

## Staff Reductions in Force & Obligation to Bargain

**Webinar**  
**January 28, 2021**

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# Staff Reductions in Force & Obligation to Bargain

Todd K. Hayden, Catherine R. Locallo and Thomas C. Garretson

January 28, 2021

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## Staff RIF & Bargaining

- Financial Challenges Amidst COVID-19 Pandemic
- Evaluate Options to Reduce Costs
  - Options include workforce reductions
- Workforce reductions trigger bargaining obligations



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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

## Overview

- Navigating the RIF Process
  - Educational Support Personnel (ESP)
    - 105 ILCS 5/10-23.5
    - Paraprofessionals, administrative assistants, bus drivers, payroll clerks and custodial/maintenance employees
  - Teachers (licensed personnel)
    - 105 ILCS 5/24-12
- Collective Bargaining Obligations

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## Reasons for an ESP RIF

- An ESP RIF occurs when a school district decides:
  - To decrease the number of ESPs employed by the District;
  - To discontinue a particular type of support service; or
  - To reduce the hours of an ESP.
- Check CBA for process to RIF ESPs
  - CBA can provide greater rights than statute
- Review School District Policy Manual for other applicable rules



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## Statutory Obligations for ESP RIF

- Illinois School Code (105 ILCS 5/10-23.5)
  - 30-day written notice requirement; or
  - 5-day written notice requirement if due to an unforeseen reduction in student population.
- Special Rules for Subcontracting (105 ILCS 5/10-22.34C)
  - If the decision to RIF an ESP is due to subcontracting non-instructional services, a 90-day notice must be given to the affected employees prior to the implementation of a decision to subcontract work to a third party.
  - If the affected employees are covered by a CBA, the contract with the third party must not be entered into or become effective during the term of the CBA.

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## Steps for an ESP RIF

A Step-by-Step Process for Effective and Compliant ESP RIFs



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## Step 1: ESP Seniority List

➤ **Step 1:** Consult with and distribute to any ESP union representative/agent a seniority list by February 1 of each year.



- Mandated by the School Code, even if no potential for RIF of ESPs.
- Check CBA for earlier distribution date
- Per the School Code, the seniority list must be categorized by positions, showing length of continuing service of each full-time ESP who is qualified to hold any such positions, unless an alternative method of layoff is provided in the CBA, then the list should be made in accordance with the alternative method.
- Districts may also prepare and distribute a seniority list for part-time ESPs (keep separate from full-time).
- Most districts also post the seniority list, regardless of whether the ESPs are represented by a union.

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## Step 2: Services Impacted by RIF

➤ **Step 2:** Identify the type of support service targeted for the potential RIF and the number of ESPs that would be impacted by a RIF.

- Review district budget and financial projections.
- Review projected student enrollment.
- Confirm status of any grant-funded services.
- Consider the impact of staff changes (e.g., resignations, retirements, transfers, reassignments, and leaves of absence).

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## Step 3: Identify Categories of Position for RIF



### ➤ Step 3: Identify the categories of position and individual ESPs who will be impacted by the potential RIF.

- Consult the seniority list posted by February 1.
- The RIF must be targeted to the employee's category of position, rather than overall district ESPs.
- Categories of position should be set forth in the ESP seniority list and supported by distinct job descriptions.
- The School Code is silent regarding how categories of position are to be determined. Thus, a district has discretion to define categories of positions, subject to any collectively bargained categories.
  - *Note:* A school board does not have discretion to define categories of positions differently for layoff and recall purposes than for other purposes.
  - *Note, also:* Categories of position cannot be established for the first time when conducting the RIF.

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## ESP RIF Hypo Facts

- The District employs Teacher's Aides ("Aides"), who have different job assignments but all work under a single Aide job description. Some Aides are assigned to a classroom (referred to as "Classroom Aides"), whereas others are assigned to work in the library and media center ("Library Aides"). However, Classroom Aides are routinely assigned to work as Library Aides and vice versa. The CBA does not distinguish between the two assignments, but simply refers to the employees as "Aides."
- The District timely provided the Union with a seniority list categorized by position, which included a single listing for all Aides.
- The District intends to eliminate two Library Aide positions, both of whom have more seniority than any of the Classroom Aides.

