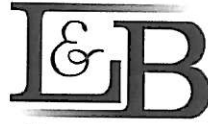


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LAMB & BARNOSKY, LLP
ATTORNEYS AT LAW

MEMORANDUM

TO: OUR PUBLIC SECTOR CLIENTS

RE: MANAGERIAL AND CONFIDENTIAL EMPLOYEES

DATE: JANUARY 12, 2010

With the New Year upon us, it may be a good time to review the composition of your bargaining units to ascertain whether there are any employees who should not be in a union due to their “managerial” and/or “confidential” status.

As a general proposition, a “managerial” employee sets, or effectively recommends, employer-wide policy; e.g., a Superintendent or an Assistant Superintendent of Schools, a Director of Labor Relations or Operations, and some department heads. In deciding whether to remove the employee from the bargaining unit, the Public Employment Relations Board (“PERB”) will look to both the person’s actual duties as of the date on which the application is filed, as well as those that are reasonably expected to be performed in the near future.

Clerical and other personnel who regularly work in a confidential capacity with managerial employees, on confidential matters involving labor relations, will be designated by PERB as “confidential.” In the case of a confidential employee, PERB looks to the actual duties that are being performed at the time of the application to see whether they meet the test.

The procedure for removing an employee from a bargaining unit due to the employee’s managerial and/or confidential status is for us to file an application with PERB that provides the affected employee’s name and title, whether a contract covers the persons within the job titles which the employer claims are managerial and/or confidential, summarizes his/her relevant duties and a factual statement in support of the application. A copy is sent to the union, which has the right to dispute the application all the way through a formal hearing at PERB. If the employer prevails, the employee may leave the unit during the 7th month before the contract expires or 120 days following the contract’s expiration. Removal from the unit has no impact on an employee’s underlying civil service status.

An employer can file only one managerial/confidential application that is processed all the way to completion (i.e., a decision following a hearing) per contract term. As a result, it is usually a good idea to file one omnibus application covering all potentially affected employees rather than several separate ones.

If you are interested in pursuing such an application, please let us know and we will review the relevant information and case law with you before an application is filed.

THIS MEMORANDUM IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.

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