

## Staffing Shortages Following the Pandemic: Strategies and Legal Considerations for Subcontracting

VIRTUAL SCHOOL ADMINISTRATORS'  
CONFERENCE

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# Following the Pandemic: Strategies and Legal Considerations for Subcontracting

Presented by Kenneth M. Florey, Howard A. Metz and Christopher R. Gorman  
School Administrators' Virtual Conference | September 23, 2021

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1

The State of  
Staffing  
Shortages and  
Possible  
Solutions



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2

## Illinois Staffing Shortages for Non-Instructional Services

- Despite legislative efforts to address staffing shortages, the struggles for Illinois school districts to fill vacancies related to non-instructional services is having a newsworthy impact on schools, parents and communities.
- Districts and third-party providers are ramping up recruitment efforts to reverse historic shortages in staffing for non-instructional services.

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3

## A Return to School without a Return to Work

- Prior to the start of the school year, retirements and furloughs during the COVID-19 pandemic reduced workforces historically.
- On August 26, 2021, Governor J.B. Pritzker institutes requirements relating to testing mandates and masking through Executive Order 2021-20 (COVID-19 Executive Order No. 87). Related deadlines were extended through Executive Order 2021-22 (COVID-19 Executive Order 88).
- Many, if not most, school districts prepared to start the school year in compliance with the Governor's Executive Order.
- Yet, with hesitancy related to vaccination and mask mandates exacerbating the ongoing staffing shortage, school districts may need to consider contracting with a third party for non-instructional services.



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4

## What can school districts do to address shortages in non-instructional services?

- During the course of today's presentation, we hope to address questions raised by clients regarding outsourcing non-instructional services in response to dramatic shortages in staffing.
- Districts can turn to third parties to provide these services, however there legal considerations when doing so.
- Those considerations relate to steps districts are required to take under the Illinois School Code and, due to the unionized nature of the workforce, applicable labor laws.

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5

## The Illinois School Code and Contracting for Third-party Non-Instructional Services.



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## Subcontracting under the Illinois School Code

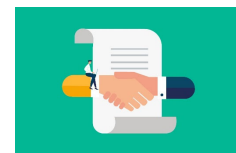
- Passed on August 17, 2017, Public Act 095-0241 imposed additional requirements on school districts that choose to contract with a third party for non-instructional services.
- The amendments resulting from Public Act 095-0241 can now be found in Section 10-22.34c of the School Code (105 ILCS 5/10-22.34c).
- The requirements of Section 10-22.34c are procedural in nature, and a limited number of challenges to third-party contracting have been filed since the law was enacted.

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7

## Overview of Section 10- 22.34c

- A school district may enter into a contract with a third party for non-instructional services *currently* performed by any employee upon 90 days written notice to any affected employee.
- However, a third-party contract may not be entered into or become effective during the term of a collective bargaining agreement covering any employees who perform the non-instructional services. As a result, A contract may only take effect upon the expiration of an existing collective bargaining agreement.
- Additionally, a school district must comply with the procedural requirements of Section 10-22.34c before a contract can be awarded.



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8

## Bidding Requirements under Section 10-22.34C

- Generally, a school district must publicly solicit bids for third-party non-instructional services being performed by any employee *or* bargaining unit member.

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9

## Requirements for Prospective Subcontractors

- Bids received from a prospective third-party contractor must include:
  - Evidence of liability insurance in scope and amount equivalent to the liability insurance provided by the school district.
  - A benefits package for the third party's employees who will perform non-instructional services *comparable* to the benefits package provided to employees by the school district.
  - A list of the number of employees who will provide non-instructional services, the job classifications of those employees, and the wages to be paid to the employees.



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10

## Requirements for Prospective Subcontractors

- Composite information about the criminal and disciplinary records of any employees who may perform the non-instructional services, provided that the individual names and other identifying information of employees need not be provided with the submission of the bid, including alcohol or other substance abuse, Department of Children and Family Services complaints and investigations, traffic violations, and license revocations or any other licensure problems.
- A notarized affidavit from the president or chief executive officer of the third party that each of its employees has completed a criminal background check as required by Section 10-21.9 of the Illinois School Code within three months of submitting the bid.

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11

## School District Obligations when Awarding Contracts

- A school district must provide a cost comparison, using GAAP, of “of each and every expenditure category and account that the school board projects it would incur over the term of the contract if it continued to perform the non-instructional services using its own employees with each and every expenditure category and account that is projected a third party would incur if a third party performed the non-instructional service.”

