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Legal Updates

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THE EVOLVING ILLINOIS FREEDOM OF INFORMATION ACT: AMENDMENTS, COMPLIANCE AND ENFORCEMENT

Three years ago, the Illinois General Assembly enacted a comprehensive rewrite of the Illinois Freedom of Information Act (FOIA), 5 ILCS 140/1 *et seq*, which took effect on January 1, 2010. Since that time, additional legislation has been enacted which further amends FOIA, and binding opinions of the Illinois Attorney General, as well as judicial decisions, have been issued that serve to clarify and enforce compliance with the various provisions of FOIA.

Some of the amendments and decisions have provided some relief to public bodies from the burden of compliance with FOIA. However, the law remains clear that compliance with the requirement of FOIA to provide prompt open access to public records "is a primary duty of public bodies to the people of this State, and [the Freedom of Information Act] should be construed to this end, fiscal obligations notwithstanding." FOIA §1, 5 ILCS 140/1.

Accordingly, it is critical that members of the governing boards of public bodies, as well as administrators, understand the requirements for FOIA compliance, and are aware of the implications and potential financial penalties of failure to fully comply with FOIA.

I. PUBLIC POLICY GOVERNING THE FREEDOM OF INFORMATION ACT

A. Public Policy Premises

The preamble provisions of FOIA, as stated below and set forth in Section 1 of the Act, define the public policy premises underlying its purpose and requirements. 5 ILCS 140/1

1. "[A]ll persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees. . ."

2. "[A]ccess by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act."

3. "Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest."

B. Presumption Regarding Governmental Records

1. All records in the public body's custody or possession are presumed to be open to public inspection and copying.

2. A public body that asserts a public record is exempt from disclosure has the burden of proving that a specific statutory exemption applies by clear and convincing evidence.

II. DEFINITION OF A PUBLIC RECORD UNDER FOIA

A. The Statutory Definition

1. All records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, records, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been used or being used by, received by, in the possession, or under the control of any public body. 5 ILCS 140/2.

2. The definition of a public record was expressly amended to include:

   a. electronic communications, recorded information and all other documentary materials regardless of physical form or characteristics;

   b. having been prepared by or for, or having been used or being used by, received by, in the possession, or under the control of any public body.

B. Whose Communications Are Considered Public Records?

1. Communications and records of elected and appointed local government officials, as well as administrators and other employees of the public body, that pertain to the business of the public body are public records subject to FOIA.

2. Attorney General opinions and judicial decisions have confirmed that the electronic communications of public officials that "pertain to the transaction of public business" are public records subject to FOIA regardless of whether the communication was sent or received via a personal email account, or on a personal computer, cell phone or other electronic device owned by the public official.

3. In June 2012, an Illinois circuit court upheld the opinion of the Illinois Attorney General that all electronic communications,

including cell phone text messages, sent or received by members of a public body via their personal electronic devices and email accounts during public meetings or study sessions are subject to disclosure under FOIA where the messages pertain to public business.

- In July 2011, *The News Gazette* sent a FOIA request to the City of Champaign seeking all electronic communications, including cell phone text messages, sent and received by members of the city council and the mayor during city council meetings and study sessions including both city-issued and personal cell phones, city-issued and personal email accounts, and Twitter accounts.

- In response, the City declined to produce any records from the mayor or council members' privately owned electronic devices claiming that these records were not in the possession of the public body and therefore were not public records subject to FOIA. *The News Gazette* filed a request for review with the Public Access Counselor in the Office of the Attorney.

- The Attorney General found, and the circuit court upheld the decision, that such communications that pertain to the business of the City are public records subject to disclosure under FOIA regardless of the fact that they may have been transmitted, received or stored on personal electronic devices. The court ordered the City to immediately comply with FOIA and provide the records. The court's ruing was appealed by the City to the Illinois Appellate Court and is pending a ruling on appeal.

- The Attorney General's Opinion states that "Whether information is a 'public record' is not determined by where, how, or on what device that record was created; rather, the question is whether the record was prepared by or used by one or more members of a public body in conducting the affairs of government". 2011 PAC 15916 (November 15, 2011)

- The Attorney General's Opinion also confirmed that messages sent by the public officials that do not pertain to the business of the City, such as messages regarding a personal business meeting or family matters do not fall within the definition of public records and do not need to be produced pursuant to a FOIA request.

C. Specific Exemptions May Apply

1. Public records, or parts of records, that contain information expressly defined as exempt from disclosure under FOIA, may be withheld from disclosure or redacted from otherwise responsive documents.

2 If a responsive record contains information that is exempt from disclosure, the exempt information may be redacted, but all remaining parts of the record must be disclosed.

3. The entire requested public record, with appropriate redactions, must be provided to the requester regardless of whether the document contains information that the public body believes is not germane to the request.

   - A recent Illinois Attorney General Binding Opinion found that the Forest Preserve District of Cook County violated FOIA by redacting non-exempt information from public documents requested pursuant to FOIA because it believed the redacted information was "outside the scope" of the request, or not responsive to the request. The District was authorized to redact "private information" pursuant to a specific FOIA exemption, but was required to produce all non-exempt information contained in the records. 2012 PAC 18530 (May 25, 2012).

   - Similarly, a recent appellate court decision reversing an order of the circuit court found that the Illinois Department of Motor Vehicles had to produce requested drivers license revocation and suspension notices, even when the documents were so heavily redacted that the Department believed that no useful information was left in the documents. The appellate court ruled that while a public body may elect to redact exempt information from public records, the public body "shall make the remaining information available for inspection and copying." *Heinrich v. White*, 2012 IL App (2d) 110564 (quoting FOIA Section 7(1), 5 ILCS 140/7(1)).

D. Examples of Exemptions that May be of Particular Interest to Community College Districts

1. Information prohibited from disclosure by other state or federal laws or regulations (including the Personnel Records Review Act which prohibits disclosure of performance evaluations). FOIA § 7(1)(a).

2. Private information - unique identifiers. FOIA § 7(1)(b).

3. Personal information the disclosure of which would constitute an unwarranted invasion of personal privacy. FOIA § 7(1)(c).

4. Preliminary drafts - documents generated by public body's officials in which opinions are expressed or policies or actions are formulated. FOIA § 7(1)(f).

5. Trade secrets and commercial or financial information obtained from a person or business under claim that they are proprietary or confidential. FOIA § 7(1)(g).

6. Test questions, scoring keys and other examination data. FOIA § 7(1)(j)(i).

7. Peer review information - information received by the College under its procedures for evaluation of faculty members by their academic peers. FOIA § 7(1)(j)(ii).

8. Grievance/discipline records - records relating to public body's adjudication of employee grievances or disciplinary cases, except final outcome of cases where discipline is imposed). FOIA § 7(1)(n).

9. Collective bargaining negotiations records. FOIA § 7(1)(p).

III. RECEIVING AND RESPONDING TO FOIA REQUESTS

A. Receipt of a FOIA Request

1. Written requests directed to the public body via personal delivery, mail, fax, email or other available means. The public bodies may honor oral requests, but it is recommended to ask for the request in writing.

2. Note: Records request handed to public official at a public meeting must be accepted and treated as a FOIA request to the public body.

   - Recent Binding Opinion of Attorney General confirms that hand delivery to Village President at Board meeting must be accepted under FOIA, but also finds that Village officer would not be obligated to accept delivery of FOIA request "during a chance encounter on the sidewalk, or at his or her private residence or place of business." 2011 PAC 17090 (January 26, 2012).

3. Public body can provide, but not require use of, a standard FOIA request form. All written records requests should be handled pursuant to FOIA; they need not be labeled as a FOIA request.

B. Timelines for Response

1. Statutory Requirements

   - Generally 5 business days to respond (see exceptions noted below).
   - May be extended 5 additional business days for reasons specified in FOIA, and with written notice to requester given within original 5 business day response period.
   - Parties may agree in writing to extend the time period for response.

2. Commercial Requesters

   - Twenty-one (21) business days for response to a request made for a commercial purpose.
   - Initial response needs to inform commercial requester of estimated time needed to provide records, or denial of request with statutory reason identified.
   - Commercial request means the public record, or information derived from the record, will be used in any form for sale, resale, solicitation or advertisement for sales or services.
   - Public body permitted to ask requester whether the request is for a commercial purpose.

3. Recurrent Requesters

   - Amendment to FOIA defines a "recurrent requester" as person who has submitted to the public body in the immediately preceding period, at least 50 requests in 12 months, at least 15 requests in 30 days, or at least 7 requests in 7 days. But note, each written FOIA request document is considered one request, regardless of number of subparts.
   - Respond within 5 business days to notify requester that public body is treating request as from a recurrent requester, the reason for that designation, the possible responses, and fact that a response will issue within 21 business days.

4. Unduly Burdensome Request

- Notify requester within 5 business days that the request is "unduly burdensome" and offer opportunity to confer and to reduce request to manageable proportion. Eventual time frame for producing responsive documents will depend on the requester's reply.
- Undue burden is a categorical request where the burden to the public body to comply with the request outweighs the public interest in the information.
- Public body must specifically quantify how the request is unduly burdensome.
- Caution: Failure to assert undue burden within the initial 5 business day response time may prevent ability to invoke that exception at a later date.