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## ESP RIF Hypo Questions

- Questions:
  - Can the District RIF the two Library Aides?
  - What if the District had created separate RIF seniority lists for Library and Classroom Aides this year?
  - What should the District do under the circumstances?



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## Step 4: Examine ESP Seniority

- **Step 4: Determine the seniority of the ESPs subject to the potential RIF.**
  - A RIF must be conducted in reverse order of seniority, unless an alternative method of layoff is provided in the CBA.
    - Consult the seniority list.
  - Determine how the district defines seniority.
    - District-wide seniority.
    - Departmental seniority.
  - Consider the impact of part-time status or leaves of absence, etc. on seniority accrual.
  - Review qualifications and the district's seniority tie-breaker rules to determine whether the individual ESP who will be impacted by the potential RIF is qualified to hold any other position within the district.



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## Step 5: Assess “Bumping” Rights

### ➤ **Step 5: Determine “bumping” rights of ESPs impacted by the potential RIF.**

- Consult the seniority list.
- Consult any applicable CBA and/or district seniority/RIF policies.
- If an individual ESP subject to a potential RIF is able to “bump” another ESP based upon their greater seniority, initiate the process again for the displaced ESP, until all ESPs have been allowed to exercise “bumping” rights.

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## Step 6: Board Action on RIFs



### ➤ **Step 6: Timely adopt resolution and issue written notice of dismissal decision.**

- School board must *timely* adopt a resolution by a majority vote authorizing the RIF of an ESP.
- *Recommendations:*
  - Full-time and part-time ESPs should not be grouped together on a resolution (e.g., there should be one resolution for full-time ESPs and a separate resolution for part-time ESPs).
  - District should meet with the individual ESPs who will be subject to the RIF prior to action by the school board to informally notify each of the intended action.
- The RIF notice must include a statement of honorable dismissal (for full-time ESPs) and the reasons for the RIF.
- The notice must be given to the ESP by first class mail *and either* certified mail, return receipt requested or personal delivery with receipt (but many districts do both).
- Robbins Schwartz has prepared model ESP resolutions and notices.

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## ESP Recall Rights

- **Recall RIF'ed ESPs if positions become available**
  - A RIF recall must be conducted by inverse order of dismissal, unless an alternative method of layoff is provided in the CBA.
  - The statutory RIF recall period is one (1) calendar year from the beginning of the school term following the RIF.
    - Confirm that the CBA does not provide for a longer recall period.
  - Only ESPs employed by the district in a full-time capacity are entitled to RIF recall under the School Code. Part-time ESPs do not have recall rights under the School Code.
    - Confirm that CBA and/or district RIF policies do not extend recall rights to part-time employees.
  - During the RIF recall period, a RIF'ed ESP has recall rights to vacancies in the specific category of position from which the ESP was RIF'ed or any other category of position they are qualified to hold.
    - A RIF'ed ESP who obtains additional qualification during the RIF recall period (and notifies the district of the additional qualifications) is entitled to recall to any vacant positions they are qualified to hold.

