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THE BOE'S PROPOSED SELF REPORTING ARREST AND CONVICTION POLICY AND REGULATION CAN AFFECT EMPLOYEES' FIFTH AMENDMENT RIGHTS AGAINST SELF INCRIMINATION

The BOE's Self-Reporting Arrest and Conviction Policy and Regulation will require all employees to report all charges, arrests and convictions for any criminal offense, including criminal traffic offenses. The policy and regulation also allow the Superintendent or his designee to investigate the reported charge, arrest or conviction administratively. There is no requirement that the BOE stay its investigation pending the outcome of the criminal case and this is where the problem arises for the employee.

Any internal investigation conducted by the BOE while criminal charges are pending can compromise the employee's Fifth Amendment Right against self incrimination in his or her criminal case. Timing is everything. Although the Fifth Amendment protection against self incrimination applies in any type of proceeding, be it criminal, civil, administrative or even investigatory, the EFFECT of "pleading the Fifth" in a criminal case is profoundly different from its effect in a civil, administrative or investigatory proceeding. If a criminal defendant invokes the Fifth Amendment Right against self incrimination in a criminal case in the judicial system, the judge or jury is not permitted to draw an adverse inference of guilt against the defendant. The exact opposite, however, applies in civil, administrative or investigatory proceedings, that is, the "finder of fact" can draw an adverse inference of guilt from invoking the right. This difference is the reason timing is of utmost importance whenever the same conduct gives rise to both criminal charges and administrative hearings/investigations such as is the case created by the BOE's self-reporting policy and regulation.

Specifically, if the BOE institutes an investigation of the employee pursuant to the self-reporting regulation while the criminal case is pending, the employee is confronted with a classic "Hobson's Choice" in deciding whether to invoke the "Fifth" in the investigation or to make a statement concerning the facts of the case. This is a no-win scenario for the employee. If the employee invokes the right against self incrimination and refuses to discuss the matter during the BOE investigation and/or hearing, the BOE finder of fact can draw an adverse inference of guilt against the employee. If, on the other hand, the employee does not invoke the "Fifth," the employee's statements made at the BOE proceeding can be used to incriminate him or her at a subsequent criminal trial, effectively defeating the employee's Fifth Amendment rights in the criminal case.

The simple and obvious resolution for the employee's "Hobson's Choice" dilemma is to amend the proposed self-reporting regulation to stay BOE investigation of the employee until after the criminal case has run its course. In cases of criminal charges for conduct supporting a potential threat to any child or adult in the school system, administrative leave with pay, pending judicial resolution is an option.

There are other problems with the Self-Reporting Policy and Regulation including their over broad application, as well as privacy and confidentiality considerations. These issues were raised and discussed by Richard Kovelant, Executive Director and General Counsel of AEL, in his Article in Volume 6, No. 1, of the AEL Newsletter.

FUN FACTS

A. "Hobson's Choice"

The term "Hobson's Choice in modern usage means the choice between two undesirable options, a bit of a change from it's original meaning of false illusion of choice. The expression originated in England, referencing the "choice" given by stable manager Thomas Hobson (1544-1630) to travelers renting his horses. Certain horses were of better quality and, therefore, more often requested, resulting in top quality horses being overworked. Accordingly, Hobson decided to begin a rotation system, refusing to rent any horse out of turn; "Hobson's Choice" offered to customers was the choice of taking the horse in rotation (often not the best horse) or taking none at all.

B. "Morton's Fork"

"Morton's Fork" is a lesser known expression, also meaning the choice between two equally undesirable alternatives, and it is my favorite. This expression originated in England in 1487 as a description of the tax collection policy of John Morton, Lord Chancellor during the reign of Henry VII. Under Morton's policy, if the subject lived a luxurious ostentatious life style, he clearly had sufficient income to pay hefty taxes to the King. Alternatively, if the subject lived frugally, showing no sign of wealth, the subject must have saved his money and also could afford to pay high taxes. These two life-style alternatives make up the two prongs of Morton's Fork, neither of which are a desirable choice from the tax payer's point of view.