C. Method for Response

1. Requires documented written response.
2. Must provide records in the electronic format specified by the requester, if feasible, and if the record is maintained in electronic format.
3. If electronic format requested is not feasible, then provide public record in the format in which it is maintained or in paper format, at the option of the requester.

D. Denying a FOIA Request

1. Timely notify requester in writing of reason for denial or any exemptions.
2. Advise requester of right to have denial reviewed by the Public Access Counselor with contact information for the PAC (except for commercial requesters), and right to seek judicial review of the denial.
    - FOIA amended so that commercial requesters not entitled to PAC review of FOIA response except to dispute commercial requester designation.
3. Caution: Failure to cite all reasons for denial or redaction of records in a timely initial response may cause the public body to forfeit right to deny the request.

E. Charging Fees

1. Generally, no charge for first 50 pages of black and white standard-sized copies; 15 cents per page thereafter. Charge for color or irregular-sized copies limited to actual cost of reproduction.

2. No fees when records transmitted electronically, except can charge for the actual cost of electronic media, such as CD.

3. No charge for cost of search and review of records, or other personnel costs associated with producing the records, except for commercial requesters.

4. FOIA amended so that public body now can charge commercial requester up to $10 per hour for the cost of any search and review of records or other personnel costs associated with providing the responsive documents, and for the actual cost of retrieving and transporting records from an off-site storage facility. But first 8 hours of any search and review must be provided free of charge. An accounting of all fees and costs charged must be issued to requester.

F. Penalties for Failing to Timely Respond

1. Public bodies which fail to timely respond to a FOIA request waive the right to later impose any copy charges for the response, and lose the ability to assert that the request is "unduly burdensome".

2. Failure to timely respond to a FOIA request can subject the public body to statutory civil penalties of $2,500 - $5,000 per occurrence, and mandatory payment of attorney fees and costs to FOIA requesters who prevail in a lawsuit filed to enforce their rights under FOIA.

IV. COMPLIANCE AND ENFORCEMENT - THE PUBLIC ACCESS COUNSELOR AND THE COURTS

A. Public Access Counselor's Role in Review of FOIA Compliance

1. A FOIA requester has 60 days to request the Public Access Counselor (PAC) in the Office of the Illinois Attorney General to review public body's partial or complete denial of a FOIA request (including redaction of records provided).

2. PAC determines either that no violation has occurred, or that further investigation is warranted, and advises the parties.

3. If further investigation is warranted, PAC contacts the public body to request documents or additional information and review process commences. This may include briefing by the parties and the PAC issuing subpoenas for additional information.

4. PAC may resolve the matter by mediation or by issuing a non-binding opinion, which is not reviewable in the courts.

5. Otherwise Attorney General issues a binding opinion within 60 days.

B. Administrative Review in the Circuit Court of Cook or Sangamon County

1. Attorney General's binding opinion is a final decision under the Illinois Administrative Review Law.

   - If binding opinion finds a FOIA violation, the public body must take immediate action to comply or seek administrative review in the circuit court of Cook or Sangamon County;

   - If binding opinion finds no FOIA violation, requester may initiate judicial administrative review.

C. Requester's Right to Seek Injunctive or Declaratory Relief

1. FOIA requester may skip request for review to the PAC and instead file claim for injunctive or declaratory relief in circuit court.

2. Public body must prove by clear and convincing evidence that it complied or properly asserted FOIA exemption.

3. Mandatory attorney fees awarded to FOIA requester who prevails in this action.

4. Civil penalties of $2,500 - $5,000 per occurrence shall be assessed against public body for willful and intentional violation of FOIA or acting in bad faith in responding to the FOIA request.

   - A recent appellate court ruling affirmed a $2,500 civil penalty against Rockford Public School District 205 for failing to act in good faith in responding to a FOIA request. *The Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879 (Oct. 3, 2012).

   - The newspaper requested a copy of a principal's written rebuttal to a separation of employment letter. Even though the District eventually voluntarily produced the requested

document, the court found the District acted in bad faith and violated FOIA when it serially responded to the requester claiming various FOIA exemptions instead of claiming all applicable exemptions with its initial response, and "began looking for reasons to support a decision it had already made."

- The court also confirmed that an award of attorney fees to a requester who prevails in a court judgment against a public body is mandatory under the FOIA statute. However, in this case, since the District had produced the document voluntarily, rather than by court order, attorney fees were not applicable.

- Lessons from the case for public bodies:

  - Strictly comply with timelines for response under FOIA.

  - Cite all applicable exemptions in initial timely response letter.

  - Consultation with legal counsel before issuing denial letter under FOIA may be appropriate to avoid future litigation and potential financial penalties.

V. SOURCES FOR INFORMATION ABOUT FOIA

A. Public Access Counselor Website

1. A FOIA training course for the general public is available on the Illinois Attorney General's website at:

   http://foia.ilattorneygeneral.net/Training.aspx

2. A separate, recorded training session required for all persons who have been designated as a public body's FOIA Officer is also available at the same website.

B. Binding Opinions of the Illinois Attorney General

1. All binding opinions of the Illinois Attorney General that have issued since 2010 are available on the Attorney General's Website at:

   http://foia.ilattorneygeneral.net/bindingopinions.aspx

2. These opinions are only binding on the parties involved in the specific matters, but serve as guidance for others with similar FOIA issues.

C. College or Local Government Attorney

1. Compliance with FOIA can involve complex issues with significant implications and penalties. Recommend: confer with your college or local government attorney for advice on responding to FOIA requests and other FOIA compliance issues.

EXTRA, EXTRA!! Read All About Why the Illinois Appellate Court Affirmed a Decision Denying a FOIA Requester Attorney Fees But Imposing a $2,500 Civil Penalty Against the Public Body for Acting in Bad Faith in Responding to the FOIA Request.

October 23, 2012

Interpreting the attorney fees and civil penalty provisions under the Freedom of Information Act (FOIA), as amended in 2010, the Illinois Appellate Court for the Second District has opined that: (1) an award of attorney fees is appropriate only if the FOIA requester prevails in the litigation through judicially sanctioned relief (*i.e.*, a court order or judgment), and (2) the court shall impose a civil penalty upon a public body if its course of conduct in responding to a FOIA request demonstrates a lack of good faith.

A Brief Overview of the Decision

The Court's decision in *The Rock River Times vs. Rockford Pubic School Dist. 205*, 2012 IL App (2d) 110879 (Oct. 3, 2012), affirmed a trial court ruling that FOIA requester *The Rock River Times* was not entitled to an award of attorney fees for the lawsuit it filed to challenge the school district's denial of its records request because the court did not *order* the school district to release the record. Rather, because the school district ultimately *voluntarily* released the record, the requester did not "prevail" in the litigation, which is now required under FOIA, as amended in 2010, in order for a court to award reasonable attorney fees to a requester. This is true even though the school district's voluntary disclosure did not occur until 21 days *after* the lawsuit was filed.

The Court further affirmed the trial court's imposition of a $2,500 civil penalty against the school district for the manner in which it responded to the FOIA request. The record demonstrated to the Court that the school district: (1) first decided that it would not release the record and then searched for reasons to prevent disclosure; (2) disregarded the express language under FOIA which requires a public body to assert <u>all</u> reasons for denying a records request within the statutory timeframe for response; (3) created its own procedural process in addressing the FOIA request, which is not supported by statute; and (4) should have released the record upon learning that the first, and only two exemptions it cited to withhold disclosure were not valid, rather than asserting a new, third exemption which also was not applicable.

The overall lesson to be learned from this decision is that responding to FOIA requests in a timely and lawful manner must remain a high priority for public bodies.

The detailed factual and legal analysis of the Court's decision is set forth below.

The Facts

On August 26, 2010, a reporter with *The Rock River Times* submitted a FOIA request to the school district for a copy of the principal's written rebuttal to a "separation of employment" letter issued by the superintendent. Four business days later, the school district timely issued an "intent to deny" letter to the requester and a

"pre-authorization" letter to the Illinois Attorney General's Public Access Counselor ("PAC") seeking permission to assert the FOIA Section 7(1)(c) "personal privacy" exemption.[1] In addition to asserting the "personal privacy" exemption, the school district also claimed that the *Personnel Records Review Act* (the "PRRA") prohibited disclosure of this record and, thus, cited FOIA Section 7.5(q) as an additional basis to deny the request. No other exemptions were cited by the school district. On September 13, 2010, the PAC denied the school district's request to assert the "personal privacy" exemption, but did not opine on the validity of the PRRA exemption because it was not subject to the "pre-authorization" process. Upon receiving the PAC's response, the school district issued a denial letter to the requester citing the PRRA exemption, which included a notice that it could seek review of the denial by the PAC.

On September 23, 2010, the requester submitted a Request for Review (the "Review") with the PAC. Without advising the school district of the pending Review and providing it an opportunity to respond, the PAC determined that the school district could not rely upon the PRRA exemption to deny the request. The school district did not learn of the PAC's decision until October 4, 2010. However, on September 29, 2010, it notified the requester that it would ask legal counsel review and reconsider its denial under the PRRA exemption. The requester responded on October 1, 2010, explaining why the PRRA exemption did not apply to the record. On October 8, 2012, the school district's legal counsel issued a letter to the requester agreeing that the PRRA exemption did not apply, but now claiming that FOIA Section 7(1)(n) exemption prevented disclosure of the record.[2] This exemption had not previously been cited by the school district as a basis to deny the request. Legal counsel further stated that her letter constituted a timely response under FOIA because it was issued within five business days following receipt of the requester's October 1 letter.

