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Districts Must Use Reasonable Care When Completing Employment Verfication and Reference Forms

Last year we alerted you to Doe-3 v. White, an Illinois Appellate Court decision that appeared to greatly expand the possibility for school districts' and district officials' liability to students when failing to report an employee with a history of abusive conduct. Doe-3 was appealed and the Illinois Supreme Court rendered a decision on August 9, 2012, that upholds a duty of districts to use reasonable care when completing employment forms, but does so narrowly, on the particular facts of the case.

Jon White was a teacher in McLean School District and, while employed by that district, sexually abused young girls in his class. Lawsuits alleged that McLean administration knew about the abuse, but did not report it to the Illinois Department of

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Children and Family Services ("DCFS"). Instead, when White resigned, a McLean administrator gave him a positive letter of recommendation and a severance package that concealed the abuse. When White applied for employment at Urbana School District, McLean administrators not only allegedly failed to inform Urbana of White's misconduct, but also provided false information to Urbana that White had taught the entire previous year at McLean.

Consistent with earlier decisions in the matter, the Illinois Supreme Court held that thestudents could not demonstrate an affirmative duty on the part of McLean School District to warn Urbana of White's conduct or to protect the students from criminal acts of a third party. McLean School District had no special relationship to the students that created a duty to them and a school district has no duty to individual students in a district, separate from the district as a whole. However, under the specific facts of this case, where McLean officials allegedly falsely represented White's employment history, a duty was created to protect the students from injuries that were reasonably foreseeable from the misstatements.

The Court applied a standard of ordinary care to the facts of this case, stating that every person owes a duty of ordinary

care to others to guard against injuries that naturally flow as a reasonably foreseeable consequence of his or her action. In other words, where a person's action creates a foreseeable risk of injury, the person has a duty to protect others from that injury. According to the Court, McLean's alleged act of misstating White's employment history on Urbana's employment verification form created a duty to the abused students. The Court found that the sexual abuse suffered by Urbana students was not, as a matter of law, an unforeseeable result of the false employment verification. By stating that White taught a full school year, when in fact he was terminated during the school year, McLean School District implied that White's severance was routine. Had McLean truthfully disclosed White's employment history, it would likely have been a "red flag" to Urbana to investigate further. The Court held that the injuries were not so remote or unlikely as to preclude a duty of care. It was a reasonable possibility that if White abused students in one district, he would do it again in another district. Finally, the Court held that it is

According to the Court, the Abused and Neglected Child Reporting Act could provide a separate basis for liability because of the

failure to report White's misconduct to DCFS. School personnel and school board members are mandated reporters to DCFS under the Abused and Neglected Child Reporting Act, 325 ILCS 5/1 et seq. Likewise, pursuant to Section 10-21.9(e-5) of the Illinois School Code, a local superintendent must notify the State Superintendent of Schools and the Regional Superintendent, of any certificate holder whom he or she has reasonable cause to believe has intentionally abused a student. Illinois public policy favors protection of children from sex offenders. The Court also noted that the Tort Immunity Act does not protect public employees against liability for willful and wanton conduct.

This decision confirms that, while School Districts have no affirmative duty to protect individual students from harm, providing false information that is reasonably foreseeable to cause injury may result in liability.

Based on this decision, we advise that extreme caution be exercised in providing any factual information about past employees. For additional information, please call one of our attorneys in Flossmoor or Oak Brook.

Published June 21, 2025

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Illinois Appeals Court Limits School District's Obligation to Provide Transportation to Parochial School Students

On June 18, 2012, the Illinois Fifth District Appellate Court ruled that the Illinois School Code does not require a public school district to provide transportation to parochial and charter school students on days that public schools are not in session. In *C.E. and C.L. v. Board of Education of East St. Louis School Dist. 189, et. al.*, 2012 IL App (5th) 110390, the Court was asked to decide if Section 29-4 of the School Code required the East St. Louis School District to provide transportation to students attending parochial and charter schools which extended their school years to include 15 days when the public schools were closed. The plaintiffs, parochial

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school students and their parents, argued that language in the Code requiring school boards to provide free transportation to parochial and charter school students "on the same basis" as public school students, meant that the public school district had to provide transportation whenever the charter and parochial schools were in session. The Appellate Court disagreed.

