Where are we now? A Look Back at 2023 Hot Topics in School Law

2024 OSPA Winter Retreat

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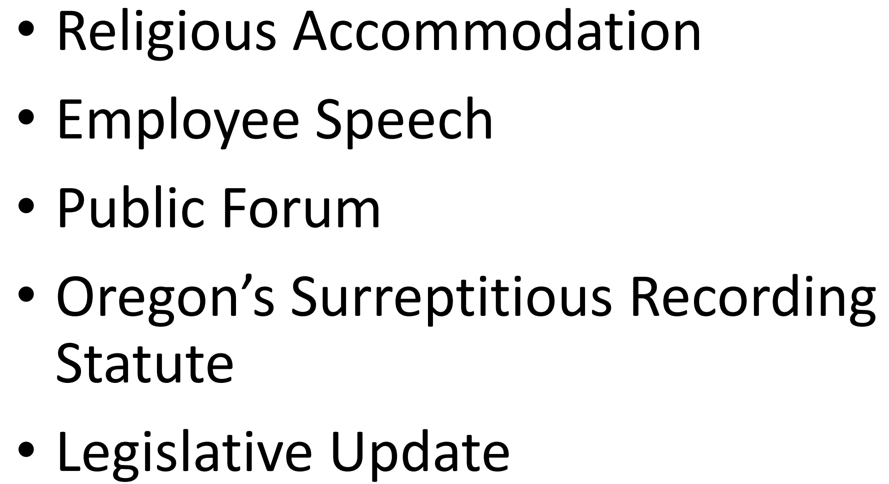

- Religious Accommodation
- Employee Speech
- Public Forum
- Oregon’s Surreptitious Recording Statute
- Legislative Update

Religious
Accommodation

Religious Accommodation under ORS 659A.033

- ORS 659A.033 only applies to:
  - Leave (allowing an employee to use leave available to them that is not restricted as to the manner in which it may be used); and
  - Religious clothing.

- "A reasonable accommodation imposes an undue hardship on the operation of the business of the employer for the purposes of this section if the accommodation requires significant difficulty or expense." ORS 659A.033(4).

- Accommodation may only have a temporary or tangential impact on the employee's ability to perform the essential functions of their job.

Undue Hardship under ORS 659A.033

Consider:

- Nature and cost of the accommodation;
- Overall financial resources of the facility (e.g., impact on the operation of the facility)
- Overall financial resources of the employer
- Size of the employer
- Type of business
- Safety and health requirement of the facility
- The degree to which an accommodation may constrain the obligation of a school district, ESD, or public charter school to maintain a religiously neutral environment.

ORS 659A.033(4).

Groff v. DeJoy, 600 US 447 (2023)

What does "undue hardship" mean (for purposes of Title VII religious accommodation)?

Title VII of the Civil Rights Act of 1964

- Under Title VII, it is unlawful employment practice for an employer "…to discriminate against any individual with respect to…compensation, terms, conditions, or privileges of employment, because of such individual's religion."
- Title VII requires reasonable accommodation of employee's religious beliefs or practices if the beliefs are "sincerely held" and the reasonable accommodation poses no undue hardship on the employer.

What constitutes a religious or sincerely held belief?

- Title VII defines “religion” to include “all aspects of religious observance and practice as well as belief.” 42 U.S.C. § 2000e(j).
  - Religion includes not only traditional, organized religions but also religious beliefs that are new, uncommon, or that may even seem unreasonable to others
  - Typically concerns “ultimate ideas about life, purpose and death…”
- The sincerity of a stated religious belief is not typically in dispute.
- Social, political, or economic philosophies, as well as preferences, are <u>not</u> religious beliefs.

Basic Questions for Religious Accommodations

1. Is there a conflict between the employee's sincerely held religious beliefs and work requirements?
2. If yes, is there a reasonable accommodation that would eliminate the conflict?
3. If yes, does the reasonable accommodation impose an undue hardship on the employer?
4. If yes, is there a reasonable accommodation that would partially eliminate the conflict and does not impose an undue hardship on the employer?

