2021*  
Handout, page 3





**SENATE BILL 375**  
RELATING TO COUNTY BOARDS OF EDUCATION  
POLICIES FOR OPEN ENROLLMENT  
*In Effect July 6, 2021*  
Handout, page 6



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- Removes many of the open enrollment/transfer provisions enacted in 2019, including a requirement that the policy also articulate any
    - admission criteria,
    - transportation provisions,
    - timelines for open enrollment periods, and
    - restrictions on transfers due to building capacity constraints


- Under the bill, an application to transfer into a school district may now be denied by a county board for only two reasons:
  - lack of grade level capacity or
  - the nonresident student's failure to correctly fill out or submit the application form


- All denials must be in writing and sent to the parent or guardian and State Department of Education within three business days of the decision
- Every denial must include the reason and explanation for the denial, plus information on appealing the decision to the State Superintendent of Schools

- The county board to which a student wishes to transfer may not refuse the transfer by virtue of the student transferring from a private, parochial, church, or religious school that holds an exemption from the compulsory school attendance requirement
- Nor may a county board give enrollment preference to such students


### Where a student transfers after the school year has begun.

- If the transfer occurs after the second month of the school year, the receiving county may, in the next fiscal year, invoice the student's former county for a pro rata share of the amount the receiving county otherwise would have received under the state basic foundation program had the student been included in its prior year's net enrollment

- 
- If a student in grades K-12 transfers after the second month, the receiving county may, in the next fiscal year, invoice the student's former county for the amount the receiving county otherwise would have received under aid to exceptional students had the student been included in the county's prior child count enrollment

- 
- If a student in Pre-K transfers after the child count of exceptional students is certified for the school year, the receiving county may, in the next fiscal year, invoice the student's former county for the amount the receiving county otherwise would have received under aid to exceptional students had the student been included in the county's prior year's child count enrollment







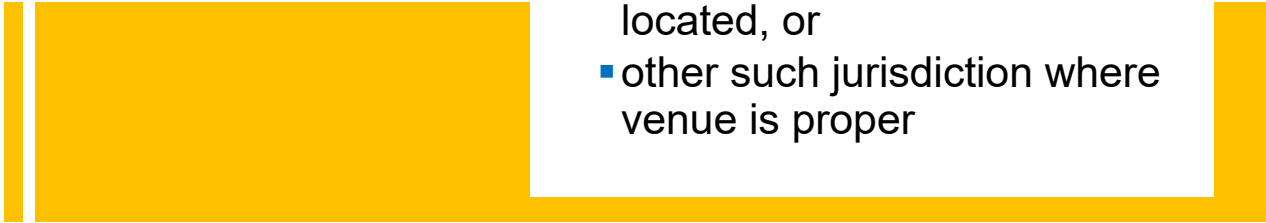
**SENATE BILL 673**  
RELATING TO VENUE FOR BRINGING CIVIL  
ACTION OR ARBITRATION PROCEEDINGS  
UNDER CONSTRUCTION CONTRACTS

*In Effect July 1, 2021*

Handout, page 10



**Beginning  
July 1, 2021**

- Every school board construction contract must provide that any civil action or arbitration must be
    - in the State of West Virginia and
    - in the jurisdiction where the construction project is located, or
    - other such jurisdiction where venue is proper
- 

The covered contracts are those to:

- design, manage construction of, construct, alter, repair, maintain, move, demolish, or excavate, or supply goods, equipment, or materials for
- the construction, alteration, repair, maintenance, movement, demolition, or excavation of
- a building, structure, appurtenance, road, bridge, or tunnel which is physically located in the state of West Virginia

House Bill 2009  
RELATING TO LIMITATIONS ON THE USE OF WAGES  
AND AGENCY SHOP FEES BY EMPLOYERS AND  
LABOR ORGANIZATIONS FOR POLITICAL ACTIVITIES

*In Effect June 17, 2021*

Handout, page 13

- Prohibits the deduction or assignment of union, labor organization or club dues or fees from the earnings of county board of education employees

- For wage assignments for permissible purposes, removes the requirement that written assignments of an employee's future wages must be notarized

## Monitor Developments!

- ***Currently the operation of House Bill 2009 has been temporarily enjoined statewide by the Circuit Court of Kanawha County***
- ***The bill will not go back into effect unless the Circuit Court or the West Virginia Supreme Court of Appeals so order***
- ***Until then, deductions for association fees continue as before***

House Bill 2633  
CREATING THE 2021 FARM BILL  
*In Effect July 5, 2021*  
Handout, page 26