On November 3, 2010, the requester filed a lawsuit against the school district under FOIA, as to the school district's denial under FOIA Section 7(1)(n). On November 24, 2010, the school district released the rebuttal letter. The school district stated that it decided to release the record after receiving a verbal opinion from the PAC that the third exemption also did not apply. The PAC asserted that it never issued such verbal opinion.

The Lawsuit and Appeal

The basis of the requester's claim was that the school district had either waived its right to assert the FOIA Section 7(1)(n) exemption or it did not apply. The requester further claimed that the school district acted "willfully, intentionally and in bad faith in relying on a series of baseless exemptions, one after another, in an effort to avoid compliance with FOIA."

The school district moved to dismiss the lawsuit as moot since it had voluntarily released the rebuttal letter. The requester submitted a response asking the court to deny the motion so that it could pursue its request for attorney fees and a civil penalty under FOIA.

In order to determine whether an award of attorney fees and imposition of a civil penalty was appropriate, the court had to interpret a recently amended FOIA section and a new FOIA section. Effective January 1, 2010, FOIA Section 11(i) was amended to read that "[i]f a person seeking the right to inspect or receive a copy of a public record *prevails* in a proceeding under this Section, the court *shall* award such person reasonable attorney fees." (emphasis added). Prior to the amendment, the italicized text read "substantially prevails" and "may", respectively. The 2010 amendments to FOIA also added a new section which provides that if a "public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith, the court shall impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence."

The requester's argument that it prevailed and attorney fees were appropriate because the lawsuit prompted the school district to voluntarily change its conduct was rejected by the trial and appellate courts. While such standard applied prior to the 2010 FOIA amendments, the court determined that the legislature must have intended to delete the word "substantially" and require that a requester actually "prevail" in order for the court to award attorney fees.

In considering the imposition of a civil penalty, the court examined the language under FOIA which requires a public body to respond to a FOIA request within five business days after receipt, and if the request is denied, specify the reasons for the denial and any exemption claimed. The conclusion was that "nothing in the FOIA

suggested that a public body could continue to assert new basis for non-disclosure of a public record once its original position was found to be incorrect." To the contrary, FOIA requires a public body to specify the "reasons" for the denial and any exemption claimed within five business days of receipt (unless the timeframe for response is extended). Thus, because the school district did not assert the FOIA Section 7(1)(n) exemption (or any language which would have identified this as one of the reasons for non-disclosure), the school district should have released the record once it learned that the PAC found the PRRA exemption inapplicable.

While the above conduct may not generally rise to the threshold of imposing a civil penalty, the totality of the circumstances and the school district's conduct tipped the scale in favor of imposing a $2,500 civil penalty. The court believed the school district "understood it was wrong on all three claimed exemptions, but was looking the other way to save face rather than simply admitting it was wrong and disclosing the document", and that it "first decided that it would not release a document which it did not want to release" and then began "looking for reasons to support the decision it had already made."

Significance of the Court's Decision

1. A public body must strictly comply with the timeframes set forth under FOIA. Failure to do so could result in payment of a requester's attorney fees and/or a significant civil penalty to be paid from public funds.
2. A public body may only deny a request for records under FOIA if one of the exemptions under FOIA Sections 7(1) or 7.5 applies. The public body has the burden of proving by "clear and convincing" evidence that the exemption applies to the record at issue.

3. If a public body believes a record may be exempt from disclosure under FOIA, it should review each FOIA exemption to determine if one or more apply to the record. If there is more than one reason to support non-disclosure of the record, the public body should cite all reasons and applicable exemptions in its response letter. Failure to do so may constitute a waiver of the right to later assert the exemption.

    - A brief consultation with legal counsel *before* a public body issues a denial letter under FOIA may be appropriate under certain circumstances and could avoid future litigation concerning the denial.
4. The new standard for awarding attorney fees tracks the language under FOIA: a requester must actually "prevail" in the litigation (court order/ judgment in favor of the requester and against the public body).

    - It is certainly possible that the legislature could further amend FOIA to address the situation where a public body discloses the record only after litigation is filed.

5. There is now an Illinois Appellate Court decision which affirmed the imposition of a significant civil penalty on a public body for its conduct in responding to a FOIA request. Responding to FOIA requests in a timely and lawful manner must remain a priority for public bodies.

If you have questions about this decision or FOIA, please contact any Robbins Schwartz attorney.

Catherine R. Locallo of the firm's Chicago office prepared this *In Brief*.

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[1] Please note that FOIA has since been amended and a public body is no longer required to issue "intent to deny" or pre-authorization letters before denying a request for records under FOIA Sections 7(1)(c) and (f).
[2] FOIA Section 7(1)(n) exempts from disclosure records "relating to a public body's adjudication of an employee grievance or disciplinary case".

I. RECENT OPEN MEETINGS ACT DECISIONS FROM THE PUBLIC ACCESS COUNSELOR

A. Binding Opinions

The OMA grants the Illinois Attorney General Lisa Madigan's Public Access Counselor (PAC) power to issue binding opinions which a public body must either comply with or initiate administrative review in a court located in Cook or Sangamon counties. Since January 1, 2010, the PAC has issued four (4) binding opinions regarding compliance with the OMA. The opinions are summarized below:

1. Public Access Opinion 12-008 (4/4/12)

A Board of Education scheduled, noticed, and held a special meeting at the private residence of the School District's Superintendent on December 21, 2011. The purpose of the meeting was to vote on the proposed tax levy. The Board's reason for holding the meeting at the Superintendent's home was because all the custodians had already worked during the day shift and the school would be closed (Winter Break). The Superintendent's home address was posted on the notice in case any member of the public wanted to attend.

OMA Section 2.01 provides that "[a]ll meetings required by the Act to be public shall be held at specified times and places which are convenient and open to the public. The terms "open" and "convenient" are not defined under the OMA. However, the PAC relied upon case law which held that a "rule of reasonableness" must be applied in determining whether a meeting is "open" and "convenient". The meeting must be "reasonably accessible" to members of the general public.

The PAC found that the Board's special meeting at a private residence outside of school district boundaries was not "reasonably accessible" to members of the public. Clearly, there were other options available to the Board (*i.e.*, having a custodian or other employee open the building or finding another public location within district boundaries). Accordingly, the December 21 meeting at the Superintendent's home violated Section 2.01 of the OMA.

2. Public Access Opinion 12-009 (6/5/12)

A Board of Review had a rule which required that an individual must give advance notice to the Clerk of the Board of Review in order to record a property tax appeal hearing. A property tax owner wanted to record his upcoming appeal hearing. He contacted the County and was granted approval by the Sheriff's Office. A member of the Board of Review did not allow him to record his hearing because he did not provide advance notice to the Clerk.

OMA Section 2.05 provides that "[a]ny person may record the proceedings at meetings required to be open by the Act by tape, film or other means. The authority holding the meeting shall prescribe reasonable rules to govern the right to make such recordings." The PAC issued pervious guidance that the phrase "reasonable rules" may include "rules or guidelines which protect the integrity of a public meeting and those participating in it or the safety of those attending a public meeting." In contrast, "rules which hinder or thwart the ability of a person to exercise the right to record a public meeting" would not be "reasonable."

The PAC invalidated the Board of Review's "advance notice to record" rule because it placed a burden on individuals who have the statutory right to record a meeting. Further, there was no evidence to suggest that such a rule was necessary to protect the integrity of a public meeting or the safety of those attending it.

3. Public Access Opinion 2012-11 (7/11/12)

A Village Board's personnel and finance committees entered closed session under the exception allowed to discuss "[t]he appointment, employment compensation, discipline, performance, or dismissal of specific employees..." OMA Section 2(c)(1). The closed session minutes and verbatim recordings reviewed by the PAC established that the closed session discussions pertained in part to specific employees, and also a broader discussion about budgetary concerns including staffing needs, how staff reductions would affect Village services, which services are most valuable to the Village, number of paid staff, and strategies for balancing the budget. The Board asserted that the broader discussion remained within the exception because the specific employees were discussed in the context of the following year's budget.

The OMA expressly provides that "...the exceptions (allowing for closed session discussions) are to be strictly construed, extending only to subjects clearly within their scope." OMA Section 2(b).

After reviewing the statutory language, legislative history and case decision, the PAC determined that the Board's broader discussion about budgetary concerns was not proper under OMA Section 2(c)(1). The PAC reasoned that the phrase "specific employees of the public body" significantly limits the scope of the 2(c)(1) exceptions. Thus, it is only intended to permit a public body to candidly discuss the relative merits or conduct of individual employees. It is not intended to allow private discussion of fiscal matters, notwithstanding that they may directly or indirectly impact employees.

Note that the PAC did not order the Board to release the closed session minutes because the permissible and impermissible subjects were so intertwined that it would not be practicable to separate them.