Most common categories of religious accommodation requests

1. Scheduling changes (*e.g.*, days off for Sabbath observance, mid-day prayer breaks, schedule changes to accommodate religious services)
2. Dress and grooming standards
   - Typically granted unless there are legitimate safety concerns (e.g., work in an industrial facility and can't safely accommodate certain clothing)
3. Religious expression in the workplace (*e.g.*, displaying religious symbols in the workplace)
   - Can present Establishment Clause concerns for public employers

School-specific religious accommodation requests

- Requests related to addressing gender diverse students by chosen/preferred pronouns and/or name:
  - *See* ODE Guidance - Supporting Gender Expansive Students (issued January 5, 2023) ("[students] should be referred to by their asserted name and pronouns").
  - *Kluge v. Brownsburg Cmty. Sch. Corp.*, 548 F Supp 3d 814 (SD Ind 2021) (holding that religious accommodation under Title VII exempting employee from district policy requiring staff to use students' preferred names and pronouns would be undue hardship to district because it would make trans students feel unsafe/unwelcome and would expose the district to liability).

“Undue hardship” not defined in the statute

Previous Standard (*TWA v. Hardison*, 432 US 63 (1977)):

Undue hardship if employer can show more than *de minimis* cost

New Standard (*Groff v. DeJoy*, 600 US 447 (2023) (issued on June 29, 2023):

Undue hardship if employer can show that burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.

Groff v. DeJoy, 600 US 447 (2023)

Groff was employed by USPS as a mail carrier.

- In 2013, USPS signed a contract with Amazon to deliver Amazon packages, including Sunday deliveries.
- Groff, an evangelical Christian, objected to working Sunday because he observed Sunday Sabbath, sought religious accommodation.
- USPS denied blanket exception for Sunday shifts, offered other accommodations.
- Groff resigned in 2019, sued in federal court for failure to accommodate his religion.

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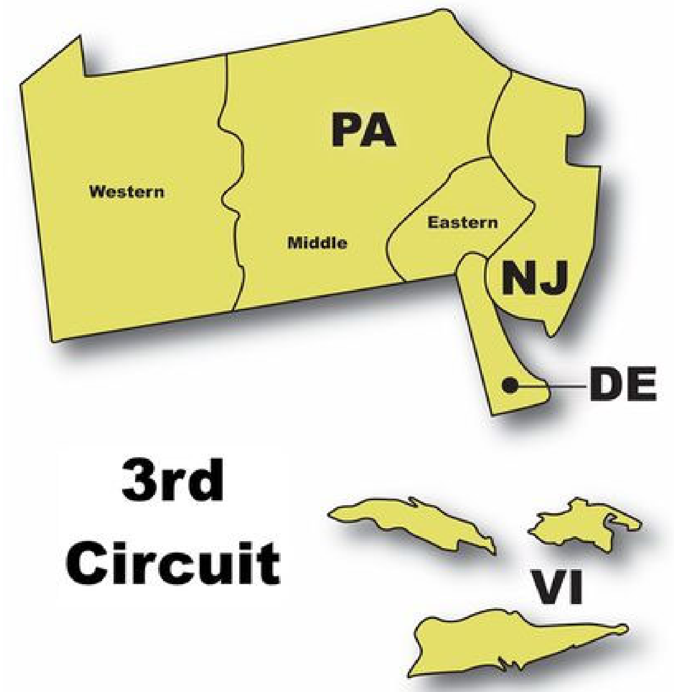
Groff v. DeJoy

- District Court for the Eastern District of Pennsylvania grants Summary Judgment to USPS; Groff appeals to Third Circuit Court of Appeals
- Third Circuit affirms District Court's decision, citing *TWA v. Hardison*'s "more than de minimis standard"
  - Exempting Groff from Sunday violated MOU, unfairly burdened other employees, and disrupted the workplace and workflow.
- Groff appeals to U.S. Supreme Court.



The Court clarifies what "undue hardship" means

- '…"[U]ndue hardship" means something very different from a burden that is merely more than *de minimis*, *i.e.*, "very small or trifling."'
- "The Court thinks it is enough to say that what an employer must show is that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business…."

The Court did not decide whether USPS could accommodate Groff's religious beliefs without undue hardship and remanded this factual determination back to the district court.

Court offers limited guidance on how to apply this new test…

- Employers considering a religious accommodation should assess in a “common-sense manner” the “practical impact” of a particular accommodation in light of all the facts at hand, such as the size and nature of the employer’s business.
- Impacts on coworkers relevant only to the extent those impacts go on to affect the conduct of the business/organization.
- Title VII does not require employers to override CBA seniority rights.

