

# NORRIS, MURRAY & PELOQUIN, LLC

Legal Counsel to Employers and Schools

Volume 7, Issue 4

Client Advisor

April, 2019

## NEW BSEA Hearing Rules

The Bureau of Special Education Appeals (BSEA) has issued revised Hearing Rules for Special Education Appeals. The new Rules, effective March 1, 2019, replace and supersede the Hearing Rules for Special Education Appeals issued in February 2008.

A copy of the new Rules is available on our website or at [www.mass.gov](http://www.mass.gov)



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## Department of Labor (DOL) Issues Advisory Clarifying DOL's Position On Designating FMLA

On March 14, 2019, the Wage and Hour Division ("WHD") of the Department of Labor ("DOL") issued an opinion clarifying the DOL's position on designating and taking leave under the Family Medical Leave Act (FMLA). According to the opinion, employers may NOT delay the designation of FMLA-qualifying leave "even if the employee would prefer that the employer delay the designation." Once an employer has the information necessary to make a determination that the leave is for an FMLA-qualifying reason, it must do so and notify the employee of the status of his/her leave within five (5) business days.

In addition, the opinion clarifies that employers may not designate more than 12 weeks of leave – or 26 weeks of leave for military caregiver leave – in a year as FMLA leave. This means if an employee elects to take paid leave for reasons that qualify for FMLA protection over unpaid FMLA leave, the paid leave counts toward the 12-week FMLA entitlement and does not expand it. The opinion makes clear that employees may not decline FMLA leave to preserve it for future use and use paid time before tapping into their FMLA leave.

The advisory opinion, which is available on our website, provides a useful guide for employers on how to respond to employee requests not to designate an FMLA-qualifying absence as FMLA leave. Contact your NMP attorney with questions or concerns regarding your compliance with this opinion.

## Untruthfulness Is Sufficient Grounds For Termination

The Appeals Court has affirmed a decision by the Civil Service Commission ("Commission") upholding the termination of a police officer who made untruthful statements under oath even though the Commission's findings were not identical to the Town's. *Desmond v. Town of West Bridgewater*, 94 Mass. App. Ct. 1122 (2019). The Town terminated Desmond for making false statements, conduct unbecoming, and harassment. He appealed. The Commission upheld the termination, but determined the harassment charge was not substantiated. Desmond appealed and the case was remanded to the Commission to determine if the Town "violated the principle of uniformity and equitable treatment in terminating Mr. Desmond" while retaining an officer who, several years earlier, also offered "false testimony" in a Court proceeding.

The Commission concluded that although the two officers were not treated uniformly, "there was no animus against Mr. Desmond that contributed to the decision to terminate him." On appeal, the Appeals Court affirmed the Commission's decision upholding Desmond's termination. The Court rejected Desmond's argument that the Commission was required to consider a lesser punishment given its findings were not identical to that of the Town. The Court found no error in the Commission's decision given that Desmond had engaged in serious conduct (lying under oath), which alone warrants termination of a police officer. With respect to the disparate treatment argument, the Appeals Court emphasized that the Town's failure to discipline one bad actor for similar misconduct does not preclude it from disciplining others absent a showing of favoritism or bias.