4. Public Access Opinion 12-013 (11/5/12)

A County Board received a letter from a generating company which expressed concerns about the legality of an amendment to a landfill ordinance, and stated that litigation would be filed unless a resolution were reached about the amendment. Three months later, the Board's Finance Committee entered closed session for the purpose of discussing probable or imminent litigation regarding an amendment to a landfill ordinance, which was the subject of the letter. Although the closed session meetings of the full Village Board were recorded, the Board's committees did not record their closed sessions. The closed session minutes did not reflect a finding as to why the litigation was probable or imminent. The closed session minutes did indicate that the Finance Committee decided to recommend approval of the ordinance.

The OMA requires that a verbatim recording be made of any closed session discussion. OMA Section 2.06. OMA Section 2(c)(11) allows a public body to discuss in closed session, "[l]itigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probably or imminent, in which case the basis for the finding shall be recorded and entered into the minutes. No final action may be taken at a closed meeting. OMA Section 2(e).

The PAC found three violations of the OMA. First, no verbatim recording was made of the Finance Committee's closed session. Note that the opinion states that this "likely led to its detriment on the other issues." Second, because no litigation was pending, and the Finance Committee did not make the necessary finding that

litigation was probable or imminent, the closed session discussion about the proposed ordinance amendment was not proper. The PAC further reasoned that even if it had made such finding, the length of time between receipt of the letter and the meeting would not reasonably support a finding that litigation was probable or imminent. Third, the PAC determined that the Finance Committee's implicit agreement during closed session to either recommend to the full Board that the amendment be passed (which the Board voted on the next day) or, at least not to oppose the amendment, constituted final action in violation of the OMA.

TOP 10 OPEN MEETINGS ACT QUESTIONS

1. What is a "meeting" and what is a "public body"?
2. Must a topic be on the meeting agenda, to be discussed at that meeting by the board?
3. What topics may the board discuss in a closed meeting?
4. What procedure should the board follow to go into closed session?
5. What training is required for elected and appointed members of a public body?
6. What does the OMA say about recording meetings?
7. How should the board handle review and release of closed session minutes and tape recordings?
8. May a board member attend a meeting by telephone conference call?
9. When and how may board members communicate by e-mail, consistent with Open Meetings Act requirements?
10. What happens if you violate the Open Meetings Act?

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1. WHAT IS A "MEETING" AND WHAT IS A "PUBLIC BODY"?

A majority of a quorum of a public body may not meet to discuss public business without complying with the Open Meetings Act ("OMA"). For a seven-member board, a **quorum is four** and **a majority of a quorum is three.**

If no public business is discussed, it's not a "meeting." Three or more board members can run into each other at the grocery store or go to a baseball game together without violating the OMA.

However, the OMA may come into play if a board holds a workshop or a staff / board "working" dinner at a local restaurant. If public business is discussed, then the gathering qualifies as a meeting. Notice must be posted, and minutes must be taken.

"Public body" also includes **committees.** If the board creates a two-member (or three-member) committee to deal with a particular topic, the committee must post notices and agendas for its meetings and keep minutes.

2. MUST A TOPIC BE ON THE AGENDA, TO BE DISCUSSED AT THAT MEETING BY THE BOARD?

The OMA states that "the requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda." The Illinois Appellate Court has held that this language means that items not specifically listed in a regular meeting agenda may only be deliberated and discussed by boards - **not acted upon** - at that meeting. *Rice v. Bd. of Trustees of Adams County*, 326 Ill. App. 3d 1120, 762 N.E.2d 1205 (4th Dist. 2002). As a result of the *Rice* decision, boards are strongly advised to be sure that any matter to be voted upon is included on their regular meeting agendas. An amended agenda which adds new proposed action items should be posted and sent to requesting news media at least 48 hours ahead of the meeting.

Agendas may be written to allow some flexibility – for example, by routinely putting categories such as "New Business" and "Finance" on all special meeting agendas. A State's Attorney or court might question whether such broad categories suffice, since the purpose of the law is give public notice of what will be acted on. However, in a pinch, some notice is better than no notice at all.

3. WHAT TOPICS MAY THE BOARD DISCUSS IN A CLOSED MEETING?

The OMA requires public bodies to meet in public, unless an exception to the requirement of open meetings applies. Most of the Act's 24 exceptions are not germane to the business of school boards. The exceptions most commonly relevant for our purposes provide that a board of education hold a closed meeting to discuss the following subjects:

- Appointment, employment, compensation, discipline, performance, or dismissal of specific employee(s) of the district or legal counsel for the district, including hearing testimony on a complaint lodged against a district employee or against district legal counsel to determine its validity. OMA § 2(c)(1).

[NOTE: The maker of the motion may simply cite the part of the exception which applies to the particular situation to be discussed in closed session. For example, "...to discuss performance of a specific employee, as allowed by § 2(c)(1) of the Open Meetings Act." Or, "...to discuss employment of legal counsel for the district, as allowed by § 2(c)(1) of the Open Meetings Act".]

- Collective negotiating matters between the district and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees. OMA § 2(c)(2).

- Selection of a person to fill a public office, as defined in the Open Meetings Act, or to fill a vacancy in a public office whose occupant the district has legal authority to appoint, or the discipline, performance or removal of the occupant of a public office whom the district has legal authority to remove. OMA § 2(c)(3).

- Purchase or lease of real property for the use of the district, including meetings held to discuss whether a particular parcel should be acquired. OMA § 2(c)(5).

- Setting a price for the sale or lease of property owned by the district. OMA § 2(c)(6).

- Sale or purchase of securities, investments or investment contracts. OMA § 2(c)(7).

- Security procedures and the use of personnel and equipment to respond to actual, threatened, or reasonably possible danger to the safety of employees, students, staff or public property. OMA § 2(c)(8).

- A student disciplinary case (or cases). OMA § 2(c)(9).

- Placement of an individual student (or students) in special education programs and other matters relating to individual students. OMA § 2(c)(10).

- Litigation, when an action against, affecting or on behalf of the district has been filed and is pending before a court or administrative tribunal, or when the district finds that an action is probable or imminent, in which case the basis for the finding must be recorded and entered into the minutes of the closed meeting. OMA § 2(c)(11).

- Establishment of reserves or settlement of claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act if the disposition of a claim or potential claim might otherwise be prejudiced, or the review or discussion of claims, loss or risk management information, records, data, advise or communications from or with respect to any insurer of the district or any intergovernmental risk management association or self insurance pool of which the district is a member. OMA § 2(c)(12).

- Self evaluation, practices and procedures or professional ethics, when the board is meeting with a representative of a statewide association of which the district is a member. OMA § 2(c)(16).

- Discussion of minutes of meetings lawfully closed under the Open Meetings Act, whether for purpose of approval by the district of the minutes or semi-annual review of the minutes. OMA § 2(c)(21).

- Meetings between internal or external auditors and governmental audit committees, finance committees, and their equivalents, when the discussion involves internal control weaknesses, identification of potential fraud risk areas, known or suspected frauds, and fraud interviews conducted in accordance with generally accepted auditing standards of the United States of America. OMA § 2(c)(28), effective 1/1/2012.

4. WHAT PROCEDURE SHOULD THE BOARD FOLLOW TO GO INTO CLOSED SESSION?

A motion to go into closed session must cite the OMA exceptions which authorize that particular closed session.

EXAMPLE:

Board Member 1: I move that the Board of Education hold a closed meeting to consider:

[Here, refer to pertinent exception(s) from the listing above.]

Board Member 2: I second the motion.

Board President: Will the Secretary please call the roll for a vote on the motion?

[Secretary takes roll call vote.]

Board President: The motion passes. The Board will now convene in closed session for the purposes stated.

[NOTE: A roll call vote is needed to go into a closed meeting. Action on a motion to conclude a closed meeting may be taken by voice vote.]

Contrary to a widely held misunderstanding, the board may properly convene in closed session during any meeting to discuss statutorily permitted topics if it follows the above procedures, even if the agenda for that meeting does not list a closed session.

5. WHAT TRAINING IS REQUIRED FOR ELECTED AND APPOINTED MEMBERS OF A PUBLIC BODY?

Effective January 1, 2012, all elected and appointed members of a public body will be required to successfully complete training curriculum developed and administered by the Illinois Attorney General's Public Access Counselor ("PAC"). The PAC is in the process of creating an electronic training program, which will be available on its website (http://illinoisattorneygeneral.gov) on or shortly after January 1, 2012.

Existing members as of January 1, 2012, must complete the training by January 1, 2013. Those who become members after January 1, 2012, must complete the training within 90 days after taking the oath of office or assuming responsibilities as a member of the public body.

6. WHAT DOES THE OMA SAY ABOUT RECORDING MEETINGS?

The Open Meetings Act allows anyone to tape record or photograph **open** meetings. The public body may make "reasonable regulations" governing these activities, but may not selectively prohibit recording at certain times. The regulations should be limited to matters of housekeeping and preserving the efficiency and good order of the meeting, such as requiring cameras to be placed so as not to block aisles. Regulations cannot require prior permission to use a camera or tape recorder.

The Open Meetings Act requires public bodies to make and maintain audio or video recordings of their closed meetings. The law establishes certain procedures for making the verbatim recording available to the court for in camera review in the event of litigation to enforce the Act, and also specifies procedures for the destruction of such verbatim recordings.