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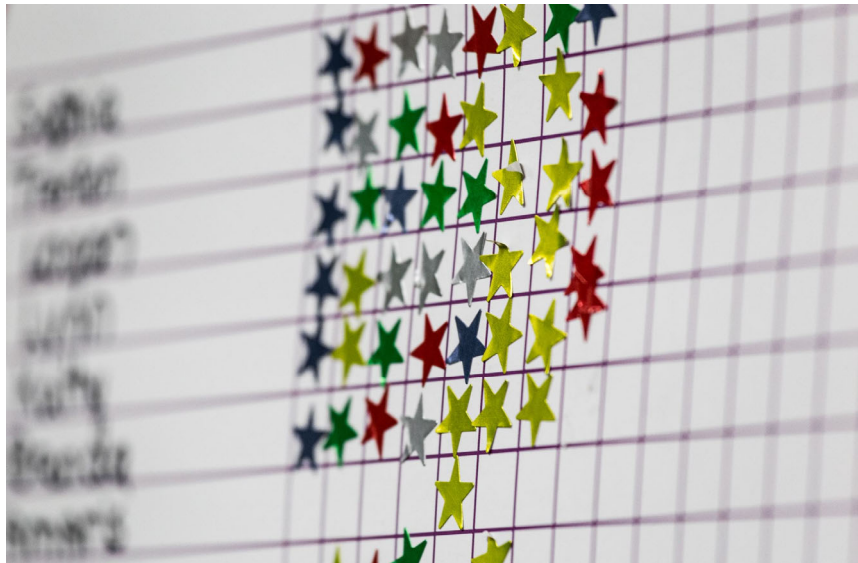
## Questions?



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## Teacher RIF



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## Reasons for Teacher RIF

- A teacher RIF occurs when a school district decides:
  - To decrease the number of teachers employed by the district;
  - To discontinue a particular type of teaching service; or
  - A reduction in the number of programs or positions in a special education joint agreement.
- Check CBA for process to RIF teachers
  - CBA can provide greater rights than statute
- Review School District Policy Manual for other applicable rules

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## Statutory Obligations for Teacher RIF



- Illinois School Code (105 ILCS 5/24-12)
  - Applies to tenured and non-tenured teachers.
  - Sequence of dismissal is determined by statute.
  - Public hearing on the question of dismissal is required if:
    - The number of honorable dismissal notices based on economic necessity exceeds five (5) notices or 150% of the average number of teachers honorably dismissed in the preceding three (3) years), whichever is more.
    - Following the hearing and board review, the action to approve any such reductions shall require a majority vote of the board.
  - Written notice requirement at least 45 days before the end of the school term (use last day of teacher attendance).

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## Teacher RIF Considerations

- Under SB 7's amended RIF provisions, school districts must now first consider qualifications and certification areas prior to considering seniority and tenure status.
- These qualifications include all qualifications imposed as a matter of law, plus additional qualifications set forth in the school district's job descriptions, established on or before May 10 of the previous year.
  - For the 2020-2021 RIF year, school districts must use job descriptions established on or before May 10, 2020.
  - If a school district does not have a job description for a position, then certification and legal qualifications will be the only basis for including/excluding a teacher from the Sequence of Dismissal list.
- School districts therefore have until May 10, 2021 to review and revise their job descriptions in order to be considered for purposes of RIFs during the 2021-2022 school year.

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## Steps for a Teacher RIF

### A Step-by-Step Process for Effective and Compliant Teacher RIFs



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## Step 1: Assess Finances and Staffing Needs

### ➤ **Step 1: Analyze school district finances and staffing needs for 2021-2022 school year.**

- Review district budget and financial projections.
- Review projected student enrollment.
- Confirm status of any grant-funded services.
- Consider the impact of staff changes (*e.g.*, non-renewals, resignations, retirements, transfers, reassignments, and leaves of absence).



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## Step 2: RIF Joint Committee Work

### ➤ **Step 2: RIF Joint Committee must reach agreements by February 1.**

- Discussions should not focus on individual teacher(s), or on problems/concerns with individual teachers.
- Discussions should be in the abstract and focus on creating standards that will apply to everyone.
- Decisions must be reached by a majority vote of all committee members, not just those present at the meeting.
- If committee member(s) are absent, ensure that at least a majority of members are present before voting on any matter.

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## Step 3: Create SOD List

### ➤ **Step 3: In consultation with the union, create a Sequence of Dismissal (SOD) list categorizing teachers by position(s) for which they are qualified and placing them in Groupings 1-4 based on performance evaluation ratings.**

- Categorize each teacher into the position(s) for which they are qualified and, within each position, place all teachers qualified for the same in 1 of the 4 SOD Groupings.
- *Note:* School Code changes to default ratings allowed during pandemic may affect RIF group placement.