Even though the Appellate Court was conscious of the "failing state" of the public school district in question and sympathetic to the circumstances facing parents of children "who certainly deserve access to quality education," it interpreted the language in Section 29-4 of the School Code requiring that transportation be provided "*on the same basis*" as public school students to mean that parochial and charter school students were not entitled to any more transportation than public school students. Therefore, on days that transportation is not provided to public school students, the district is not obligated to provide it to parochial and charter school students. The Court noted that any other interpretation of the Code would ignore the intent of the Legislature to make transportation equally accessible to nonpublic school students and to provide them with transportation without unduly

increasing the costs to the public school district.

This is an important decision which limits the obligation of public schools to provide transportation to charter and private school students.

If we can be of further assistance, please contact one of our attorneys in our Flossmoor office – (708) 799-6766 or in our Oak Brook office – (630) 928-1200.

School Code Provisions on Service Animals Amended to Include Miniature Horses

Governor Quinn has signed into law Public Act 97-0956, which amends Section 14-6.02 of the School Code to permit not only dogs, but also miniature horses, to act as service animals for

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students with disabilities. Effective immediately, a “service animal” is defined as a dog or miniature horse trained or being trained as a hearing animal, guide animal, assistance animal, seizure alert animal, mobility animal, psychiatric service animal, autism service animal, or animal otherwise trained to assist an individual with a physical, mental or intellectual disability. (Prior to this Public Act, any animal individually trained to perform tasks for the benefit of a student with a disability was permitted to accompany the student.)

According to the U.S. Department of Justice Disability Rights Section, miniature horses generally range in height from 24-34 inches at the shoulders and generally weigh between 70 and 100 pounds. In determining whether a school must reasonably accommodate a request for a horse, the school must consider: (1) the type, size and weight of the miniature horse and whether the facility can accommodate its features; (2) whether the handler has sufficient control over the horse; (3) whether the horse is housebroken; and (4) whether the horse’s presence in the facility compromises legitimate safety requirements necessary for operation of the school. These considerations are consistent with current Americans with Disabilities Act regulations

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regarding service animals.

School districts should consider the individual circumstances of students with disabilities who request to bring horses as service animals and be prepared to modify policies, practices and procedures as needed. For more information or assistance with review of your district's policies, procedures, or practices, contact one of our attorneys in Oak Brook or Flossmoor.

Hauser Izzo to Conduct School Board Leadership Training

We are proud and happy to report that Hauser Izzo, LLC has been approved by the Illinois State Board of Education to provide Leadership Training for Illinois school board members. Leadership Training is a new program required by the Education

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Reform Act. Pursuant to Section 10-16a of the School Code, all school board members elected or appointed after the Act's effective date, June 13, 2011, must receive training on specific topics. Of course, longer-serving members may also find the training useful.

Hauser Izzo will provide training in the general areas of (a) Education and Labor; (b) Financial Oversight and Accountability; and (c) Fiduciary Responsibilities of School Board Members, including a comprehensive overview of issues board members are likely to encounter. Specific topics covered are listed on the attachment. After a detailed PowerPoint presentation, our attorneys will lead a mock school board meeting, including both regular and closed sessions, to demonstrate and reinforce substantive law issues and board procedures.

Although the first school board election under this new law will be in April 2013, we are offering 2 initial sessions this fall, open to any incumbent school board members and anyone interested in becoming a school board member. **The first session will be on Saturday, September 15, from 8:00 a.m. to noon, at the offices of the South Cook Intermediate Service Center, 253 W. Joe Orr Road, Chicago Heights. The second session will be on Thursday,**

Published June 21, 2025

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October 11, from 6:00 p.m. to 10:00 p.m., at the Drake Oak Brook Office Plaza, 2215 York Road, Oak Brook, Illinois.

There will be limitations on the number of participants. Cost is $100 per person. Training materials are included in this cost. To register for the Oak Brook location, please call Sraga Hauser and ask for Melissa or email her at mschmehl@dev.hauserizzo.com. To register for the South Cook Intermediate Service Center location, information is available on their website www.s-cook.org. Click on “Professional Learning” and then on “Calendar of Courses.”