- The West Virginia Fresh Food Act required schools, beginning July 1, 2019, to purchase a minimum of 5% of their fresh produce, meat and poultry products from in-state producers
- That Act is modified in several respects

- The 5% minimum will now apply to foods that the schools “obtain” rather than just purchase
- The 5% minimum for obtaining food from in-state producers will no longer apply to just fresh produce, meat and poultry products, but now will also apply to “milk and other dairy products, and other foods”

- The 5% rule can be satisfied not only with food grown or produced by in-state producers, but also with food “processed” by them
- The Agriculture Commissioner must establish rules that
  - contain criteria for a food or food product to satisfy these requirements and
  - establish criteria for determining when exceptions or exemptions should be granted, such as when a desired food cannot be grown or is not available from in-state producers

- Contracts for the purchase of food, or that include the purchase of food as a component of the contract, must contain provisions to ensure compliance with the bill and any rule of the Commissioner

**Senate Bill 680**  
**ALLOWING STATE SUPERINTENDENT OF SCHOOLS TO  
DEFINE CLASSROOM TEACHERS CERTIFIED IN  
SPECIAL EDUCATION**

*In Effect July 5, 2021*

Handout, page 11

- The state minimum salary schedule for teachers gives 3 additional years of experience to classroom teachers “certified in special education and employed as a full-time special education teacher”
- Are speech-language pathologists considered classroom teachers for purposes of this salary enhancement?
  - The State Department has advised that they are not
  - The Grievance Board has ruled that they are

- With the apparent intent of resolving the question, this bill provides that the meaning of “each classroom teacher certified in special education and employed as a full-time special education teacher” shall be determined by the State Superintendent of Schools

HOUSE BILL 2145  
RELATING TO STUDENT AIDE CLASS TITLES  
*In Effect July 9, 2021*  
Handout, page 23



## 4 New Class Titles:

- Aide V (Special Education Assistant Teacher – Temporary Authorization)
  - *a person who does not possess minimum requirements for the Aide V permanent authorization but is enrolled in and pursuing requirements as prescribed by the State Board of Education*
  - The employee is compensated at pay grade E
- Aide V (Special Education Assistant Teacher)
  - *a service person referred to in the Aide I classification who holds a high school diploma or a GED certificate and who has completed the requirements and experience to be prescribed by the State Board*
  - The employee is compensated at pay grade F

## 4 New Class Titles

- Aide VI (Behavioral Support Assistant Teacher – Temporary Authorization)
  - *a person who does not possess minimum requirements for the Aide VI permanent authorization but is enrolled in and pursuing the requirements as prescribed by the State Board*
  - The employee is compensated at pay grade E
- Aide VI (Behavioral Support Assistant Teacher)
  - *a person who works with a student or students who have identified behavior difficulties, holds at least an Aide III classification, and has completed the requirements and experience to be prescribed by the State Board*
  - The employee is compensated at pay grade F

## 4 New Class Titles



No service person is entitled to the paygrade associated with the new titles unless they have been selected to fill a posted position which specifically requires the successful candidate to hold or be enrolled in and pursuing the requirements for the classification



In each case, the determination as to whether a position will be posted requiring the class title is "solely at the discretion of the county"

## HOUSE BILL 3294 RELATING TO UNEMPLOYMENT INSURANCE

*In Effect July 1, 2021*

Handout, page 31

- An employer may contact Workforce West Virginia when an employee who was previously laid off by that employer is given the opportunity to be rehired but declines to do so
- In response, Workforce West Virginia must investigate to determine whether the employee should continue to receive unemployment benefits

**SENATE BILL 651**  
ALLOWING COUNTY BOARDS  
OF EDUCATION TO PUBLISH  
FINANCIAL STATEMENTS ON  
WEBSITE

*In Effect July 6, 2021*

Handout, page 9

- County boards of education will have 120 days after the end of a fiscal year, instead of 90 days, to prepare and publish the financial statement for that year on the form prescribed by the State Auditor and State Superintendent of Schools
- However, boards will have to prepare their financial statements and file them with the State Auditor and State Superintendent no later than 90 days after the end of the fiscal year

- As of July 1, 2023, boards will have the choice of publishing their financial statements either as Class I-0 legal advertisements or on their websites.
- Prior to first exercising the website option, a board must
  - (1) hold a public hearing at which interested persons may express their views on whether the statement should be published as a Class I-0 legal ad or on the website, and
  - (2) give public notice of the availability of the website posting, publishing this notice once a week in a qualified newspaper of general circulation for two successive weeks

- If posted as a Class I-0 legal advertisement, the financial statement must not include the name of any person who has entered into a contract with the county board as a regular or substitute teacher or service employee