EEOC's Guidance on Religious Accommodation under Title VII

- The Court signaled approval of EEOC's Guidance on Religious Accommodation—"A good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by the Court's clarifying decision"—but refusing to formally endorse any or all of it.
- EEOC Guidance on Religious Accommodation likely an effective guidepost for navigating religious accommodation requests going forward. (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination)

Takeaways from *Groff*

- Going forward, processing of religious accommodation requests will be similar to ADA accommodation requests and considered on a case-by-case basis (though ADA is still more onerous)
- If employee's preferred form of accommodation poses an undue hardship:
  - The employer should consider alternative accommodations to eliminate the conflict (and document this!)
  - If the employer cannot eliminate the conflict without undue hardship, the employer should consider alternative accommodations to partially eliminate the conflict (and document this!)
- When in doubt, contact your district's general counsel or PACE preloss

Employee Speech

Public Employee - First Amendment Rights

Speech is protected by the First Amendment if:

- the speech is on a matter of public concern, **and**
- the speech is not said by the employee as part of the employee's job duties, *Garcetti v. Ceballos*, 547 US 410 (2006), **and**
- the damage caused by the speech to the efficiency of the government agency's operation does not outweigh the value of the speech to the employee and the public (the so-called *Pickering* balance). *Connick v. Myers*, 461 US 138 (1983).

Pickering Balancing Test

- Even if an employee was speaking on a matter of public concern as a private citizen, he/she may still be disciplined for such speech if "the government's interest in efficiency outweighs the employee's interest in speaking out."

  See generally Connick, 461 US 138, 147 (1983); *Pickering*, 391 US 563 (1968).

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***Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 772 (9th Cir. 2022)**

Proceed with caution when considering employee discipline for political speech

Dodge v. Evergreen Sch. Dist. #114, 56 F.4th 767 (9th Cir. 2022)

- Dodge attended a professional cultural sensitivity and bias training the week before school year began
- He wore a “Make America Great Again (MAGA)” hat in the parking lot and placed it near him during the training
- Washington State University professor facilitating the training and district staff complained they felt threatened and upset by Dodge’s hat

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OREGON SCHOOL BOARDS ASSOCIATION

Dodge Continued…

After one day with the hat:

- Dodge's supervisor, a principal, asked about the hat.
  - Dodge: It protects my head and I like the message that everyone should be the best they can be at what they do.
  - Principal: Some people view the hat as a symbol of hate and bigotry. Use better judgment in the future.

After second day with the hat:

- Principal to Dodge: If you wear that hat again, we will need to discuss the issue at a meeting with your union rep.

What happens next?

Complaint to the Board:

- Dodge complained that principal violated the harassment, intimidation, and bullying policy.
- Asked for a transfer.

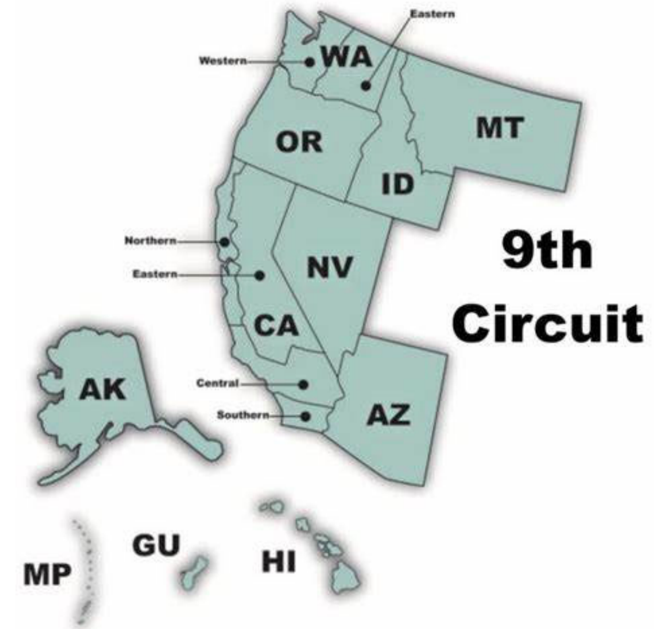
District granted transfer but dismissed complaint after third-party investigation found no policy violation.

Lawsuit

- Dodge sued the district, principal, and HR officer.
- Alleged his First Amendment right to free speech was violated when he was retaliated against for bringing MAGA hat to the trainings.

