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RECAPTURE OF AGGREGATE EXTENSION BASE NOW ALLOWS UNDER-LEVY WITHOUT PENALTY

NOW ALLOWS UNDER-LEVY WITHOUT PENALTY

Since its adoption about 30 years ago, the Property Tax Extension Limitation Law ("PTELL" or "tax cap") has contained an inherent disincentive for school districts and other taxing bodies to ever levy less than the legal maximum in any year. That is because when a district levies less than the maximum in one year it forever reduces the limit on its future tax levies. However, a new provision added to the PTELL this year will now provide districts with a means to avoid this problem. If a timely certification is made, a district can under-levy one year without penalizing itself with reduced tax caps in the future.

The new provision is contained in Section 18-190.7 of the Property Tax Code. The terms used in the law are "alternative aggregate extension base" and "recapture" (which should not be

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confused with the amendment last year allowing districts to recover revenues lost due to refunds awarded to taxpayers in tax assessment appeals). This "recapture" relates to the aggregate extension base, the starting point for calculating the district's limiting rate under PTELL. The way this recapture works is that a county clerk, when directed to do so by a taxing district which has levied less than its legal maximum in any year, will use an alternative aggregate extension base. Instead of just using the actual extension from the previous tax year or the highest actual extension over the last 3 years, the clerk will use an amount equal to whatever the maximum extension would have been.

However, districts need to be aware of two important caveats to this new law. The first caveat is that, even under this new law, an extension base cannot be greater than 5% more than the previous year. Although the law says that increases over 5% can be recaptured over time in succeeding years, this limitation presents a major practical obstacle to accessing new revenues, especially in times of high inflation and in cases where there has been substantial new construction in a district. Given current consumer price index (CPI) rates, districts should

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recognize that revenues lost due to even one year of under-levy may not be recovered for many years.

The second important caveat is that a district must have an ISBE Financial Profile System designation of "recognition" or "review" to be eligible to make use of the new law. Districts with a designation of "early warning" or "watch" cannot do so.

To take advantage of the recapture procedure, there is a strict time limit for district action. A district which wants its aggregate extension base to be adjusted after levying less than the maximum for that year must certify that fact to the county clerk within 60 days after the filing of the less-than-maximum levy. So, for instance, if a district levies less than the maximum for tax year 2022 and then files that levy on December 15, the district must file its recapture certification with the county clerk no later than February 13, 2023, even though it will not affect the district until the 2023 levy extended during 2024. That obviously takes some advance planning. Districts which might want to take advantage of this new law will have to act quickly. For that reason, we advise school boards to decide on whether to recapture their aggregate extension base at the same time that they approve any levy which is less than the

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maximum.

While not perfect, the new law is an important and logical reform to PTELL which should have happened long ago. It is designed to allow taxing districts in good financial years to save the taxpayers money without reducing access to future tax revenues in years when those revenues might be more needed. However, because the new law as written will likely be difficult for county clerks to administer, we expect to see some legislative revisions in the near future.

If you have any questions, please do not hesitate to contact one of our attorneys.

NEW FINANCIAL REPORTING

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REQUIREMENTS ON CASH BALANCES AND VENDOR INFORMATION

Within the past year, two new financial reporting requirements have been imposed upon school districts. Neither is particularly onerous and neither has penalties specified for noncompliance. Nonetheless, both legal mandates are now in effect.

Cash Balances. New Section 17-1.3 of the School Code provides that at the public hearing at which a school district certifies its annual budget and annual levy, the district must disclose the "cash reserve balance of all funds held by the district related to its operational levy and, if applicable, any obligations secured by those funds." It appears that this requires only a verbal recitation of all fund balances at both the budget hearing and the levy hearing. Even if a public hearing is not required for the levy under the Truth in Taxation Act, the fund balances should be announced at the board meeting

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wherein the final levy is approved.

Vendor Information. New Section 18-50.2 of the Property Tax Code provides that, beginning in tax levy year 2022, every taxing body, including school districts, which impose an aggregate tax levy of more than $5 million must collect and electronically publish certain specified information about its vendors and subcontractors. A "good faith effort" must be made to collect and publish the required information, so a failure to obtain complete or totally accurate information from contractors should not be the responsibility of the district as long as it has made that required effort. The law allows districts to use existing software to comply.