- If posted on a board's website, the financial statement must remain posted there at least until publication of the next annual statement, and it must include:
  - the name of every regular and substitute teacher and service employee who has entered into a contract with the board, with the amounts paid to each,
  - budget estimates, and
  - a list of the names of each firm, corporation and person who received less than \$250 from any fund during the fiscal year, showing the amount paid to each and the purpose of the payment

Ethics Commission Advisory Opinion  
No. 2021-13

*Conflicts of Interest*  
handout, page 35

Vendor Contracts

## Top 10 Issues For Contract Review

1. The “Board of Education” is always the correct entity to enter into a contract
  - Individual schools are buildings, not legal entities, and not the appropriate party to enter into any contracts

## Top 10 Issues For Contract Review

2. The Superintendent is almost always the appropriate officer or administrator to sign the contract.
  - However, you should check your policies. It is possible that some other administrator has been authorized by a school board’s policies to execute certain types of contracts.

## Top 10 Issues For Contract Review

### 3. Is the expenditure authorized?

- Appendix C to Policy 1224.1 (which is included in your materials) provides a list of expenditures considered by the State Attorney General or the State Superintendent to be unauthorized or authorized. If you have any doubts, you should consult that list or seek advice. Note that the list is not exhaustive.
- Violations of this rule may result in criminal charges and personal liability for expenditures.

## Top 10 Issues For Contract Review

### 4. Always attach the Agreement Addendum, which is attached as Exhibit C to Policy 8200 and included in your materials.

- If you have any doubts about whether it is appropriate to attach the Agreement Addendum, always err on the side of caution and attach the Agreement Addendum
- *Relatedly, make sure that the vendor actually signs the Agreement Addendum.*



## Top 10 Issues For Contract Review

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5. It is preferable that every contract contain language incorporating the Agreement Addendum into the contract.
  - For instance, a sentence may be added indicating that in the event of a conflict between the contract and the Agreement Addendum the terms of the Agreement Addendum control.

## Top 10 Issues For Contract Review

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6. Duration of the Contract: A contract should cover a 12-month period or cite a specific time for completion for the project or service.

## Top 10 Issues For Contract Review

7. “Annual Out” Clause: If a contract is for a duration exceeding the end of the fiscal year, the contract should contain a provision allowing the school board to cancel the contract with advance notice.

## Top 10 Issues For Contract Review

8. Do not take on the liabilities or debts of the vendor or other party to the contract, which is often called an “indemnification” or “hold harmless” clause.
  - This is covered by the Agreement Addendum (and a reason the addendum should be attached), but it is an issue that vendors or other parties unfamiliar with school boards may not understand.

## Top 10 Issues For Contract Review

9. General rule of thumb No. 1: Be wary of contracts sent from out-of-state vendors.
  - These large, national vendors (think national schoolbook company) will often have large contract forms that they use for all contracts. These contracts may or may not have terms that are contrary to the laws in West Virginia. At a minimum, these vendors, like all others, should sign the Agreement Addendum and the contracts will often need to be modified to reflect that the contracts are subject to the Agreement Addendum.

## Top 10 Issues For Contract Review

10. Rule of Thumb No. 2: Just because the “Board of Education of the County of Mayberry” does something one way does not mean it is correct.
  - This is never a justification for a school board taking a certain action (with regard to contracts or any other action). You should consult your local policies, State Board policies 8200 and 1224.1, and/or seek advice if you have doubts.

## Top 10 Issues for Contract Review – Bonus Rule

- “Stringing” is defined by Policy 8200 as the “illegal practice of issuing a series of requisitions or purchase orders for the purpose of circumventing the competitive bidding procedures.”
- This is possible to do by accident, such as a situation where the school board desires to replace certain items, equipment, or goods, but wants to do it in stages over the course of a few years.
- If cumulatively, those expenditures exceed \$5,000, you must bid the contract.

COVID 19  
LEAVE

Does it even  
exist anymore?

## Way Back When . . .

- Emergency Paid Sick Leave Act
  - 80 hours paid sick leave
  - Does not matter how long employed
  - EXPIRED DECEMBER 31, 2020
- Emergency Family & Medical Leave Expansion Act
  - Up to 10 week paid
  - Must have been employed 30 days prior
  - EXPIRED DECEMBER 31, 2020
- FEDERAL LAW EXPIRED

## What Happens When an Employee Gets COVID today?

- Does the employee qualify for leave under . . .
  - 18A-4-10
  - ADA
  - FMLA
  - Local leave policies