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12

## School District Obligations when Awarding Contracts

- Bids must generally be reviewed and considered in open session of a regularly scheduled board meeting.
- However, bids may be reviewed and considered at an open session of a specially scheduled board meeting if the exclusive bargaining representative of the employees who perform non-instructional services agrees in writing.

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13

## School District Obligations when Awarding Contracts

- A minimum of one public hearing must be held prior to the school district entering into a contract with a third party to perform non-instructional services.
- The school board must provide notice to the public of the date, time, and location of the first public hearing on or before the initial date that bids to provide the non-instructional services are solicited or a minimum of 30 days prior to entering into such contract, whichever is greater.

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14



## Contract Requirements under Section 10/22.34C

- The contract entered into between the school district and a third party providing non-instructional services must:
  - Contain provisions requiring the third party to offer available employee positions under the contract to qualified school district employees displaced by the contract
  - Contain provisions requiring the third party to comply with a policy of nondiscrimination and equal employment opportunity for all persons and to take affirmative steps to provide equal opportunity for all persons

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## Emergency Exception to Section 10-22.34C Requirements

- Section 10-22.34c contains a provision allowing a school district to enter into third-party contracts for non-instructional services currently performed by an employee or bargaining unit *for the purpose of* augmenting the current workforce in an emergency situation that threatens the safety or health of the school district's students or staff.

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16

## Emergency Exception to Section 10-22.34C Requirements

- In such cases, a contract may last no longer than three months.
- A school district must also comply with “all of its obligations under the Illinois Educational Labor Relations Act [IELRA]” before awarding emergency contracts.

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17

## Labor Considerations for Emergency Contracting



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## IELRA Obligations that Impact Subcontracting

- In part, with respect to operational changes, the obligations of a school district under the IELRA will depend on the language of its collective bargaining agreement with affected employees (e.g., reopener clauses), if any.

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19

## Competing Rights under the IELRA

- Under Section 4 of the IELRA, school districts “shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees and direction of employees.”
- But school districts are *required* to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment *as well as the impact thereon* upon request by employee representatives.



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20

## The Duty to Bargain

- A school district's duty to bargain, addressed by Section 10 of the IELRA, includes different duties with respect to:
  - Mandatory subjects of bargaining
  - Permissive subjects of bargaining
  - Prohibited subjects of bargaining

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21

## Obligations under the IELRA related to Subcontracting

- Based on labor board decisions and court rulings, the impact of reductions in force, restructuring, and third-party contracting are normally held to be mandatory subjects of bargaining.
- As a mandatory subject of bargaining, a school district may not make a decision regarding contracting without first engaging in good faith bargaining.
- However, given the emergency nature of the decision, the decision may not be found to be a mandatory subject of bargaining under the prevailing balancing test adopted by the Illinois Supreme Court.
- Even if not a mandatory subject of bargaining in light of the emergency, the union would have a right to bargain over the impact of the decision at the request of the union.



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What if a school district decides to contract before notifying the union?

- Section 15 of the IELRA allows the union to file charges with the Illinois Educational Labor Relations Board for unfair labor practices
- Under Section 14, unfair labor practices involving unilateral changes include:
  - (a)(1) - Interfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act
  - (a)(3) - Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization.
  - (a)(5) - Refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit

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23

*Community Unit School Dist. No. 5 v. Ill. Educational Labor Relations Bd., 12 N.E3d 120 (Ill. App. 4th Dist. 2014)*

- After staffing shortage and chronic absenteeism, the school district decided to outsource its transportation services on an emergency basis.
- The school district later decided to permanently outsource transportation services, and the union filed unfair labor charges for the later contract despite the fact that the contract was the subject of bargaining over a new contract for transportation employees.
- "In the subcontracting context, the requirements for good-faith bargaining on the decision to subcontract are notice of the consideration of a contract, before it is finalized; meeting with the union to provide an opportunity to discuss and explain the decision; providing information to the union; and giving consideration to any counterproposals the union makes." citing *Service Employees International Local Union No. 316 v. Ill. Educ. Relations Bd., 153 Ill.App.3d (1987)*.
- Supports the notion that the bargaining obligations of short-term, emergency contracting differ from longer-term plans for sub-contracting.