The following information is to be collected and published:

1. Whether each vendor or subcontractor is a minority-owned or women-owned business, as those terms are defined by the

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Business Enterprise for Minorities, Women, and Persons with Disabilities Act.

2. Whether the vendor or subcontractor holds any certifications for those categories or if they are self-certifying and, if self-certifying, whether they qualify as a small business under the federal Small Business Administration standards.

If you have any questions, please do not hesitate to contact one of our attorneys.

Election Season Do’s and Don’ts – IASB

John M. Izzo will present on the topic of “Election Season Do’s

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and Don'ts" to the Illinois Association of School Boards, In-House Counsel Networking Meeting on October 14, 2022 at 1:00 p.m.

https://www.iasb.com/

U.S. SUPREME COURT EMPHASIZES RELIGIOUS LIBERTY IN SCHOOL CASES

Among the typical flurry of cases issued at the end of its session in June 2022, the U.S. Supreme Court included two very important cases affecting how the religious freedom clauses in the First Amendment of the Constitution will be applied to educational institutions. One dealt with prayers led by a public school coach at a football game; the other concerned

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state financial assistance to students choosing to attend private religious schools. In both cases, the results were determined by the same 6-3 vote, clearly evincing the ideological division on the Court on these issues. Together, these cases illustrate a major shift in the way the federal courts attempt to resolve religion-based disputes in the schools.

The First Amendment contains two clauses aimed at imposing governmental neutrality toward religion. The Free Exercise Clause guarantees freedom of religious belief and prohibits discrimination based on those beliefs. The Establishment Clause limits governmental support of religious institutions or practices. Sometimes these constitutional provisions work in tandem, as when government attempts to mandate religious practices. At other times, the two clauses appear antagonistic, as might be seen in these most recent cases. The net result here has been a tipping of the scales more toward free exercise and away from previous anti-establishment principles.

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In Kennedy v. Bremerton School District, a Washington state football coach was disciplined for not ceasing his practice of leading public prayers on the field immediately after games. The Court ruled that this violated the coach's right to individual religious liberty. In this particular case, the majority and the dissenting justices seemed to interpret the facts very differently, with the majority stating that the prayers were "brief, quiet, and personal" without being coercive of the student athletes. It was emphasized that, while the coach was on duty, his activities were not so controlled that he would not have been permitted to engage in other non-work related activities, such as making personal phone calls, checking text messages, or socializing. To permit secular personal activities but not religious ones, then, violated his Free Exercise rights. The dissent, on the other hand, included pictures of Kennedy leading large numbers of students in the middle of the football field and described Kennedy as a public employee regularly incorporating a public communicative display of his religious beliefs into a school activity, a conclusion which would have implicated the Establishment Clause had it prevailed.

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But what is more important than the facts or even the outcome in this particular case is that the Court used the occasion as an opportunity to emphatically reject some of the traditional standards for court review of religious exercises in the public schools. Since the 1971 case of Lemon v. Kurtzman, the Court has often, though not always, said that a public school practice violates the Establishment Clause if (1) it has a religious purpose, (2) it has a predominantly religious effect, or (3) it fosters excessive entanglement between government and religion. Later cases also ruled that the Establishment Clause prohibits governmental practices which endorse particular religious beliefs or which coerce participation in religious practices. In still other cases, however, the Court has focused on a historical approach, looking to whether the challenged conduct was common-place and accepted at the time of the adoption of the First Amendment in order to determine whether or not it would be a precluded activity under the Establishment Clause. The Court in Kennedy made it clear that neither the 3-part Lemon test nor the endorsement test should be the standard for review. Rather, the First Amendment religion clauses should be interpreted "by

reference to historical practices and understandings" in order to discern what the Founding Fathers intended by the language of the First Amendment.

It may be unclear how this standard will be applied in future cases, where the practices at issue may have no historical analogy. It is possible that the vitality of many long-standing precedents will now be in doubt. What is clear is that this Court will be much more tolerant of religious activities in the public schools than has been true in the past.