7. HOW SHOULD WE REVIEW AND RELEASE CLOSED MEETING MINUTES AND TAPES?

The board must review closed session minutes and tape recordings every six months and release closed meeting minutes (or parts of them) which no longer need to be kept confidential. As to closed meeting minutes which are not released, the board must make a specific finding in the record that the need for confidentiality still exists as to such minutes. Tape recordings may be destroyed after 18 months, provided that the board has approved minutes for the closed

meeting(s) in question, and that there is no litigation pending challenging OMA compliance for the particular closed meeting involved. The specific tapes to be destroyed must be identified in the motion.

Recap: Closed Session Minutes and Tape Recordings

	YES	YES	EVENTUALLY	NEVER
	NEVER	YES	POSSIBLE, BUT NOT REQUIRED	OK AFTER 18 MONTHS

Because of the need for periodic review and release, it is helpful to number and title each topic covered in a particular closed meeting, designating the reason why each item qualified for closed session discussion. For example:

1. Student Discipline Case/Jill M.

2. Pending Litigation/Smith v. Board

3. Compensation of Employee/Business Manager Jones

Not only does this help prove that the matters were properly discussed in closed session, it can also streamline the process for deciding at future semi-annual reviews what parts of a particular set of closed meeting minutes should be made public. The release list can refer to the closed matters by number.

The board will probably not wish to conduct the semi-annual review as a group at a board meeting. Many boards delegate the review to a staff member or to their attorney, and simply act on the recommendations of that person at a board meeting. The board can modify those recommendations if it so desires.

8. MAY A BOARD MEMBER ATTEND A MEETING BY TELEPHONE CONFERENCE CALL?

The Open Meetings Act was amended effective in 2007 to create requirements which public bodies to follow when one or more of their members attends a meeting electronically – that is, by speaker phone or similar device. The new law and procedures it mandates apply to both open and closed meetings.

For many years, Illinois law was silent regarding whether board members could properly attend meetings electronically. In reliance on an Illinois Appellate Court

decision upholding a state administrative agency's actions taken in a meeting by conference call, most school and municipal attorneys advised their clients that teleconference attendance was legal, as long as the board member attending by teleconference was placed on a speaker phone audible to the audience (and vice versa) in order to comply with the OMA.

The amended law does not change that requirement, but it considerably reduces governmental bodies' flexibility by imposing many new restrictions on electronic attendance. Thus,

- A quorum of the board must be physically present at the actual location of the meeting. Absent members may not "call in" to make up a quorum.

- Absent members may participate electronically **only if specifically allowed by the public body under adopted rules on the subject**.

- An absent member may be permitted to participate electronically only if he or she is prevented from physically attending the meeting due to:

  a. Personal illness or disability;

  b. Employment purposes;

  c. Business of the public body;

  d. A family emergency or other emergency.

- A member who wishes to attend electronically must notify the "recording secretary or clerk" of the board before the meeting unless it is "impracticable" to do so. The law does not specify how many hours before the meeting the notice must be given.

- All meeting minutes must reflect whether a member is present physically or electronically. This is true regardless of whether any members attend electronically or not.

9. WHEN AND HOW MAY BOARD MEMBERS COMMUNICATE BY E-MAIL, CONSISTENT WITH OPEN MEETINGS ACT REQUIREMENTS?

E-mail communications should be analyzed for OMA purposes along the same lines as other types of potential "meetings."

Simultaneous e-mail communication between three or more board members would constitute a "meeting" for purposes of the Open Meetings Act.

E-mail communications between only two parties would not fall under the Act, unless the two participants were members of a board committee comprised

of five or fewer board members and the purpose of the communication was to discuss committee business.

Single message sent to multiple parties: Here the issue is less clear cut. We believe that the transmittal of an e-mail message to multiple parties is not subject to the requirements of the Open Meetings Act **unless** the message solicits a response from the receiving parties. Distribution by e-mail of information to Board members for which no response is required does not constitute a meeting any more than do distribution of agendas, meeting packets, or other similar information to board members during periods between meetings.

When an e-mail communication solicits responses from all recipients, whether or not a "meeting" (and a potential violation of the Act) has occurred would depend upon to whom the responses were sent. In the school board context, if the responses were sent only to the person who initiated the e-mail and not to the other recipients, no meeting has occurred. [But note: a two-way communication of the latter type between two school board members who constituted a majority of a quorum of a board committee, would be a "meeting."] If, however, the responses are also forwarded to multiple parties, the resulting exchange of communications would probably be deemed to constitute a "meeting.

Therefore, we recommend that when sending an e-mail message to multiple parties soliciting their response, the sender should specify that the response should be sent to the sender **only,** and not copied to the other recipients of the original message. Because e-mail messages create a permanent record of the communication, it is important that these protocols are followed.

"Contemporaneous interactive communication": The 1997 OMA amendments addressing electronic attendance at board meetings also suggest that a meeting can occur if board members engage in "contemporaneous interactive communication" electronically. The precise meaning of this term is not clear. It appears that board members may e-mailing one another individually, as long as those "in the loop" do not equal a quorum and sufficient time elapses between responses.

However, the more that board member online communications approach real-time conversation, the more likely it is they will be viewed as "contemporaneous" within the meaning of the statute. Citing dictionary definitions of "contemporaneous", as meaning happening at the same **period** of time – not "synchronous" (implying exact correspondence in time) – the Attorney General's office takes the view that the term should be interpreted liberally in the spirit of the OMA, and that board members who engage in serial online communications about public business risk violating the Act.

☞ ***Confidentiality concerns relating to e-mail use***

Unless encryption programs are used, most e-mail communications are by their very nature not confidential and can be intercepted by parties with appropriate knowledge and technology. Therefore, we recommend that district personnel and board members avoid using e-mail to discuss confidential information, including any information which should be discussed by the board only in closed session (e.g. collective bargaining negotiations, pending litigation, student expulsion hearing testimony, special education placements, confidential personnel issues, etc.).

Summing up the "do's and don't's" of board e-mail communications:

Do's (Permitted E-mail Communications)

- An e-mail communication involving only two school board members who do not discuss any confidential information.
- An e-mail message broadcast to all board members for which no response is required.
- An e-mail communication soliciting a response but directing that response be made to the original sender only and not copied to the other board members.
- E-mail communications for purposes other than discussing public business (such as to confirm location of a board retreat).

Don't's (Prohibited or Inadvisable E-mail Communications)

- Three or more board members participating in an on-line chat room for the purpose of discussing public business.
- E-mail messages broadcast to all board members which are made for the purpose of discussing public business and which solicit responses.
- The discussion of any confidential information via e-mail.

☞ ***Local Records Act and FOIA implications of electronic communications***

The Illinois Local Records Act provides that public records, including "digitized electronic material, or other official documentary material, regardless of physical form or characteristics, made, produced, executed or received by any agency or officer pursuant to law or in connection with the transaction of public business" must be preserved unless the State Local Records Commission has given permission to destroy those records.

Public records include day-to-day communications among staff and board members on matters relating to school business.

Archived e-mail messages are considered no different than traditional "hard copy" letters and memoranda, for Local Records Act purposes.

Since the Act requires that e-mails be preserved for some time, board members' computers would provide a perfect "paper trail" of the electronic "meeting." Even if the e-mails were erased, computer specialists can still retrieve them from the hard drive.

Also, the Illinois Freedom of Information Act allows members of the public to review and obtain copies of documents held by public agencies (absent an applicable exemption from disclosure), whether the materials are maintained in printed or electronic form. These include e-mail communications.

10. WHAT HAPPENS IF YOU VIOLATE THE OPEN MEETINGS ACT?

Private citizens can enforce the OMA by suing for a court order to enjoin a public body from violating the Act, or to void actions taken in a manner which violated the Act. In such cases, a prevailing plaintiff can have his attorney's fees paid by the public body.

Even more serious are the remedies which the State's Attorney of your county can seek. The State's Attorney can pursue civil remedies in the same manner as a private citizen. However, more importantly, the State's Attorney can also indict elected officials. In Will County, the State's Attorney indicted local officials who met secretly to discuss a real estate transaction not only for the misdemeanor of violating the DMA, but also for the felony of official misconduct.

The State's Attorney can convene a grand jury and subpoena any records which might lead to information that a violation has been committed, including personal notes, tape recordings of closed sessions, and unreleased minutes of closed sessions. Often, the assistant state's attorney handling the case has little understanding of how local boards work or of the intricate nature of the matters handled by the board. This can lead to wholly unsubstantiated charges of violations - which, once made, are impossible to erase from the public memory. Even the hint that the State's Attorney has opened up an investigation has been known to create enough backlash to affect election results.

Ordinarily, the board attorney helps the public body respond to citizen or prosecutorial complaints of OMA violations. However, if the State's Attorney makes it clear that the investigation is criminal rather than civil, the public body's legal counsel may believe it inappropriate to continue representation at the taxpayers' expense. Some public entities have an indemnification policy which provides that officials who are investigated or prosecuted for acts relating to their office will be reimbursed for the attorney's fees they incur in those proceedings. *But see Wright v. City of Danville*, 174 111.2d 391, 675 N.E.2d 110 (1996),

holding that a city cannot indemnify officials who are found guilty for the cost of criminal defense. The Illinois Supreme Court left open in *Wright* whether officials found innocent could lawfully be reimbursed under such a policy.