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24

## Considerations for Short- and Long-Term Subcontracting

- Consider involving the union in discussions over staffing shortages before receiving a demand to bargain.
- Consider contracting on an emergency basis while complying with the Act's requirements for long-term subcontracting.
- Consider other creative solutions, including coops (which do not seem contemplated by the Section 10-22.34c

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## COVID-19 and Third-Party Employees

# COVID-19 FAQs FOR EMPLOYEES



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## Impact of COVID-19 Mandates on Third-Party Employees

- On August 26, 2021, Governor Pritzker ordered Executive Order 2021-22 (COVID-19 Executive Order No.88 ).
- On August 26, 2021, Governor J.B. Pritzker institutes requirements relating to testing mandates and masking through Executive Order 2021-20 (COVID-19 Executive Order No. 87). The requirements were later clarified through Executive Order 2021-22 (COVID-19 Executive Order 88).
- These masking and testing requirements can be applied to third-party contractors

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27

## School Personnel under E.O. 20212-22



- “School Personnel” means any person who (1) is employed by, volunteers for, or is contracted to provide services for a School or school district serving students in pre-kindergarten through 12th grade, or who is employed by an entity that is contracted to provide services to a School, school district, or students of a School, and (2) is in close contact (fewer than 6 feet) with students of the School or other School Personnel for more than 15 minutes at least once a week on a regular basis as determined by the School.

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28

## Mandates for School Personnel

- Executive Order 2021-22 (COVID-19 Executive Order 88) requires school personnel who have not been fully vaccinated to undergo COVID-19 testing until fully vaccinated.
- School personnel must have a first shot no later than September 19, 2021 unless exempted.
- Beginning September 19, 2021, school personnel must test weekly until fully vaccinated in order to enter or work at a school
- Unless exempt because vaccination is medically contraindicated (including ADA accommodations) or due to sincerely held religious beliefs, practices or observances. In such cases, weekly testing will be required.

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29

## Ensuring Compliance through Third-Party Contractors

- Require vendors to check the vaccination status of employees through vaccination cards
- Require vendors to provide a list of all fully vaccinated employees.
- Require vendors to comply with weekly testing mandate and confirm, in writing, as to employees' vaccination status.

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## Critical Contract Clauses



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## Critical Contract Clauses

- Insurance
  - The contract should require the vendor to maintain commercial general liability insurance, automobile liability insurance, worker's compensation insurance, as well as an umbrella insurance policy with minimum coverage amounts acceptable to the District.
  - In some contracts, it is also advisable to require professional liability coverage.

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32

## Critical Contract Clauses

- Insurance
  - The school board, its officers, employees and agents should be named as additional insureds on the commercial general liability, automotive liability and umbrella policies.



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## Critical Contract Clauses

- Indemnification
  - Contracts should contain an indemnification provision requiring the vendor to indemnify and hold the School District harmless against any liabilities the District might incur as a result of the vendor's negligence or breach of contract.

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34

## Critical Contract Clauses

- Limitation of Liability
  - These clauses attempt to limit the vendor's liability to a specific dollar amount. Some of these clauses even attempt to limit this liability for intentional wrongdoing on the part of the vendor. All limitation of liability clauses should be deleted in their entirety.



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## Critical Contract Clauses

- Choice of Law
  - Form contracts may contain a provision that the contract shall be controlled by the laws of a State other than Illinois. These provisions may further provide that the venue for any action brought pursuant to the contract will be outside of Illinois. These provisions should be modified to provide that Illinois Law controls the contract and the venue will be where the District is located.

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## Critical Contract Clauses

- Statute of Limitations
  - Form contracts often contain a provision requiring that a lawsuit for breach of the agreement be brought within a specified time. This time period is often shorter than the time period allowed under Illinois law to bring such a lawsuit. All statute of limitations paragraphs should be deleted from the form contract in that Illinois law will control the time period to bring a lawsuit.



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37

## Critical Contract Clauses

- Automatic Renewals
  - Some service contracts contain a clause that the contract will automatically re-new unless cancelled in writing within a specified number of days before the end of the term. This clause should be modified to require mutual consent of the parties to re-new any contract.

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38

## Critical Contract Clauses

- Termination for Convenience
  - It is advisable in most longer term service contracts that the District maintain the right to terminate the contract with an agreed upon notice period.



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## Critical Contract Clauses

- Attorneys' Fees
  - Most form contracts provided that should a lawsuit be necessary, the vendor will be entitled to recover their attorney fees if they are successful. This paragraph should be either deleted in its entirety or be modified so that the attorneys' fee provision is made mutual and that either party will recover their attorneys' fees if successful in litigation.