Use of Employee Social Media

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and E-Mail Accounts for Employment Decisions

On August 1, 2012, Governor Pat Quinn signed into law new provisions of the Illinois Right to Privacy in the Workplace Act which significantly curtail an employer's right to gain access to the private social media and e-mail accounts of employees and prospective employees. The new provisions of the Act, which take effect on January 1, 2013, make it unlawful for an employer to demand that its employees or those applying for employment disclose their "password or any other account-related information in order to gain access to the employee's or prospective employee's account or profile on a social networking website or to demand access in any manner to an employee's or prospective employee's account or profile on a social networking website." 820 ILCS 55/10(b). There are no exceptions to the new restrictions set forth in the Act. Illinois is the second State in the country to enact such a sweeping piece of legislation.

Despite its breath, the new law makes it clear that its provisions do not prohibit employers from developing and

implementing policies "governing the use of its electronic equipment including policies concerning Internet usage, social networking site use and e-mail use." Moreover, the new law does not prohibit an employer from "monitoring its employees' use of its electronic equipment and e-mail without requesting or requiring any employee or prospective employee to provide any password or other account-related information in order to gain access to the employee's or prospective employee's account or profile on a social media networking site." The changes to the Act do not prohibit employers from obtaining information about an employee or job applicant that is in the public domain or is obtained in compliance with the new provisions of the Act.

According to the new provisions of the law, a "social networking website" is an "Internet based service that allows individuals to a) construct private or semi-private profiles within a bounded system, created by the service; b) create a list of other users with whom they share a connection within the system and; c) view and navigate their list of connections and those made by others within the system." E-mail is not considered a "social networking site" under the new law. However, Facebook, Twitter, My Space, Google Plus and Live Journal certainly are

examples of websites that are “social networking sites.”

The new Illinois law follows a series of National Labor Relations Board (NLRB) decisions tackling the issue of an employer’s restrictions on employee social media use. In Hispanics United of Buffalo and Ortiz, 3-CA-27872 (NLRB September 2, 2011), the NLRB decided that an employer’s termination of employees for complaints about the employer on their private Facebook accounts was a violation of the National Labor Relations Act (NLRA) because
it was a restraint on the employees’ right to discuss matters affecting their employment amongst themselves.” Particularly salient to the Board’s finding was the fact that the employees were using their private accounts outside of work.

However, in Karl Knauz Motors, Inc. and Becker, 13-CA-46452 (NLRB September 28, 2011), the Board found that an employee’s termination as a result of Facebook postings on his private page did not violate the NLRA as the employee made mocking comments about his employer which did not involve any discussion with other employees and there were no comments made about the terms and conditions of his employment. The Board also reaffirmed
that an employee’s use of disparaging terms or even profanity

may be protected activity under the NLRA. While the Board found that the employee's conduct was not protected activity under the NLRA, it nevertheless found that the employer's application of its policies against company "disrespect" and "bad attitude" could be interpreted as chilling an employee's right to communicate with co-workers concerning the terms and conditions and of employment and therefore violated Section 7 of the Act.

While the NLRB's rulings are merely persuasive and not binding, Hispanics United and Kauz elucidate three guiding principles for employers trying to determine if social media commentary is "protected activity" under the NLRA: 1) the social medial comments in question must involve terms and conditions of employment; 2) an employee's use of profanity or disparaging remarks about an employer on a social media site may not be enough to remove the Act's protection of the employee's commentary and; 3) an employee's social media commentary must be in conjunction with other employees or somehow involve other employees.

Employers still have the right to set policy restricting the use of electronic media both as to employer-owned technology and, to a lesser degree, disruptive use of employee-owned technology.

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However, in light of the new Illinois law and recent rulings by the NLRB, employers should proceed with caution. An employer should not demand that an employee or applicant for employment turn over their private social media or e-mail account as a condition of their employment or continued employment. An employer should also be very careful in developing social media use restrictions for its employees and disciplining employees for discussions posted about their employer on private social media accounts. If you have any questions concerning your social media policy or access to employee email or social media accounts, please contact our attorneys at 708-799-6766 or 630-928-1200.