Because a State's Attorney may prefer to focus available resources on more serious crimes, he or she may decline to prosecute even if an OMA violation is suspected, and may merely send a "slap on the wrist letter" admonishing the public body. Some may view the letter as better than being indicted. However, since it is tantamount to a finding of guilty without a trial, it may unfairly taint a public official who actually has a legitimate defense to the State's Attorney's claim.

The Illinois Attorney General has a Public Access Counselor (staffed with several full-time attorneys) which handles complaints and conducts training around the state to promote compliance with the Open Meetings Act and the Illinois Freedom of Information Act.

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LAW ALERT

AGENDAS FOR PUBLIC MEETINGS: "JUST ONE MORE THING"... OR TWO

July 20, 2012

Illinois' oft-amended Open Meeting Act (OMA) has been amended again, this time to mandate more specific content for meeting agendas, and that they be made "continuously available for public review" during the required 48-hour posting period before the meeting. The Governor signed these changes to OMA Section 2.02 into law on July 19, 2012 as Public Act 97-827. They will take effect on January 1, 2013.

Section 2.02(a) has previously required that a public body post an agenda for each scheduled regular meeting, at its principal office and at the place where the meeting will be held, at least 48 hours before the meeting. If the public body has a website maintained by full-time staff, the agenda must also be posted there. Except in emergencies, public notice of special meetings must be given 48 hours in advance, and must include an agenda for the meeting. Section 2.02(b) requires, among other things, that any notice of a regular meeting posted on the public body's website shall remain there until the meeting is concluded - but also provides that failure to post notice of or the agenda for any meeting on the website shall not invalidate the meeting or any actions taken at the meeting.

P.A. 97-827 adds Section 2.02(c) to the OMA. It provides that any agenda required by Section 2.02 must "set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting ." (This wording resulted from a Senate amendment to House Bill 4687, which as introduced would have required agendas to be "sufficiently descriptive to give the public reasonable notice of the items that will be considered or will be the subject of final action at the meeting.")

Per new Section 2.02(c), the public body must also ensure that at least one copy of the notice and agenda for the meeting is continuously available for the public to see during the 48 hours preceding the meeting. The public body may satisfy this requirement by posting the notice and agenda on its website. If, "due to actions outside of the control of the public body", the notice or agenda is not posted continuously for the full 48-hour period, that lack of availability will not invalidate the meeting or any action taken at the meeting.

This *Law Alert* was prepared by Heidi A. Katz of the firm's Chicago office. Should you have any questions about P.A. 97-827 or other aspects of Open Meetings Act compliance, please call any Robbins Schwartz attorney.

EQUAL ACCESS TO ATHLETIC OPPORTUNITIES AND BENEFITS: TITLE IX'S "FORGOTTEN" REQUIREMENTS

I. INTRODUCTION

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving financial assistance.

June 23, 2012 marked the 40th Anniversary of Title IX of the Education Amendments of 1972 ("Title IX"). Title IX is a federal law prohibiting discrimination on the basis of sex discrimination in all education programs and activities operated by recipients of federal funds.

This presentation will review the history of Title IX and its implementing regulations. The presentation will also examine Title IX's requirement for equal access with regard to athletic benefits and opportunities for men and women and analyze how the Office for Civil Rights ("OCR") will determine if a College is meeting this requirement. The presentation will conclude with some practical tips on complying with Title IX's equal access to athletic opportunities directives.

II. TITLE IX HISTORICAL TIMELINE

June 23, 1972

Title IX is enacted by Congress and is signed into law by President Richard Nixon.

July 21, 1975

Title IX federal regulations are issued in the area of athletics. High schools and colleges are given three years to comply.

December 11, 1979

The Department of Health, Education, and Welfare issues final policy interpretation on "Title IX and Intercollegiate Athletics." Rather than relying exclusively on a presumption of compliance standard, the final policy focuses on each institution's obligation to provide equal opportunity and details the factors to be considered in assessing actual compliance.

May 16, 1980

The Department of Education is established and given oversight of Title IX through the Office for Civil Rights (OCR).

February 28, 1984

Grove City v. Bell: limits the scope of Title IX, effectively taking away coverage of athletics except for athletic scholarships. The United States Supreme Court concludes that Title IX only applies to specific programs (*i.e.* Office of Student Financial Aid) that directly receive federal funds. Under this interpretation, athletic departments are not necessarily covered.

March 22, 1988

The Civil Rights Restoration Act of 1988 is enacted into law over the veto of President Ronald Reagan. This Act reverses the United State Supreme Court's decision in *Grove City*, restoring Title IX's institution-wide coverage. Making clear that if any program or activity in an educational institution receives federal funds, all of the institution's programs and activities must comply with Title IX.

February 26, 1992

Franklin v. Gwinnett County Public Schools: the United States Supreme Court rules that monetary damages are available under Title IX. Previously, only injunctive relief was available (*i.e.*, the institution would be enjoined from discriminating in the future).

January 16, 1996

OCR issues a clarification of the three-part "Effective Accommodation Test" that reiterates the requirements of the policy interpretation that institutions may choose any one of three independent tests to demonstrate that they are effectively accommodating the participation needs of the underrepresented gender.

October 1, 1996

All institutions of higher education must make available, to all who inquire, specific information on their intercollegiate athletics department, as required by the Equity in Athletics Disclosure Act passed in 1994.

November 21, 1996

Cohen v. Brown University: A federal appeals court upholds a lower court's ruling that Brown University illegally discriminated against female athletes. Brown unsuccessfully argues that it did not violate Title IX because women are less interested in sports than men. Many of the arguments offered by Brown are similar to those relied upon by colleges and universities all over the country.

February, 2002

The National Wrestling Coaches Association, College Gymnastics Association, and the U.S. Track Coaches Association, along with several other groups representing male athletes and alumni of wrestling programs at Bucknell, Marquette, and Yale, file suit alleging that Title IX regulations and policies are unconstitutional.

April, 2010

The Department of Education issues a Dear Colleague letter clarifying its 1996 "Clarification of Intercollegiate Athletics Policy Guidance." The 2010 letter provides clarification on how the Office for Civil Rights will determine whether an institution is "effectively accommodating the athletic interest and abilities of students of both sexes."

April 4, 2011

The Department of Education issues a Dear Colleague letter which makes clear that Title IX's protections against sexual harassment and sexual violence apply to all students, including athletes.

III. EQUAL ACCESS TO ATHLETIC OPPORTUNITIES AND BENEFITS

A. Office for Civil Rights Findings

Recent OCR investigations and surveys reveal that women and girls still do not have equal access to opportunities and benefits in athletics within schools, colleges and universities. "Although there has been undisputed progress since Title IX was enacted, women and girls continue to represent a disproportionately low percentage of college and high school athletes when compared to their enrollment rates." (Title IX Enforcement Highlights, OCR, June, 2012).

B. Athletic Benefits and Opportunities

Title IX regulations require colleges and other educational institutions to "provide equal athletic opportunity for members of both sexes." Ten factors will be examined in determining whether an educational entity provides equal athletic opportunity:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

2. The provision of equipment and supplies;

3. Scheduling of games and practice time;

4. Travel and per diem allowance;

5. Opportunity to receive coaching and academic tutoring;

6. Assignment and compensation of coaches and tutors;

7. Provision of locker rooms, practice and competitive facilities;

8. Provision of medical and training facilities and services;

9. Provision of housing and dining facilities and services; and

10. Publicity.

C. Athletic Financial Assistance

1. The primary goal of Title IX's financial assistance provision is to assure that scholarship monies are awarded in proportion to the numbers of each sex participating in athletic programs. This provision also extends to grants and work-study programs.

2. With regard to athletic scholarships, Title IX's regulations provide:

   a. To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic sports.

   b. Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph.

3. Title IX does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. However, it does provide that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rate.

D. Demonstrating Compliance with Title IX's Equal Access Mandate

Colleges can establish compliance with Title IX's equity in athletics mandate by meeting any <u>one</u> of the following three benchmarks:

1. Intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, the college can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

3. Where members of one sex are underrepresented among intercollegiate athletes, and the college cannot show a continuing practice of program expansion as per No. 2 above, it can show that its present program fully and effectively accommodates the interests and abilities of members of that sex.

If an institution has met any part of the three-part test OCR will find that the Institution has met its nondiscrimination requirement.

E. Compliance with Part Three of the Three-Part Test

Part three of the three-part test focuses on whether the institution is fully and effectively accommodating the athletic interest and abilities of the underrepresented sex. In determining compliance with part three OCR will consider all of the following three questions:

1. Is there unmet interest in a particular sport?

2. Is there sufficient ability to sustain a team in the sport?

3. Is there a reasonable expectation of competition for the team?

Unmet Interest and Ability

In making the determination, OCR will examine.

- Whether an institution uses nondiscriminatory methods of accessing athletic interest and abilities;

- Whether a viable team for the unrepresented sex recently was eliminated;

- Multiple indicators of interest;

- Multiple indicators of ability; and

- Frequency of conducting assessment.

Reasonable Expectations of Competition

- Competitive opportunities offered by other schools against which the institution competes; and

- Competitive opportunities offered by other schools in the institution's geographic area including those offered by schools against which the institution does not now compete.