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40

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Ken Florey concentrates his practice representing public and private clients, including municipalities, school districts, community colleges, townships, libraries, private owners, contractors and design professionals regarding land use, municipal law, construction, tax, finance and litigation. Ken has also started offering his services as a mediator with an emphasis on construction disputes.

Ken was the Chair of the DuPage County Bar Association's Local Government Committee. He was appointed Special Assistant Attorney General to prosecute and defend construction litigation claims on behalf of the Illinois Capital Development Board. Ken is also a member of the Illinois ASBO Service Associate Advisory Committee. He served as a Trustee for the Village of Lombard for eight years and is a member of the Lombard Fire and Police Commission.

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### **RECENT PUBLICATIONS**

Contributing author, "Joint Purchasing Everything You Want to Know but Are Afraid to Ask!" *UPDATE Magazine*, Illinois ASBO (2019)

Contributing author, "How Far Does the Law Allow Schools to Go?" *UPDATE Magazine*, Illinois ASBO (2018)

Contributing author, "Top 11 Public Bidding Questions & Solutions" *UPDATE Magazine*, Illinois ASBO (2018)

Co-author, "School Construction from Start to Finish: A Project Checklist," *School Business Affairs Magazine*, ASBO (2018)

Contributing author, "Top 11 Public Bidding Questions," *UPDATE Magazine*, Illinois ASBO (2018)

Contributing author, "Mediation a Win-Win for Clients and their Attorneys in Construction Litigation," *Chicago Daily Law Bulletin* (2018)



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"The Good, the Bad and the Ugly of School Bidding Requirements," *UPDATE Magazine*, Illinois ASBO (2016)

"Settlement Crumbles; Appeals Court Declines to Put Pieces Back Together," *Chicago Daily Law Bulletin* (2015)

"On Public Display: Advertising in Schools," *UPDATE Magazine*, Illinois ASBO (2015)

#### **RECENT PRESENTATIONS**

*Foolproof Contract that Abide by State Laws*, 2019 Illinois ASBO Annual Conference (May 2019)

*Construction Contracts: Boilerplate Language Landmines You May Not Know*, NBI (February 2019)

*Legal, Legislative and Ethics Update*, ICCTA (November 2018)

*Purchasing Processes, Problems & Solutions*, Illinois ASBO (September 2018)

*Navigating Property Tax Assessment Complaints and the PTAB*, Illinois ASBO & IASPA (October 2018)

*Construction Disputes: Bring Home a Win for Your School District*, ASBO International (October 2018)

*Construction Project Problems or Solutions After Construction is Done*, Illinois ASBO (October 2018)

*Construction and Purchasing Disputes and Resolutions*, ASBO International Conference (September 2018)

*Construction, Bidding and Purchasing in Township Government*, Township Officials of Illinois Online Seminar (August 2018)

*Administrators Legal Session II*, Concordia University (August 2018)

*Construction Disputes and Resolutions*, Illinois ASBO Conference (May 2018)

*Top Solutions and Problems for Bidding and Construction*, Illinois ASBO Annual Conference (May 2018)

*Lead Testing Update: Everything You Need to Know*, Illinois ASBO Conference, (May 2018)



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Contributing author, "Joint Purchasing Everything You Want to Know but Are Afraid to Ask!" *UPDATE Magazine*, Illinois ASBO (2019)

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Contributing author, "How Far Does the Law Allow Schools to Go?" *UPDATE Magazine*, Illinois ASBO (2018)

Co-author, "School Construction from Start to Finish: A Project Checklist," *School Business Affairs Magazine*, ASBO (2018)

Contributing author, "Organization, Finance, and Property," *Illinois School Law*, IICLE (2017)

"Look Before You Leap: Evaluating Your Joint Purchasing Options," *UPDATE Magazine*, Illinois ASBO (2016)

Contributing author, "School Property and Environmental Issues," *Illinois School Law*, IICLE (2010 and 2012)

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Contributing author, "Labor Issues in the Transactional Side of the Project," *Construction Law: Transactional Considerations 2021 Edition*, IICLE (2021)

"Continuing Controversy Over FCC's Efforts to Improve Broadband Connectivity," *Energy, Utilities, Telecommunications and Transportation Newsletter*, Illinois State Bar Association (2021)

"The Future of For-Profit Online Charter Schools," *Labor and Employment Law Quarterly*, American Bar Association (2016)



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