

CLIENT ADVISOR



September,
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Calling All Employers: New DLR Decision Weighing In On Town's Cell Phone Use Policy

On August 22, 2013, the Department of Labor Relations (DLR) issued a decision in *In the Matter of Town of Plymouth and AFSCME (Plymouth)* that determined that "[t]he Town's duty to bargain was not eliminated simply because it raised the issue of safety." At issue was the Town's implementation of a policy that addressed the use of cell phones during work hours. The policy limited the use of Town-issued phones for personal calls, prohibited use of Town and personal cell phones while operating a Town vehicle/equipment, limited personal calls at work, and provided for disciplinary action, up to and including discharge, for violating the policy. The Town approved and implemented the policy without bargaining with the Union.

The Town defended its implementation of the Policy on safety grounds. According to the Town, the use of cell phones while driving was prohibited because, "Safety must come before all other concerns and talking while operating a vehicle is an unnecessary distraction."

At first glance, the Town's policy appears reasonable. After all, in 2002, the DLR upheld a similar policy in *In the Matter of Suffolk County Sheriff's Dep't. (Suffolk County Sheriff's)*. In *Suffolk County Sheriff's*, the Department instituted a policy prohibiting jail officers from using private cell phones on the job, without first bargaining with the Union. After balancing the employees' interest in

bargaining over the policy with the employer's interest in maintaining its managerial rights, the DLR determined that the Department's interest in ensuring that jail officers are able to provide for the care, custody and control of inmates without distraction, outweighed the employees' interests in carrying their cell phones.

Applying the same balancing test in *Plymouth*, the DLR concluded that the Town's interests in the safe operation of vehicles and conducting town business without distraction, did not outweigh the Union's interests in bargaining over a change in working conditions. Of significance was the fact that the policy applied to all members of the union and not just those operating vehicles or in safety sensitive positions.

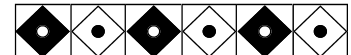
Following this decision, employers who seek to implement a cell phone use policy without first bargaining with the union, should consider who will be affected by the policy and whether those individuals hold safety sensitive positions. In addition, employers should consider drafting a policy that impacts drivers and non-drivers differently.

Employers who are contemplating the implementation of a new, or revised cell phone policy should contact counsel with any questions.

Speaking Engagements

On October 25, 2013, Leo Peloquin will present at the Massachusetts Municipal Personnel Association's (MMPA) Labor Relations Seminar in Boxborough, MA. The workshop, "A New Chapter — A Journey Beyond Civil Service" will advise employers on the steps required to get out of the civil service system.

If you are unable to attend the Seminar or Leo's workshop, and would like information on this topic, please call the office or email Donna Banville at dbanville@collinslabor.com



Reach Us By Email:

Philip Collins
pcollins@collinslabor.com

Michael C. Loughran
mloughran@collinslabor.com

Leo J. Peloquin
lpeloquin@collinslabor.com

Tim D. Norris
tnorris@collinslabor.com

Joshua R. Coleman
jcoleman@collinslabor.com

Melissa R. Murray
mmurray@collinslabor.com

Stephanie M. Merabet
smerabet@collinslabor.com

Bullying Can Result In A Denial Of FAPE For Students With Disabilities

In August, 2013, the U.S. Department of Education issued a "Dear Colleague" letter which provides an overview of a school district's responsibilities under the Individuals With Disabilities Education Act (IDEA) to address bullying of students with disabilities. The message of the letter is clear, a school district's failure to properly address bullying of students with disabilities could result in a denial of a free appropriate public education (FAPE) for those students.

While bullying of one student by another student is never acceptable, the letter reminds school districts that students with disabilities are disproportionately affected by bullying. According to the letter, "bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA that must be remedied." Additionally, situations involving a student not previously identified as having a disability may "trigger a school's child find obligations under IDEA." Bottom line: "A student must feel safe in school in order to fulfill his or her academic potential." A copy of the letter is available on the CLP website. School personnel should review the letter and contact counsel with questions.