Whether you choose "Hobson's Choice" or "Morton's Fork" to describe the Fifth Amendment choice required by the BOE's Self-Reporting Policy and Regulation, the result is the same; it remains the choice between two equally undesirable alternatives for the employee.

THE MARYLAND FLEXIBILE LEAVE ACT: MARYLAND'S NEW LAW SUPPLEMENTING THE FEDERAL FAMILY MEDICAL LEAVE ACT

The federal Family Medical Leave Act ("FMLA") and its 2009 amendments known as the "Final Rule" were outlined in detail in Volume 2, Issue 1 (September, 2009) of the AEL Advocate. In 2008 and 2009 Maryland passed and clarified respectively, the Maryland Flexible Leave Act ("MFLA"), legislation meant to supplement FMLA coverage for PRIVATE NON-PUBLIC EMPLOYERS. Although the MFLA does not, therefore, apply DIRECTLY to AEL or any BOE employee, it clearly can have an indirect application and benefit to certain AEL members who have family members employed in the private sector. As more fully discussed herein, the MFLA covers private sector employers with 15 or more employees, rather than the 50 required by FMLA and, unlike the FMLA, the MFLA has no specific longevity of employment requirement. Although other coverage requirements apply (set forth below), this broader application in the private sector can benefit AEL members with family working for small employers not covered by the FMLA as follows:

1) AEL members needing care during illness can receive care by the MFLA covered family member, without that family member's loss of income (see restrictions below).
2) AEL members can now share care of a family member with another MFLA covered family member, without loss of income to the caregivers (see restrictions below).

For those of you who wish to read the entire statute providing MFLA coverage, it is located in Section 3-802 of the Labor and Employment Article of the Maryland Code (2009 supplement, at the back of the book).

MFLA COVERAGE

Employers Covered:

To be covered by the MFLA, the employer must:

1) **be engaged in a business, industry, profession, trade or other enterprise in Maryland** (MFLA, therefore, does not apply to public or governmental employers),
AND
2) **employ 15** (rather than the FMLA's 50) **or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year,**
AND
3) **provide leave with pay under the terms of a collective bargaining agreement or an employment policy** (an employee handbook policy could form the basis).

Employees Covered:

To be covered by the MFLA, the employee must be:

a. **"primarily" employed in Maryland by a covered employer** (although "primarily employed" is not statutorily defined, it is most likely to be construed as at least 51% of actual work time to be in Maryland. There is no other "location of work requirement" compared to the FMLA's requirement that the employee work at a location where 50 or more employees work or within 75 miles thereof. In addition,

there is no "time employed requirement" in the MFLA compared to the FMLA's requirement that the employee had worked 1250 hours during the 12 months prior to the leave and had worked at least 12 months for said employer [not always consecutively]).

Despite the foregoing, however, the only paid leave available would be paid leave previously earned by the employee.

MFLA BENEFITS AVAILABLE

The stated purpose of the MFLA is to allow the covered employee to use leave with pay to care for an immediately family member who is ill under the same conditions and policy rules that would apply if the employee took leave for his/her own illness.

a. "immediate family member" includes:

1) **child** (adopted, biological or foster child, stepchild or legal ward under age 18, or over age 18 if incapable of self-care, due to a mental or physical disability)
2) **spouse**
3) **parent** (adoptive, biological or foster parent, step parent, legal guardian or person standing in *loco parentis*)

b. "leave with pay" includes <u>earned</u> sick leave, vacation time, paid time off and compensatory time.

As stated previously, an employee may only use leave that has been earned in compliance with the terms of the collective bargaining agreement or employment policy. If more than one type of leave with pay has been earned, the employee may elect the type and amount of leave to be used. An employer may not threaten to or actually discharge, demote, suspend, discipline or otherwise discriminate against an employee because the employee took leave authorized by the MFLA, opposed a practice authorized by the MFLA, or made a charge, testified or participated in an investigation, proceeding or hearing concerning the same. Finally, the MFLA is clear that if the employee is covered by both MFLA and FMLA, it does not act to either extend or limit the period of leave the employee has under the FMLA.