Court Nixes Use of Church for Public School Graduation

Despite two earlier rulings allowing the practice in the same case, the United States Court of Appeals in Chicago, by a 7-3

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vote last week, ruled that a Wisconsin high school district acted improperly in conducting its graduation ceremonies in an evangelical Christian church.

In what is commonly referred to as the “Establishment Clause”, the First Amendment to the United States Constitution prohibits governmental sponsorship, endorsement, or support of any religious beliefs or non-belief. In the case of *Doe v. Elmbrook School District* (Case No. 10-2922, July 23, 2012), the U.S. Court of Appeals for the 7th Circuit held that it amounted to an improper establishment of religion for that district to conduct its high school graduation ceremonies in a church which contained numerous and obvious religious symbols and proselytizing items to which participants in the ceremony would be subjected. The majority opinion emphasized the presence of Latin crosses in the sanctuary and on the church roof and the evangelical literature in the lobby and in the pews. The court concluded that the display of such materials conveyed a sectarian message of endorsement of particular religious beliefs and had a coercive effect, similar to subjecting graduation attendees to religious exercises such as prayers. There was no evidence that school officials selected the location for the

purpose of proselytizing their individual beliefs. But the majority found neither this fact, nor the favorable features of the church location such as its space and comfort, to be determinative. This is because, while a governmental action might be invalidated due solely to a religious purpose or motivation, so could a non-religiously motivated action which has the predominant though unintended effect of promoting religion. Although the majority opinion went to great lengths to emphasize that its ruling was based on the particular facts present in this case and was not meant to create an absolute rule against public school graduations in houses of worship, it is hard to imagine many situations where religious iconography and literature would not be so apparent as to pass muster under this court's reasoning.

Given the strong dissents and the controversial nature of the decision, there is a good possibility that this case will be reconsidered by the United States Supreme Court. However, unless and until that happens, and absent exigent circumstances, we recommend that all Illinois public schools avoid the use of any house of worship for any function involving students, especially where attendance is compulsory or nearly so. This advice applies

even though such locations may offer many legitimate advantages such as increased capacity, temperature control, or the preferences of the majority of parents or students. While the court's reasoning would not necessarily extend to temporary or rental use of church-owned properties such as meeting halls or sports fields where religious iconography and literature are not so obvious or may easily be concealed, we strongly recommend consulting with legal counsel to assess the circumstances.

If we can be of further assistance, please contact one of our attorneys in our Flossmoor office – (708) 799-6766 or in our Oak Brook office – (630) 928-1200.

IAASE Attorney Panel Presentation on September 21,

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2012

Teri Engler will be addressing special education transportation issues as part of an Attorney Panel presentation at the IAASE Fall Conference in Tinley Park on September 21, 2012.

Open Meetings Act: New Agenda Requirements

Effective January 1, 2013, there are a few new provisions in the Open Meetings Act relating to board meeting agendas. The amendments are contained in Public Act 97-827, which adds new subsection (c) to Section 2.02.

First, it is now mandated that the "general subject matter of any resolution or ordinance" must be set forth in order for a board to take final action. This sets at least some standard for

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the degree of particularity required on the agenda for action items. The Act has long provided that, to be valid, actions at special meetings need only be "germane to a subject on the agenda," and, logically, it would seem that regular meeting agendas would not have to be more particular than special meetings. However, one 10-year-old appellate court decision ruled that the topic "new business" on a regular meeting agenda was not specific enough notice for any particular action to be taken. This new statutory language, requiring "general subject matter," is more particular than being merely "germane," but note that the new requirement is limited to formal actions which could be termed a "resolution or ordinance."

Second, the amendments make it clear that a posted agenda must be **continuously** available for public review during the 48-hour period preceding the meeting. However, this continuous posting requirement may be satisfied alternatively via the district's website, as well by physically posting the agenda at the district office.

Finally, if the 48-hour continuous availability for viewing requirement is not met due to actions outside of the control of the district, then that failure will not invalidate the meeting

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or any action taken.

Principal & Teacher Evaluations Fourth Reminder of Actions Required by PERA and Senate Bill 7

Action required on the first day of student attendance. Action required on or before September 1, 2012.