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## Criteria for Groupings 1-4

- Grouping 1 shall consist of each teacher who is not in contractual continued service and who (i) has not received a performance evaluation rating, (ii) is employed for one school term or less to replace a teacher on leave, or (iii) is employed on a part-time basis.
- Grouping 2 shall consist of each teacher with a **"Needs Improvement"** or **"Unsatisfactory"** performance evaluation rating on either of the teacher's last 2 performance evaluation ratings.
- Grouping 3 shall consist of each teacher with performance evaluation rating of at least **"Satisfactory"** or **"Proficient"** on both of the teacher's last 2 performance evaluation ratings, if 2 ratings are available, or on the teacher's last performance evaluation rating, if only one rating is available, unless the teacher qualifies for placement into grouping 4.
- Grouping 4 shall consist of each teacher whose last 2 performance evaluation ratings are **"Excellent"** and each teacher with 2 "Excellent" performance evaluation ratings out of the teacher's last 3 performance evaluation ratings with a third rating of **"Satisfactory"** or **"Proficient"**.

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## Sequence of Dismissal Within Groupings

- Within Grouping 1, the sequence of dismissal must be at the discretion of the school district.
- Within Grouping 2, the sequence of dismissal must be based upon average performance evaluation ratings, with the teacher or teachers with the lowest average performance evaluation rating dismissed first.
  - A teacher's average performance evaluation rating must be calculated using the average of the teacher's last 2 performance evaluation ratings, if 2 ratings are available, or the teacher's last performance evaluation rating, if only one rating is available, using the following numerical values: 4 for Excellent; 3 for Proficient or Satisfactory; 2 for Needs Improvement; and 1 for Unsatisfactory.
- As between or among teachers in Grouping 2 with the same average performance evaluation rating and within each of Groupings 3 and 4, the teacher or teachers with the shorter length of continuing service with the school district must be dismissed first unless an alternative method of determining the sequence of dismissal is established in a CBA.



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## Step 4: Issuance of SOD List

➤ **Step 4:** Issue the SOD list to union *at least 75 days* prior to end of school term and finalize list no later than 45 days before end of school term.

- Also issue a seniority list showing length of continuing service of each teacher to the union.
- Provide individualized written notice to teachers with their SOD placement information, *e.g.* "You are in Group 3 in the following positions (specify job categories) and are number 10 of 30."

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## Step 5: Impact of Ordinary Non- Renewal Actions

➤ **Step 5:** Determine ordinary non-renewals of probationary teachers.

- Of teachers remaining after non-renewals of probationary staff, identify number of staff to be reduced (if any).
- CAUTION: non-renewals of probationary teachers are for reasons related to the individual teacher and not a means to reduce the overall number of teachers. Reductions – for probationary and tenured teachers – must be processed as a RIF.



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## Step 6: Identify Teachers Subject to RIF

### ➤ **Step 6: Identify teachers subject to RIF, starting with Grouping 1 and working up to Grouping 4.**

- *Reminder:* Teacher RIF bumping rights.
  - Even though school districts now utilize a SOD list which is tied to teacher performance, bumping rights still exist.
- Hypo: If a school district is reducing teachers in a particular position and there are more legally and otherwise qualified individuals on that position list than are actually teaching in that position, who gets reduced?
- Per ISBE, the teacher(s) identified for honorable dismissal is/are the teacher(s) teaching during the relevant school year in the position that the school district is seeking to reduce.

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## Step 7: Board Action on RIFs



### ➤ **Step 7: Take Board action to approve RIFs and deliver notices to affected teachers *no later than 45 days* prior to end of school term.**

- The notice must be given to the teacher by first class mail *and either* electronic mail, certified mail, return receipt requested or personal delivery with receipt (but many districts do all).
- Per the School Code, for teacher RIF actions, all earned compensation must be paid by the 3<sup>rd</sup> business day following the last day of pupil attendance for the relevant school term.
- We have developed model resolutions and notices for use by school districts.