However, based upon what the Court did expressly hold, we do offer these guideposts for future action in your District:

1. Employees are generally permitted to engage in non-coercive religious activities on school property even during the workday provided that non-religious and non-work related activities would be permitted during the same

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time frame. For example, an employee can say a prayer during a passing period or break where the employee would be allowed to make personal phone calls or otherwise fraternize with staff.

2. The mere fact that students or members of the public may be able to observe the employee engaging in a religious activity during the workday and/or on school property is insufficient standing alone to be able to restrict the employee's religious exercise. This is true even if some people are offended or object to viewing the religious observation.

3. Employees are still restricted from requiring students to engage in religious activities or exercises.

We encourage you to reach out to one of our attorneys to assist you should any issue of this nature arise so that we can provide you with guidance and advice as to how to move forward.

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In the other important First Amendment Free Exercise case, Carson v. Markin, the State of Maine had a program for high school students in sparsely populated areas without public high schools to be given tuition vouchers permitting attendance at out-of-district public schools or private schools, with the caveat that the private school must be "secular". The Court ruled that the condition that the private school must be secular was an unconstitutional infringement of the students' religious freedom. The Court reasoned that, while the state need not provide benefits to private schools, once it does so generally, it cannot discriminate against religious schools.

The Carson decision follows two other Supreme Court cases in recent years which disallowed differentiation between religious and secular schools in state assistance to private schools. In a 2017 case, the Court had held that a state providing money for playgrounds to private schools could not exclude religious schools. Then in 2020, the Court applied the same result where the benefit was a state-based scholarship program for attendance

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at private schools. The Court in Carson declined to distinguish those situations, even though the Maine program was devised to ensure a free public education. What all these cases reveal is that the Court is no longer permitting states to use the Establishment Clause as a justification for distinguishing between religious and secular private schools. That is in stark contrast to many earlier decisions.

If you have any questions, please do not hesitate to contact one of our attorneys.

NEW ILLINOIS LAW PROVIDES

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ADMINISTRATIVE LEAVE AND RETURN OF SICK DAYS TO VACCINATED EMPLOYEES FOR TIME MISSED DUE TO COVID-19

Last week, Governor Pritzker signed House Bill 1167 into law. Among other things, this law requires school districts, joint agreements, and charter schools to provide administrative leave days and return previously used sick days to vaccinated employees who previously missed, or will miss, work as a result of COVID-19. As described in further detail below, this law imposes obligations on educational employers which must be addressed over the next several weeks.

Return of Sick Days

HB 1167 requires educational employers to return sick days that

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were used by “fully vaccinated” employees during the 2021-2022 school year for the following reasons:

- The sick leave was taken because the employee was restricted from being on school district property because the teacher or employee:
  - Tested positive for COVID-19 with a PCR or equivalent test;
  - Had a probable COVID-19 diagnosis via an antigen diagnostic test (i.e., positive rapid test);
  - Was required to be excluded from school as a close contact to a confirmed COVID-19 case; or
  - Was required to be excluded from school because he or she had COVID-19 symptoms.
- The sick leave was taken to care for the employee’s child who was not able to attend elementary or secondary school because the child:
  - Tested positive for COVID-19 with a PCR or equivalent test;
  - Had a probable COVID-19 diagnosis via an antigen diagnostic test (i.e., positive rapid test);
  - Was required to be excluded from school as a close

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contact to a confirmed COVID-19 case; or
- Was required to be excluded from school because he or she had COVID-19 symptoms.

Importantly, the return of sick days only applies to sick days that were taken during the 2021-2022 school year for one of the above-listed reasons. Similarly, only employees who were employed on or after April 5, 2022 and who meet HB 1167's definition of "fully vaccinated against COVID-19" are eligible for the return of sick days. To meet this definition, an employee must meet one of the following criteria on or before May 10, 2022[1]:

- The employee has received his or her second dose in a 2-dose COVID-19 vaccine (e.g., Pfizer or Moderna); or
- The employee has received his or her single dose COVID-19 vaccine (e.g., Johnson & Johnson).