## Leave under 18A-4-10

- 1.5 days per month, in advance (all up front at start of school year)
  - Reasons: accident, sickness, death in the immediate family, or life threatening illness of the employee's spouse, parents, or child, or *other causes authorized or approved by the board*
    - ❖ *What is the difference between authorized and approved?*
  - 4 days annually, instead of 3, for leave without cause
- Accumulate unused leave "without limitation"
- Transferable within state

## Leave under 18A-4-10

- Coordinate with workers compensation benefits
- Must reimburse County if paid leave used but not earned
- County boards may supplement personal leave rules by written policy

## Leave Under the ADA

- Employees are entitled to reasonable accommodations under the Americans with Disabilities Act if they have an underlying condition that (a) requires an accommodation regardless of COVID; or (b) requires an accommodation because of COVID.
- Accommodations must be reasonable and not create an undue hardship for the employer
- Modifying leave policies can be considered a form of reasonable accommodation

## Leave Under the ADA

- Employers are entitled to ask questions:
  - To determine whether the condition is a disability;
  - To discuss with the employee how the requested accommodation would assist him and enable him to keep working;
  - To explore alternative accommodations that may effectively meet his needs; and
  - To request medical documentation if needed.



## Leave Under the ADA

- According to the EEOC:
  - The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.
  - An employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.
  - An employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.



## Leave Under FMLA

- Must be entitled to FMLA (12 months/1250 hours)
  - Must have a serious health condition or be caring for a family member with a serious health condition
  - Entitled to 12 work weeks unpaid leave within a 12 month period
-





## Leave Under FMLA

- Is COVID a serious health condition?
    - conditions requiring an overnight stay in a hospital or other medical care facility;
    - conditions that incapacitate the employee or the employee's family member (for example, unable to work or attend school) for more than three consecutive days and that include ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care, such as prescription medication); and,
    - chronic conditions that cause occasional periods when the employee or the employee's family member is incapacitated, and which require treatment by a health care provider at least twice a year.
- 



## Leave Under FMLA

- The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19 in some instances, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee solely for the purpose of avoiding exposure to COVID-19 is not protected under the FMLA.
  - Employees are **not** entitled to FMLA leave:
    - For fear of contracting COVID or
    - For fear of spreading COVID to a family member
-

## Leave Under the Parental Leave Act

- 12 weeks of unpaid leave following exhaustion of all other leave, paid or unpaid
- To care for the employee's son or daughter, spouse, parent, or dependent who has a serious health condition
  - Does this include COVID?
  - What about long COVID?

## Leave Under the Parental Leave Act

- The position held by an employee immediately before the leave of absence shall be held and the employee shall be returned to that position upon his or her return to work. However, the employer may hire a temporary employee to fill the position for the period of time the employee is off work.

## Leave Under Local Policies

- Some counties:
  - Extended COVID leave past December 31, 2020
  - Allow employees to take leave without pay for COVID quarantines
  - All employees to take leave without pay for any number of things


## Leave Under Local Policies

- Be consistent!
- Do you require a doctor's excuse?
- You may still be required to provide leave under other statutes
- Does your leave run concurrently or consecutively?



## Employee or Independent Contractor?

- *A question of great consequence for school boards and the people who perform services for school boards*
- 



## Where the distinction makes a difference

- ***Whether a school board is liable for a person's negligence that causes injury to person or property***
  - Known as the "Doctrine of respondeat superior"
    - ❖ "Let the superior give answer"
    - ❖ aka "Vicarious liability"

## Where the distinction makes a difference

- ***How much to pay for work and whether to withhold from the pay***
  - State and county pay schedules and stipends?  
Contract price?
  - Withholdings?
    - ❖ Federal and state personal income tax
    - ❖ Social security deductions
    - ❖ Retirement system contributions

## Where the distinction makes a difference

- ***Selection of the worker***
  - The selection criteria and requirements of the personnel statutes? e.g.,
    - ❖ West Virginia Code § 18A-4-7a (regular professionals)
    - ❖ West Virginia Code § 18A-4-8b (regular service; extra duty)
    - ❖ West Virginia Code § 18-4-16 (extracurricular)
    - ❖ West Virginia Code § 18-5-39 (summer)
  - The competitive bid and alternative and emergency selection procedures of State Board Policy 8200 and similar county policies?

Where the  
distinction  
makes a  
difference

- **Workers' rights and benefits**
  - Workers compensation coverage
  - Retirement benefits
  - Wage Payment and Collection Act rights
  - Remedies under the WV Human Rights Act
  - Seniority
  - RIF and recall rights
  - Other due process job protections under the school laws, including for contract suspension and termination

There can be costly consequences for acting under mistaken characterizations of workers as independent contractors and vice versa!