PRINCIPAL/ASSISTANT PRINCIPAL EVALUATION

The Performance Evaluation Reform Act (“PERA”) requires that on and after September 1, 2012, data and indicators of student growth be a “significant factor” in the performance evaluation of “principals.” Subsequent legislation has included “assistant

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principals" within this requirement. Rules adopted by the Illinois State Board of Education ("ISBE") define "significant factor" as a minimum of 25% of the principal/assistant principal overall evaluation in the 2012-13 and 2013-14 school years, and a minimum of 30% in the 2014-15 school year and thereafter. Principal/assistant principal practice must be at least 50% of the overall evaluation. On and after September 1, 2012, principals/assistant principals must be evaluated at least once each school year.

The title "assistant principal" is defined by ISBE rule as:

> *…an administrative employee of the school district who is required to hold an administrative certificate…or a professional educator's license endorsed for either general administration or principal, and who is assigned to assist the principal with his or her duties in the overall administration of the school.*

In our opinion, this definition is broad enough to encompass most, if not all, building level administrators. Other administrators, beyond the building level, are not required to

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be evaluated in accordance with PERA.

On and after September 1, 2012, a principal/assistant principal must be evaluated by a "qualified evaluator." A qualified evaluator is a superintendent or designee who has completed the five prequalification training modules available on the ISBE website for the evaluation of principals/assistant principals and who has passed the State-developed assessments appropriate to each of the training modules. Although the training modules were late to arrive, the training modules are now available. Only a "qualified evaluator" may evaluate the performance of a principal/assistant principal after September 1, 2012.

The ISBE rules provide that on the first day students are required to be in attendance, the school district/joint agreement shall provide a written notice to each principal and assistant principal that a performance evaluation will be conducted that school year. If the principal or assistant principal is hired or assigned to the position after the start of the school year, the written notice must be given not later than 30 days after the contract is signed or the assignment is made. The written notice shall include:

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1. a copy of the rubric to be used to evaluate student growth and professional practice; and
2. a summary of the manner in which student growth and professional practice measures will be used to obtain an evaluative rating.

The legal impact of failing to provide the required notice on the first day of student attendance is, as yet, unknown; we suggest that you comply with the requirement as provided by the ISBE rules.

TEACHER EVALUATION

The inclusion of data and indicators of student growth in the evaluation of teachers is not required until the PERA implementation date which, for most school districts, is September 1, 2016. Nonetheless, on and after September 1, 2012, a teacher must be evaluated by a "qualified evaluator." As with the evaluation of principals/assistant principals, a qualified evaluator is an administrator or, with the agreement of the teachers' exclusive bargaining representative another teacher, who has completed the prequalification training modules available on the ISBE website for the evaluation of teachers and

has passed the state-developed assessments appropriate to each of the training modules. Only a "qualified evaluator" may evaluate the performance of a teacher after September 1, 2012.

The training modules were late to arrive and, therefore, the ISBE has altered the required prequalification training schedule. As a result, training modules one through three must be completed by September 1, 2012 or by the beginning of the evaluation of teachers within the local school district/joint agreement. Training module four must be completed by November 1, 2012. Training module five, which concerns the incorporation of data and indicators of student growth need not be completed until November 1 of the school year in which the student growth component is implemented in the local school district/joint agreement.

The extension until November 1, 2012 for completion of training module four is, in our opinion, troublesome. Training module four concerns measurement, evaluation and reflection in order to determine performance ratings for teachers. Commencing the observation and data gathering process for teacher evaluation prior to the completion and successful passage of the assessment of module four, may lead to challenges to the validity of the

evaluation and performance rating of teachers. Rather than risk such challenges, we recommend that teacher evaluators complete module four before commencing evaluations. Obviously, if completion is delayed until on or about November 1, 2012, the timeframe to complete teacher evaluations will be substantially compressed. We suggest your immediate attention to completing training modules one through four.