Dodge v. Evergreen Sch. Dist.

- District Court of Western Washington grants summary judgment in favor of the school district; Dodge appeals to Ninth Circuit Court of Appeals.
- Ninth Circuit reverses:
  - Dodge's wearing the hat was protected speech:
    - Dodge's hat conveyed a message that was of public concern; and
    - Dodge was acting as a private citizen in conveying the message.
  - Principal's interest in preventing disruption did not outweigh Dodge's First Amendment Rights.
    - "That some may not like the political message being conveyed is par for the course and cannot itself be a basis for finding disruption of a kind that outweighs the speaker's First Amendment rights."
  - Remands for a jury trial to decide whether district retaliated against Dodge for engaging in protected speech.



Outcomes & Takeaways

- We don't know the outcome yet. Dodge has the right to a trial for his claims.
- What do we know from the 9th Circuit decision?
  - Threats of discipline based on political messages = proceed with caution!
  - Controversial speech causes unpleasantness. But this is probably not enough of a disruption to allow you to restrict free speech.
  - Political speech is not the same in front of teachers/staff as it is if students or parents are present

Public Forum

Public Forum & Free Speech

Can a district control a community member's speech? It depends on where:

- Traditional public spaces– parks, sidewalks, etc
- Spaces created for public discourse – meetings, bulletin boards
  - Reasonable time, place, and manner restrictions allowed
  - Can limit to certain classes of speakers / types of speech if viewpoint-neutral
- Spaces where public speech occurs but that's not it's purpose - airport terminals, polling places, etc
  - Reasonable time, place, and manner restrictions allowed
  - Content-based restrictions allowed if viewpoint-neutral

Garnier v. O'Connor-Ratcliff

41 F.4th 1158 (9th Cir. 2022), cert. granted, 143 S Ct. 1779 (2023)

Pending Supreme Court decision regarding public officials' social media pages

Garnier v. O'Connor-Ratcliff
41 F.4th 1158 (9th Cir. 2022), cert. granted, 143 S Ct. 1779 (2023)

- Candidates for school board created public Facebook and Twitter pages to promote their campaigns
- After they became board members, they continued using these pages to talk about district activities
- Parents in the district left *repetitive* critical comments
- The board members:
    - Deleted the comments; and then
    - Blocked the parents from the pages

Garnier v. O'Connor-Ratcliff
41 F.4th 1158 (9th Cir. 2022), cert. granted, 143 S Ct. 1779 (2023)

Can they do that?

- 9th Circuit: No, not on social media accounts related to official government duties
- Supreme Court: (We will find out)

Garnier v. O'Connor-Ratcliff

41 F.4th 1158 (9th Cir. 2022), cert. granted, 143 S Ct. 1779 (2023)

- The 9th Circuit also told us:
  - The board members could have established and enforced rules of etiquette for public comments to deter repetitive comments
  - Disruption to a social media page from obnoxiously repetitive comments is not a justification to block someone from a designated public forum

Takeaways

- Social media accounts about district programs and activities may be a public forum, depending on:
  - Who created the account/page, and who has access to manage it?
  - Are comments allowed?
- Best practices for district social media accounts
  - Establish rules of conduct
  - Be cautious of blocking users or deleting comments
  - Consider turning off public commenting options

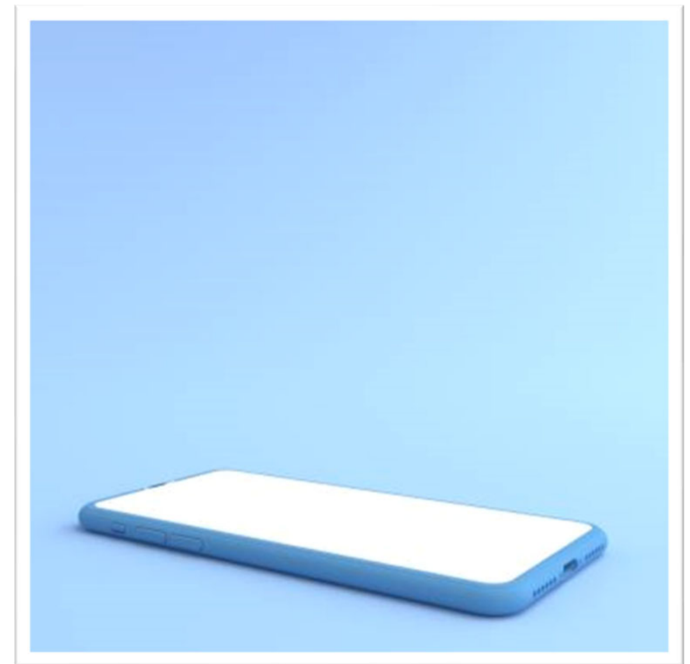
Oregon’s Surreptitious Recording Statute