Consequently, an employee who meets one of these criteria, but who was not vaccinated earlier this school year when he or she

used sick days for reasons related to COVID-19, would still be entitled to the return of those sick days.

Additionally, please note that educational employers should make arrangements for the return of sick days to eligible employees on or before May 10, 2022.

Provision of Administrative Leave Days

HB 1167 also requires educational employers to provide paid administrative leave days to eligible employees. To be eligible for paid administrative leave days, an employee must have been employed on or after April 5, 2022 and must meet one of the criteria to satisfy the definition of "fully vaccinated against COVID-19." In addition, educational employers must understand their obligations for providing administrative leave days both retroactively and going forward.

Retroactive Administrative Leave

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Educational employers must retroactively provide paid administrative leave days to an eligible employee who missed work because he or she:

1. Tested positive for COVID-19 with a PCR or equivalent test;
2. Had a probable COVID-19 diagnosis via an antigen diagnostic test (i.e., positive rapid test);
3. Was required to be excluded from school as a close contact to a confirmed COVID-19 case; or
4. Was required to be excluded from school because he or she had COVID-19 symptoms.

Similarly, the employer must retroactively provide paid administrative leave days to an eligible employee who missed work to care for a child who was not able to attend elementary or secondary school because the child:

1. Tested positive for COVID-19 with a PCR or equivalent test;
2. Had a probable COVID-19 diagnosis via an antigen diagnostic test (i.e., positive rapid test);

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3. Was required to be excluded from school as a close contact to a confirmed COVID-19 case; or
4. Was required to be excluded from school because he or she had COVID-19 symptoms.

Educational employers should make arrangements to provide eligible employees with retroactive paid administrative leave on or before May 10, 2022. As noted above, an employee who receives the required doses to become "fully vaccinated" by May 10, 2022 is entitled to the retroactive provision of administrative leave – regardless of whether the employee was vaccinated at the time of his or her absence.

Unlike the return of sick days, the retroactive provision of administrative leave days is not strictly tied to the 2021-2022 school year. For further information on how and when – or whether – administrative leave days should be applied retroactively, we recommend contacting your Petrarca, Gleason, Boyle & Izzo attorney.

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Administrative Leave After HB1167's Passage

Educational employers are also obligated to provide eligible employees with paid administrative leave for absences relating to COVID-19 (i.e., same specific reasons to which retroactive leave applies) which occur after HB 1167 was signed into law. Please note, however, that eligible employees are only entitled to such leave "during any time when the Governor has declared a disaster due to a public health emergency pursuant to Section 7 of the Illinois Emergency Management Agency Act." Governor Pritzker's current Disaster Proclamation expires on May 1, 2022. If the Disaster Proclamation is renewed, educational employers' obligation to provide paid administrative leave to eligible employees for COVID-related absences will continue. If the Disaster Proclamation expires, employees will be required to use sick days for such absences, unless and until a Disaster Proclamation is put back into place.

Please contact one of our attorneys with any questions that you have about this new law.

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[1] Please note that the definition of "fully vaccinated against COVID-19" could change in the future if, for example, the Illinois Department of Public Health adopts a definition which requires individuals to receive booster shots to be considered "fully vaccinated." At this time, however, booster shots are not required to meet the definition of "fully vaccinated."

APPELLATE COURT DISMISSES GOVERNOR PRITZKER'S APPEAL ON COVID MANDATES

Late Thursday night, the Fourth District Illinois Appellate Court dismissed the appeal from the Sangamon County Circuit Court order rendering unenforceable Governor Pritzker's Executive Orders mandating masks, close contact exclusions, and

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vaccinations or weekly testing in schools

Some school districts have now already determined not to follow the Governor's Executive Orders in whole or in part. The Appellate Court's decision confirms that they have that option. While there is no court order prohibiting districts from imposing their own rules, the adoption of such rules may be subject to legal challenges similar to the challenges to the rules adopted by the Illinois Department of Public Health and the Illinois State Board of Education regarding masks, vaccines, and COVID testing, which are the subject of this lawsuit.

There are likely also collective bargaining implications should a school district want to continue to require staff members to wear masks or be vaccinated or be tested weekly.

