COLLINS, LOUGHRAN & PELOQUIN, P.C.
Legal Counsel to Employers and Schools

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MINIMUM WAGE REMINDER

Public employees are exempt from the state's Minimum Wage Law. Massachusetts public employees are instead covered by the FLSA.

The current federal minimum wage is $7.25. The provision in the FLSA that states that an employee is entitled to the higher of the two minimum wages (state or federal), only applies to employees that are subject to both sets of minimum wage laws. In Massachusetts, case law and EOLWD Opinion Letters have determined that the state's minimum wage law does not apply to the state's public employees.

For more information please visit: www.collinslabor.com and review our blog post on this issue ("Minimum Wage Increase Does Not Apply to Municipal Employees").

CONTACT US

Philip Collins
pcollins@collinslabor.com

Leo Peloquin
lpeloquin@collinslabor.com

Tim Norris
tnorris@collinslabor.com

Joshua Coleman
jcoleman@collinslabor.com

Melissa Murray
mmurray@collinslabor.com

Summer School Versus Extended School Year Services

A common scenario facing many school districts this time of year is how to address situations where special education students are deemed ineligible for Extended School Year (ESY) Services by the team, but are then enrolled in summer school by their parents. Where the student meets the criteria for summer school and the family is willing to pay for it, school districts should not exclude students from these programs just because the IEP does not provide for ESY.

When summer school is a program/service offered by the school district, the student should be allowed to enroll in the program and provided with reasonable 504 accommodations (rather than IDEA accommodations) that support his/her access to the program. These may be the same or similar accommodations provided for in the student's IEP; however, there is no obligation to fully implement the IEP in the summer school program where the team has determined that the student does not qualify for ESY services. School districts with questions regarding this situation or their individual obligations to a student should contact their CLP attorney for more information.

Noteworthy Decisions

Record Keeping Is Critical In Wage Act Cases

When dealing with the issue of time worked but not compensated, the absence of proper records kept by the employer can, at a very minimum, complicate a marginal case. *Escobor v. Helping Hands Company, Inc*., decided by the Suffolk Superior Court on April 19, 2016, is a case that illustrates this point. In that case the employee received an hourly travel expense of $2.00, a figure well below the hourly rate of $10.00 paid for time spent on site. In assessing the employee's Wage Act claim, the court held that:

> "The employer's failure to keep records as alleged in Count V may, at the pleadings stage, make it plausible that it knows that keeping the legally required records would show a violation."

The court denied the employer's motion to dismiss. The fact that the plaintiff employee could not present evidence of or pinpoint a specific pay period in which she was underpaid, was not fatal to her claims given the total lack of records available in the case.

"Sorry, But You Know We Had To Take That Case to Arbitration"

This refrain, often heard from local Union presidents and Union counsel, sometimes reflects an inordinate fear of being sued. However, as was recently confirmed by the Appeals Court in *Gagne v. CERB*, (April 22, 2016), a Union's "duty of fair representation" has never obligated the Union to take every grievance to arbitration, not even employee discharges.

In *Gagne*, the Court affirmed the decision of the CERB dismissing an employee's case against the Union, where the Union had grieved the discharge of a UMass/Lowell police lieutenant who approached a subordinate in a threatening manner, but ultimately determined, after the grievance hearing, that the Union would not prevail in arbitration. This decision by Union Counsel, made in good faith, prevailed over the employee's arguments that the Union was against him and his challenge to the weight and credibility of the evidence against him.