Project Veritas v. Schmidt, 72 F4th 1043 (9th Cir 2023)

Struck down ORS 165.540(1)(c)’s prohibition of surreptitious recordings of conversations as unconstitutional).

Takeaways

- Public can record open session without saying anything
- Can likely ask people (incl. media) to not record executive session, but if they do it is unclear what the remedy is
- Be mindful of what you say in open session and executive session
- Assume that if others are present, you may be recorded



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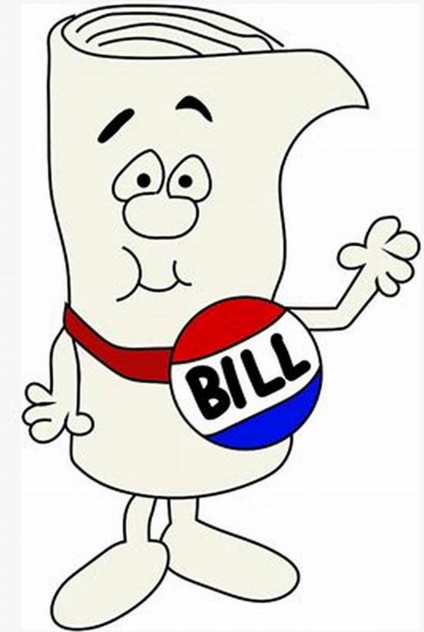
Recent Legislation Hot Topics

2023 Legislative Session

3,000 bills introduced

100 bills impacting K-12 education signed into law

Longest legislative walkout in Oregon history



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We will go through:

- SB 790: Adding Unlawful Restraints to Definition of Child Abuse
- SB 756: School Employee Access to Special Education Records
- SB 283: Education Omnibus Bill ("just cause")
- SB 489: Unemployment Insurance for Nonprofessional Education Workers
- SB 907: Protection for Employees Who Refuse to Expose Themselves to Serious Injury or Death from a Hazardous Workplace Condition
- HB 2281: Requiring Schools to Designate One or More Civil Rights Coordinators

SB 790: Adding Unlawful Restraints to Definition of Child Abuse

Adds the following to the definition of abuse in ORS 419B.005:

Use of a restraint or seclusion in violation of in violation of ORS 339.285, 339.288, 339.291, 339.303 or 339.308

Corporal punishment in violation of ORS 339.250(9).

SB 790 Continued…

- If DHS substantiates a child abuse report in the event of a school employee's unlawful restraint and seclusion, the district rather than the employee will be found "responsible" if:
  - The district failed to provide a sufficient number of employees trained in the use of restraint and seclusion to comply with the student's IEP, 504 plan and behavior intervention plan and the employee was not aware of the student's IEP, 504 plan and behavior intervention plan;
  - A superior ordered the employee to impose the restraint or seclusion and the employee believed they would be disciplined if they did not comply.
  - The district failed to provide "appropriate" training on restraint and seclusion, the employee believed the action was necessary to maintain safety, and it was not a restraint prohibited by ORS 339.288.

SB 790 Continued…

- DHS will submit a report on child welfare within public education programs to committees of the Legislative Assembly on the first day of every calendar quarter, which will include publicly available information about the name of the education provider, the date and nature of abuse, and whether an injury was sustained.
- Effective date: July 1, 2023

Action Item: Continue to train personnel on appropriate restraints and seclusion.

SB 756: School Employee Access to Special Education Records

- Requires that school district officials who work with students who have IEPs, 504 plans, or behavior intervention plans be provided access to student records related to the employee's responsibilities to assist the student.
- Remember: FERPA still applies
- Requires that school districts consult with employees assigned to work with students with specialized needs when that student's education plan is being developed, reviewed, or revised.