Finally, none of these state court proceedings diminish the continued validity of the federal mandate concerning masking on

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school buses.

If you have any questions, please do not hesitate to contact one of our attorneys.

FULL FUND TRANSFER AUTHORITY RESTORED UNTIL 2024

    With the Governor’s approval of Public Act 102-671 on November 30, 2021, the authority of school boards to transfer money between principal school district operating funds without limitation has been restored, at least through June 30, 2024.

    Section 17-2A of the School Code has long

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provided a mechanism for interfund transfers, which can be accomplished after a timely published notice and a public hearing. One substantive limitation on these transfers expressly stated in the law has been that each transfer must be "made solely for the purpose of meeting one-time, non-recurring expenses." However, for over 20 years, the law has also provided for a temporary waiver of that non-recurring use limitation. Further, every time the expiration date for that waiver period has approached, the General Assembly has seen fit to extend the time period. That is, until June 30, 2021, when the legislature allowed the waiver period to pass without any action to extend it.

    However, during this past fall's veto session of the General Assembly, House Bill 594 was passed with several government-related provisions. Among the provisions was an amendment to Section 17-2A which again waives the non-recurring use limitation on fund transfers for a defined period of time. The new date for expiration of the waiver period relating to fund transfers is now June 30, 2024.

    Fund transfers under Section 17-2A must be preceded by a public hearing and a notice for that hearing must

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be published in a newspaper no more than 30 days nor less than 7 days in advance. The transfer may be between any of a school district's three principal operating funds: Educational, Operations & Maintenance, and Transportation. Further, since 2017, transfers from the Tort Immunity Fund to the Operations & Maintenance Fund have also been permitted. There is no statutory limit on the amount of money transferred in this manner. And now, at least until July 1, 2024, a school board need not present or explain the purpose of the transfer or attempt to justify it as for a non-recurring expense.

    Districts should also be aware that another fund transfer mechanism with a sunset provision expiring on June 30, 2021, was not extended by this legislation. Section 17-2.11(j) had permitted the transfer of unused life safety revenues to the Operations and Maintenance Fund, subject to a public notice and hearing like the one in Section 17-2A. Currently, that option is not available to districts, however.

    If you have any questions or would like assistance in accomplishing timely fund transfers, please do not hesitate to contact one of our attorneys.

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GOVERNOR PRITZKER SIGNS LAW CLARIFYING THE ILLINOIS HEALTH CARE RIGHT OF CONSCIENCE ACT

In August, Governor Pritzker signed Executive Order 2021-20 requiring all school personnel to be fully vaccinated from COVID-19 or receive at least weekly COVID-19 testing. The Order further ordered schools to exclude any school personnel who do not comply with the vaccination or testing requirement.

Since that time, some school employees have argued that they have a right to refuse COVID-19 vaccination and/or testing under the Illinois Health Care Right of Conscience Act. This law has historically been applied to protect health care workers from discipline when they refuse to perform certain medical

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procedures because of a religious or conscientious objection.

On November 8, 2021, Governor Pritzker signed Public Act 102-667 into law. This law adds a new section to the Health Care Right of Conscience Act which provides that:

> It is not a violation of this Act for any person or public official, or for any public or private association, agency, corporation, entity, institution, or employer, to take any measures or impose any requirements, including, but not limited to, any measures or requirements that involve provision of services by a physician or health care personnel, intended to prevent contraction or transmission of COVID-19 or any pathogens that result in COVID-19 or any of its subsequent iterations. It is not a violation of this Act to enforce such measures or requirements.

This amendment clarifies that the Act does not provide school personnel with a right to refuse COVID-19 vaccination and/or testing, and that it does not protect them from discipline based

on that refusal.

This statutory amendment does not become effective until June 1, 2022. However, the General Assembly can act it move up that date if it takes action upon reconvening in January. The law also contains a provision that the new section of the Act "is a declaration of existing law and shall not be construed as a new enactment." In theory, that means that a school district's prior or current position that the Health Care Right of Conscience Act does not afford employees with a right to refuse COVID-19 vaccination and/or testing remains valid. However, the courts do not always give effect to such legislative declarations about a law's intent.