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## RIF Recall: Teachers

- Recall Period
  - Groupings 3 and 4:
    - Within one (1) calendar year from the beginning of the following school term; or
    - Within two (2) calendar years from the beginning of the following school term *if the number of honorable dismissals based on economic necessity exceeds 15% of the number of full-time equivalent positions filled by certified employees during the preceding school year.*
  - Groupings 2 (if other rating is "P" or better): through February 1st of following school term.
- Recall order = inverse order of dismissal, unless an alternative order is established in a CBA.

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## Teacher RIF Hypo Facts

- For cost-saving reasons, the District has determined it necessary to eliminate five teaching positions for the 2021-2022 school year. The District has not RIF'd any teachers in the last four years. After review of the SOD list, the positions identified as subject to the RIF include:
  - Group One: two non-tenured teachers, one part-time teacher.
  - Group Two: one teacher.
  - Group Three: one teacher.

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## Teacher RIF Hypo Questions



- Questions:
  - Must the Board hold a public hearing regarding the dismissals?
  - What are the bargaining obligations associated with the RIF?
  - What are the notice obligations to the impacted teachers?
  - What if bargaining is still ongoing when the notices need to be issued?
  - What recall rights (if any) do the teachers have?

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## RIF Collective Bargaining Obligations

- Identify bargaining obligations in connection with a proposed RIF.
  - Economic (cost savings) v. Non-Economic Reason
    - Under Illinois law, a district's decision to RIF for economic reasons (*i.e.*, cost savings) is a mandatory subject of bargaining, and the district is obligated to bargain the *decision* to RIF to agreement or impasse.
    - In contrast, a district's decision to RIF is for non-economic reasons (*e.g.*, lack of student enrollment), the district is only obligated to bargain the *impact* of the decision.
  - RIF bargaining obligations—Number of sessions—"Good faith" obligation
    - *Remember:* The district is only required to initiate but not complete its bargaining obligations prior to complying with the statutory RIF notice requirements.
    - Ability to implement RIF if no agreement or impasse
  - IELRB and School Code compliance obligations

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## RIF Bargaining Tips

- Notify the Union of the range—not fixed number—of employees subject to the proposed RIF.
  - **Example:** 5-10 classroom teacher aides or 1-2 first grade teachers
- Provide school district's rationale and data to support the RIF for cost-saving reasons.
  - **Example:** Increased expenditures due to COVID-19 safety measures, reduced state funding, declining year-end educational fund balance, etc.
- Plan on scheduling several RIF bargaining sessions to document record of good faith bargaining to avoid unfair labor practice claim.
  - Bargaining does not need to be completed prior to action by the Board
- Discuss and respond to any union counter-proposals and make any adjustments to initial proposed RIF plan.
  - **Reminder:** School districts have no obligation to agree to any union counter-proposals under IELRA.



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Position	Statute	RIF Reasons	Required Notice	Recall Rights	Bargaining Obligations
Teacher	105 ILCS 5/24-12	(1) Decrease # of teachers employed; (2) Discontinue particular type of teaching service; or (3) Reduce # of programs or positions in SPED joint agreement.	At least <b>45 days</b> before end of school term.	<b>Groups 3&amp;4:</b> within one calendar year from the beginning of the following school term; OR within two calendar years (depending on # of honorable dismissals).  <b>Group 2:</b> until Feb. 1 of the following school term.  *Check CBA for longer period.	<input checked="" type="checkbox"/>
ESP	105 ILCS 5/10-23.5	(1) Decrease # of ESPs employed; (2) Discontinue particular type of educational support service; or (3) Decrease hours of work.	At least <b>30 days</b> before the ESP's last workday; OR  <b>5 days</b> if due to unforeseen reduction in student population.	Within one calendar year from beginning of following school term.  *Check CBA for longer period.	<input checked="" type="checkbox"/>

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Questions?