F. The Office for Civil Rights, Title IX's Enforcement Agency

The Office for Civil Rights ("OCR") of the United States Department of Education enforces Title IX. According to OCR regulations, there are two ways in which enforcement is initiated:

1. Compliance reviews - Periodically the Department must select a number of colleges and universities and conduct investigations to determine whether they are complying with Title IX; and

2. Complaints - The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs. The OCR has received nearly 3,000 Title IX complaints in the last three years. From FY 2009 to FY 2011 OCR initiated 17 proactive investigations of possible Title IX violation in athletic programs. Additionally, during the same period OCR received more than 900 complaints from students, parents, coaches and others alleging Title IX violations in athletic programs.

G. Review of Recent OCR Activity

- Investigation of fundraising by athletic booster clubs predominately for male teams to determine if this is creating benefit inequities between male and female athletes.

- Investigation of an entire sports league by requiring the league and its member district to equitably treat female and male students in "primetime" scheduling of athletic events, in scheduling of practice time and providing publicity.

  In a recent decision, the Seventh Circuit Court of Appeals held that an Indiana high school's disparity in scheduling boys' and girls' basketball games can be a violation of Title IX.

  In *Parker v. Franklin Co. Schools* (7th Cir. 2012), the court addressed the issue of whether discriminatory scheduling practices are actionable under Title IX. Franklin County High School had regularly scheduled half of its girls' basketball games on non-primetime nights (generally Monday through

Thursday) to give preference to the boys' Friday and Saturday night games. The court noted that the majority of Title IX litigation has focused on "accommodation" claims where plaintiffs assert that schools have failed to establish athletic programs to meet the interests and abilities of the underrepresented sex. In contrast, relatively few cases have focused on "equal treatment" claims seeking substantial equality in program components of athletics as the instant case had. Title IX not only requires schools to establish athletic programs for female athletes, but also prohibits schools from discriminating against females participating in those programs by denying equivalence in benefits, such as equipment, facilities, coaching, scheduling, and publicity.

In this case, the court found that the scheduling disparity was severe enough to present a claim under Title IX. The evidence established that since at least 2007, only 53% of the girls' games were scheduled on primetime nights as compared to 95% of the boys' games.

Moreover, OCR had prepared a letter to the defendant school and other Indiana high schools regarding the scheduling disparity in 1997, and the letter expressly warned the schools that the OCR believed such disparity could violate Title IX. Despite this warning over a decade prior to the litigation, the scheduling disparity had continued. The court noted the negative impact of the scheduling disparity: disproportionate academic burdens resulting from a larger number of weeknight games (homework conflicts), reduced school and community support (loss of audience), and psychological harms (a feeling of inferiority). Accordingly, the court held that the plaintiffs sufficiently alleged the existence of a systemic, substantial disparity that could amount to a denial of equal opportunity as required by Title IX.

Because the court believed that the discriminatory scheduling could violate Title IX, it vacated the district court's entry of summary judgment in favor of the school.

- Obtained relief for women athletes by reaching a resolution with their university to construct upgraded practice and competitive facilities, new and improved locker rooms and other equitable treatment.

- Obtained resolutions requiring college and school districts to add new teams, and to provide comparable coaching and medical and training services.

VI. BEST PRACTICES RECOMMENDATIONS

A. Athletics Compliance

All colleges should be proactive and conduct a review of their athletic programs, with special emphasis on the level of female participation.

1. Objectively evaluate the college's men's and women's sports programs to determine whether the interests of all students are being effectively accommodated. Any committees formed to conduct such evaluations should include representatives from the administration, student body and faculty.

2. Examine the revenues and subsidies received for intercollegiate athletics and determine how financial resources can best be allocated so that all capable and interested students will have access to participation. Programs to enhance the voluntary participation of women in varsity sports should be considered.

3. Review the level of progress made by the college in providing opportunities to women during its preceding five (5) years. If it has not expanded opportunities in women's sports during this period, it should be prepared to show why such action was not taken. The extent to which interest was accommodated during this period will be particularly relevant to this inquiry.

4. Carefully review each varsity sport offered by the college to ensure that male and female teams are offered equal athletic benefits and opportunities.

5. Institute ongoing procedures for collecting, maintaining and analyzing information on the interest and abilities of students of the underrepresented sex.

SURS RETURN-TO-WORK: NEW LIMITS AFFECTING THE COST AND PROCEDURES TO EMPLOY SURS ANNUITANTS

I. INTRODUCTION

On August 16, 2012, Governor Quinn signed HB 4996 into law as Public Act 97-968 ("Act") after the bill passed both houses unanimously. The Act amends the SURS Article of the Pension Code by adding a new provision which significantly limits the ability of community colleges and other SURS-covered employers to employ or re-employ SURS annuitants. The legislation allows SURS to recoup the amount of an individual's retirement annuity when that individual continues to work for a SURS-covered employer and earn compensation greater than 40 percent of the annuitant's highest rate of earnings prior to retirement. This drastic measure is aimed at protecting the funded status of SURS, which as of June 30, 2011 was only 44.3% funded.[1] The Act does not preclude the employment of SURS annuitants, but employers who choose to do so must proceed cautiously to avoid incurring significant cost.

II. TWO-PART TEST FOR IDENTIFYING AN "AFFECTED ANNUITANT"

A. Affected Annuitants

Employers who employ "affected annuitants" after August 1, 2013, will be charged an employer contribution *equal to the annuitant's annual retirement annuity*. A SURS annuitant becomes an "affected annuitant" on the first day of the academic year following the academic year in which the annuitant first meets both of the following conditions:

1. Employed on or after August 1, 2013 by one or more SURS employers for a total of more than 18 paid weeks (inclusive of all employers in the same academic year). A "paid week" is defined as any calendar week in which the annuitant works at least *one* paid day; **and**

2. Received compensation on or after August 1, 2013 that is greater than 40 percent of the highest annual rate of earnings earned prior to retirement.[2]

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[1] *See* SURS 2011 Annual Report.

[2] The Act includes a narrow exception for compensation paid from federal, corporate, foundation, or trust funds or grants of State funds. Any periods of employment for which the annuitant is compensated solely from such sources will be excluded for determining whether the annuitant meets the 18 paid week's condition. Similarly, any compensation received from one of these sources will be excluded for purposes of determining whether the annuitant meets the 40 percent condition.

B. Return to Work Restrictions

Once an annuitant meets both conditions and becomes an "affected annuitant", the annuitant will remain an "affected annuitant" unless and until the annuitant suspends his or her retirement annuity and becomes a participant again in SURS, making all required contributions. These new limitations operate independently of the existing SURS "return to work" restrictions for annuitants that impose a reduction in the annuity amount.[3]

III. REQUIRED EMPLOYER CONTRIBUTION FOR EMPLOYING AN AFFECTED ANNUITANT

A. Contribution Calculation

If a SURS-covered employer employs an "affected annuitant", the employer's contribution to SURS will be equal to the affected annuitant's annualized retirement annuity payable on the day in which the employer has employed the "affected annuitant". In other words, the contribution will be calculated by multiplying by twelve the amount of the monthly annuity received by the annuitant in the first month of employment.

B. Notification

The Act requires SURS to notify the employer and certify the amount of the contribution whenever it determines that an employer is liable for an employer contribution. Employers will be required to pay the required contribution within one year after receipt of the certification from SURS. If a SURS-covered employer employs an "affected annuitant" for multiple academic years, that employer is required to make the contribution for each academic year of employment. If multiple employers concurrently employ an "affected annuitant" in the same academic year, then the required contribution will be allocated among the employers in proportion to the compensation paid by each.

C. Penalty

If SURS determines that an employer has failed to identify an "affected annuitant", or has failed to notify SURS of any required information, the employer will make a payment to SURS in an amount equal to *double* the required contribution for employing an "affected annuitant", *i.e.* twice the annual annuity.

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[3] See section 15-139 of the Pension Code. 40 ILCS 5/15-139.

IV. EMPLOYER NOTICE AND CERTIFICATION OBLIGATIONS

A. The Notice Requirement

Under the Act, the employer is obligated to identify whether an annuitant is an "affected annuitant" and to notify SURS when an "affected annuitant" is employed. Beginning August 1, 2013, employers will be required to notify SURS within 60 days of employing any SURS annuitant. The notice must include the following information:

1. A copy of the annuitant's employment contract, or if no contract exists, the anticipated length of employment and rate of pay;

2. whether or not the annuitant will be paid from federal, foundation, trust, or corporate funds, or state grants in which the principal investigator is named; and

3. the employer's determination as to whether the annuitant is already an "affected annuitant". By definition, the earliest academic year in which an annuitant will qualify as an "affected annuitant" will be 2014-2015.

B. Certification

In addition to providing such notice, employers must certify to SURS the following information:

- the number of paid days and paid weeks worked by the annuitant in the current academic year; **and**

- the amount of compensation paid to the annuitant in the academic year.[4]

The Act authorizes SURS to specify the time, form, and manner of providing the required determinations, notifications, certification, and documentation required by the new law. The Act also empowers SURS to audit employers beginning with the 2013-2014 academic year to ensure compliance with the new limitations and notice requirements.

[4] Including amounts paid from federal, foundation, trust, or corporate funds, or state grants in which in the principal investigator is named.