Finally, please note that this statutory amendment only pertains to an employee's refusal to get vaccinated or to submit to COVID-19 testing under the Health Care Right of Conscience Act. It does not affect employees' rights, or school districts' obligations, under any other laws including the Americans with

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Disabilities Act, Title VII, the Illinois Human Rights Act, and the Illinois Religious Freedom Restoration Act.

If you have any questions, please do not hesitate to contact one of our attorneys.

New Associate Attorney – Mary J. Rocco

Mary J. Rocco has joined our firm as an Associate Attorney and practices out of our Oak Brook Office. Mary has over seventeen years of experience practicing law. She worked for ten years as a litigator with Administration of Children's Services in New York City, focusing on assisting families and children touched by the foster care system.

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In 2015, Mary moved to Illinois with her family and opened up her own law practice specializing in family law focusing on special education matters. With her years of experience in advocating on behalf of families, Mary has the background to advocate on behalf of school districts. She has experience with IEP compliance, 504 Plans, mediation, due process hearings, disciplinary matters, expulsion and residency hearings.

Mary earned her J.D. from The University of San Diego School of Law, her B.A. from Villanova University and obtained an M.S.W. from New York University. Mary is licensed to practice law in Illinois and New York. In 2007, Mary was the recipient of the Family Court Legal Service's Permanency Award, recognized for her outstanding dedication and hard work.

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PROPERTY TAX RECOVERY LEVY LAW GOES INTO EFFECT WITH GOVERNOR'S SIGNATURE

Several weeks ago, we reported on the passage of Senate Bill 508, which provides for a supplemental levy, outside the tax caps (*i.e.*, the limiting rate of the Property Tax Extension Limitation Law ("PTELL")). The bill is designed to make taxing districts whole for revenue lost due to property tax refunds resulting from successful property tax assessment appeals. On Friday, August 20, 2021, Governor Pritzker signed that bill, which makes this new law go into effect immediately. It adds a new Section 18-233 to the Property Tax Code.

Starting with school districts' 2021 levies, county treasurers must annually certify by November 15 the amount of property tax revenues lost due to PTAB or court orders to each district over the previous 12 months from property tax assessment appeals, The Treasurer must then issue a supplemental

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or recapture levy in the amount of that loss. These levies will be in addition to a district's tax-capped levies and debt service levies.

As we discussed in June, there are limitations to this new law. [Click here for our June 8, 2021, Priority Briefing]. First, it is not available to districts which are not subject to PTELL, *i.e.*, those in non-tax-capped counties. Further, there will be an inherent delay in obtaining the make-whole revenues as the result of the usual extension and collection cycle. And it must be kept in mind that the recapture levies will not make districts whole for revenue losses due to refunds which were not assessment-based, such as those due to tax rate objections or the granting of new tax exemptions.

We also need to emphasize that the reason PTAB and the courts order tax refunds is because of their determinations to retroactively reduce a district's equalized assessed valuation ("EAV"). EAV reductions have adverse consequences for school districts even without immediate tax revenue loss due to refunds. EAV loss means less bonding authority and, most significantly, the shifting of tax burdens to other taxpayers, such as homeowners and small businesses. This result will only

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exacerbate the problem already facing many suburban and small city communities, where higher property taxes discourage new development and hold down property values, thus increasing tax rates even more and further discouraging development. It is a cycle of fiscal disadvantage which the State has promised to ameliorate, but which this legislation will only aggravate. These factors should be weighed when future involvement in opposing assessment appeals is considered.

Coincidently, or maybe not, a new bill, House Bill 4130, was introduced just the day before the Governor's action on Senate Bill 508. This new bill would significantly modify, but not eliminate, the revenue recovery levy. It would, for instance, make the levy discretionary with each district, allow the levies to be implemented over multiple years, and place certain limits on the amount. The General Assembly is out of session now, not to return until the fall session in late October, but we expect to see consideration of this or other proposals for adjustments to the recovery levy provisions in the near future.

In the meantime, districts are best advised to continue to pay close attention to tax assessment appeals for properties

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in their communities, but possibly with new strategies in how to address them.

If you have any questions about this important legislation, please do not hesitate to contact one of our attorneys.