## From Senate Bill 272

“RELATING TO THE WEST  
VIRGINIA EMPLOYMENT  
LAW WORKER  
CLASSIFICATION ACT”

W. Va. Code 21-5I-4  
*Took effect June 9, 2021*  
*Handout, page 3*

## WV Employment Law Worker Classification Act

- Certain standards must be used to determine who is an independent contractor for purposes of West Virginia’s
  - workers compensation laws,
  - unemployment compensation laws,
  - Human Rights Act, and
  - Wage Payment and Collection Act


## WV Employment Law Worker Classification Act

- A worker engaged by a county board of education must be classified as an independent contractor for those 4 purposes if they meet all 4 tests set forth in the bill

## WV Employment Law Worker Classification Act: TEST 1


- The worker signs a contract stating the board's intention to engage them as an independent contractor & acknowledging that
  - (a) they are providing services as an independent contractor;
  - (b) the board will not treat them as an employee;
  - (c) the board will not provide them with workers' compensation and unemployment compensation benefits; and
  - (d) they will be responsible for the majority of supplies and other variable expenses that they incur in performing the contracted service, except for expenses that are for travel and expenses that are reimbursed under an express provision of the contract, and except for supplies and expenses that are commonly reimbursed under industry practice





## WV Employment Law Worker Classification Act: TEST 2

- For fees earned from the work, the worker has filed or is contractually required to file, appropriate business or self-employment income tax returns
- Even though the worker may not have control over the final result of the work, they actually and directly control the manner and means by which the work is to be accomplished, except for the exercise of control necessary to comply with government and regulatory requirements, protect persons or property, protect a franchise brand, or deploy, implement or use any safety improvement required by contract or otherwise



## WV Employment Law Worker Classification Act: TEST 3

- Even though the worker may not have control over the final result of the work, they actually and directly control the manner and means by which the work is to be accomplished, except for the exercise of control necessary to comply with government and regulatory requirements, protect persons or property, protect a franchise brand, or deploy, implement or use any safety improvement required by contract or otherwise

## WV Employment Law Worker Classification Act: TEST 4

- The worker satisfies 3 or more of 9 other criteria listed in the statute, such as
  - control over the amount of time personally spent providing services,
  - freedom to hire or contract with others to perform all or some of the work,
  - the right to work for other parties, and
  - no obligation to perform additional services for the board without a new or modified contract

## WV Employment Law Worker Classification Act

- *Workers who don't satisfy the 4-part test are not necessarily employees!*
- Instead, they must be classified as independent contractors or employees under the 20-factor analysis of IRS Revenue Ruling 87-41
  - Even though this is for WV workers compensation, retirement, Human Rights, and Wage Payment & Collection, not federal taxes!
  - Handout, page 46

## WV Employment Law Worker Classification Act

- Senate Bill 272's 4 test for determining whether a worker is an independent contractor does not govern such determinations
  - for federal tax purposes, or
  - in areas of West Virginia law outside of workers compensation coverage, unemployment compensation, Human Rights Act claims, and Wage Payment and Collection Act rights

## Determining Worker Status for *Other* Purposes

- **Federal personal income tax withholding**
  - The 20-factor analysis of the IRS Revenue Ruling
  - Note: The IRS still uses that analysis, but has categorized the 20 factors into three categories
    - ❖ Behavioral: Does the Board control the worker & how they do their job?
    - ❖ Financial: Does the Board control business aspects of the worker's job such as pay, expenses, furnishing tools
    - ❖ Type of Relationship: Are there written contracts? Employee-type benefits such as vacation and insurance?
  - The IRS can help! Form SS-8, Handout, page 54

## Determining Worker Status for *Other* Purposes

- **Various worker rights and benefits under the West Virginia school laws**
  - The Legislature, which created the rights and benefits, also defined the workers who enjoy them
  - For example:
    - ❖ West Virginia Code § 18-1-1. Definitions.
      - ☐ “Regular full-time employee”
    - ❖ West Virginia Code § 18A-1-1. Definitions
      - ☐ “School personnel,” “Professional person,” “Service person”

## Determining Worker Status for *Other* Purposes

- **“Respondeat Superior” Liability**
  - WV courts consider 4 factors to determine, based on the facts of each case, whether a person causing injury was an employee or independent contractor:
    - ❖ Selection and engagement of the worker
    - ❖ Payment and compensation
    - ❖ Power of dismissal
    - ❖ Power of control
  - All must be considered. The first 3 do not necessarily control. The 4th factor – the right to control or supervise the work -- may be determinative
  - See the *Cunningham* decision, Handout, page 63

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

And thank you for all you do to  
improve student achievement in  
West Virginia's schools

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