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# Robbins Schwartz

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Todd Hayden practices in the areas of school and municipal law. He provides governmental employers with guidance and counseling regarding labor and employment, including employee discipline and termination, board governance, collective bargaining, contract, public finance and transactional matters.

Todd has represented employers in various employer-employee disputes including federal and state litigation, EEOC/Department of Human Rights charges, State Labor Board Proceedings and grievance and arbitration proceedings. Todd has extensive experience in collective bargaining, including unit formation proceedings, negotiations, mediation and interest arbitration. He has performed construction contract reviews, served as local bond counsel and worked on school boundary changes.

Todd is approved by the Illinois State Board of Education to provide school board member training.

### **AWARDS**

Illinois Leading Lawyer, Employment Law: Management, Labor Law: Management, School Law and Governmental, Municipal, Lobbying & Administrative Law, 2015

### **RECENT PUBLICATIONS**

Contributing author, "Civil Rights Litigation," *Illinois School Law*, IICLE (2017)

### **RECENT PRESENTATIONS**

*Collective Bargaining for School Board Members and Administrators*, IASB/IASA/Illinois ASBO Joint Annual Conference (November 2018)

*Employee Free Speech and the Public Employer*, HR Source Employment Law Conference at Northern Illinois University (September 2018)

*Practical Advice for Maintaining a Harassment Free Workplace*, IASA (February 2018)



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Commercial Transactions  
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Catherine Locallo's practice focuses on labor and employment law and board governance matters. She counsels employers in all aspects of employment law including hiring, employment contracts, employee discipline issues, terminations and reductions in force, collective bargaining and labor relations, nonimmigrant worker visas and employment discrimination matters. She also counsels public bodies on compliance with Illinois' Freedom of Information Act and Open Meetings Act. Catherine has extensive experience representing clients in court and administrative agency proceedings involving discrimination, retaliation, and harassment claims.

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### AWARDS

Illinois "Rising Star," Employment & Labor Law (2015-2018)

### RECENT PUBLICATIONS

"Recent Department of Labor Opinion Letters: Pay for Training and Travel," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Sexual Harassment Prevention Training Compliance Required Before New Year," *Employment and Labor Law Flashpoints*, IICLE (2020)

"Will 'Scabby the Rat' Live To Fight Another Day?" *Employment and Labor Law Flashpoints*, IICLE (2020)

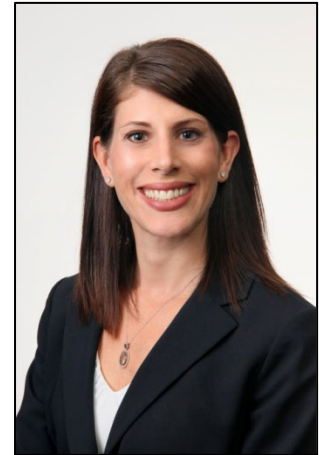
"Superintendent's Police Report is Protected Speech" *Employment and Labor Law Flashpoints*, IICLE (2020)

"Changing the Landscape: Abusive Conduct Not Protected Under NLRA" *Employment and Labor Law Flashpoints*, IICLE (2020)

"COVID-19 Changes to Claims for Unemployment Benefits in Illinois" *Employment and Labor Law Flashpoints*, IICLE (2020)

"Seventh Circuit: Jury, Not Judges, Must Decide Coach's Sex Discrimination Claim" *Employment and Labor Law Flashpoints*, IICLE (2020)

"Examining DOL Rule on New Employee Leave Rights" *Employment and Labor Law Flashpoints*, IICLE (2020)



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Education Law  
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Litigation

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J.D., *cum laude*, The John  
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U.S. Court of Appeals for  
the Seventh Circuit