Like the evaluation of principals/assistant principals, the ISBE rules provide that on the first day students are required to be in attendance, the school district/joint agreement shallprovide a written notice to each teacher scheduled for evaluation that school year stating that a performance evaluation will be conducted. If a teacher is hired after the start of the school year, the written notice must be given not later than 30 days after the contract is executed. The written notice shall include:

1. a copy of the rubric to be used to rate the teacher against identified standards and goals, and other tools to be used to determine the performance rating; and
2. a summary of the manner in which measures of student growth (only for those school districts/joint agreements

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implementing student growth) and professional practice will be used to obtain an evaluative rating; and
3. a summary of the procedures related to the provision of professional development for teachers who receive a “needs improvement” or “unsatisfactory” rating.

Again, the legal impact of failing to provide the required notice on the first day of student attendance is, as yet, unknown; we suggest that you comply with the requirement as provided by the ISBE rules.

If we can be of further assistance, please contact one of our attorneys in our Flossmoor office – (708) 799-6766 or in our Oak Brook office – (630) 928-1200.

Required Hospital

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Qualifications for Property Tax Exemptions

On June 14, 2012, a new law became effective which is intended to clarify some controversial issues surrounding a hospital's right to receive property tax exemptions. The controversy was the focus of the Illinois Supreme Court decision in Provena Covenant Medical Center v. Department of Revenue, 236 Ill.2d 368 (2010). In Provena, the Illinois Supreme Court ruled that a particular "non-profit hospital" was not entitled to receive a property tax exemption because it did not qualify as a charitable institution. In order to qualify as a charitable institution, the hospital would have to derive its funds mainly from charities, dispense charity to all who need it, and not provide a profit to any person connected with it.

Since the Provena decision, meeting the specific requirements to entitle a hospital to property tax exemption status has been hotly debated among hospital organizations and governmental institutions. The Illinois Department of Revenue (IDOR) initially was hesitant to make any determinations regarding

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hospital tax exemption applications. However, on August 16, 2011, the IDOR issued a decision denying tax exemption status to Prentice Women's Hospital at Northwestern Memorial Hospital in Chicago, Edward Hospital in Naperville, and Decatur Memorial Hospital. Those decisions stated that the properties were not owned by charitable organizations and were not being used for charitable purposes. Therefore, the IDOR denied exemption status for these institutions.

To resolve the ambiguities surrounding what it will take for a hospital organization to qualify as a charitable organization entitled to tax exemption status, Public Act 097-0688 was enacted. This Act amends the Illinois Income Tax Act, Use Tax Act, Service Use Tax Act, Service Occupation Tax Act, Retailer's Occupation Tax Act, and the Property Tax Code to include provisions outlining what requirements are needed to entitle hospitals to qualify for various tax exemptions.

Generally, the amendments state that a hospital will be entitled to a tax exemption if the amount of charitable services it provides in one year is equal to or higher than the amount of property taxes it would owe for that year. What constitutes charitable services is specifically defined in the new law. The

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monetary value of all charitable services is added together; if this sum exceeds the estimated specific tax liability for the year, the hospital is entitled to a tax exemption.

In order to receive property tax exemption status, an organization must apply for such status with the local county board of review. The local county board of review then forwards their exemption decision to the IDOR. The IDOR makes the final determination on whether the organization should receive an exemption or not. The new provisions regarding charitable exemptions for hospitals in the Property Tax Code applies to all exemption applications filed by hospitals before the county board of review and all hospital exemption decisions that are currently pending before the IDOR. Once a hospital is granted tax exempt status as a charitable organization, the hospital has to file an affidavit at the beginning of each year thereafter with the chief county assessment officer confirming whether it still satisfies the conditions for which the exemption was originally granted. A failure to file this affidavit may terminate the organization's exemption status at the discretion of the chief county assessment officer.

School districts with hospitals within their boundaries should

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be aware that this Act may impact the amount of tax revenue they receive. The continuation of existing exemptions should have no revenue impact. However, the granting of new exemptions may result in costly tax refunds, especially if certificates of error are issued for up to three past tax years. Conversely, removal of the exemption can mean increased revenues because the hospital's assessed value will be treated as new property under the Property Tax Extension Limitation Law (the "tax cap").

If we can be of further assistance, please contact one of our attorneys in our Flossmoor office – (708) 799-6766 or in our Oak Brook office – (630) 928-1200.