V. RECOMMENDATIONS

A. Current Annuitants

We recommend that SURS employers review their existing workforce to determine whether any SURS annuitants are currently employed. If those annuitants will be employed during the 2013-2014 academic year and subsequent years, employers will be required to notify SURS and certify all days worked and compensation provided to the annuitant during the 2013-2014 year. While only days worked and compensation provided to a SURS annuitant after August 1, 2013 will be used for determining whether such annuitant is considered an "affected annuitant", employers should begin considering the impact of this new legislation. [5]

By initiating this review process immediately, employers will ensure that they have adequate time to prepare and plan appropriately in advance of the 2014-2015 academic year, which is the first academic year in which an employer contribution may be imposed for employing an "affected annuitant". In order to avoid incurring the contribution, employers will need to carefully monitor an annuitant's schedule and compensation throughout the 2013-2014 academic year to ensure that one or both of the qualifying conditions for becoming an "affected annuitant" are not satisfied.

B. Planning for Future Hiring

In addition to this initial review process, employers should also begin planning and preparing for the notice requirement which will be effective beginning August 1, 2013. Employers may wish to amend their standard employment application to require applicants to indicate whether he/she is presently a SURS annuitant. Applicants should also be required to disclose all employment (present and past) for a SURS covered employer.

Employers may also consider requiring any employed SURS annuitants to complete a certification form at the beginning of their employment that details their SURS-covered employment and identifies their highest rate of earnings prior to retirement. While the Act creates a process whereby the annuitant can request certification from SURS, employers have not been granted authorization to request such information directly from SURS. Accordingly, employers will be required to rely upon employees to obtain and provide this information. A certification form provides documentation of the information relied on by the employer in making the employment decision regarding a SURS annuitant.

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[5] While the Act does not specify, we do not believe that an individual who retired from SURS as a participant in the Self Managed Plan would qualify as an "affected annuitant."

By taking these recommended steps and planning appropriately, employers can limit their potential exposure for incurring the employer contribution as a result of employing an affected annuitant.

"WHAT'S HAPPENING AT THE BARGAINING TABLE" - NEGOTIATING HEALTH INSURANCE AND PENSION BENEFITS IN A NEW WORLD ORDER

Since the constitutional challenge to the Affordable Health Care Act (ACA) community colleges like many public employers have cautiously avoided negotiating drastic changes to its health benefit plans while awaiting a ruling from the United States Supreme Court. Now that the Supreme Court has determined that the ACA's provisions affecting college-sponsored health insurance plans are constitutional, and given the election results, colleges must be knowledgeable of the Act's various requirements, including, how the college's ability to comply with many of these new requirements may be impacted through collective bargaining.

Similarly, community colleges for the past several years have had to negotiate successor collective bargaining agreements under the threat of "pension reform." Although the Illinois General Assembly has started to take steps to enact long-term reform to the public pension systems, many of the proposed immediate pension reforms have yet to garner enough legislative support to become law. This has cast a lot of uncertainty over already unstable collective bargaining negotiations.

The illustrations that follow address a variety of health benefit plan and pension benefit issues that have arisen recently at the bargaining table due to health care and pension reforms.

Health Benefit Plan Scenario #1

A community college, employing more than 50 full-time equivalent employees, maintains a fully insured health insurance plan. The college currently pays 100% of the full single member premium. The collective bargaining agreement requires the union to approve any changes to the health insurance plan, including benefits and coverage. The college and its faculty's union also maintain the plan document and a summary of benefits as an addendum to their collective bargaining agreement. The college has experienced an increase in the single member premium over the past several collective bargaining agreements, thereby increasing its contribution from $350 per month to $550 per month. The college just learned from its insurance broker that it is currently looking at another 10% premium increase for the upcoming year.

The college is interested in learning how to shift some of its premium costs to the faculty and different options for doing so.

Health Benefit Plan Scenario #2

A community college typically provides its administrators with the same health insurance coverage as its employees, but its new president candidate, whom the college desperately wants to hire, insists on receiving full college-paid family health

insurance. What issue does this request present for the college and what options does the college have?

Health Benefit Plan Scenario #3

Assume that a community college (50+ full-time employees) has had a younger workforce for several years due to a rash of early retirements because of the uncertainty with changes to the public pension systems. The younger healthier workforce has been more concerned with maximizing their creditable earnings, instead of maintaining affordable health insurance coverage. Consequently, the single member premium has significantly outpaced the college's contribution, which has largely remained constant. Now the college is facing a situation where it is only contributing $350 per month toward a $650 per month single member insurance plan premium. The high premium is largely due to the fact that the college has low participation numbers, but an extremely high claim history.

- What are the issues facing the college?
- What solutions are available to the college?

Health Benefit Plan Scenario #4

Assume the community college from the previous example maintains a "grandfathered," "Cadillac" health insurance plan and has committed to pay 90% of the employee's single member premium. The college's current "Cadillac" plan's deductibles and co-payments are no longer comparable to current market conditions. This premium has increased from $450 to $650 during the time the college has been trying to maintain its plan's "grandfathered" status. The college has decided to abandon its plan's "grandfathered" status and explore less expensive insurance options. The college's insurance broker is recommending that it consider replacing its expensive "Cadillac" plan with low premium, high deductible health insurance plan. Deductibles under this plan are $2000 for employees and $4000 for family. What factors should the college consider in its decision?

Health Benefit Plan Scenario #5

A community college's insurance broker suggests the college could receive lower premium rates the next time it advertises its health insurance plan for bid if it implements a wellness program for its employees. The college is on the verge of beginning the second of a three year collective bargaining agreement for a portion of its staff. The remaining staff is non-union, either excluded from collective bargaining or unrepresented. The college pays 100% of the single member premium.

Participation in the wellness program will be mandatory. The college announces that for those employees covered by its health insurance plan that do not participate in the wellness program, those employees will be responsible for 10% of the insurance

premium. The college unilaterally implements the wellness program and the new premium contribution requirement for all staff without first bargaining with the unionized employees' exclusive bargaining agent.

Health Benefit Plan Scenario #6

Consider for a moment that participation in the wellness program is voluntary and there are no negative consequences for not participating. Elements of the wellness program include free of charge:

- Annual flu immunizations
- Annual physicals
- Alcohol and drug counseling
- Health club membership
- Smoking cessation plan
- Weight loss and nutrition counseling
- One extra personal leave day each year of participation
- Additional employer contribution toward FSA, HRA or HSA

The college again unilaterally implements the wellness program without first negotiating with the unionized employees' union.

- Union rejects the wellness program just described due to the fact that it wants the increased FSA/HRA/HSA contribution to apply to all bargaining unit members, and not just to those that participate in the wellness program. The college unilaterally implements the program for everybody and the union files an unfair labor practice charge. The college resolves the charge by agreeing to implement the wellness program for just non-union employees, including management.

Retirement and Pension Reform Scenario

A college's collective bargaining agreement contains a provision requiring summer school and overload work to be distributed on a seniority basis. The collective bargaining agreement was last negotiated in 2009 and is scheduled to expire June 30, 2013.

- During negotiations over a successor collective bargaining agreement, the faculty union believes that it must obtain an employer concession in exchange for relinquishing faculty's seniority rights associated with summer school and overload assignments. The union proposes that retiring faculty have the first opportunity to bid on any emeritus or adjunct faculty vacancy. The college counters with a proposal that it will maintain seniority as a deciding factor in selecting applicants for summer school and overload assignments, but that the instructors will pay any penalties for exceeding the 6% salary threshold.

HSAS, HRAS AND HEALTH FSAS
COMPARING ELIGIBILITY AND COMPLIANCE REQUIREMENTS

	HSAs	HRAs	FSAs
Who is eligible?	Individual covered by qualified HDHP, and no non-qualified HDHP coverage	Any eligible employee; no HDHP coverage required	Any eligible employee
Who can contribute?	HSA holder, employer, any other person	Employer only	Employer or employee
Cafeteria plan salary reductions?	Permitted	No	Yes
What expenses are reimbursable?	Otherwise unreimbursed qualified medical expenses (account holder, spouse, dependents)	Otherwise unreimbursed qualified medical expenses and health insurance premiums (employee, spouse, children up to age 26, dependents)	Otherwise unreimbursed qualified medical expenses (employee, spouse, children up to age 26, dependents)
Cash out for non-medical expenses?	Yes, but taxable and subject to 20% excise tax	No	No
Limited to expenses incurred during the period of coverage?	No	Yes	Yes (except for specified grace period)
Keep account funds after termination of employment?	Yes, is portable and nonforfeitable	Yes, if permitted by the plan	No
Uniform Coverage Rule?	No	No	Yes

Carry over unused amounts to next year?	Yes	Yes, if permitted by the plan	No (except for specified grace period)
Nondiscrimination rules for health plans? (Code §105(h))	No. But comparability rules for employer contributions apply	Yes	Yes
Cafeteria plan nondiscrimination rules? (Code §125)	Only if offered under a cafeteria plan	No	Yes, if offered under cafeteria plan
Participate in the other accounts at the same time?	No traditional, general purpose HRA or FSA permitted. (But certain limited purpose HRAs or FSAs may not prevent HSA eligibility.)	FSA permitted. No HSA (except if HRA is a certain limited purpose HRA plan)	HRA permitted. No HSA (except if FSA is a certain limited purpose FSA plan)