U.S. District Court for the  
Central District of Illinois

U.S. District Court for the  
Northern District of Illinois

Supreme Court of Illinois

"Better Safe Than Sued – Issuing Timely FMLA Notices" *Employment and Labor Law Flashpoints*, IICLE (2020)

"Unions Strike Back Through Amendments to Illinois Public Labor Acts" *Employment and Labor Law Flashpoints*, IICLE (2020)

"First Amendment Protections Get Broader for Government Employees," *Chicago Daily Law Bulletin* (2016)

"Regulatory Changes to the Illinois Wage Payment and Collection Act," *Justinian Society Newsletter* (2015)

"New FOIA Amendments to Ease Burden on Public Bodies," *Justinian Society Newsletter* (2015)

"Illinois Supreme Court Determines Arbitration Award Ordering Reinstatement of a Paraprofessional was Binding Because the Award 'Drew Its Essence' from the CBA," *Justinian Society Newsletter* (2014)

"When the Music Stops, Why Not Require Certain Title VII Plaintiffs to Find a Chair on Which to Rest Their Complaint," *The John Marshall Law Review*, (2009)

#### **RECENT PRESENTATIONS**

*Is PERA Dead?? Implementation of a Local Appeals Process for Unsatisfactory Ratings*, IASPA Annual Conference (January 2020)

*A Workshop on Compliance with the Open Meetings Act and Illinois Freedom of Information Act*, LUDA Annual Conference (October 2019)

*Community College Trustees Training Session*, ICCTA (June 2019)

#### **ORGANIZATIONS**

Chicago Bar Association

Illinois Council of School Attorneys

Illinois State Bar Association

Illinois Council of School Attorney

National Council of School Attorneys

Secretary, Justinian Society of Lawyers

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Tom counsels employers in all aspects of labor and employment law, including internal misconduct investigations, disciplinary action, labor relations, collective bargaining, and federal and state employment discrimination matters under the Americans with Disabilities Act, Family and Medical Leave Act, Age Discrimination in Employment Act, Illinois Human Rights Act, Title VII, and other federal and state anti-discrimination and wage laws. Tom represents employers in a variety of venues, including federal/state courts, the U.S. Equal Employment Opportunity Commission, the Illinois Department of Human Rights, and federal/state labor boards.

Prior to joining Robbins Schwartz, Tom worked in Labor Relations for the Cook County Health System. During law school, Tom interned with the U.S. Equal Employment Opportunity Commission's Enforcement Unit.

### RECENT PUBLICATIONS

"Recent Department of Labor Opinion Letters: Pay for Training and Travel," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Seventh Circuit: Jury, Not Judges, Must Decide Coach's Sex Discrimination Claim," *Employment and Labor Law Flashpoints*, IICLE (2020)

"Unions Strike Back Through Amendments to Illinois Public Labor Acts," *Employment and Labor Law Flashpoints*, IICLE (2020)

"Heading Into the New Year with New Employment Laws," *Employment and Labor Law Flashpoints*, IICLE (January 2019)

### RECENT PRESENTATIONS

*Employee Misconduct Investigations and Discipline During a Pandemic*, IASPA Annual Conference (January 2021)

*Is it ADA, FMLA, or Other Leave? Navigating the Murky Waters of Employee Leave Benefits*, IAPD/IPRA Soaring to New Heights Conference (January 2020)

*Updates from the DOL: New Developments for FMLA, FLSA, and IWPCA*, IAPD/IPRA Soaring to New Heights Conference (January 2020)

*A Step-by-Step Guide to the ADA Interactive Process*, IAPD/IPRA Soaring to New Heights Conference (January 2019)

*Conducting Employee Misconduct Investigations: Best Practices to Minimize Employer Liability*, IAPD/IPRA Soaring to New Heights Conference (January 2019)



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Labor & Employment

### EDUCATION

J.D., Chicago-Kent College of Law

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Michigan State University

### ADMITTED TO PRACTICE

U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois

### ORGANIZATIONS

Chicago Bar Association