SB 756 Continued…

- If school district employees are invited to meetings regarding IEPs, 504 plans, behavior intervention plans, or meetings about the students when decisions are related to that particular employee's responsibilities or that employee has "unique information" about that student, then the employee must be compensated for attendance at those meetings.
- Requires that school districts provide adequate training to employees so they may safely carry out each of their specialized duties.
- School districts will incur additional costs to train new employees and compensate employees for attending meetings. The fiscal report stated that the estimated fiscal impact to school districts is anticipated to be minimal but will vary depending on number of staff requiring training and number of students in special education.
- Effective date: September 24, 2023

SB 283, Section 18: Just Cause for “Classified School Employees”

- “Classified school employees” shall have the right to be dismissed, demoted or disciplined “only for just cause.”
- “Classified school employee” includes all employees of a school district except those for whom a teaching or administrative license is required as a basis for employment (broad definition).
- Classified school employees subject to just cause on day 1 of their employment.
- Effective date: July 1, 2023

Just cause

- Forewarning?
- Policy or rule reasonable?
- Inquiry?
- Fair and objective investigation?
- Substantiated evidence or proof?
- Application/relationship to similar cases?
- Scope of infraction/degree of discipline?

SB 283 Just Cause Continued…

Proceed with greater degree of caution regarding adverse employment actions against employees who previously were not subject to "just cause" standard (*e.g.*, probationary employees); consult with general counsel or PACE preloss if you would like to discuss specific employees.

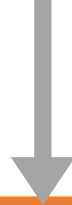
Progressive discipline

- Verbal warning
- Written warning
- Written reprimand
- Unpaid suspension

Due process

Always provide due process

- Notice; and
- Meaningful opportunity to be heard



Provide:

- Pre-termination letter
- Hearing
- Termination letter

Employment termination process

- Classified Employees--ORS 332.544(2) A classified employee may only be dismissed, demoted or disciplined for **just cause**. (SB 283).
  - * No longer have right to hearing after dismissal.
- Probationary Teacher—ORS 342.835(1) A probationary teacher may be discharged at any time during the probationary period for any cause deemed sufficient by the Board. ORS § 342.835(1). The district needs to provide written notice and the opportunity for a hearing.
- Licensed Teacher—ORS 342.805 - 342.934
- *Always check your CBA

SB 489: Unemployment Insurance for Nonprofessional Education Workers

- Applies to education workers who are not performing instructional, research, or principal administrative work.
- Eliminates the “reasonable assurance” test that was previously in ORS 657.221(1)(b). Previously, if an employee subject to ORS 657.221 received reasonable assurance that they would have a job after a school break, they were not eligible for unemployment during a school break.
- Per SB 489, now such an employee could be eligible for unemployment during a school break (if they are not working).
- Effective date: January 1, 2024

SB 489 Continued…

Determine which employees in your district this applies to. Janitorial and maintenance employees were already eligible to receive unemployment insurance.

Consider offering work to eligible employees during school breaks.

SB 907: Protection for Employees Who Refuse to Expose Themselves to Serious Injury or Death from a Hazardous Workplace Condition

- Makes it an unlawful employment practice to discipline or discharge an employee (or prospective employee) because they "[w]ith no reasonable alternative and in good faith, refused to expose the employee or prospective employee to serious injury or death arising from a hazardous condition at a place of employment."
- Effective date: January 1, 2024

Potential Concern re SB 907

- Employees walking off the job if they have a challenging student situation.

Provide "reasonable alternatives" to employees, and document in writing (*e.g.*, call the front office in the event of an unsafe student situation).

HB 2281: Requiring Schools to Designate One or More Civil Rights Coordinators

- Requires school district boards to designate one or more civil rights coordinators for the school district. Coordinator(s) may be a district employee or the district can contract with an education service district to provide these services.

HB 2281 (Civil Rights Coordinators) Continued…

- Minimum requirements for the position(s) include:
  - Monitoring, coordinating, and overseeing school district compliance with state and federal laws prohibiting discrimination in public education;
  - Overseeing investigation and resolution of compla alleging discrimination in public education;
  - Providing guidance to school and district personne on civil rights issues in the school district, respondin to questions and concerns about civil rights in the school district, and coordinating efforts to prevent civil rights violations from occurring in the school district; and
  - Satisfying any training requirements for the position as prescribed by the State Board of Education.
- The law will become a Division 22 requirement.
- Effective date: January 1, 2024

QUESTIONS?